

**IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI
[COURT III : Division Bench B1]**

Appeal No.: ST/00348/2012

[Arising out of Order-in-Original No. 12/2012-S.Tax/Ch.IV
dated 29.03.2012 passed by the Commissioner of Central
Excise, Chennai-IV Commissionerate]

M/s. Goldline Hospitality Solutions (P) Ltd., : Appellant
McNichols Road, 4th Lane,
Chetpet, Chennai – 600 031

Versus

The Commissioner of G.S.T. & Central Excise, : Respondent
Chennai South Commissionerate

Appearance:-

Shri. N. Viswanathan, Advocate
for the Appellant

Shri. B. Balamurugan, AC (AR)
for the Respondent

CORAM:

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing/Decision: 23.01.2019

Final Order No. 40160 / 2019

Per Bench :

The appellants are engaged in providing Outdoor Catering Service and registered as a service tax assessee.

2.1 Pursuant to investigations carried out by the Departmental Officers, it emerged that in respect of invoices where the bill amount shows the cost of the item and service charges separately, appellant

had paid service tax only on the service charges collected by availing the benefit of Notification No. 12/2003-ST. So also, wherever the bill amount showed the total cost of sale without showing the cost of items and service charges separately, appellants had paid service tax on 50% of the cost by availing the benefit of Notification No. 01/2006-ST.

2.2 The Department took the view that supply of food is essential in rendering Outdoor Catering Service and is inseparable; hence, the benefit of Notification No. 12/2003-ST will not be applicable to appellant as far as "Outdoor Catering Service" is concerned; appellants were therefore liable to pay the differential service tax in respect of clearances made by them by availing the benefit of Notification No. 12/2003-ST. From verification of their P&L account and balance sheet, it appeared that appellants had also received commission, consultancy fees and housekeeping and pantry management charges. The Department took the view that these charges collected are relatable to Outdoor Catering Service; however, since no food is provided in respect of these services, the taxable amount received would not qualify for abatement as provided in Notification No. 01/2006-ST and therefore, the entire amount is liable to service tax.

2.3 Accordingly, a Show Cause Notice dated 13.04.2010 was issued to the appellant *inter alia* proposing demand of service tax liability of Rs. 50,04,624/- with interest thereon, as also imposition of penalties under various provisions of law. In adjudication, the Commissioner vide impugned Order dated 29.03.2012, confirmed a lower service tax liability of Rs. 48,71,657/- with interest thereon and also imposed penalties under Sections 77 and 78 of the Finance Act, 1994. Hence, this appeal.

3. Today when the matter came up for hearing, on behalf of the appellant, Ld. Advocate Shri. N. Viswanathan made oral and written submissions which can be broadly summarized as under :

(i) Levy of service tax and levy of sales tax are mutually exclusive as has been held by the Apex Court in *Imagic Creative Pvt. Ltd. Vs. C.C.T. – 2008 (9) S.T.R. 337* and hence, their practice of payment of sales tax on food items supplied and payment of service tax on the service charge collected from the customers is correct and legal and hence the same ought not to have been impugned by the Department without any rhyme or reason or cogent reasons;

(ii) Even assuming that the above supply of foods is a composite contract involving both the supply of food articles and

provision of service, their availment of the exemption provided under Notification No. 12/2003-ST in respect of food articles is also correct in as much as they have paid VAT on the food articles in proof of which they submitted documents specifically indicating the value of the food articles thereby satisfying the legal requirement of Notification No. 12/2003-ST;

(iii) The Ld. adjudicating authority's allegation that the transaction of the assessee is a composite activity and cannot be artificially vivisected into 'sale' and 'service' portions is not correct as it was not correct as it was not based on facts since the appellants have shown the value of food articles and service charge normally and genuinely and not artificially;

(iv) Hence, the appellant's availment of the exemption provided vide Notification No. 12/2003-ST in respect of food articles on which VAT was paid is correct in view of the decision of :

(a) *The Hon'ble Tribunal in:*

- (i) *Sky Gourmet Pvt. Ltd. Vs. C.S.T. – 2009 (14) S.T.R. 777;*
- (ii) *Daspalla Hotels Ltd. Vs. C.C.E. – 2010 (18) S.T.R. 75;*
- (iii) *Saj Flight Services Pvt. Ltd. Vs. C.C.E. – 2010 (19) S.T.R. 874;*
- (iv) *Super Transports Pvt. Ltd. Vs. C.C.E. – 2017 (51) S.T.R. 46.*

(b) The Hon'ble Karnataka High Court in C.S.T. Vs. LSG Sky Chef India Pvt. Ltd. – 2017 (49) S.T.R. 286.

