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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
CUSTOMS APPEAL BRANCH

Appeal No. ST/374 /2008 - CU[DB] ST/399/09, ST/462/10, ST/Cross/267/08 Date **28/01/2011**
Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S SAYAJI HOTELS LTD.
H/1, SCHEME NO. 54,VIJAYA NAGAR, INDORE (M.P.)

M/S SAYAJ HOTELS LTD. Appellant
Vs
C.C.E. INDORE Respondent

I am directed to transmit herewith a certified copy of **Final order No.** ST/26-28 / 11 **CU[DB]** dated 25.1.11

passed by the Tribunal under **Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax**

Assistant Registrar
(Customs Appeal Branch)

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6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
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Assistant Registra
(Customs Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. II

Service Tax Appeal No. 374 of 2008 with Cross Objection Application No. 267 of 2008 and Appeal No. 399 of 2009 and Appeal No. 462 of 2010

[Arising out of the Order-in-Original No. 01/Commr/ST/IND/ 2008 dated 14/03/2008, Order-in-Original No. 11-12/Commr/ ST/IND/2009 dated 26/02/2009 and Order-in-Original No. 02/ Commr/ST/IND/2010 dated 08/01/2010 passed by The Commissioner, Central Excise & Customs, Indore.]

M/s Sayaji Hotels Ltd. Appellant

Versus

CCE, Indore Respondent

For Approval and signature :

Hon'ble Shri D.N. Panda, Judicial Member
Hon'ble Shri Rakesh Kumar, Technical Member

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:
3.	Whether their Lordships wish to see the fair copy of the order?	:
4.	Whether order is to be circulated to the Department Authorities?	:

<u>Appearance</u>

Shri Laxmi Kumaran, Advocate – for the appellant.

Shri Sumit Kumar, Authorized Representative (SDR) – for the respondent.

CORAM : **Hon'ble Shri D.N. Panda, Judicial Member**
Hon'ble Shri Rakesh Kumar, Technical Member

DATE OF HEARING : 11-11-2010
DATE OF DECISION : 25-01-2011

Final Order No. ST/26-28/11 Dated : 25-1-11

Per. Rakesh Kumar :-

The appellant is a company engaged in the business of running a hotel in Indore under the name "Sayaji Hotels". The Appellant in their Hotel have hotel rooms, restaurants, swimming pools, health & fitness centre', banquet halls called Mandap etc. They provide various services like lodging & Boarding to their guests, rent-a-cab service, Mandap keeper service etc. The present dispute relates to the services provided by the Appellant to their clients in relation to use of Mandap.

1.1 The service in relation to use of Mandap in any manner became taxable w.e.f. 1/7/97 under Section 65 (105) (m) readwith Section 65(66) and 65 (67) of the Finance Act, 1994. With effect from 16/6/05, service provided by the Mandap keeper as a caterer in course of providing service in relation to use of Mandap was specifically included within the purview of this service. The service tax is chargeable on this service at the ad-valorem rate prescribed under Section 66 of the Finance Act, 1994, on the assessable value determined under Section 67 ibid readwith Service Tax (Determination of Value) Rules, 2006 and when the entire consideration for service is in money, the assessable value would be the gross amount charged. However

Exemption Notification No. 1/06-ST dated 1/3/06 issued under Section 93 of the Finance Act, 1994 and its predecessor Notification No. 21/97-ST dated 26/6/97 as amended by Notification No. 12/04-ST dated 10/09/04 exempt the service provided by a Mandap Keeper, when the Mandap keeper also provides catering services, that is supply of food during the service in relation to use of Mandap, from so much of the service tax leviable thereon as is in excess of the amount of service tax calculated on sixty percent of the gross amount charged from the client by the Mandap Keeper. The expression 'food' for the purpose of this notification means substantial and satisfying meal. The exemption, however, is available subject to the conditions that –

(a) no Cenvat Credit of inputs or capital goods has been taken under the provisions of Cenvat Credit Rules, 2004, and

(b) benefit of exemption under Notification No. 12/03-ST dated 20/6/03 has not been availed.

The Appellant availed the exemption Notifications No. 21/97-ST till 28/2/2005.

1.2 Notification No. 12/03-ST under Section 93 ibid was issued on 20/6/03. This notification is a general exemption notification which exempts so much of the value of all the taxable services as is equal to the value of goods and materials sold by the service provider to the recipient of service, from the service tax leviable thereon under Section 66, subject to conditions that –

a) there is documentary proof specifically indicating the value of the goods and materials sold ; and

b) no Cenvat Credit of duty paid on such goods and materials sold has been taken under Cenvat Credit Rules, 2004 and where such credit has been taken, the service provider has paid an amount equal to such credit availed before the sale of such goods and materials.

1.3 From 1/3/05, the Appellant stated availing the benefit of Notification No. 12/03-ST dated 20/6/03 by splitting the bill for services in relation to use of Mandap into the charges for Mandap and the charges for food and beverages. The Department was of the view that exemption Notification No. 12/03-ST is not applicable to the Appellant and that they could avail only of exemption under Notification No. 21/97-ST dated 26/6/97, as amended and its successor Notification No. 1/06-ST dated 1/3/06 if they satisfy the condition of this notification, as the Appellant's contract with their clients providing service in relation to use of Mandap is an indivisible service contract and it is not possible to divide the same into the value of service and the value of the food served to the guests and that there is no sale of food involved in providing of service in relation to use of Mandap. The department was also of the view that the Appellant are not eligible for exemption under Notification No. 1/06-ST as the conditions for this exemption are not satisfied. It is in this background that four SCNs, the details of which are given below, were issued to the Appellant.

S.No.	SCN No. & date	Amount of Service Tax demanded	Period of SCN
1.	ST/10/Adj-1/07/17249-251 dt. 22.5.07	Rs.1,16,90,589/- alongwith interest u/s 75 of Finance Act, 1994 and also for imposition of penalty u/s 76 & 78 ibid	1/3/05 to 30/9/06
2.	ST/29/Adj-1/07/7659 dated 2.4.08	Rs.60,26,569/- & Rs.1,00,92,224/- alongwith interest under Section 75 of the Finance Act, 1994 and also for imposition of penalty u/s 76 & 78 ibid	1/10/06 to 31/3/07 ; and
3.	ST/37/Adj-1/08/25875 dated 23/9/08		1/4/07 to 31/3/08
4.	ST/41/Adj.-1/2009/26567 dt. 15/10/09	Rs.1,29,44,543/- alongwith interest u/s 75 of Finance Act, 1994 and also for imposition of penalty u/s 76 & 78 ibid	1/4/08 to 31/3/09

1.3.1 The SCN dated 22/5/07 at S. No. 1 was adjudicated by the Commissioner vide order in original No. 1/Commr/ST/IND/08 dated 14/3/08 and the SCNs dated 2/4/08 & 23/9/08 were adjudicated by the common order-in-original No. 11-12/Commr/ST/IND/2009 dated 26/2/09. By these orders, the Commissioner, while holding that Notification No. 12/03-ST was not available to the Appellant, held that the benefit of Notification No. 21/97-ST & 1/06-ST would be available. Accordingly, the Commissioner, vide order-in-original No. 1/Commr/ST/IND/08 dated 14/3/08 confirmed the service tax demand of Rs.58,79,296/- alongwith interest and imposed penalty of

Rs.58,79,296/- on the Appellant under Section 78, and penalty of Rs. 200/- per day till the date of payment of tax under Section 76 ibid. Vide order-in-original No. 11-12/Commr/ST/ IND/08 dated 26/2/09 the Commissioner confirmed the total service tax demand of Rs.68,54,100/- alongwith interest and while penalty of Rs.68,54,100/- was imposed under Section 78, penalty of Rs. 200/- per day till the date of payment of tax was imposed under Section 76. Vide order-in-original No. 02/Commer/ST/IND/2010 dated 8/10/2010 in respect of the show cause notice dated 15/10/09 the Commissioner confirmed service tax demand of Rs. 1,29,44,543/- holding that the appellant are not eligible for exemption order No. 12/03-ST as well as for Notification no. 1/06-ST. He imposed penalty of Rs. 1,29,44,543/- on the Appellant under Section 78 and penalty of Rs. 200/- per day under Section 76.

