IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

Service Tax Appeal No.41796 of 2014

(Arising out of Order-in-Original No.4/2014(ST) dated 30.4.2014 passed by the Commissioner of Central Excise, Chennai III Commissionerate)

M/s. ISS Catering Services South Pvt. Ltd. **Appellant**
Kandigai Village
Vandalur – Kelambakkam Road
Chennai – 600 048.

Vs.

Commissioner of GST & Central Excise **Respondent**
MHU Complex, No. 692,
Anna Salai, Nandanam,
Chennai – 600 035.

<u>APPEARANCE:</u>

Shri G. Natarajan, Advocate for the Appellant
Shri Arul C. Durairaj, Superintendent (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri P. Venkata Subba Rao, Member (Technical)

Final Order No. **42341 / 2021**

Date of Hearing: 24.08.2021
Date of Decision: 24.08.2021

Per Ms. Sulekha Beevi C.S.

Brief facts are that the appellants are engaged in providing outdoor catering service and hold service tax registration for such services. During the scrutiny of their accounts, it was noticed that the income reflected in the balance sheets for the years 2008 – 09 to 2011 – 12 did not correlate with the taxable value declared by them in the ST-3 returns for the corresponding period. It appeared that the appellants have not included the entire taxable income received by them in their ST-3 returns for payment of service tax. The appellants claimed that the differential amounts which were not shown in the ST-3 returns were received by them from the catering services rendered to SEZ units and also food items sold in foot courts which were exempted from payment of service tax. However, the appellant did not furnish necessary proof to support their claim. Show Cause Notice dated 18.10.2013 was issued for the period from 2008 – 09 to 2011 – 12 proposing to demand the short-paid service tax along with interest and also for imposing penalty. After due process of law, the adjudicating authority confirmed the demand of differential service tax of Rs.5,34,06,154/- along with interest and imposed equal penalty under section 78 of the Finance Act, 1994. A separate penalty of Rs.10,000/- was imposed under section 77 of the Act ibid. Aggrieved by such order, the appellants are now before the Tribunal.

2. On behalf of the appellant, learned counsel Shri G. Natarajan appeared and argued the matter. He submitted that the appellant is engaged in providing outdoor catering service and also housekeeping service to various industrial premises and also providing other allied services. The Show Cause Notice has been issued alleging that the turnover as per the profit and loss account, for the disputed period, is not matching with the value of taxable service declared by the appellant in their ST-3 returns. The appellant had explained the reasons for such difference before the adjudicating authority.

3. It is submitted by him that during the disputed period, the taxable value was calculated on receipt basis whereas the income in the balance sheet is determined and reflected on accrual basis. Further, the difference is mainly for the reason that the services were provided

to SEZ units and such services are exempted from payment of service tax. He referred to para 11 of the impugned order and submitted that the plea of the appellant that the services which are provided to SEZ units are exempted from payment of service tax was not accepted by the adjudicating authority stating the reason that the appellant has not furnished sufficient evidence in the nature of contracts entered by the appellant with such SEZ units. He submitted that the appellant had produced copy of agreements for the major period under dispute. However, for the intermittent period, the appellant had not produced the documents to show that they were providing services to SEZ units. It is submitted by the learned counsel that the appellant would be able to produce the documents and a further opportunity may be given in this regard.

4. It is contended by the learned counsel, without prejudice to these submissions, that the invoices would show that the services were provided to SEZ units and that there is no requirement to furnish the copies of contracts. He referred to Notification No. 4/2004-ST dated 31.3.2004 and the superseded Notification No. 9/2009-ST dated 3.3.2009 and superseded by Notification No. 17/2011-ST dated 1.3.2011 to submit that these notifications provide for exemption from payment of service tax for services provided to SEZ units. There is no condition in these notifications to furnish copies of the contract to claim exemption. Moreover, the conditions in the notification cannot be pressed into application to deny the substantial benefit of exemption envisaged under section 26 of the Special Economic Zone Act, 2005 (hereinafter referred to as SEZ Act). Sub-section (2) of section 26 of SEZ Act gives powers to the Central Government to prescribe the

manner in which and the terms and conditions under which the exemptions envisaged in section 26 can be claimed. However, the above said Notifications 4/2004-ST and 9/2009-ST and 17/2011-ST are issued in exercise of the powers under section 93 of the Finance Act, 1994 and not under sub-section (2) of section 26 of SEZ Act, 2005. As per section 51 of the SEZ Act, the provisions of the SEZ Act, 2005 have overriding effect. This being so, the Commissioner has erred in demanding the appellant to produce documents in terms of the Notifications to claim the exemption of service tax. He relied upon the decision of the Hon'ble High Court of Andhra Pradesh and Telungana in the case of GMR Aerospace Engineering Ltd. Vs. Union of India – 2019 (31) STR 596 (AP) wherein it was held that the requirements like filing of form A1 / A2 are not cast under SEZ law and hence the exemption cannot be denied for violation of conditions prescribed in the notification.