(v) As admitted in the Show Cause Notice “Consultancy fee is the amount received for demonstration of international cuisine and recipes to their customers, commission is the incentive received from M/s. Fresh & Honest for facility provided to them at their sales counter and housekeeping and pantry management charges were received for the maintenance of the canteen and pantry premises” and hence, it is evident that none of the above activities was related to supply of food by the appellant, that too at the customer's end and hence, none of the above activities meet the two legal requirements of Section 65(76a) of the Finance Act viz., ‘catering’ and ‘at a place other than his own’. Hence, the above charges are not liable to service tax under the taxable category of ‘Outdoor Catering Service’;

(vi) Appellants have, along with periodical ST-3 returns, submitted to the jurisdictional Range Officer the detailed work sheets showing the total billing amount, exempted abatement (claimed under Notification No. 12/2003-ST) and service charge collected by them and service tax payable and paid by

them thereon. Hence, the allegation of suppression is not sustainable in view of the decision of the Apex Court in *C.C.E. Vs. Pioneer Scientific Glass Works – 2006 (197) S.L.T. 308* and the Hon'ble Tribunal in *Amway India Enterprises Pvt. Ltd. Vs. C.C.E. – 2017 (3) G.S.T.L. 69*;

(vii) The invocation of extended period of time under Section 73(1) of the Finance Act by the adjudicating authority without bringing any evidences on record of any conscious or deliberate intention on their part but merely observing that 'but for the verification of the Departmental Officers, the fact of non-payment would not have come to light' is not correct and sustainable in view of judicial decisions in :

- (a) *Steer Engineering Pvt. Ltd. Vs. C.C.E. – 2017 (358) E.L.T. 390*; and
- (b) *Punj Lloyd Vs. C.C.E. & S.T., Rohtak – 2015 (40) S.T.R. 1028*.

(viii) Where suppression, fraud, etc., cannot be alleged, extended time limit under proviso to Section 73(1) is not invocable and penalty under Section 78 is not imposable as has been held in :

- (a) *SPG Metal Industries Pvt. Ltd. Vs. C.C.E. – 1999 (111) E.L.T. 286*;
- (b) *C.C.E. Vs. HMM Ltd. – 1995 (76) E.L.T. 497 (S.C.)*; and
- (c) *Anand Nishikawa Co. Ltd. Vs. C.C.E. – 2005 (188) E.L.T. 149 (S.C.)*.

4. On the other hand, Ld. AR Shri. B. Balamurugan appearing on behalf of the respondent supports the impugned Order. He submits that the appellant had not adduced any evidence during the investigation or during adjudication; that the amounts received in respect of commission, consultancy fees and housekeeping and pantry management charges were unrelated to Outdoor Catering Service.

5. Heard both sides and have gone through the facts of the case.

6. We find that the issues in dispute are as under :

(i) Whether the differential service tax of Rs. 47,81,657/- with interest demanded on entire value of food and service charges is correct or whether the service tax liability is required to be calculated only on the service charges;

(ii) Whether the amount of commission, consultancy fees and housekeeping and pantry management charges received by the appellant are required to be included in the value of taxable service under "Outdoor Catering" category or otherwise.