1.4 Appeal No. ST/374/08 has been filed against order-in-original No. 1/Commissioner/ST/IND/08 dated 14/3/08. The Committee of Chief Commissioners, in respect of this appeal, directed the Commissioner, under Section 86(4) of the Finance Act, 1994 for filing a memorandum of Cross Objection for praying the Tribunal for decision on the following points arising out of the impugned order.

> "Whether the supply of food alongwith the Mandap keeper service amounts to sale in terms of Notification No. 12/03-ST dated 20.6.03.

Accordingly a cross objection No. ST/CO/267/08 was filed by the Commissioner.

1.4.1 While appeal No. ST/399/09 has been filed against the order-in-original No. 11-12/Commr./ST/IND/09 dated 26.2.09, appeal No. ST/462/2010 has been filed against the order in original No. 02/Commr/ST/IND/2010 dated 8/1/2010.

1.5 In respect of stay application No. ST/S/794/2010 filed alongwith appeal No. ST/462/2010, the Tribunal vide order No.ST/210/10 dated 28/7/2010 had directed the Appellant to pre-deposit an amount of Rs.60 lakhs within a period of four weeks from the date of the order and the compliance was to be reported on 8/11/2010. However, on a writ- petition No. 12695/2010 being filed by the Appellant before Hon'ble High Court of Madhya Pradesh, Indore Bench, the Hon'ble Court vide order dated 25/10/2010, while quashing the Tribunal's order regarding pre-deposit, directed the Tribunal to decide the appeal alongwith the earlier appeals without insisting on the pre-deposit within a period of eight weeks from the date of receipt of copy of this order. In this regard, the direction of Hon'ble Court in para 12 of its order are reproduced below:-

> "12. The Tribunal is directed to decide the petitioner's appeal on merits without insisting on pre-deposit. We record the statement of the learned counsel for the petitioner that the petitioner is ready and willing to get its all the aforesaid three appeals decided as expeditiously as

possible. In order to avoid undue delay, we direct the Tribunal to decide all the aforesaid appeals of the petitioner finally within a period of 8 weeks from the date of receipt of copy of this order. The petitioner shall cooperate in disposal of its appeals within the time fixed."

Accordingly these three appeals alongwith the Department's Cross Objection No. ST/CO/267/08 in respect of appeal No. ST/347/08 were taken up for hearing.

2. Heard both the sides.

2.1 Shri V. Laxmi Kumaran, Advocate, the learned Counsel for the Appellant, made the following oral as well as written submissions.

(1) During the period of dispute, the Appellant were in the practice of raising separate invoices/bills on their customers on account of –

(i) Banquet hall charges and other charges for the infrastructure provided at the hall like tent house charges, decoration charges, stage charges, music systems charges etc.

(ii) Service charges for the serving of the food and beverages to the guests; and

(iii) Value of the food and beverages sold.

The Appellant were paying service tax on the total amounts collected under (i) and (ii) above which represented the value of Mandap keeper services. No abatement or exemption was claimed on the amounts mentioned in (i) & (ii) above. On the value of food & drinks sold, the Appellant were paying Sales Tax/VAT and in respect of the sale value of food and beverages, the Appellant were availing service tax exemption under Notification No. 12/03-ST. The Appellant have not availed input duty credit in respect of food and drinks. Therefore, benefit of exemption under Notification No. 12/03-ST has been correctly availed.

(2) Exemption Notification No. 21/97-ST dated 26/6/97 and its successor Notification No. 1/06-ST dated 01/3/06 are specifically applicable for Mandap keeper services, while Notification No. 12/03-ST is a general exemption notification available in respect of all the taxable services. The specific vs. General rule does not apply when two exemption notifications are available to an assessee. The assessee is free to avail the benefit of the notification which is more beneficial to him. In this regard, reliance is placed on the judgment of Hon'ble Supreme Court in case of **CCE vs. India Petro Chemicals** reported in the **1997 (92) E.L.T.-13 (S.C.)** and of the Tribunal in the cases of **CCE vs. Bharat Seats Ltd.** reported in **1999 (108) E.L.T. - 847(Trib.), Waterbase Ltd. vs. CCE** reported in the **2001 (130) E.L.T. – 386 (Tri-Che.)** and **Parth Harsh Mills Pvt. Ltd Vs. CCE** reported in **2005 (191) E.L.T. – 725 (Tri-Mum.).**

(3) Notification No. 12/03-ST uses the expression -

"exempts so much of the value of all the Taxable Services". Thus, this notification applies to all the taxable services including Mandap keeper Service. Second proviso to Notification 1/06-ST provides that this exemption shall not apply to a service provider who has availed the benefit under Notification 12/03-ST. If Notification No. 12/03-ST is not available at all to Mandap Keeper Service providers, this proviso to Notification No. 1/06-ST will become redundant.

(4) The Appellant have fulfilled the conditions of Notification No. 12/03-ST ; as

(a) there is sale of food and beverages, in question, by the Appellant to their customers;

(b) separate invoices have been raised in respect of value of food and beverages sold and the value of banquet hall charges/service charges which are a clear documentary proof of value of food and beverages sold ; and

(c) no Cenvat credit was availed in respect of food and beverages sold.

(5) Serving of food and beverages by the Appellant in course of providing services in relation to use of Mandap is sale of food and beverages simpliciter to their customers (hosts). The invoices for sale of food and beverages show only the value of the food and beverage sold out and do not include the value of services provided alongwith sale of food. The charges for serving the food and drinks are included in the charges for service in relation to use of

Mandap on which Service Tax has been paid. Hon'ble Delhi High Court in the case of **IRCTC Vs. Govt. of NCT of Delhi** reported in **2010-TIOL-517 HC-Del.-ST** has held that catering of food by IRCTC in Trains is pure sale of goods liable for sales tax is not a composite transaction of sale and services.

(6) Meaning of the word 'sale' in Notification No. 12/03-ST has to be understood in terms of its definition as given in Section 2(h) of the Central Excise Act, 1944 which, by virtue of Section 65 (121) of the Finance Act, 1994 is applicable to Service Tax. This definition of 'sale' is wider than the definition of 'sale' in Section 4 of the sale of Goods Act, 1930. The supply of food and beverages to the guests of the clients while providing the Mandap Keeper services is sale within the meaning of this term as defined in Section 2(h) of the Central Excise Act, 1944, as in this case, there is transfer of possession of the goods. Thus there is sale of goods involved without invoking the concept of deemed sale under Article 366 (29A) (f) of the Constitution.