5. The other reason for which there is difference in the taxable value declared in their ST-3 returns is that the department has considered the income received from selling food through their food courts to be consideration received for providing services. Although the appellant is engaged in outdoor catering service, they also undertake sale of food through food courts and Over the Counter Sales (OTC). Such sale of food through these food courts / OTCs are only pure sale of food and there is no element of service. Such food courts are like restaurant wherein people would walk in and place orders based on the menu cards. The appellant has established such food courts in various commercial premises for use of the staff of such establishments and for the general public who visit these premises. He referred to

definition of 'outdoor catering' in clause (76a) of Section 65 of the Finance Act, 1994 which reads as under:-

> "(76a) 'outdoor caterer' means a caterer engaged in providing services in connection with catering at a place other than his own but including a place provided by way of tenancy or otherwise by the person receiving such services"

The definition of 'taxable services' for outdoor catering has been defined under section 65(105)(zzt) of the Act and the same reads as below:-

> "(zzt) Taxable service means any service provided or to be provided to any person, by an outdoor caterer"

6. On a perusal of the definition of 'outdoor caterer' it would be apparently clear that a outdoor caterer is one who is providing catering service in a place other than his own or a place provided by the receiver of the services under some tenancy agreement. In the present case, the sale of food through food courts / OTCs is to the customers in general and not to any specific company so as to consider it as outdoor catering. It has nothing to do with restaurant service for which no levy of service tax was applicable during the material period. The levy of service tax on restaurant service was introduced for the first time only with effect from 1.5.2011 vide section 65(105)(zzzzv) of the Finance Act, 1994 which is reproduced below:-

> "Taxable service means any service provided or to be provided to any person, by a restaurant, by whatever name called, having the facility of air-conditioning in any part of the establishment, at any time during the financial year, which has license to serve alcoholic beverages, in relation to serving of food or beverage, including alcoholic beverages or both, in its premises"

7. The above provisions were in force till 1.7.2012. In the instant case, the disputed period is up to 31.3.2012. The demand of service tax on the income received from sale of food through food courts / OTC

would not survive as such services were not covered as taxable service under the Finance Act, 1994 for the disputed period. Further, that these food courts / OTCs conducted by the appellant does not have the facility or license to serve liquor. That for these reasons, the value of Rs.27,73,23,837/- being the income from food courts / OTCs cannot be subjected to service tax. He referred to para 12 of the Order in Original and submitted that these contentions of the appellant were not considered by the Commissioner on the reason that the appellant did not produce the copies of lease / contract entered by them with these establishments. In fact, the appellant had furnished the copy of the Chartered Accountant to prove that the amount relates to sale of food courts / OTCs.

8. The third issue is with regard to unbilled revenue reflected in the balance sheet. He reiterated that the balance sheet is prepared on accrual basis and the revenue for the month of March of each year though billed in April would be taken into consideration as unbilled revenue and reflected in the balance sheet. During the disputed period (upto 2011) service tax was payable only on receipt basis and hence the unbilled revenue is liable to be excluded for the purpose of reconciliation in regard to the total revenue reflected in the balance sheet with the ST-3 returns. Accordingly, in respect of each year upto 31.3.2011, such unbilled revenue is not liable to service tax.

9. Without prejudice to the above contentions, appellant submitted that the demand of service tax has been made on differential values under outdoor catering service without giving the benefit of abatement to the appellant in terms of Notification 1/2006-ST as amended. For providing the catering service, the appellant has entered into

agreement with the respective customers wherein it is agreed to provide food and beverages to the workers / employees in the industrial / commercial establishments. The goods / items required for preparation of food and beverages are completely procured by the appellant and have paid VAT on such procurements. The benefit of abatement as per Notification 1/2006 ought to have been extended to the appellant.

10. The learned counsel also argued on the ground of limitation. It is submitted by him that all the facts and figures were duly reflected in their balance sheets which is the public document. These documents are filed before various statutory authorities like Registrar of Companies, Income Tax Department etc. Since the demand has been raised from the accounts maintained by the appellant, the allegation that the appellant has suppressed facts with intention to evade payment of service tax cannot sustain. The entire period of demand in the Show Cause Notice dated 18.10.2013 would fall within the extended period of limitation.

