

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL MUMBAI

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 87972 of 2018

(Arising out of Order-in-Appeal No.CD/TR(APPEALS)/ME/240/2017-18 dated 06.03.2018 passed by the Commissioner of CGST & Central Excise, Thane Rural, Mumbai.)

M/s Jammam Food Supplier

4, Ground Floor, Deorukhkar Estate,
Gupta Compound, 11th Road, Near Gemini Studio,
MIDC, Andheri (East), Mumbai-400 093.

.... Appellant

Versus

Commissioner Central Goods and Service Tax, Mumbai East.

4th Floor, GST Bhawan, Plot no. 24-C, Sector-E,
BandraKurla Complex, Bandra (E) Mumbai 400051.

.... Respondent

Appearance:

Shri Mahesh Raichandnani, Advocate for the Appellant

Shri Prabhakar Sharma, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86324/2022

Date of Hearing: 22.12.2022

Date of Decision: 22.12.2022

Per: S.K. MOHANTY

Briefly stated, the facts of the case are that the appellant herein is engaged in the business of supplying food tiffin items to various film production houses, which are prepared in appellant's canteen located at Andheri (East), Mumbai. After the food packets are prepared, the delivery boys of the film production houses collect the foods packets and deliver at the production houses. The appellant did not pay service tax on the activity undertaken by it for preparation of the food items at its

site, treating that the same are liable for payment of Sales Tax/VAT, being sale of goods. However, the department contended that the activities undertaken by the appellant should fall under the taxable category of "Outdoor Caterer Services", defined under Section 65(76a) of the Finance Act, 1994. Accordingly, show cause proceedings were initiated by the department, seeking for confirmation of service tax demand of Rs.1,89,47,916/- along with interest and for imposition of penalties under Section 76,77 & 78 *ibid*. The matter arising out of the show cause notice was adjudicated by the learned Additional Commissioner of Service Tax-V, Mumbai vide Order dated 01.05.2017, wherein the proposals made in the SCN were dropped. Against the said original order dated 01.05.2017, department has filed appeal before the learned Commissioner (Appeals), which was disposed off vide the impugned order dated 06.03.2018 by dismissing the original order and allowing the appeal in favour of the department. Feeling aggrieved with the impugned order, the appellant has filed this appeal before the Tribunal.

2. Heard both sides and perused the records.

3. The following definitions are relevant for consideration of the present dispute:

"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. (Section 65 (24) of Finance Act, 1994 as amended.)

"Outdoor caterer" means a caterer engaged in providing services in connection with catering at a place other than his own but including a place provided by way of tenancy or

otherwise by the person receiving such services.” (Section 65 (76) (a) of Finance Act, 1994 as amended.)

“Taxable service” means any service provided or to be provided to any person, by an outdoor caterer. (Section 65 (105) (zvt) of Finance Act, 1994 as amended.)”

4. On reading of the above statutory provisions, the position is clear that the levy of service tax is on the “outdoor caterer” and not on a mere caterer, engaged in preparing the food items and that the catering service should be provided at a place other than the place of the outdoor caterer. In the case in hand, the facts are not under dispute that the appellant herein was engaged only in preparation of the food items in its canteen and the activities such as, picking of the food packets from its place and serving the same to the person at the client’s site is outside the ambit of the contract/arrangement. Appreciating the facts of the present case vis-à-vis the statutory provisions, the original authority vide the impugned order dated 01.05.2017 has dropped the proposals made the SCN. The relevant paragraph in the said order is extracted herein below:

“17.....From the records before me such as invoices, receipt details etc., of the transactions, I find that the assessee have not indicated and have not charged for anything other than sale of food. Also the assessee have confirmed through their submissions and through letters of their customers that the serving and further activities of the food delivered were done by their customers only and not by the assessee and that the transportation cost for the supply has been directly borne by the customers of the assessee. From this it can be deduced that the assessee's activity is one of pure sale of food and does not contain any

portion of service. I also find that the SCN does not lay emphasis on any other facts to prove that service was actually provided by the assessee during the course of supply of food, except for that the wordings of the definition of caterer discussed above includes supply of the food and hence a service thereof had been provided. In view of the above, I find it very hard to refer their activity as one involving any taxable service both before 01.07.2012 as well as after 01.07.2012."

5. In the present case, the price charged by the appellant was fixed for the food items and since, there is no element of service on doing such activity of preparation of food alone, in our considered view, the activity will not fall under the purview of Finance Act, 1994 for levy of service tax under the taxable category of "Outdoor Caterer Service". We find that the issue arising out of the present dispute is no more *res intergra*, in view of the order dated 15.06.2015 passed by the Tribunal in the case of M/s. Ambedkar Institute of Hotel Management Vs. Commissioner of Central Excise and Service Tax, Chandigarh, reported in 2015-TIOL-1593-CESTAT-DEL. The relevant paragraph in the said order is extracted herein below:

"6.....The service which is covered under Section 65 (105) (zzt) is the service provided or to be provided to any person by an "outdoor caterer" and not by any caterer. The outdoor caterer as defined in Section 65 (76a) means a caterer engaged in providing services in connection with catering at a place other than his own but including a place provided by any of tenancy or otherwise by the person receiving such services. Since the appellant are preparing

mid day meals in their institute and not in the schools where the meals are served are not involved in serving of the meals in any manner, in our view they are not covered by the definition of "outdoor caterer" and hence their activity of preparing and supplying meals for mid day scheme would not be covered by the definition of taxable service under Section 65 (106) (zvt). Accordingly the duty demand on this count would not be sustainable."

6. In view of the above discussions, we do not find any merits in the impugned order, insofar as it has confirmed the adjudged demands on the appellant. Therefore, by setting aside the impugned order, the appeal is allowed in favour of the appellant.

(Operative portion of the order pronounced in open court)

(C J Mathew)
Member (Technical)

(S.K. Mohanty)
Member (Judicial)