

2. The appellant herein M/s. Taj Mahal Hotels are service tax registration holder for rendering services of, Mandap Keeper, Dry Cleaning service and health club and fitness centre w.e.f 13.sep.2002, 13.09.2002 and 22.08.1997. During the course of investigation it was observed by the department as follows:

A. Appellants are receiving commission on account of foreign exchange incentives from M/s. LKP Financial services between July 2003 to July 2006 appellant had received Rs. 39,01,430/- but have not discharged the liability allegedly under Business Auxiliary Service being in tax net w.e.f 10.09.2004.

B. The appellants were alleged to have wrongly availed the benefit of notification no. 12/2001 ST dated 20.12.2001 for the period 20.12.2001 to 09.07.2004 despite the fact that the said exemption was available to hotels registered under Mandap keeper if the substantial meal was served in the function held in hotel premises. Department alleged that the appellant did not pay the service tax on those invoices where tea /snacks/ breakfast were served.

C. The functions like senior management meet, dealers meet, customer meet, medical conferences etc were alleged to be covered under convention services and these were denied to be services of Mandap Keeper resultantly a demand of Rs. 42,00,490 for a period w.e.f. October, 2002 to June 2004 was raised.

D. It was alleged that while rendering the Mandap keeper service the appellant were charging the service tax @ 10% of the invoices value but were not discharging the liability thereon. The appellants were alleged to have evade Rs. 2,25,057 for of period October 2002 to 2004 on this account.

E. The appellant were receiving remittances from foreign agencies for providing services outside India towards maintaining and providing voice reservations GVS reservations and internet reservations globally and also for advertisement outside India and also on account of membership and subscription to various world organization to be the members of their elite organization. It was alleged that they were not discharging there liability towards service tax for the period prior to 18.04.2006.

3. The aforesaid demand was raised vide show cause notice no. 10922 dated 24.04.2008 for total amount of 1,10,49,066/- alongwith appropriate interest and proportionate penalty was also proposed. The amount of 4,02,491/- as was got already deposited by the appellant for a period July 2003 to July 2006 in respect of foreign incentive received allegedly under Business Auxiliary Services was proposed to be appropriated.

4. The said show cause notice was adjudicated vide the order under challenge. The original adjudicating authority dropped the following demands:

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- (i) Service tax amounting Rs. 42,00,490/- for the alleged convention service from the period October 2002 to June 2004.
- (ii) The demand of Rs. 2,25,057/- for a period October 2002 to June 2004 as was raised on value of tea/snacks/breakfast as had been served by the appellant under Mandap keeping service giving benefit of notification no. 12/2001.
- (iii) The demand for an amount of Rs. 60,76,473/- on the value of foreign receipts by the appellant for the period w.e.f October 2002 to March 2007. The department has filed the Appeal No. ST/55986/2014 challenging the above said dropping.

However, the following demands were confirmed by the original adjudicating authority:

- i. the demand for an amount of Rs 3,44,764/- as received during the period w.e.f July 2004 to March 2005 on the amount received as 10 % of the invoice value for Mandap keeping services.
- ii. The demand of Rs. 2,02,284/- as received for the period w.e.f August 2006 to March 2007 by the appellant as incentive from M/s. LKP Financial Services holding the

appellant to be the service provider for Business Auxiliary service to said M/s. LKP Financial Service.

The findings for confirming the said two demands have been challenged by the appellant vide Appeal No. ST/55336/2014 Thus all the alleged five demands have to be adjudicated.

5. We have heard Padmavati Patil Id. Advocate for the appellant and Mr. Amresh Jain Id. DR for the Department.

6. The Id. Advocated impressed upon that the appellant is an entity involved in rendering hospitality service. She submitted about each of the alleged demand separately. Accordingly the submissions of both the parties & respective observations & opinion of ours for each of the impugned services are as follows:

A. Taxability of incentive received from M/s. LKP Financial Services Whether sustainable under Business Auxiliary Service [55336/2014]:

