

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
REGIONAL BENCH : ALLAHABAD**

ST/55306/2014-CU[DB]

(Arising out of Order-in-Appeal No.NOI/EXCUS/000/APPL/123/14 dated 24.06.2014 passed by Commissioner(Appeals) Customs & Central Excise, Noida.)

Commissioner of Customs, Central Excise & Service Tax, Noida
...APPELLANT(S)

VERSUS

M/s.Fortune Cookie
RESPONDENT (S)

APPEARANCE

Shri Rajeev Ranjan (Addl.Commr.) (AR) for the Revenue
Shri Kapil Vaish(C.A.) for the Respondent

CORAM:

SHRI ASHOK JINDAL, HON'BLE MEMBER(JUDICIAL)

SHRI ANIL G. SHAKKARWAR, HON'BLE MEMBER(TECHNICAL)

DATE OF HEARING/DATE OF DECISION 26.07.2018

FINAL ORDER NO.71624/2018

Per Ashok Jindal :

Revenue is in appeal against the impugned order where the Id.Commissioner(Appeals) dropped the proceedings against the respondents on the premise that the activity undertaken by the respondent duly fall under the 'restaurant service' and not under the 'outdoor catering service'.

2. The facts of the case are that during the period 01.04.2007 to 31.03.2012, the appellant was providing food services in the premises of Noida Golf Course at Noida. As per the agreement, the respondent was paying Rs.3.00 Lakhs per month to Noida Golf Course and providing food to the members of Noida Golf Course. In May 2011 the 'restaurant services' came in the net of taxable services and since then,

the respondent is paying Service Tax under 'restaurant services'. Revenue is of the view that the activity undertaken by the respondent falls under the category of 'outdoor catering service' and the said service is taxable since 2003 therefore, the respondent are liable to pay Service Tax for the period 01.04.2007 to 31.03.2012. In this set of facts, a show cause notice dated 26.10.2012 was issued to the respondent to demand Service Tax under the category of 'outdoor catering services' and to impose penalty. The matter was adjudicated. The demand of Service Tax was confirmed along with interest and various penalties were imposed. The said order was challenged before the Id.Commissioner(Appeals), who set aside the adjudication order. Against the said order, the Revenue is in appeal before us.

3. The Id.A.R. submits that the activity undertaken by the respondent is "outdoor catering service" as they are providing food in the premises of Noida Golf Course to their members through Noida Golf Course. Therefore, the correct classification of the service is "outdoor catering service" and the said activity was not known to the Revenue, therefore, the extended period of limitation is rightly invoked.

4. On the other hand Id.Consultant appearing for the respondent supported the impugned order and submits that the respondent is providing that service from their own premises which has been taken on rent from Noida Golf Course therefore the correct classification of service is 'restaurant service' and to support his contentions he relied on the decision of Tamil Nadu Kalyana Mandapam Assn. v. UOI [2006 (3) S.T.R. 260 (S.C.)].

5. Heard the parties, considered the submissions.

6. In this case Service Tax sought to be demanded from the respondent under the category of "outdoor catering service", which is required to be examined as defined in section 65, (76)(a) of the Finance Act, 1994. 'Outdoor caterer' means a caterer engaged in providing services in connection with catering at a place other than at his own but including a place by provided by way of tenancy or otherwise by person receiving such services and the 'restaurant service' means as per 65(105)(zzzzb) "any service provided or to be provided to any person, by a restaurant, by whatever name called having the facility of air conditioning in any part of the establishment, at any time during the financial year, which has license to serve alcoholic beverage in relation to serving of food or beverage including alcoholic beverage or both in its premises".

7. On examination of both the definitions, the "outdoor catering service" is to be provided at the premises of the service recipient at his own premises or the premises taken on hire by the service recipient whereas in the case of "restaurant service" to be provided by the service provider in its own premises. Admittedly, in this case the place of service had been provided by the respondent as taken on rent from Noida Golf Course. In that circumstances, place where the service has been provided is premises of the respondent. Further, we find that the issue where the service undertaken by the respondent is a restaurant service or the 'Outdoor Catering Service' has been examined by the

Hon'ble Apex Court in the Tamil Nadu Kalyana Mandapam Assn.'s case (supra) wherein the Hon'ble Apex Court has observed as under:-

"Similarly the services rendered by out door caterers is clearly distinguishable from the service rendered in a restaurant or hotel inasmuch 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 manner in which the food is to be served. But in the case of restaurant, the customer's choice of foods is limited to the menu card. Again in the case of outdoor catering, the 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 the catering service, including the price to be paid to the caterer. Outdoor catering has an element of personalized 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."

8. From the above observation of the Hon'ble Apex Court, it is clear that the service of restaurant and outdoor caterer are distinguishable. Admittedly the services provided by the respondent in a restaurant of Noida Golf Course are in the nature of 'restaurant service' as respondent is maintaining menu card, prices fixed in every item and there is no personal interaction with the service recipient in the restaurant. In that circumstances, we hold that the services provided by the respondent do qualify as 'restaurant service'. Therefore, no demand is sustainable against the respondent under the category of "outdoor catering service".

9. In view of the above analysis, we do not find any infirmity in the impugned order, therefore, the same is upheld and in result, the appeal filed by the Revenue is dismissed.

(Dictated and pronounced in the open Court.)

SD/
(ANIL G. SHAKKARWAR)
MEMBER(TECHNICAL)

SD/
(ASHOK JINDAL)
MEMBER (JUDICIAL)

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