(7) In any case, the expression 'sold' in Notification No. 12/03-ST would also include transaction deemed as sale in terms of Article 366(29A) of the Constitution for the purpose of levy of sales tax by States. Same view has been taken by the Tribunal in the case of **Sky Gourmet Pvt. Ltd. Vs. CCE, Bangalore** reported in **2009 (14) STR-777 (Tri.-Bang.)**.

(8) The Hon'ble Supreme Court in the cases of **BSNL Vs. UOI** reported in **2006 (2) STR 161** and **Imagic Creative Pvt. Ltd. Vs. Commissioner of Commercial Taxes** reported in **2008 (9) STR-337** has held that VAT and Service Tax are mutually exclusive and both the taxes cannot be levied simultaneously on the same value. Keeping this basic principle in mind, the legal fiction created in Article 366 (29A) of the Constitution will have to be read into Notification No. 12/03-ST as a Mandap Keeper also supplying food and beverages in course of use of Mandap by the customers must have the option to avail of Notification No. 1/06-ST (or its predecessor Notification No. 21/97-ST) or Notification No. 12/03-ST, depending upon whether the value of food and drinks supplied is about 40% of the gross amount charged or is much more than 40% of the gross amount charged.

(9) The issue involved in the present appeals is no longer res integra, as the same have been decided by the Tribunal in the cases of

(a) **Daspalla Hotels Ltd. vs. CCE** reported in **2010 (18) STR -75 (Tri.-Bang.)** and

(b) **Sky Gourmet Pvt. Ltd. vs. CST, Bangalore** reported in **2009 (14) STR 77,** wherein it was held that benefit of exemption under Notification No. 12/03-ST in respect of value of food and beverages supplied would be available to a Mandap Keeper and outdoor catering.

(10) Even if Notification No. 12/03-ST is not available, the benefit of Notification No. 1/06-ST in appeal No. ST/462/2010 cannot be denied subject to reversal of Cenvat credit on input services availed. In this regard, reliance is placed on Tribunal's judgement in case of **CCE, Vadodara Vs. Ram Krishna Travels Ltd.** reported in **2010 (17) STR 4.**

(11) There is no suppression of facts, wilful, mis-statement etc. on the part of the Appellant. Hence, a part of the demand covered by appeal No. 374/08 is time barred. Since there is no fraud, suppression of facts, wilful mis-statement etc. with intent to evade the payment of tax, penalty under Section 78 of Finance Act, 1994 is not warranted.

2.2 Shri Sumit Kumar, the learned DR made the following oral as well as written submissions :

(i) Serving of the food and beverages to the guests of the Appellant's clients in course of use of Mandap is an activity ancillary to and part of the main activity of providing service in relation to use of Mandap. Catering of food and beverages to the guests of the clients in course of use of Mandap is an integral part of the services provided by the Appellant in relation to use of Mandap and the same cannot be split up into the value of food and beverages and the value of services in relation to use of Mandap.

(ii) Main objective of the Appellant's contract with their clients is making available to them a banquet hall space with decoration, lighting, music, catering of food and beverages and other necessary facilities for the business, social or official functions. There is no intention to sell food and beverages. Hence, there is no sale of food and beverages. Therefore Notification No. 12/03-ST is not applicable.

(iii) Till February 2005, the Appellant were paying Service Tax by availing Notification No. 21/97-ST. Subsequently, they started splitting the bills into the charges for Mandap and charges for food and beverages. Letter dated 5.2.07 of the Appellant admits that they started availing Notification No. 12/03-ST by splitting the bills for service in relation to use of Mandap, into the bill for use of Mandap and bill for food and drinks. Though the appellant claim that the charges for food and drink do not include the charges for service, and the same are included in the "Mandap charge", the invoices do not show this and there is no other evidence in this regard. There is, in fact, no sale of food and beverages involved.

(iv) There is no 'sale' of food and beverages within the meaning of this term, as defined in Section 2(h) of the Central Excise Act, 1944, as the food and drinks served get consumed and as such, there is no transfer of possession of food and drinks.

(v) Appellant's contract with their clients is a pure service contract of providing Mandap to their clients with all the related facilities including the service of catering of food and beverages to the guests of the clients. Food and beverages served get consumed in providing of this service

– there is no sale of food and beverages. Such a service contract cannot be artificially spilt up into sale of food and beverages and service, just to avail the benefit of Notification No. 12/03-ST.

(vi) Hon'ble Supreme Court in para 55, 56 and 57 of its judgement in case of **Tamil Nadu Kalyana Mandapam Association vs. Union of India** reported in **2004 (167) ELT 3 (SC)** has held that a tax on services rendered by Mandap Keepers and outdoor caterers is in pith and substance, a tax on services and not a tax on sale of goods or on hire purchase activities. Hon'ble Kerala High Court in the case of **Saj Flight Services P. Ltd. Vs. Superintendent of Central Excise** reported in **2006 (4) STR 429 (Ker.)** in para 5 of the judgement, has held that payment of sales tax treating the service of food and beverages by the caterers to aircraft as sale of goods under Section 2(29) of Kerala General Sales Tax Act, introduced after 46th Constitution amendment, does not exonerate the petitioner from liability for service under the Central legislation which is upheld by the Supreme Court and that since service of food and beverages by caterers to aircraft amounts to sale of goods as well as rendering of service, both service tax and sales tax under the respective provisions can be levied on the very same transaction. Therefore, just because sales tax has been paid on the charges for food and drinks served, it does not mean that service tax cannot be charged on the portion of the value of the Mandap Keeper service, which represents the charges for supply of food and drinks. Hon'ble Supreme Court in the case of **Tamil Nadu Kalyana Mandapam Association vs. UOI** (supra) has also observed that service tax is chargeable on the gross amount charged by the Mandap Keepers for service in relation to use of Mandap and also on the charges for catering – though the Government has decided to charge service tax on Mandap Keeper's service only on 60% of the gross amount charged by the Mandap Keepers from the customers.

(vii) Hon'ble Supreme Court in case of **Northern India Caterer's vs. Lt. Governor of Delhi** reported in **1980 (45) STC 212** has held that supply of food and beverages by caterers is a service not a sale and same view was taken by Hon'ble Supreme Court in case of **State of HP vs. Associated Hotels of India** reported in **(1972) 29 STC 474** with regard to supply of food by a hotelier to his guests. Therefore in this case, serving of food and beverages by the Mandap Keeper to his client's guests in course of use of Mandap is pure service and the same cannot be split up into catering service element and cost of food and beverages.