Since appellant has foreign guest also, keeping in view the comfort the appellant was providing the facility of money exchange to them in its own premises. Earlier appellant itself was authorized by Reserve Bank of India to render the services of foreign exchange however later the said authorization was withdrawn under the guidelines of having specific authorized entities to provide the financial services as that of money change. It is thereafter that the said services are being provided for the appellants guest in the

appellants premises by M/s. LKP Financial Services. In this given set of facts the appellant cannot be held to have been providing Business Auxiliary Service to said M/s. LKP Financial Service as is alleged by the department while impressing upon the definition of business auxiliary service as per Section 65(19) of the Finance Act, 1994 (in short Act). It is impressed upon that the said activity of the appellant do not fall under the any of the clauses of the said section. The demand is alleged to have wrongly been confirmed. It is submitted that this activity of appellant may be that of money changing facility covered under banking and other financial services which came into tax net w.e.f 6.05.2008. The show cause notice is silent to that effect the demand as confirmed is prayed to be set aside. Ld. DR on the other hand has justified the confirmation of this demand.

To adjudicate, definition of BAS is relevant:

Section 65 of the Act defines Business Auxiliary Service to mean any service in relation to,

- (i) Promotion or marketing or sale of goods'**
or
- (ii) Promotion or marketing or services; or**
- (iii) Any customer care service; or**
- (iv) Procurement of goods or services; or**
- (v) Production of goods on behalf of client; or**
- (vi) provision of service on behalf of client; or**

(vii) any incidental or auxiliary support service such as billing, collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management evaluation or development of prospective customer or vendor, public relation services, management or supervision, and includes services as a commission agent provided by any person who acts on behalf of another person.

In the present case, the facility of conversation of foreign currency notes, coins or travelers' cheques into Indian Rupees is a service provided by LKP Financial Services to the guests of the Taj hotel, who, otherwise would have to get the foreign currency converted from any other outside Money Changers. Thus this is an in-house service facility availed by the appellant for their customers.

Admittedly appellants otherwise are not a professional organization engaged in the service of a commission agent and, hence, cannot be said to be providing any service to M/s. LKP Financial. The purpose of entering into an Agreement with M/s. LKP Financial was only for providing the money changing facility to the guests of the appellant which cannot to be done, except under an authorization by the Reserve Bank of India. It is also an admitted fact that

earlier the appellants themselves were authorized by RBI to provide this service to guests.

From the BAS definition, as above, "Business Auxiliary Service" does not cover the aforesaid activity of Money Changing Facility, while 'Banking & Other Financial Services' specifically covers 'Money Changing Business', that too w.e.f 16.05.2008, Nomenclating the very same under 'Business Auxiliary Service' for the purpose of charging service tax is therefore not proper and legal. Even otherwise also (appellant apparently & admittedly are discharging service tax thereon, w.e.f. 16.05.2008) assuming, whilst denying, that there are two contesting heads of services:

- (i) 'Business Auxiliary Service
- (ii) 'Banking & Other Financial Services'

Then by invoking the provisions of Section 65 A, specific description of the said activity would be under 'Banking & other Financial Services', as against general description under 'Business Auxiliary Service'. Show Cause Notice has proposed the demand under Business Auxiliary Services. Adjudicating authority is bound by Show Cause Notice and is not supposed to alter or modify the contents therein. Seen from any angle, as discussed, the aforesaid activity is denied to be the activity of providing BAS to M/s. LKP Financial Services.

In view of these findings the demand on account of foreign exchange of incentives from M/s. LKP Financial

Services is liable to be set aside irrespective the commission received by appellant from M/s LKP for providing premises to render banking & financial services is taxable provided it had been so demanded. We therefore hold that adjudicating authority below has committed error while confirming the said demand. The order to that extent is therefore set aside.

B. With respect to the Mandap keeper services and non-payment of service tax on the invoices where the tea/ snacks/ breakfast was served: [55986/2014]:

it is submitted by the appellant that the articles as were served (though commonly known as snacks/ refreshments) but consisted of items of multicourse, meal may or may not be an economical meal, i.e. the items covered under refreshments apparently very well be compared as sufficient meal as is the only criteria for seeking the benefit of notification no. 12/2001 ST dated 20.12.2001. The Id. Counsel has relied upon the judgment of Tribunal in **Welcome Hotel V.s Commissioner of Central Excise, Vadodara 2009 (13) STR 375** to impress upon that Tribunal Ahmedabad has considered High Tea as a substantial meal and has held the assessee entitled to exemption under the said notification. It is submitted that

the adjudicating authority below has rightly dropped the said demand. Order to that extent is prayed to be upheld.

