

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI**

REGIONAL BENCH – COURT No. III

Service Tax Appeal No. 40338 of 2015

(Arising out of Order-in-Appeal No. 205/2014 dated 04.12.2014 passed by Commissioner of Central Excise (Appeals-I), No. 1, Foulks Compound, Anai Medu, Salem – 636 001)

M/s. Nala Hotels Pvt. Ltd.

6/153, Trichy Road,
Namakkal – 637 001.

...Appellant

Versus

Commissioner of GST and Central Excise

Salem Commissionerate,
No. 1, Foulks Compound,
Anai Medu,
Salem – 636 001.

...Respondent

APPEARANCE:

For the Appellant : Mr. S. Murugappan, Advocate

For the Respondent : Mr. Harendra Singh Pal, Authorised Representative

CORAM:

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)

HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER No. 40665 / 2024

DATE OF HEARING : 30.05.2024

DATE OF DECISION: 14.06.2024

Order :- Per Mr. VASA SESHAGIRI RAO

The Appellant M/s. Nala Hotels (P) Ltd., holders of Service Tax registration vide RC No. AAACN7503QST001 for Mandap Keeper Service and Short-Term Accommodation Services were discharging their Service Tax liability and filing half yearly ST3 returns periodically.

1.2 The Appellant had an air-conditioned restaurant and a licenced bar in their premises. Since the premises had facility of air-conditioning and license to serve alcoholic beverages, the department was of the view that they were required to pay service tax on the restaurant service rendered by them. The Appellant informed department that no liquor was served in their air-conditioned restaurant and that no food and beverages were sold at their FL3 licensed bar and only Liquor was served in the bar. However, the Appellant furnished the details of collections made in their bar to the Department.

1.3 It appeared to the Department that the Appellants were serving snacks and beverages inside the licenced bar and hence services rendered at the bar were covered under "Restaurant Service" w.e.f. 01.05.2011 and hence the Appellant was required to pay Service Tax at the appropriate rates. Hence the Total Taxable value for the period from 01.05.2011 to 30.09.2012 worked out to Rs.24,31,767/- and after extending applicable abatements of 70%, the total Service Tax payable worked out to Rs.2,69,077/-.

1.4 Therefore, a Show cause Notice dated 12.06.2013 was issued to the Appellant seeking to demand the service tax of Rs.2,69,077/- for the period from 01.05.2011 to 30.09.2012 under Section 73 of Finance Act, 1994 (ACT) with applicable interest under Section 75 and to impose penalty under Section 76 of ACT *ibid*. Subsequently, a statement of demand dated 25.03.2014 was issued for the period from 01.10.2012 to 31.03.2013

demanding Service Tax of Rs.1,18,517/- under Section 73 of the ACT with interest under Section 75 and to impose penalty under Section 76 of ACT *ibid*.

1.5 After due process of law, the Adjudicating Authority confirmed both the demands under Section 73(2) of the ACT *ibid* and levied appropriate interest under Section 75 and imposed penalty under Section 76 of the ACT *ibid*.

1.6 Aggrieved, the Appellant went on appeal before the Commissioner (Appeals) who *vide* Order-in-Appeal No. 205/2014-ST dated 04.12.2014 upheld the impugned order and dismissed the appeal filed by the Appellant. Aggrieved, the Appellant has come on appeal before this forum.

2. The main grounds of appeal filed by the appellant are as specified below:-

- i. It was submitted that none of the restaurants in their hotel were having license to serve liquor as the permit bar with FL 3 licence is clearly demarcated and is not permitted to sell liquor at any place other than the permit bar as it is a punishable offence under Tamil Nadu (Liquor and Permit) Rules.

- ii. It was averred that the provisions of Section 65(105)(zzzzv) contemplates assessment of sale of food in a restaurant and not sale of liquor.
- iii. It was pointed out that the sale of food and liquor already suffered VAT @ 14.5%
- iv. It was contested that the impugned order ignored the decision in the case of *Kerala Classified Hotels and resorts Association and others Vs. Union of India [2013-TIOL-533-HC-Kerala]* wherein it was held that sub-clauses (zzzzv) and (zzzzw) to clause 105 of Section 65 of the Act is beyond the legislative Competence of the parliament.
- v. It was contended that the impugned order ignored the fact that two conditions were to be satisfied for levy of Service tax under the category of restaurant service Viz. (a) It should have the facility of Air Conditioning and (b) It should have licence to serve alcoholic beverages. It was further pointed out that if there were two or more restaurants in the same entity, clearly demarcated and separately named, the ones which satisfy both the criteria alone are liable to Service Tax.
- vi. It was contended that the question of abatement would arise only if the benefit of Notification No. 12/2003 dated 12.06.2003 was not availed exempting the total value of goods and materials sold by the Appellant to the recipient of service.
- vii. It was put forth that the impugned order ignored the earlier order of Commissioner (Appeals) in Appeal No. 149/2013-ST dated 20.02.2014 which held that no service tax is leviable on the Appellants.

