

(2011) 04 KAR CK 0041
In the Karnataka High Court
Case No : CEA No. 103 of 2009

Commissioner of Service Tax

APPELLANT

Vs

The Grand Ashok

RESPONDENT

Date of Decision : 20-04-2011

Acts Referred:

Constitution of India, 1950 — Article 366 (29A)
Finance Act, 1994 — Section 65 (76a), 67

Citation : (2013) 31 STR 528 : (2011) 32 STT 223

Hon'ble Judges : Ravi Malimath, J;N. Kumar, J

Bench : Division Bench

Advocate : N.R. Bhaskar, for the Appellant; V.S. Shahajahan and Renuka Prasad, for the Respondent

Judgement

Ravi Malimath, J.—This appeal is filed by the revenue being aggrieved by the common order passed by the Tribunal against the very same Assessee holding that in an outdoor catering service the cost of goods supplied should be treated as sale of goods and it cannot be charged to service tax in view of the ratio of the Supreme Court in Bharat Sanchar Nigam Ltd. v. Union of India (2006) 3 STT 245.

2. The Assessee is engaged in the activity of providing catering service falling under out door caterer taxable u/s 65(76a) of the Finance Act, 1994. On scrutiny of the records by the Anti Evasion Wing of the Commissionerate, it was revealed that the Assessee had not made payment of service tax on the basis of the correct value of the taxable services. The service tax liability had to be paid on the basis of the gross amount collected from the clients after deducting the abatement as per Notification dated 10-9-2004 bearing No. 20/04-ST up to 28-2-2006 and Notification No. 1 /2006-ST, dated 1-3-2006. That the service tax was paid only on a part of the amount collected that is only on the handling and transportation charges which is in contravention of provisions of Section 67 of the Finance Act, 1994.

3. It appears that the Assessee received an amount of Rs. 11,34,69,387 from the Airlines, for In-flight catering from 10-9-2004 to 31-3-2006 and the value of the taxable service after abatement works out to Rs. 5,87,34,694 on which the service tax liability works out to Rs. 57,86,938. The Assessee however paid a sum of Rs. 4,96,456 only. Hence the balance of amount of Rs. 52,90,482 was sought to be recovered by them. Accordingly a show-cause notice was issued.

4. The Assessee contended that they are eligible for exemption under Notification No. 12/2003, dated 20-6-2003 in respect of the value of food and beverages served to the Airlines on payment of VAT. That in a transaction of sale of food, the element of service in connection with catering was only to the extent of handling and loading of food and beverages on the aircraft. Hence they had paid service tax to that extent. The assessing authority came to the conclusion that in terms of Section 67 of the Act the Assessee is liable to pay service tax on the gross amount realised from the various Airlines on account of outdoor catering service provided by them. That Section 67 clearly prescribes that the value of taxable service shall be the gross amount charged by the service provider. Further the exemption claimed by the Assessee under Notification 12/2003, dated 20-6-2003 is legally unsustainable. Accordingly, the assessing authority confirmed the demand along with interest and penalty. Aggrieved by the same, the Assessee preferred an appeal to the Tribunal. The Tribunal held that the Assessee is entitled to the benefit of Notification No. 12/2003. That there is inclusion of value of goods sold by the Assessee and in view of the separate invoices raised for the food and beverages having been supplied and having been paid for separately, the food supplied should be treated as sale of goods and hence no service tax can be levied to that extent. By relying on the judgment of the Hon'ble Supreme Court in the case of Bharat Sanchar Nigam Ltd. (supra) the benefit of Notification 12/2003 was held applicable to the Assessee. Accordingly, the appeal was allowed. The imposition of penalty was set aside and consequential reliefs were granted. Hence, the present appeals by the revenue.

5. This appeal was admitted to consider the following substantial questions of law:

1 Whether the order of the CESTAT is legally sustainable and in conformity with the reasons and provisions of the Statute in its interpretation of "Outdoor Catering Services"?

2. Whether, the CESTAT was right in not recognising the fact of supply of food and beverages as an integral activity of "Outdoor Catering Service" which was recognised so by the Govt. of India to have uniformity in valuation and liability to tax issued a notification No. 20/04, dated 10-9-2004 read with Notification No. 1/2006, dated 1-3-2006 specifically for Outdoor Catering Service by allowing an abatement of 50 per cent of the gross value towards cost of food beverages supplied during the course of rendering the taxable service?

Therefore it is clear that the question that arises for consideration in this appeal

is as to whether the Assessee is liable to pay service tax for the services rendered by them as outdoor caterers.

6. The identical question with regard to the liability of the Assessee towards service tax so far as service rendered by them with regard to the outdoor catering is concerned, came up for consideration before the Division Bench of this Court in Writ Appeal Nos. 671 to 726/2011 which were disposed off by the order dated 18-4-2011. By a detailed consideration and relying on various Supreme Court judgments, the Division Bench of this Court came to the conclusion that the outdoor catering contract is a contract for service by virtue of Sub-clause (f) of Clause 29(a) of Article 366 of the Constitution of India which has to be treated as composite contract and the State Legislature is competent to levy the sales tax on the sale aspect only namely, the value of the food articles.

7. The Division Bench held that outdoor catering consists of goods namely, the articles of food etc., which would constitute sale. Hence, the value of the food articles are liable for sales tax which the State Government is liable to impose. The other part of outdoor catering is the service rendered by the Assessee in bringing the food articles to a place designated by the client. The service so rendered by the Assessee, which also includes the cost of transporting the food articles constitutes service. Therefore, to this extent alone, the Assessee is liable for service tax and not for the entire cost received from the Airlines. Hence, there has to be a bifurcation with regard to the sale of goods and the service provided. However, it does not empower the State Government to levy tax on the entire amount mentioned in the bill. The entire sale price includes the transportation charges also and out of that sale price what is the service aspect and what is the sale aspect requires to be decided by the authorities. It is only thereafter that sales tax could be imposed on the cost to the food articles arrived at and the remaining extent including transportation is to be treated as liable for service tax. Therefore, the Court declared that a contract for outdoor catering "is a composite contract which falls under Sub-clause (f) of Clause (29A) of article 366 of the Constitution of India and service tax is payable on service aspect and sales tax is payable on deemed sales aspect and it is not an indivisible contract".

8. The facts involved in the present case are identical to the facts that arose in the Writ Appeal Nos. 671 to 726/2011. Under these circumstances, these appeals are disposed off in terms of the judgment dated 18-4-2011 passed in Writ Appeal Nos. 671 to 726/2011, Consequently, the substantial questions of law are answered in favour of the Assessee and against the revenue.