(viii) Catering service provided to the clients during their use of Mandap has an element of personalised service and the service element is more weighty, visible and pre-dominant in case of catering. No sale of food and beverages is discernible in the activity of catering which is an ancillary activity to the activity of providing service in relation to use of Mandap i.e. making banquet hall available to the clients with all the facilities like lighting, decoration, music etc. The charges for serving of food and beverages are the charges for catering, not the charges for sale of food and beverages. If the Appellant claim that the charges in the invoices are purely the charges for food and beverages supplied and do not include the service charges and the service charges are included in the charges for Mandap services, the burden of proving this is on the appellant. In this regard, reliance is placed on Hon'ble Supreme Court's judgment in case of **Jayesh Containers vs. CCE, Baroda** reported in **1996 (84) RLT 7 (SC)**, wherein it was held that burden of proof for claiming exemption is on the claimant. In this case, this burden has not been discharged.

(ix) Judgement of Hon'ble Supreme Court in case of **Imagic Creative Pvt. Ltd. vs. Commissioner of Commercial Taxes** (supra) is of no relevance to this case, as in this case, the issue involved is totally different. Notification No. 12/03-ST claimed by the Appellant is not admissible to them even if sales tax is paid by them on the supply of food and beverages. Hon'ble Supreme Court in case of **Tamil Nadu Kalyana Mandapam Association vs. UOI** (supra) on the question as to whether in view of the deeming provisions of Article 366 (29A) (f) of the Constitution, the "serving of food" which otherwise is not a sale transaction should be deemed as sale transaction and its value excluded for the purpose of charging service tax on service in relation to use of Mandap, held that Article 366(29A) (f) only permits the state to impose a sales tax on the supply of food and drinks by whatever mode it may be made and it does not conceptually or otherwise bring the supply of food and drinks by a Mandap Keeper within the definition of sale or purchase of goods. Hon'ble Court, therefore, held that service tax on service in relation to use of Mandap is leviable on the gross amount charged by the Mandap Keeper for services in relation to use of Mandap including the charges for foods and drinks served.

(x) The Appellant have intentionally contravened the provisions of the Finance Act, 1994 and of the Service Tax Rules, 1994 with intent to evade the service tax and therefore longer limitation period under Section 73 of the Finance Act, 1994 has been rightly invoked for recovery of the service tax and penalty under Section 78 ibid has been rightly imposed on the Appellant.

2.3 In rejoinder, Shri V. Lakshmi Kumaran, made the following submissions :-

(1) Notification No. 12/2003-ST is a general exemption notification applicable to all the taxable services in rendering which sale of goods and materials is involved. In this case, the food and beverages were sold by the Appellant to their clients and service of catering was provided only on the client's request, the charges for which are included in the charges for use of Mandap. The invoices for food and beverages are the evidence of the value of the food and beverages sold.

(2) Appellant's contracts with their clients are divisible contract i.e. contracts for sale as well as service, not indivisible contract for service.

(3) The Commissioner in the order-in-original No.11 & 12/Commr/ST/IND/2009 dated 26.2.2009 in (para-28) has observed that the term 'sale' includes deemed sale under Article 266 (29A) (f) of the Constitution. This finding of the Commissioner has not been challenged.

(4) Judgement of Hon'ble Supreme Court in case of **Tamil Nadu Kalyana Mandapam** (supra) is in respect of the constitutional validity of levy of service tax on the service in relation to use of Mandap and the Hon'ble Apex Court upheld the levy. Hon'ble Supreme Court in this case, did not go into the question of measure of tax or into the question of applicability of exemption Notification No. 12/03-ST to Mandap Keeper service. Similarly, judgement of Hon'ble Kerala High Court in case of **Saj Flight Services** (supra) wherein it has been held that the fact that the supply of foods is chargeable to sales tax will not exonerate the assessee from the liability of service tax on the element of service involved in the transaction, does not help the

Department as the Appellant are paying service tax on the service element of their transaction with their customers and are only claiming the deduction of value of food and beverages sold to the customers.

(v) There was nothing illegal or wrong about separating the bills relating to the value of Mandap Keeper service and sale value of food and beverages. The Appellant had adopted this practice since March 2005 in order to qualify for the requirement of Notification No. 12/03-ST which requires documentary proof regarding value of goods and materials sought to be excluded. Such a tax planning done by the Appellant cannot be the ground for denial of the exemption under Notification No. 12/03-ST.

3. We have carefully considered the submissions from both the sides and perused the records. The undisputed facts are that:-

(a) The Appellant provide the service in relation to use of Mandap to their customers, which is taxable under Section 65 (105) (m) readwith Section 65(66) and 65 (67) of the Finance Act, 1994;

(b) In course of providing the above service by providing temporary occupation of a Mandap for a consideration for organising any official, a social or business function, they also provide service as a caterer (as defined in Section 65(24) ibid], or in other words, they serve food and beverages to the guests of the customers;

(c) upto 28.2.05, the Appellant were discharging service tax liability by availing exemption under Notification No. 21/97-ST and were paying service tax on 60% of the gross amount charged including the amount charged for food and beverages served, and

(d) W.e.f. 1.3.05, the Appellant started splitting the invoices to their customers into the charges for food and beverages and the charges for Mandap and other services and started availing exemption under Notification No. 12/03-ST claiming that the supply of food and beverages to the guests of their customers in course of use of Mandap is sale of food and beverages whose value is separately shown in the invoices and on which sales tax/VAT is paid.

3.1 The main thrust of the Appellant's plea is that their transactions as Mandap Keeper with their customers involve sale of food and beverages on which sales tax/VAT levied by the State Government is paid, as well as service in relation to use of Mandap and the invoices issued by them show the value of food and beverages supplied, and therefore, the benefit of exemption under Notification No. 12/03-ST cannot be denied to them. It has also been pleaded that in view of Hon'ble Supreme Court's judgment in case of **Imagic Creative Pvt. Ltd. Vs. Commissioner of Commercial Taxes** (supra) Sales tax/VAT and service tax are mutually exclusive and both cannot be levied simultaneously on the same value and therefore depending upon whether the value of food and beverages supplied by the Mandap keeper is upto 40% of the gross amount charged or more than 40% of the gross amount charged, the Mandap Keeper must have the option to avail Notification No. 21/97-ST or 1/06-ST or Notification No. 12/03-ST so as to totally remove the value of food and beverages supplied from the assessable value for the purpose of calculating the service tax payable. The Department's contention, on the other hand, is that it is only the Notification No. 21/97-ST and its successor Notification No. 1/06-ST, which being the specific exemption for Mandap Keeper Service, is available to the Appellant and (as emphasised in cross objection No. ST/CO/267/08 in respect of appeal No. ST/374/08) the Appellant's transactions as Mandap Keeper with their customers are pure service transaction whose main objective is to make Mandap i.e. Banquet hall available to the customers for their official, social or business functions, with all the facilities like decoration, lighting, music, catering service etc. and as such, their is no sale of food or beverages involved and that by treating the supply of food and beverages in course of catering service provided by the Appellant as deemed sale under Article 366(29A) (f) of the Constitution of India for the purpose of charging Sales Tax/VAT, such supply can not be treated as "sale of food and beverages " for the purpose of Notification No. 12/03-ST. The department's contention, therefore, is that Notification No. 12/03-ST is not available to the Appellant and that they can avail only the Notification No. 21/97-ST or its successor Notification No. 1/06-ST by following its conditions.