viii. It was pointed out that the impugned order ignored the ratio of the decision in the case of *Commissioner of Service Tax, Bangalore Vs. LSG Sky Chef Pvt. Ltd. [2012 (27) STR (5) (Kar.)]* wherein it was held that the “respondent was eligible to claim deduction in respect of goods portion” while discharging Service tax liability.

3. The Ld. Counsel Shri S. Murugappan appearing for the Appellant submitted that the levy of Service Tax under Section 65(105)(zzzv) of the Finance Act, 1994 was only on the specified category of restaurant and not on the permit room or whatever be the facilities attached to that and the same concept continued in the negative services regime as the essence of the statutory provision was in-built in the declared services under Section 66 E read with Sl.no.19 of the mega exemption Notification no.25/2012-ST. It was pointed out that Service Tax levy will not sustain in view of the clarifications issued by the Board Circular dated 10.05.2011. Finally, it was submitted that the present issue was squarely covered by the case of *Commissioner of GST and Central Excise, Trichy Vs. Sangu Chakra Hotels Pvt. Ltd., Trichy vide [Final order No. 41139/2023 dated 19.12.2023]* involving similar facts wherein it was held that demand under restaurant service cannot sustain.

4.1 The Ld. Authorised Representative Shri Harendra Singh Pal reiterated the findings in the impugned order and submitted that the Appellants are liable for levy of Service Tax as food and beverages were sold at their licensed bar that would fall within the ambit of levy of Service Tax.

He advanced the submission that the Service provided by a restaurant in relation to serving of food or beverages in its premises does not figure in the negative list and as the respondent have licence to serve liquor in the premises and have the facility of air-conditioning in their establishment where they serve food / beverages, it appeared that they were not eligible for exemption under Notification No. 25/2012-ST dated 20.06.2012 and hence liable for payment of Service Tax. It was pointed out that the clarifications issued in Circular No. 139/8/2011-TRU dated 10.05.2011 was relevant to the case as it was clarified in Sl.No. 2 of the Circular that the food and beverages served at swimming pool or an open area are also liable for payment of Service Tax as the above areas become extensions of the restaurant.

4.2 It was further submitted that the respondent has satisfied both conditions namely having an air-conditioning facility and licence to serve liquor in their premises and hence the service rendered by the Respondent was liable for payment of Service Tax. It was contended that no where it was contemplated in the definition of Section 65(105)(zzzzv) that serving of food or beverages including alcoholic beverages or both should take place in the restaurant itself and it was sufficient if the serving took place in the premises of the restaurant, which includes bar, swimming pool or an open area attached to the restaurant as clarified in the Circular cited above.

4.3 It was contended that the Tamil Nadu Liquor (Licence) and Permit Rules prohibiting serving of food in the bar was not applicable in this

case as the financials of the respondent have separately shown sale at bar and restaurant giving an indication that food was served in the bar also. It was further submitted that the bar and the restaurant were not two different entities but were two different places in the same establishment and that the bar is only an extension of the restaurant.

4.4 Finally, it was submitted that even assuming that restaurant is a separate entity and does not have a licence to serve liquor, the food and beverages served in the bar are liable for charge of Service Tax as they have air-conditioning facility also. Hence it was prayed to dismiss the appeal filed by the Appellant by upholding the impugned order.

5. Heard both sides and carefully considered the rival submissions and evidences on record.

6. The issues that arise for decision in this appeal are:-

- i. Whether the activity rendered by the Appellant at its licenced bar qualifies for demand of Service Tax under, "Restaurant Service" in terms of provisions of Section 65(105)(zzzzv) of the Finance Act, 1994, up till 30.06.2012?
- ii. Whether the appellant is eligible for exemption under Notification No. 25/2012-ST dated 20.06.2012, which is effective from 01.07.2012?

7.1 It is expedient to examine the legal provisions relevant to this appeal. The appellant was found to be providing "Restaurant Service" w.e.f. from 01.05.2011. The levy of Service Tax on "Restaurant Service" came into effect from 01.05.2011 under Section 65(105)(zzzzv) of the Finance Act, 1994, as it stood before 01.07.2012, i.e., prior to being amended by the Finance Act, 2012 with effect from 01.07.2012, introducing Negative List based levy of tax on services.