11. It is pointed out by the learned counsel submitted that in para 14 of the impugned order, the issue with regard to bad debts / write off has been discussed. This relates to the amount not recovered from customers. Out of the sundry debtors reflected in the balance sheet for the respective period, certain amounts were not recovered and hence the appellant was constrained to write off such amounts as bad debts. The amount so written off upto 31.3.2011 is Rs.36,56,775/-. The appellant had produced necessary document in this regard. The adjudicating authority in para 14.1 had given the benefit in this regard for the bills raised upto 31.3.2011. The demand in this regard is

confirmed only for the period after 31.3.2011. Therefore, the appellant concedes to such demand and is not contesting the said issue in this appeal.

12. The learned AR Shri Arul C. Durairaj appeared for the department. He submitted that there was a huge difference between the income shown in the balance sheet and the income reflected in the ST-3 returns. Though the appellant contended that they have provided services to SEZ units, the required documents to establish this contention has not been produced before the adjudicating authority. Further, the Chartered Accountant's certificate produced by them showing year wise value of services did not tally with the unit wise and year wise figures. Though the appellant contend that they earned revenue by conduct of food courts at SEZ locations, the appellant has not produced documents evidencing this in the form of lease contracts. In the case of unbilled revenue also, it was not possible for the adjudicating authority to verify the contention of the appellant due to lack of proper documents. The abatement was also not extended since the invoice with regard to purchase of goods and the payment of VAT was not produced. When the appellant has not furnished necessary documents, their plea with regard to limitation cannot be considered.

13. Heard both sides.

14. The demand has been raised on account of the difference between the income shown in the balance sheet and the taxable value reflected in the ST-3 returns of the appellant. One of the major contention put forward by the appellant is that outdoor catering services were mainly provided to SEZ units and that these services are exempted from service tax. He has referred to Notification No. 4/2004-

ST superseded by Notification No. 9/2009-ST and which is superseded by Notification No. 17/2011-ST to argue that the demand of service tax cannot sustain for the services provided to SEZ units. From the records, it is seen that in spite of repeated directions, the appellant has not furnished the documents to evidence that they have provided services to the SEZ units. The appellant is bound to establish their contention by either furnishing copies of agreements or the invoices to show that the services were provided to SEZ units. Even in the appeal grounds, the appellant asserts that they would be able to produce necessary documents. Para 8.4 of the appeal grounds, reads as under:-

> "8.4 After making the above observation, the Commissioner proceeds to deal with each SEZ unit for which the appellant had provided the services. In para 11.1 of the order, the Commissioner observes that in respect of M/s. Covansys India Pvt. Ltd. no evidence has been produced by the appellant that the contract has been extended from 1.8.2010 to 31.3.2012. Having observed so, the Commissioner should have allowed exemption at least upto 31.7.2010. Notwithstanding the fact that the above said information is not at all relevant, the copies of the contracts available are tabulated below for easy reference. The appellant also undertakes to submit the missing contracts during hearing."

15. In para 12 of the impugned order, the Commissioner has discussed the issue with regard to food courts / OTCs. It is seen stated that the appellant has not provided sufficient documents to establish that the revenue received in this regard is only through OTCs and not outdoor catering services. Restaurant services became taxable service only with effect from 1.5.2011 and it has to be examined whether their services would fall within the definition. If the income received by the appellant is only by food sale / OTC and not outdoor catering service, the demand cannot sustain. However, this has to be verified by the Commissioner. The appellant has to establish the same by necessary

documents. Although they have produced a certificate from Chartered Accountant, it is submitted by the learned AR that the year wise value did not tally with unit wise figures. The learned counsel has submitted that they would be able to submit required documents.

16. The third issue is with regard to unbilled revenue. It is argued by the learned counsel that the difference in figures is only because service tax was determined on receipt basis prior to 31.3.2011. However, in para 13 of the impugned order, it is noted by the Commissioner that the appellant has given only a worksheet consisting of the year wise unbilled revenue and not furnished sufficient documents to conclude that the difference in the figures is for the reason as contended by the appellant.

17. The issue with regard to demand raised on bad debts is not contested by the appellant and therefore we uphold the same.

18. From the above, it can be seen that though several contentions were raised, the appellant has not furnished necessary documents before the adjudicating authority. Even at the time of hearing, the learned counsel prayed that the matter may be remanded so that the appellant may be able to produce sufficient documents to establish their contentions. As the appellants have not furnished necessary documents, the issue of limitation also cannot be considered at this stage.

19. We are of the opinion that it is a fit case for remanding to the adjudicating authority. The impugned order is set aside without disturbing the demand in regard to bad debts and all other issues are remanded to adjudicating authority who shall consider the matter

afresh after affording reasonable opportunity of hearing and to furnish documents to the appellant.

20. The appeal is disposed in above terms.

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

(**SULEKHA BEEVI C.S.**)
Member (Judicial)

(**P. VENKATA SUBBA RAO**)
Member (Technical)

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