4. Mandap Keeper Services during the period prior to 16/6/05 was defined in Section 65(105)(m) of the Finance Act, 1994 as - "Service provided to a client by a Mandap Keeper in relation to the use of Mandap in any manner including the facilities provided in relation to such use"

With effect from 16/6/05, the definition of 'Mandap Keeper Service in Sec. 65(105)(m) is –

> "Service provided or to be provided to any person by a Mandap Keeper in relation to the use of Mandap in any manner including the facilities provided to such person in relation to such use and also the service, if any provided or to be provided as a caterer".

Thus with effect from 16/6/05 the service provided or to be provided as a caterer in course of use of Mandap was specifically included within the purview of Mandap Keeper Service.

4.1 Under Section 65 (66), "Mandap" means any immovable property as defined in Section 3 of the Transfer of Property Act, 1882 and includes any furniture, fixtures, light fittings and floor coverings thereon let out for a consideration for organizing any official, social or business function.

4.1.1 Under Section 65(67), "Mandap Keeper" means a person who allows temporary occupation of a Mandap for a consideration for organizing any official, social or business function."

4.1.2 Under Section 65(24), "Caterer" means any person who supplies, either directly or indirectly, any food, edible preparations, alcoholic or non-alcoholic beverages or crockery and similar articles or accoutrements for any purpose or occasion".

4.2 Under Section 67 of the Finance Act, 1994 the taxable value for the service in relation to use of Mandap is the gross amount charged without any provision for abatement for the cost of food and beverages served. Since with effect from 16/6/05 the definition of Mandap Keeper Service in Section 65(105) (m) specifically includes the service provided by the Mandap Keeper as a caterer and a caterer, in terms of its definition in Section 65(24) means - 'any persons who supplies either directly or indirectly, any food, edible preparations, alcoholic or non-alcoholic beverages or crockery or similar articles or accoutrements for any purpose or occasion", there is no scope of doubt that during period w.e.f. 16/6/05, the value of Mandap keeper service would include the value of catering service provided, which is the value of food and beverages plus the charges for serving the same. As regards the period prior to 16/6/05, the expression "services provided to a client by a Mandap Keeper in relation to use of Mandap in any manner" is wide enough to include the service of catering provided in course of use of Mandap and, therefore, we have no doubt that even during the period prior to 16/6/05, the taxable value of the Mandap keeper service under Section 67 ibid would be the gross amount charged including the charges for catering service. In fact, on this point, there is no dispute in this case. The dispute is as to whether only the exemption Notification No. 21/97-ST or its successor Notification No. 1/06-ST can be availed by the Appellant or whether the Appellant have the option to avail the general exemption Notification No. 12/03-ST also.

5. Notification No. 21/97-ST and its successor Notification No. 1/06-ST issued under Section 93(1) of the Finance Act 1994, exempt the service in relation to use of Mandap provided by a

Mandap keeper or by a hotel as Mandap keeper from the Service Tax, as is in excess of the amount of Service Tax calculated, which is equivalent to 60% of the gross amount charged for that service, subject to conditions that –

(i) The Mandap Keeper also provides catering service, that is, supply of food and the invoice bill or challan issued indicates that it is inclusive of the charges for catering service – the "food" being substantial and satisfying meal;

(ii) No Cenvat Credit of duty on inputs or capital goods and of Service Tax on input services used for providing the service in relation to use of Mandap has been taken under Cenvat Credit Rules, 2004, and

(iii) Benefit of Notification No. 12/03-ST has not been availed.

Thus this exemption is a specific exemption in respect of service in relation to use of Mandap provided by a Mandap keeper or by a Hotel as a Mandap Keeper when in course of use of Mandap, "substantial and satisfying meal" is also served and subject to satisfying the conditions of the notification, the service tax payable is the tax at the rate prescribed in Section 66 on 60% of the gross amount including the charges for catering service. Though this notification does not say so explicitly, from its wordings it as clear that the intention of the Government behind this exemption is to avoid charging service tax on that portion of the value of the service in relation to use of Mandap, which represents the value of food and beverages served and the 40% abatement represents the average value of the food and beverages component of the service in relation of use of Mandap. But having said so, we want to make it clear that as discussed in para 4.2 above, the Central Government has powers to charge service tax on gross amount charged including the charges for catering and the abatement towards the value of food and beverages supplied allowed by issuing an exemption notification under Section 93 (1) of the Finance Act, 1994 is limited only to the extent it is prescribed in the exemption Notification No. 21/97-ST and its successor Notification No.1/06-ST, issued under Section 93 (1) even if the component of the value of food and beverages served is more than 40% of the gross amount charged.

6. The question now arises as to whether a Mandap keeper, in whose case, the value of food & beverages served is much more that 40% of the gross amount charged for the Mandap keeper service, has option to avail of the general exemption under Notification No. 12/03-ST by treating the supply of food and beverages as sale. Since this is the core issue in this case, we will examine it on greater detail.

6.1 Notification No. 12/03-ST issued under Section 93(1) of the Finance Act, 1994, is a general exemption, which exempts a taxable service provided, from the tax to the extent of the service tax on the value of the goods and materials sold by the service provider to the recipient of service, subject to conditions that -

(i) there is documentary proof specifically indicating the value of the said goods and materials.

(ii) No credit of duty paid on such goods and materials sold has been taken under the provision of Cenvat Credit Rules, 2004, and

(iii) When such credit has been taken by the service provider on such goods and materials, such service provider has paid the amount equal to such credit availed before the sale of such goods and materials.

The Appellant claim this exemption on three grounds –

(a) The Appellant's transactions as Mandap keeper with their customers are the transactions of sale as well as service the sale being of the food and beverages supplied and this sale is sale within the meaning of this term as defined in Section 2(h) of the Central Excise Act, 1944, as made applicable to Service Tax by virtue of Section 65 (121) of the Finance Act, 1944.

(b) In any case, the 'sale' referred to in Notification No. 12/03-ST would also cover the "deemed sale" under Article 366 (29A) of the Constitution as under clause (f) of Article 366(29A) of the constitution, "Tax on sale or purchase of goods" includes _" a tax on the supply by way of or as part of service or in any other manner whatsoever of goods being food or any other article for human consumption or any drink (whether or not intoxicating) for cash, deferred payment or other valuable consideration"

(c) Since Sales Tax/VAT is paid on the supply of food and beverages, in terms of Hon'ble Supreme Court's judgment in case of **Imagic Creative Pvt. Ltd. Vs. Commissioner of Commercial Taxes** (Supra) Service Tax can not be charged on the value of food and beverages and since in this case, the value of food and beverages is much more than 40% of the gross amount charged, the abatement of value of food and beverages on actual basis must necessarily be allowed under Notification No. 12/03-ST our findings on these points are as under.