7.2 Section 66 of the Finance Act, 1944, as it stood before 01.07.2012, provided for levy of Service Tax on the taxable services referred to in the sub-clauses of clause (105) of Section 65 of the Act. Sub-clause (zzzzv) of Section 65(105) of the Act, as it stood before 01.07.2012, read as follows:-

"Sec. 65(105)(zzzzv): "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 licence to serve alcoholic beverages, in relation to serving of food or beverage, including alcoholic beverages or both, in its premises."

7.3 It is thus seen that if a restaurant, by whatever name called, having air-conditioning in any part at any time of the financial year and having licence to serve alcoholic beverages, provides any service in relation to serving food or beverage in its premises, then such service would be liable to Service Tax under Section 65(105)(zzzzv) of the Finance Act 1994, as it stood prior to 01.07.2012. Notification No. 1/2006- ST dated 01.03.2006 as amended by Notification No. 34/2011-ST dated 25.04.2011

grants abatement in value to the extent of 70% of the gross amount charged for providing the restaurant service. In other words, Service Tax would be payable on 30% of the gross amount charged for providing the restaurant service. This Notification No. 1/2006- S.T. remained in force upto 30.06.2012 before being rescinded by Notification No. 34/2012-S.T. dated 20.06.2012 with effect from 01.07.2012.

7.4 After introduction of Negative List based levy of Service Tax with effect from 01.07.2012, Section 66B of the Finance Act, 1994 provides for levy of service on all services other than those services specified in the negative list, provided or agreed to be provided by one person to another. As per Section 65B(34) of the Act, 'negative list' means the services which are listed in Section 66D. Section 66D specifies 17 services, listed under clauses (a) to (q) of the Section, as comprising the negative list. The service provided by a restaurant in relation to serving food or beverage in its premises does not figure in the negative list under Section 66D.

7.5 Section 65B(44) of the Act defines 'service' as follows :-

(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—

(a) an activity which constitutes merely,--

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ii) a transaction in money or actionable claim;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any Court or tribunal established under any law for the time being in force.

Thus, as per the above definition, "service" includes a declared service. As per Section 65B(22),

"declared service" means any activity carried out by a person for another person for consideration and declared as such under Section 66E."

Section 66E specifies nine activities, listed under clauses (a) to (i) of the Section, as constituting declared services. Clause (i) of Section 66E specifies the following activity as constituting a declared service:

"Section 66(E)(i): Service portion in an activity wherein goods, being food or any other article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of the activity."

7.6 Thus, it is seen that with effect from 01.07.2012, the term "service" includes a 'declared service'. The 'declared services' specified in Section 66 (E) include the service portion in an activity wherein food or any other article of human consumption or any drink is supplied as part of the activity.

7.7 Under Notification No. 25/2012-S.T. dated 20.06.2012, which is effective from 01.07.2012, exemption from Service Tax is granted to the taxable services specified in the notification. The entry at Sl.No. 19 of the Notification specifies, "services provided in relation to serving of food or beverages by a restaurant, eating joint or a mess, other than those having (i) the facility of air-conditioning or central air-heating in any part of the

establishment, at any time during the year, and (ii) a licence to serve alcoholic beverages." It is thus seen that the exemption under the above Notification is not applicable to services provided in relation to serving of food or beverages by a restaurant, eating joint or a mess having air-conditioning or central air-heating in any part at any time of the year and having a licence to serve alcoholic beverages. The condition regarding 'licence to serve alcoholic beverages' has been omitted by the amendment made to the above Notification by Notification No. 3/2013-S.T. dated 01.03.2013 with effect from 01.04.2013. Consequently, with effect from 01.04.2013, Service Tax would be attracted even if only one condition is satisfied, i.e., if there is air-conditioning or central air-heating facility in any part of the establishment at any time during the year. However, the disputed tax period in this appeal is from 01.05.2011 to 31.12.2012.

7.8 With effect from 01.07.2012, Rule 2C was inserted in the Service Tax (Determination of Value) Rules, 2006. As per this Rule, the value of service portion in an activity wherein food or any other article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of the activity at a restaurant, shall be 40% of the total amount charged for such supply.