Ld. DR while rebutting these arguments & impressing upon the appeal of the Department has submitted that notification 12/2001 is about the service providers of Mandap keeper as that of hotels where the services provided include catering services i.e. the supply of food. It is impressed upon that food is explained in the notification itself to mean a substantial and satisfying meal. It is alleged that adjudicating authority below has made erroneous findings while holding the serving of tea and snack as serving of substantial and satisfying meal. The dropping of this demand is therefore prayed to be set aside.

As far as the demand of service tax on the invoice where the tea/ snacks/ breakfast was served has been raised denying the benefit of notification no. 12/2001 dated 20.12.2001 for the impugned period, we have perused the case law as relied upon by the appellant in welcome hotels (supra) case. Perusal makes it abundantly clear that Tribunal, while dealing with the contention of the department that providing snack tea/ coffee cannot, mean fulfill of condition supply of food has held that breakfast serving various food items is a substantial meal of any reasonable standards and the high tea is the British terms that refer to substantial early evening meal i.e often considered as the main meal. It was also held by the

Tribunal that such being the case serving of high tea or breakfast with snacks tea and coffee satisfying the condition for food to be substantial and satisfying the Mandap keeper was held entitled to avail the benefit of the impugned notification.

In the present case also the appellant hotel being registered as the Mandap keeper is providing the catering service. The invoices so raised by him show that the same were inclusive of charges of catering services. It is clear from the language of the notification that the nature of menu is not the criteria for availing the exemption but the menu served has to be substantial and satisfying. Following the same ratio of decision of Ahmadabad Tribunal in Welcome Hotel (supra) case we hold that the demand under this head is not sustainable. Accordingly, it is held that the demand has rightly been dropped, vide the order under challenge order is therefore upheld to that extent.

C. Taxability about convention services:

With respect to the alleged liability under convention services Id. Advocate for appellant has submitted that the appellant is registered as Mandap keeper service provider since the year 1997 no doubt the function as that of senior management meet, dealers meet, customers meet and medical conferences etc have been convened in the hotels of the appellant but all these programs informal in nature were actually for recreation, amusement and entertainment

purpose which are excluded from the ambit of convention services which came into tax net only w.e.f 16.07.2001. It is impressed upon that the original adjudicating authority has rightly observed these functions to be a late night functions with liquor being served and resultantly being out of the ambit convention of service. Order to that extent is therefore prayed to be upheld.

While rebutting these arguments and impressing upon the departments appeal Id. DR has mentioned that any service to be covered under convention service, the time duration for the said convention meet and the menu including as that of the beverages as served in those meet, is of no consideration. The only fact that any function which is a formal meeting or assembly being not open to general public is covered under convention service. This important criteria has miserly being ignored by original adjudicating authority. The observations qua time and serving of liquor are alleged to be a wrong basis for dropping the demand under the head of convention service. Order to that extent is prayed to be set aside.

To adjudicate the demand raised alleging the services of appellant as that of convention services it is important to know the definition. The convention services are defined under Section 65 (32) of the Act as: "Convention" means a formal meeting or assembly which is not open to the general public, but does not include a meeting or assembly,

the principal purpose of which is to provide any type of amusement, entertainment or recreation;

Definition from Act,

And are taxable under Section 65(105) (zc) of the Act, as: [to any person], by any [person] in relation to holding of a convention, in any manner.

Whereas Mandap is defined under Section 65(66) of the act to mean: "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 converging therein let out for a consideration for organizing any official, social or business function; and the Mandap keeper is defined under Section 65 (67) of the act as: Mandap keeper" means a person who allows temporary occupation of a Mandap for a consideration for organizing any official, social or business function;

And the service is made taxable under Section 65(105) of the Act as: "taxable service" means any [service provided or to be provided',

Thus Mandap Keeper is a person, who allows temporary occupation of a Mandap for consideration for organizing any official, social or business function and these services are in tax net w.e.f. 10.07.1997. Whereas "Convention Services provider means a person who permits his premises to be used for any formal meeting or assembly, which is not open to the general public. But it does not

include a meeting or assembly, the principal purpose of which is to provide any type of amusement, entertainment or recreation and this service came into tax net w.e.f 16.07.2001.