6.1.1 Coming to point (b) first, from the wordings of clause (f) of Article 366(29A) of the constitution it is clear that by this provision, for the purpose of charging tax on sale or purchase of goods, the supply of food or drinks by the way of or as part of service is to be treated as sale of food and drinks. It is thus a legal fiction created for the purpose of enabling the State Governments to charge sales tax on supply of food and drinks involved in catering contracts, while otherwise had been held by the courts as services contracts, by treating the same as sale. As has been held by Hon'ble Supreme Court in its judgments in the cases of – (a) **State of Maharashtra vs. Laljit Rishi Shah** reported in **(2000) 2-SCC-699** ; (b) **Union of India vs. Sampat Raj Dugar** reported in **AIR 1992 SC-1417** ; (c) **K Prabhakaran vs. P Jayarajan** reported in **(2005) 1 SCC-754 = AIR (2005) -688**; (d) **Raymond Ltd. vs. State of Chhattisgarh** reported in **(2007) 3 SCC-79** and (e) **Imagic Creative Pvt. Ltd. vs. Commissioner of Commercial Tax** (supra), in construing a legal fiction, it is not to be extended beyond the purpose for which it has been created. Since Article 366(29A) had been inserted in the Constitution of India by 46th Constitutional amendment to enable the State Governments to charge sale tax on supply of goods or transfer of property therein in respect of certain transactions which were involved in service contracts or were not sale as commonly understood, by deeming the same to be sale, such extended definition of sale can be construed in the context of charging sales tax, not for understanding the scope of the word 'sale' in Service Tax exemption Notification No. 12/03-ST. ~~----------~~

~~----------~~ For applicability of exemption Notification No. 12/03-ST there should be distinct "sale" of goods within the meaning of the term "sale", as defined in Section 2 (h) of the Central Excise Act, 1944, which by virtue of Section 65(121) is applicable to Service Tax matters and the benefit of exemption under this notification can not be extended to the predominant service contracts not involving 'sale' of goods primarily, as defined in Section 2 (h) of the Central Excise Act, 1944 misconstruing legal fiction of Article 366(29A).

6.1.2 Coming to the question as to whether there is sale of food and beverages in this case definition of the term "sale" as defined by Section 2(h) of the Central Excise Act, 1944, may be examined. The word 'sale' has been defined in this section as "any transfer of possession of goods by one person to another in ordinary course of trade or business for cash or deferred payment or other valuable consideration". This definition of sale obviously involves intention for transfer of possession for some consideration. Unless such an intention for transfer of possession of goods for some consideration is discernible in a contract, the same can not be said to be sale. When in a contract rendering of service is the predominant intention – the use of goods being unintentional and unavoidable for performance of service and the performance of such service is for some consideration, it will be a pure service contract not involving any sale even if invoice issued show break up of the gross amount towards value of the goods used and the value of service provided. However, if a contract is for supply of a specified quantity of goods at a specified price for use in performance of a service for separate considerations, such a contract will be a contract for sale as well as for service. Thus, whether a given contract is a contract for service or a contract for sale or for both sale as well as service or for two or more different services, depends upon the intention of the parties, which has to be ascertained from the terms of the contract. In this regard, Hon'ble Supreme Court in para 4 of its judgment in case of **Sentinal Rolling Shutters & Engg vs. Commissioner of Sales Tax** reported in **(1978) 4 - SCC - 260** has observed as under –

> "4. It may be pointed out of that a contract where not only work has to be done but the execution of such work requires goods to be used may take one of three forms. The contract may be for work to be done for remuneration and for supply of materials used in the execution of work for a price; it may be a contract for work in which the use of materials is accessory or incidental to the execution of work; or it may be a contract for supply of goods where some work is required to be done as incidental to sale. <u>When the contract is of the first type, it is a composite contract consisting essentially of two contracts, one for the sale of goods and other for work and labour.</u> The second type of contract is clearly a contract for work and labour not involving sale of goods, while the third type of contract is a contract for sale where the goods sold as chattel and some work was undoubtedly done, but it is done only as incidental to the sale ...."

6.1.2.1 In this case the contract of the Mandap keeper with its customers is to allow use of Mandap with all its facilities like decoration, lighting, stage, music, catering service etc. for some consideration for organizing some official, social or business function. The catering service provided is a service incidental and ancillary to the service in relation to use of Mandap and though it involves supply of food and beverages, it is essentially a service contract, not for sale of food and beverages. Thus the contract of a Mandap keeper with its customer, even if it involves catering service, is a contract of service not a contract for sale. In this regard. Hon'ble Supreme Court in para 55 of its judgment in case of **Tamil Nadu Kalyana Mandapan Association vs. Union of India** (supra) has observed as under:-

> "The services provided by a Mandap keeper are professional services which he alone by virtue of his experience has the wherewithal to provide. A customer goes to a Mandap keeper, say a star hotel, not merely for the food that they will provide but for the entire variety of services provided therein which result in providing the function to be solemnised with the required effect and ambience. Similarly the services rendered by outdoor caterers is clearly distinguishable from the service rendered in a restaurant or hotel in as much as, in the case of outdoor catering service, the food/ eatables/drinks are the choice of the person who partakes the services. He is free to choose the kind, quantum and the manner in which the food is to be

served. But in case of restaurant, the customer's choice of food is limited to the menu card. Again, in the case of outdoor catering, customer is at liberty to choose the time and place where the food is to be served. In the case of an outdoor caterer, the customer negotiates each element of catering service, including the price to be paid to the caterer. Outdoor catering has an element of personalised service provided to the customer. Clearly the service element is more weighty, visible and predominant in the case of outdoor catering. It cannot be considered as a case of sale of food and drink as in restaurant."

Hon'ble Supreme Court in case of **Northern India Caterers (India) Ltd. vs. Lt. Governor of Delhi** reported in **(1979) 1 SCR-557** has held that serving of food or drinks by a restaurant to his customers does not partake of the character of sale of goods. Thus, the catering component of the Appellant's contract with their customer while rendering Mandap keeper service is service in which there is no object of sale of food and beverages and as such no sale of food and beverages is involved. In fact the food and beverages served to the guests of the customer while using the Mandap is consumed by them without transfer of possession of food and beverages from the Mandap keeper to his customer for some consideration. Just because a Mandap keeper charges a specified amount for serving food and beverages to the guests of its customers, that does not become sale of food and beverages, as the intention of the contract is providing service incidentally involving serving of food and drinks to the guests of the customer and the price charged for serving of food and drinks forms part of consideration of Mandap keeper service but not the price for sale of food and drinks.

6.1.2.2 Other than merely making a bald claim that the charges for food and drinks shown in the invoices represent the value of food and drinks only and do not include the service charges i.e. the charges for serving the food and drinks, no evidence in this regard could be produced by the appellant. If in order to claim the exemption under Notification No. 12/03-ST, the appellant claims that their transaction with their customers involves sale of food and beverages in the sense that there is transfer of possession of a specified quantity of food and beverages to the customer for a specified price, the burden of proving this was on the Appellant. No evidence was produced to show that in every case of providing service in relation to use of Mandap, the Appellant's agreement with their customer was to supply a specified quantity of food and drinks at a specified price. The records show that the Appellant were serving food and beverages to the guests of their customers in course of providing Mandap keeper service for which they have billed the customer. These charges are the charges for catering service, not the charges for sale of food and beverages.

6.1.2.3 In view of the above discussion, we hold that there was no sale involved in the Appellant's transaction as Mandap keeper while serving their customers, for there is no sale of food and beverage as defined in Section 2 (h) of the Central Excise Act, 1944. When there is no sale of any materials or goods, the exemption under Notification No. 12/03-ST would not apply. This exemption notification is inapplicable to indivisible service contracts like the present one in hand.