7.1 Coming to the first dispute, we find that the issue is no longer *res integra* and is covered by the decision of the Hon'ble Karnataka High Court alluded to by the Ld. Advocate in *C.S.T., Bangalore Vs.*

The Grand Ashok – 2013 (31) S.T.R. 528 (Kar.). The Hon'ble High Court of Karnataka relying upon its earlier judgement in *Sky Gourmet Catering Pvt. Ltd. Vs. Assistant Commissioner of Commercial Taxes – Writ Appeal Nos. 671-726/2011, dated 18-4-2011* has held that Outdoor Catering is a composite but divisible contract of service under Article 366(29)(a)(f) of the Constitution of India; hence, sale of goods has to be bifurcated from service provided. The relevant portion of the order is reproduced as under:

“6. The identical question with regard to the liability of the assessee towards service tax so far as service rendered by them with regard to the outdoor catering is concerned, came up for consideration before the Division Bench of this Court in Writ Appeal Nos. 671 to 726/2011 which were disposed off by the order dated 18-4-2011. By a detailed consideration and relying on various Supreme Court Judgments, the Division Bench of this Court came to the conclusion that the outdoor catering contract is a contract for service by virtue of sub-clause (f) or Clause (29a) of Article 366 of the Constitution of India which has to be treated as composite contract and the State Legislature is competent to levy the sales tax on the sale aspect only namely, the value of the food articles.

7. The Division Bench held that outdoor catering consists of goods namely, the articles of food etc. which would constitute sale. Hence, the value of the food articles are liable for sales tax which the State Government is liable to impose. The other part of outdoor catering is the service rendered by the assessee in bringing the food articles to a place designated by the client. The service so rendered by the assessee, which also includes the cost of transporting the food articles constitutes service. Therefore, to this extent alone, the assessee is liable for service tax and not for the entire cost received from the Airlines. Hence, there has to be a bifurcation with regard to the sale of goods and the service provided. However, it does not empower the State Government to levy tax on the entire amount mentioned in the bill. The entire sale price includes the transportation charges also and out of that sale price what is the service aspect and what is the sale aspect requires to be decided by the authorities. It is only thereafter that sales tax could be imposed on the cost of the food articles arrived at and the remaining extent including transportation is to be treated as liable for service tax. Therefore, the Court declared that a contract for outdoor catering “is a composite contract which falls under sub-clause (f) of clause (29-A) of Article

366 of the Constitution of India and service tax is payable on service aspect and sales tax is payable on deemed sales aspect and it is not an indivisible contract."

8. The facts involved in the present case are identical to the facts that arose in the Writ Appeal Nos. 671 to 726/2011. Under these circumstances, these appeals are disposed off in terms of the Judgment dated 18-4-2011 passed in Writ Appeal Nos. 671 to 726/2011. Consequently, the substantial questions of law are answered in favour of the assessee and against the revenue."

7.2 In the event, we hold that the demand amounting to Rs. 47,81,657/- with interest thereon and also the imposition of penalties on that score cannot sustain and will require to be set aside, which we hereby do.

8.1 The remaining part of the demand of Rs. 2,22,967/- pertains to charges received by the appellant under commission, consultancy fees and housekeeping and pantry management charges. Even before adjudication, appellants had informed the Department vide letter dated 17.07.2009, that "consultancy fee is the amount received for demonstration of international cuisine to the customers; that commission is the incentive received from M/s. Fresh & Honest for the facility provided to them at their sales counter; that housekeeping and pantry management charges are charges received for the maintenance of the canteen and pantry premises; that based on the bills raised on the customers, they are collecting and paying service tax on these charges; that they have paid the service tax on

the amount collected under housekeeping and pantry management charges under Outdoor Caterer Service on which no abatement claimed.”

8.2 In this regard, we do not find any corroborative evidence in the Show Cause Notice or the impugned Order to shore up the Department’s allegation that these charges actually relate to Outdoor Catering Service only. The aforesaid clarifications of appellant in this regard have also not been addressed or rebutted by the adjudicating authority. In the circumstances, we are of the considered opinion that this demand with interest and penalty also does not have any basis to sustain and will therefore have to be set aside, which we hereby do.

9. In the event, the entire appeal is allowed with consequential benefits, if any, as per law.

(Operative part of the order was pronounced in open court)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S.)
Member (Judicial)

Sdd