Though both the services seem to be slightly overlapping but it is the settled law that the appellant ought to have classified services under appropriate category to pay service tax. The Circular of the Board issued vide no. ST.-51/13/2002 dated 07.01.2003 issued under F. NO. 178/1/2002/CX.4 which reads:

- (i) Before levying service tax, it is essential to determine under which category a particular service falls.
- (ii) One service provider may provide more than one taxable service. In such cases, services provider need to take only one registration, but it shall be endorsed for all the taxable services and tax liability will have to be discharged for each of the taxable services separately.
- (iii) The guiding principle should be that a service should be categorized under the category, which is more specific. As for example, hotel may rent out a conference room for an official conference where lunch is also served. A dispute could arise in this case as to whether this particular service would fall under the category of "Mandap Keeper" and

exemption from tax vide Notification No. 12/2001 Service Tax dt. 20.12.2001, or it will fall under the category of "convention service" and charged to service tax. between the two competing categories, in this case, the more specific one would be that of a "convention service" since as "Mandap Keeper" includes official, social as well as business functions whereas a 'convention service' covers convention only which is like an official function.

- (iv) The proper Central Excise officer has to decide on merits as to which is the more specific category and charge service tax accordingly.

Thus apparently the service herein seems to be that of convention service. However reliance is placed upon the decision of this Tribunal in the case of Taj view Hotel 2014 (36) STR 888 (Tri.-Del.) wherein the Board; circular dated 09.07.2001 is considered and it was clarified that apart from the fact of subtle distinction between the types of events (officials, social or business function in the case of Mandap keeper as opposed to formal meeting in the case of convention services) but the intention is not to charge the service tax twice on the same service. If a service provider is already registered as a Mandap keeper and paying service tax, he is not liable to pay service tax again under the category of convention services. Similarly,

convention service is not liable to tax as Mandap keeper service also.

Seen from above discussion about definitions and clarifications we are of the opinion that while holding senior management meet, dealer meet, customer meet, medical conference etc the appellants were providing the services and that of convention services and not the Mandap keeper services. The fact that those meetings continued till late hours and liquor in addition was served there does not alter the fact that these still were the meetings for the specific group of people for the professional/ official objective and were not open to general public. The findings of the Commissioner are therefore opine incorrect to this effect. As a result of above discussion on this point, we hold that impugned services are that of convention service. However, since the liability while treating them as Mandap keeper service had admittedly been already, discharged, the differential, if any, shall only be payable under this head order accordingly is set aside to this extent.

D. Taxability of 10% services charge/tips in the bills:

With respect to the alleged liability it is mentioned by the appellant the said amount is not meant to be retained with the appellant and as such is not the income of the appellant. The amount was to be distributed among the serving boys as tips for the food served hence the said amount cannot form part of the

taxable value of Mandap keeper service. The demand is alleged as wrongly been confirmed.

While justifying the said confirmation, Id. DR has submitted that the amount has specifically been charged and specifically been mentioned in invoice as service charges. Therefore it becomes the part of the gross value received by rendering the services and as such is taxable. Order to that extent is prayed to be upheld.

With respect to the 10% amount of the invoice value as has been charged under the head of service charges we are of the opinion that the said amount is very much the part of the gross value charged from the service recipient. In addition it has specifically been charged in lieu of the service charges. Following statutory provisions are relevant: "Section (65)67 defines Mandap keeper as a person who allows temporary occupation of a Mandap for a consideration for organizing any official, social or business function. For such services all such charges as are related to the use of a Mandap by a Mandap keeper are to be included towards gross amount and are chargeable to service tax as per the above said provisions. The appellant is admittedly providing the Mandap keeper services. Since 10 % of the service charge/ tip is also one of the charges of services included essentially towards providing the Mandap Keeper Service the same has to be included in the gross amount.

A conjoint reading makes it clear that specifically when we find no infirmity in the findings of the adjudication authority below while confirming this demand. The order to that extent is here by upheld.

E. Taxability of services received from outside India:

With respect to the services received from outside of India it is submitted on behalf of appellant, that the amount so received was not liable to service tax till 18.04.2006. Resultantly the demand in that respect for the period prior to 18.04.2006 is not sustainable and as such has rightly been dropped. With respect to demand beyond 18.04.2006, it is submitted that the same can be hit by the principal of limitation. Hence order to that extent is prayed to be modified.