7.9 From the provisions referred to above, it is seen that Service Tax would be leviable in the following circumstances:-

Period	Circumstances
From 01.05.2011 to 30.06.2012	If a restaurant, by whatever name called, having air-conditioning in any part at any time of the financial year and having licence to serve alcoholic beverages, provides any service in relation to serving food or beverage in its premises.- Section 65(105)(zzzzv) Value: 30% of the gross amount charged, i.e., after allowing abatement of 70% under Notification No. 1/2006-ST dated 01.03.2006 as amended by Notification No. 34/2011-ST dated 25.04.2011
From 01.07.2012 to 31.03.2013	'Declared service' covers service portion in an activity wherein food or any other article of human consumption or any drink is supplied as part of the activity.- Section 66E(i). Exemption from tax, granted under Notification No. 25/2012-ST (Sl. No.19), is inapplicable to services provided in relation to serving of food or beverages by a restaurant, eating joint or a mess having (1) the facility of air-conditioning or central air-heating in any part of the establishment, at any time during the year, and (ii) a licence to serve alcoholic beverages. Value: 40% of the total amount charged for such supply, in terms of Rule 2C of the Service Tax (Determination of Value) Rules, 2006.

8.1 We find that as per the clarification issued *vide* Board's Circular No. 139/8/2011-TRU dated 10.05.2011, the Service Tax is liable to be paid on restaurants (i) having the facility of air-conditioning in any part of the establishment and (ii) which have a licence to serve alcoholic beverages. The usage of "and" in the above clarification makes it amply clear that both the requirements are to be fulfilled to satisfy the criteria for attracting Service Tax levy on Restaurant Service. Thus, it is clear that Service Tax is liable to be paid on the Restaurant Service if two essential conditions are fulfilled *viz.*,

if it has the facility of air-conditioning in any part of the establishment and it should have licence to serve alcoholic beverages. Therefore, we are of the view that for the period from 01.05.2011 to 16.03.2012, the restaurant at the premises of the Appellant do not fulfil the requirement of having a licence to serve alcoholic beverages in the premises of the air-conditioned restaurant, in order to bring the service under the ambit of Restaurant Services.

8.2 In terms of the Notification No. 12/2012-ST dated 17.03.2012 the Union of India exempted various taxable services from the whole of the service tax leviable under Section 66B of the Finance Act, 1994. In respect of Restaurant Service, the above Notification has provided exemption, subject to certain condition which read as follows:-

"19. Services provided in relation to serving of food or beverages by a restaurant, eating joint or a mess, other than those having the facility of air-conditioning or central air heating in any part of the establishment, at any time during the year and which has a licence to serve alcoholic beverages."

The above Notification has been superseded by Notification No. 25/2012 dated 20.06.2012 but, it continued to exempt the Restaurant Service, if there is no service of alcoholic beverages and the restaurant which is not air-conditioned.

8.3 Thus, to qualify for the above exemption, a restaurant should satisfy the two essential conditions of having no air-conditioned facility and no serving of alcoholic beverages. Hence for the period from 01.04.2012 to

31.03.2013, the restaurant of the Appellant do not fulfil the criteria of having a licence to serve alcoholic beverages in the premises of the restaurant, in order to bring the services of the restaurants under the coverage of "Restaurant Services".

9. Further, we also find that there is no clarity on the value on which Service Tax has been demanded & confirmed in the impugned order. Whether based on the total collections inside the bar or only on the value of food and beverages alleged to be served inside the bar. We find that the demand raised in the Show Cause Notice is on the total collections (liquor sales) in the licenced bar and not on the value of the food and beverages served inside the bar and as such the demand suffers from infirmity and the adjudicating authority made a blatant error in confirming the demand. For computation of service tax considering entire liquor sales in a permit room is clearly against the provisions of the law as alcoholic liquor for home consumption is outside the Service Tax Act. Even, in a case where snacks and beverages are sold in permit room, service tax payable should have been limited to computing to such sales of snacks and beverages.

10. We further find that the issue is no more *res integra* in view of this Tribunal's order in a similar case, *Commissioner of GST and Central Excise, Trichy Vs. Sangu Chakra Hotels Pvt. Ltd., Trichy vide [Final order No.41139/2023 dated 19.12.2023]* wherein it was held as follows:-

"As such, the restaurants located in the appellant's premises both at Trichy and Thanjavur have not satisfied one of the conditions of serving alcoholic

beverages and so the Service Tax liability cannot be fastened in respect of restaurant service on the appellant."

16. In the result, the impugned order does not call for any interference and the Department's appeal stands dismissed."

11. In view of the above discussions and following judicial discipline, we hold that the demand of service tax on the Appellant is devoid of merits and in the result, the appeal filed by the Appellant is allowed.

(Order pronounced in open court on 14.06.2024)

Sd/-
(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

Sd/-
(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

MK