6.1.3.1 As regard the third contention of the Appellant that value of food and beverages served in their case is more than 40% of the gross amount charged for service in relation to use of Mandap, and abatement under Notification No, 21/97-ST and its successor Notification No. 1/06-ST is 40%, abatement of actual value of food and drinks has to be allowed under Notification No. 12/03-ST, and disallowance of exemption under this notification would amount to levy of both service tax by Central Government and sales tax/VAT by the State Government on the same value, which is not permissible in view of Hon'ble Supreme Court's judgment in case of **Imagic Creative Pvt. Ltd. vs. Commissioner of Commercial Taxes** (supra), such plea is untenable for the reason that field of taxation and power of taxation of union and state is different. Different aspects of a transaction is taxed under different legislative entries. After carefully considering plea of the appellant, we are of the view that the same is devoid of merit for the following reasons.

(1) Hon'ble Supreme Court in case of **Tamil Nadu Kalyana Mandapam Association Vs. Union of India** (Supra) while considering the validity of levy of service tax

by the Central Government on the service in relation to use of Mandap, while dismissing the argument of the Appellants that service tax by Central Government on catering services, a part of service in relation of use of Mandap, amounts to tax on sale and purchase of goods, and upholding the levy, held that the fact that sales tax on the supply of goods involved in the said service can be levied does not mean that a service tax can not be levied on the service aspect of catering. In this regard para 42, 43,44 and 45 are reproduced below :-

"42. As far as the above point is concerned, it is well settled that for the tax to amount to a tax on sale of goods, it must amount to a sale according to the established concept of a sale in the law of contract or more precisely the Sale of Goods Act, 1930. Legislature cannot enlarge the definition of sale so as to bring within the ambit of taxation transactions, which could not be a sale in law. The following judgments and the principles laid down therein can be very well applied to the case in hand.

1. **M/s J.K. Jute Mills Co. Ltd. V. The State of U.P. & Anr. (1962) 2 SCR 1;**

2. **M/s Gannon Dunkerley & Co. and Ors. v. State of Rajasthan & Ors. (1993) 1 SCC 364;**

3. **The State of Madras v. Ganon Dunkerley & Co. (Madras) Ltd. (1959) SCR 379;**

4. **The Sales Tax Officer, Pilibhit v. M/s Budh Prakash Jai Prakash [1955] 1 SCR 243;**

5. **M/s George Oakes (P) Ltd. v. State of Madras [1962] 2 SCR 570.**

43. In regard to the submission made on Article 366 (29A) (f), we are of the view that it does not provide to the contrary. It only permits the State to impose a tax on the

supply of food and drink by whatever mode it may be made. It does not conceptually or otherwise includes the supply to services within the definition of sale and purchase of goods. This is particularly apparent from the following phrase contained in the said sub-article "*such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods*". In other words, the operative words of the said sub-article is supply of goods and it is only supply of food and drinks and other articles for human consumption that is deemed to be a sale or purchase of goods.

44. The concept of catering admittedly includes the concept of rendering service. The fact that tax on the sale of the goods involved in the said service can be levied does not mean that a service tax cannot be levied on the service aspect of catering. Mr. Mohan Parasaran, learned senior counsel for the appellant submitted that the High Court before applying the aspect theory laid down by this Court in the case of **Federation of Hotel and Restaurant V. Union of India & Ors.** (supra) ought to have appreciated that in that matter Article 366(29A) (f) of the Constitution was not considered which is of vital importance to the present matter and that the High Court ought to have differentiated the two matters. In reply, our attention was invited to paras 31 and 32 of the judgment of the High Court in which service aspect was distinguished from the supply aspect. In our view, reliance placed by the High Court on **Federation of Hotel and Restaurant** (supra) and, in particular, on the aspect theory is, therefore, apposite and should be upheld by this Court. In view of this, the contention of the appellant on this aspect is not well founded.

45. It is well settled that the measure of taxation cannot affect the nature of taxation and, therefore, the fact that service tax is levied as a percentage of the gross charges for catering cannot alter or affect the legislative competence of

Parliament in the matter"

Thus the plea that service tax can not be levied on the portion of value of Mandap Keeper Service which represents the value of food and beverages served is baseless. In fact in para 42 & 43 of the Apex Court judgment reproduced above it has been held in very clear terms that Article 366 (29A) (f) only permits the states to impose a tax on the supply of food and drinks by whatever mode it may be made and it does not conceptually or otherwise includes the supply to services within the definition of sale and purchase of goods.

(2) In the case of **Imagic Creative Pvt. Ltd. vs. Commissioner of Commercial Taxes** (supra), the assessee was providing "advertising Agency's service" and was paying sales tax on goods used in providing the service by treating the same as deemed sale. The commercial tax Department wanted to include the value of service portion also in the value of goods for the purpose of charging sales tax which was not accepted by Hon'ble Supreme Court on the ground that accepting the commercial tax authority's plea would amount to extending the legal fiction beyond the purpose for which it was created. It is in this context that the Hon'ble Court observed that payment of service tax and the VAT are mutually exclusive, as when sales tax/VAT is charged on the value of goods used in an indivisible service contract involving use of goods in rendering of service by treating the goods supply as deemed sale under Article 366(29A) of the Constitution, sales tax on such deemed sale can be charged only on the value of the goods, not on the entire value of the contract including the value of service portion, as doing so would amount to charging of tax on a service contract i.e. service tax by the State Governments

which they can not do. But the position is different when charging service tax on an indivisible service contract by Central Government where some goods have been used for performing the service. For charging tax on such indivisible service contract, no legal fiction is required – service tax is to be charged if the service is taxable on the measure as chosen by the legislature, as it is settle law that measure of a tax is independent of the nature of the tax. The service tax can be charged on the gross amount charged for the service including the value of the goods used for providing the service. Therefore the observations of Hon'ble Supreme Court in case of **Imagic Creative Pvt. Ltd.** (Supra) that payments of service tax and VAT are mutually exclusive is in consonance with observation of the Apex Court in para 44 of its judgment in case of **Tamil Nadu Kalayana Mandapam Association Vs. Union of India** (Supra).

6.2 It was pleaded by the Appellant that Notification No. 21/97-ST and its successor Notification 1/06-ST which are specific notifications meant for Mandap keepers have a condition that benefit of this exemption notification would not be available if the benefit of Notification No. 12/03-ST has been availed and this indicates that a Mandap Keeper has the option to avail the Notification No. 12/03-ST also.

6.2.1 As discussed above, serving of food and beverages for consideration to the guests of the customers in the course of use of Mandap is catering service, is not sale of food and beverages. If such a contract involves sale of food and beverages or any other goods or material, the evidence for the same has to be produced. As discussed in para 6.1.2.2 above, there was no evidence produced to show that there was a sale contract between the Appellant and its customers.