While rebutting these arguments and impressing upon the departments appeal Id. DR has submitted that since the appellant is a reputed hotel involved in rendering several kinds of services, any plea of non awareness about the statutory liability is not available to them. The non-payment in the given circumstances was nothing but an intention to evade tax resultantly the plea of limitation is not applicable them. The appellants are liable to pay service tax upon the remittances and the receipts. Appeals are prayed to be disposed off accordingly.

Coming to issue of making payment in foreign exchange for receipt of interim services from outside India, we are of the opinion that liability of service tax on services provide from outside India was made taxable only w.e.f. 18.04.2006 after insertion of Section 66A in the Statute book, as was held by the Hon'ble Bombay High Court judgment in the case of **Indian National Shipowners Association, as reported in 2009(13) STR 235 (Bom.)**, which has been upheld by **Hon'ble Supreme Court, as reported in 2010 (17) STR 157 (SC)**. In the present case, undisputedly, for the period 2003-04 and 2006-07, the amounts were remitted on account of services received on account of overseas travel agents (commission), advertisement sales paid to foreign parties including fees paid to international travel agent group for which participation of hotel is mandatory for securing business, payments made for participation in Frequent Flyer Programmes made outside India, Membership outside India i.e. all the services provided and consumed outside India. These services came into tax net only w.e.f. 18.04.2006 Hence, we hold that demand on this count has correctly been dropped by the Ld. Commissioner but only for the period prior 18.04.2006. The order under challenge is accordingly modified to the extent that demand w.e.f 18.04.2006 to March 2007 stands confirmed.

Now coming to the issue of show cause notice being barred by time:

Finally the show cause notice in hand has been alleged to have been barred by limitation on the simple fact there is no alleged suppression of facts on part of the appellant. The entire demand is accordingly impressed to not to be sustainable. The appellant has prayed for its appeals to be allowed.

The department while rebutting these arguments and impressing upon the arguments qua respective service, justifying the order as far as the findings on limitation aspect are concerned as above have prayed there for their appeal to be allowed and for the appeals of the appellants to be rejected.

We are of the opinion that the appellants are registered under service tax for providing various kind of services being in a hospitality industry. It is also apparent that they are discharging the respective liability other than the demand raised by the impugned show cause notice. From the entire above arguments of appellant it is clear that they have taken the plea of being under some bonfide confusion either due to similarity between the Mandap keeper and the convention services or due to them not being the service provider for M/s. LKP Financial Services while getting facility of money exchange for their guest or due to the 10% amount of Service charge not being their income

being disbursed among service boys and as such is not the taxable. But from the entire above discussion qua respective services where demand has been confirmed, it is clear that the appellant have failed to observe the statutory provisions of applicable laws and have interpreted the provisions the way it suited them and thus have committed non-compliance of the obligation cast upon them by the statutory provisions. It is also apparent from record that the appellant had not paid the, whatever tax, by the prescribed date. They had not disclosed the amount paid towards these services till the date the audit was conducted. There is no communication on record seeking clarification on account of pleaded bonafide confession. As per Section 70 of the act, the assessee has mandatorily to self assess the tax due on the services provided by him. Non disclosure of total income at the time of filling returns is definite suppression of facts, as it was also held in the case of **Mysore Rolling Mills Private Limited Vs Collector of Central Excise Belgaum 1978 (28) ELT 50 (SC)** as being rightly relied upon by the adjudicating authority. As a result we hold that the department was entitled to invoke the extended period of limitation.

7. In view of the entire above discussion both the appeals stands partly allowed in the following terms. In the departments appeal no. 55986 the demand for conventions service is confirmed however modified as in the order

above. The demand under Business Auxiliary Services allegedly to be services qua receiving foreign incentives is confirmed however for the lesser period as mentioned above. The demand qua Mandap keeper service is held to have rightly been dropped by the adjudicating authority below. The order to that extent is confirmed. Departmental appeal is accordingly partly allowed.

Now coming to the assessee's appeal the demand for 10% service charge qua Mandap keeper service is confirmed however the demand for allegedly providing BAS services to M/s. LKP Financial Services is hereby dropped in view of above findings. The appeal of the assessee are also accordingly partly allowed.

(Pronounced in the open court on 17.12.2018)

(C.L. MAHAR)
MEMBER(TECHNICAL)

Sakshi

(RACHNA GUPTA)
MEMBER (JUDICIAL)