6.3 The Appellant relied on Tribunal's judgment in case of **Sky Gourmet Pvt. Ltd. Vs. Commissioner of Service Tax, Bangalore** reported on **2009 (14) STR 777 (Tri-Bang)** wherein it was held that in view of legal fiction of Article 366(29A) (f) of the Constitution, serving of food and beverages in a catering contract is sale of food and beverages for the purpose of Notification No. 12/03-ST. But this judgment has not considered at all the judgment of Hon'ble Supreme Court in case of **Tamil Nadu Kalyana Mandapam Association Vs. Union of India** (supra). In para 55 of the said judgment Hon'ble Court has held that service element is more weighty and predominant in outdoor catering and it cannot be considered as a case of sale of food and drinks as in a restaurant and also the observations in para 43 of the judgment reproduced above the Apex court has held in clear terms that supply of food and drinks in a catering contract, which by virtue of Article 366 (29A) (f) of the Constitution is deemed to be sale for the purpose of charging sales tax, cannot be treated as sale of goods for the purpose of service tax. The Tribunal's judgment in case of **Sky Gourmet Pvt. Ltd. vs. Commissioner of Service Tax** (supra), is therefore, per incurium and hence, the same is not a binding precedent. As regards the judgment of Hon'ble Delhi High Court in case of **Indian Railways Catering & Tourism Corporation Ltd. (IRCTC Ltd.) Vs. Govt. of NCT of Delhi & Others** (supra) cited by the Appellant, on going through this judgment, we find that in this case, in para 39 of the judgment, Hon'ble Court has given a clear finding that providing of food, snacks and water to the passengers on board the trains is altogether different from outdoor catering service and Hon'ble Supreme Court's judgment in case of **Tamil Nadu Kalyana Mandapam Association vs. Union of India** (supra) is not applicable to providing of food, snacks and water to passengers on board the trains and the same is pure sale of goods. Thus the judgment of Hon'ble Delhi High Court in case of **IRCTC vs. Govt. of NCT of Delhi & Others** (supra) cited by the Appellants is not applicable to the facts of the present case in hand.

6.4 In view of the above, we hold that there was no sale contract in the Appellant's contract as Mandap keeper for the purpose of levy of service tax under Finance Act, 1994 and therefore exemption Notification No. 12/03-ST is not available to the Appellant. They should have paid service tax after determining their liability on the basis of Notification No. 21/97-ST and its successor Notification No. 1/06-ST if conditions of such notification are satisfied. Therefore, so far as appeal No. ST/374/08 and ST/399/09 is concerned, the service tax demands are correct on merits and so far as appeal No. ST/462/2010 is concerned, since in this case, even the Notification No. 1/06-ST has been denied on the ground that input service credit has been availed and since the Appellant are ready to reverse the input service credit as prayed in the course of hearing, the tax demand has to be re-determined after permitting exemption under Notification No. 1/06-ST subject to condition that the Appellant reverses the Cenvat credit.

7. It has been pleaded that since the Appellant availed of Notification No. 12/03-ST under bonafide belief that they are eligible for the same, they never suppressed fact from the Department as availment of this exemption notification was declared by them in the ST-3 returns, only normal limitation period under Section 73 of the Finance Act, 1994 would be available to the Department for recovery of short paid service tax and accordingly in appeal No. ST/374/08, the demand for the period prior to March 06 would be time barred. It is also pleaded that in absence of fraud, suppression of facts, wilful misstatement etc. with intent to evade the payment of tax penalty under section 78 ibid is not called for.

7.1 As per the provisions of Section 73(1) of the Finance Act, 1994, longer limitation period of five years from the "relevant date", as defined in Section 73(6) ibid is available to the Department for recovery of short levied, short paid, not levied or paid or erroneously refunded service tax only if such non levy, short levy/short payment or erroneous refund has taken place by the reason of fraud, collusion or wilful misstatement, or suppression of facts or contravention of any provisions of chapter V & V A of the Finance Act, 1994, by the person chargeable with the Service Tax or his agent. Hon'ble Supreme Court in a series of judgments in cases of –

(a) **Padmini Products vs. CCE reported in 1989 (43) ELT-195(SC)**

(b) **CCE vs. Chemphar Drugs & Liniments reported in 1989(40) ELT-276(SC)**

(c) **Pushpam Pharmaceutical Company vs. CCE, reported in 1995 (78) ELT-401(SC) and**

(d) **Anand Nishikawa Co. Ltd. vs. CCE, reported in 2005 TIOL-118-SC-CX,**

has held that something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise is required for invoking the longer limitation period of five years under provision to Section 11A (1) of the Central Excise Act, 1944. Since the provisions of Section 11A(1) of the Central Excise Act, 1944, and of Section 73 of the Finance Act, 1994, as it stood w.e.f. 10/9/04, are parimateria, the ratio of the above- mentioned judgments of Hon'ble Supreme Court in respect of Section 11A (1) of the Central Excise Act, 1944 would be applicable to Section 73(1) of the Finance Act, 1994 also.

7.2 In this case, the Appellant were filing the six monthly ST-3 returns and it is not the allegation of the department that availment of Notification No. 12/03-ST was not declared in the ST-3 returns. When the Department had knowledge that the Appellant are availing of exemption under Notification No. 12/03-

ST since 1/3/05, it can not be said that the Appellant suppressed this information from the Department with intent to evade the tax. Thus the criteria for invoking the longer limitation period, as mentioned in the judgments of Hon'ble Supreme Court mentioned in para 7.1 above is not satisfied. Therefore only normal limitation period of one year from the "relevant date" would be available to the Department for recovery of short paid tax and accordingly while the service tax demands in appeal No. ST/399/08 and ST/462/2010 are within time, part of demand in appeal No. ST/374/08 for period prior to March 06 would be time barred.

8. It has been pleaded that since there is no wilful misstatement, fraud or suppression of facts with intent to evade the Service Tax, penalty under Section 78 of the Finance Act, 1994 is not called for. Since as discussed above, there is no suppression of facts etc. on the part of the Appellant and this is a case of interpretation of exemption notification, and since the criteria for imposition of penalty under Section 78 ibid is the same as the criteria for invoking extended limitation period under proviso to Section 73(1), there are no grounds for imposition of penalty under Section 78. The same is, therefore, liable to be set aside. However, since the service tax was not paid by the due date, penalty under Section 76 has been correctly imposed.

9. In view of our above findings –

(a) we uphold the Commissioner's findings in these cases that Notification No. 12/03-ST dated 20/06/03 is not available to the Appellant ;

(b) so far as appeal No. ST/374/08 is concerned, the service tax demand alongwith interest is upheld only for the normal limitation period and the demand for period beyond the normal limitation period of one year from the relevant date is set aside and the matter is remanded to the Commissioner for quantifying the demand for normal limitation period ;

(c) so far as appeal No. ST/399/09 is concerned, the service tax demand alongwith interest is upheld ;

(d) so far as appeal No. ST/462/10 is concerned, the matter is remanded to the Commissioner for re-quantifying the service tax demand, after permitting abatement under Notification No. 1/06-ST subject to condition that the Appellant reverse the Cenvat Credit availed by them ; and

(e) while penalty imposed under Section 76 of Finance Act, 1994 in these appeals is upheld, the penalty imposed under Section 78 ibid in these appeals is set aside.

9.1 The appeal No. ST/374/08 alongwith Department's Cross Objection No. ST/CO/267/08; appeal No. ST/399/09 and appeal No. ST/462/2010 stand disposed of, as above.

(Pronounced in open court on 25.01.2011)

(Rakesh Kumar)
Technical Member

(D.N. Panda)
Judicial Member

PK