

(2014) 04 AHC CK 0350

In the Allahabad High Court

Case No : Central Excise Appeal No. 50 of 2014

Indian Coffee Workers" Co-Op. Society Ltd.

APPELLANT

Vs

C.C.E. and S.T.

RESPONDENT

Date of Decision : 10-04-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11AC
Constitution of India, 1950 — Article 366(29A), 366(29A)(f)
Finance Act, 1994 — Section 65, 65(105)(zzt), 65(24), 65(76a), 73
Uttar Pradesh Value Added Tax Act, 2008 — Section 2(ac)(vi)

Citation : (2014) 269 CTR 385 : (2014) 45 GST 343 : (2014) 34 STR 546 :
(2014) 72 VST 191

Hon'ble Judges : Dhananjaya Yashwant Chandrachud, C.J.; Dilip Gupta, J

Bench : Division Bench

Advocate : Bharat Ji Agarwal, Sr. Advocate, Piyush Agrawal and Ms. Rashi Mishra, Advocate for the Appellant; Ashok Singh and R.C. Shukla, Advocate for the Respondent

Judgement

1. This appeal by the assessee arises from an order of the Customs, Excise & Service Tax Appellate Tribunal (CESTAT), dated 17 September, 2013 [2013 (200) ECR 373]. Though several questions of law have been formulated, the following three would govern the controversy in the appeal: (1) Whether in view of the decision of the Hon'ble Supreme Court in the case of M/s. K. Damodarasamy Naidu and Bros. Etc. Etc. Vs. The State of Tamil Nadu and Another Etc. Etc., , the activities of the appellant being covered under the main part of the definition of tax on sale or purchase of goods under Article 366(29A)(f) of the Constitution and the appellant having, admittedly, paid VAT in respect of the supply of food including beverages in the canteen/restaurant to individual customers who paid the amount according to the menu card, no Service Tax can be levied since it comes within the definition of "sale" under Article 366(29A)(f) of the Constitution of India read with Section 2(ac)(vi) of U.P. Value Added Tax Act;

(2) Whether the appellant having charged the amount in cash directly from

individual customers in respect of the food, eatables, drinks and beverages according to the rates mentioned in the menu card maintained in the canteen/restaurant run by it, hence it is neither providing any service to NTPC nor to LANCO but is only selling the goods in the restaurant to individual customers and is not liable for payment of any Service Tax as outdoor catering service u/s 65(76a) read with Section 65(24) of Finance Act, 1994; and

(3) Whether the Tribunal has committed an error of law in confirming the imposition of penalty without considering the law laid down by the Apex Court in the case of Union of India (UOI) Vs. Rajasthan Spinning and Weaving Mills, , and the decision of the Apex Court in the case of Commissioner of Income Tax v. Reliance Petro Products, (2010) 322 ITR 158, in which it has been specifically held that the penalty u/s 11AC of the Central Excise Act (which is in pari materia to Section 78 of the Finance Act, 1994) can only be imposed after recording the finding of fraud, collusion or any willful misstatement or suppression of facts or contravention of any provisions of the Act with intent to evade payment of duty.

The assessee is a Society registered under the Societies Registration Act, and had entered into agreements with National Thermal Power Corporation Limited (NTPC) and Lanco Infratech Limited (LANCO). Pursuant to an award of contract of 20 June, 2008, NTPC entered into an agreement with the assessee for running and maintenance of an administrative building canteen. The total value 2014 J INDIAN COFFEE WORKERS" CO-OP. SOCIETY LTD. v. C.C.E. & S.T., ALLAHABAD 549 of the contract was Rs. 36,94,824/-, the period of completion being two years. Clause 4 of the letter of award, stipulates that the Service Tax applicable would be reimbursed extra at actuals against the submission of documentary evidence. The rates for eatables to be served in the canteen of the administrative building were prescribed in Annexure-II. The letter of award contained other incidental conditions. By another letter of 2 June, 2008, NTPC awarded to the assessee the work of running and maintenance of a guest house. The contract value was Rs. 53,75,604/-. The contract stipulated that the rates of eatables to be served in the guest house would be as provided in Annexure-I. On 8 October, 2009, LANCO awarded to the assessee a contract for running and maintenance of catering services for its Porta Huts Township at its Anpara site. The scope of the work included but was not limited to the running and maintenance of catering services. The monthly value of the contract was Rs. 2.10 lacs. The letter of award stipulated that Service Tax would be paid extra in accordance with the prevailing rates on the submission of relevant documents. Commercial tax/VAT was required to be charged from customers and visitors. LANCO agreed to reimburse the amount of consumables and cleaning materials required for the use of Porta Huts to the contractor besides reimbursing the laundry charges. These agreements are annexed to the paper book in the appeal of the assessee and have formed the basis of the submission which has been urged in support of the appeal.

2. A notice to show cause was issued on 5 April, 2011, by the office of the

Commissioner of Central Excise, Allahabad requiring the assessee to show cause why Service Tax in the amount of Rs. 10,40,803/- for the period 1 October, 2009 to 30 September, 2010, should not be imposed on the assessee by treating the activity of the assessee of running restaurants/canteens at the premises of NTPC and LANCO as "outdoor catering services" within the meaning of Section 65(76a) of the Finance Act, 1994. The assessee submitted a reply to the notice to show cause. By an order dated 16 September, 2011, the Joint Commissioner of Central Excise & Service Tax, Allahabad confirmed the demand of Rs. 10,40,803/- as Service Tax u/s 73 of the Finance Act, 1994 together with interest. A penalty of Rs. 10,000/- u/s 77(1)(a) was imposed. Additionally, a penalty u/s 78 of the Finance Act, 1994 was imposed on the ground that the assessee had suppressed material facts from the department by not getting itself registered in due time, by not submitting ST-3 returns and by not paying the dues of Service Tax for the taxable services provided by the assessee. The Commissioner (Appeals) dismissed the appeal filed by the assessee on 23 April, 2012. The CESTAT, by its order dated 29 August, 2013, has confirmed the order by dismissing the appeal,

3. The submission of the assessee in appeal is that (i) the activities of the assessee are covered by the main part of the definition of a tax on the sale or purchase of goods under Article 366(29A)(f) of the Constitution and the assessee has paid Value Added Tax in respect of the supply of goods including beverages in the canteen to individual customers under the U.P. VAT Act; (ii) the assessee does not provide any service to NTPC or LANCO but only sells goods in their canteens to individual customers for which it is not liable to pay Service Tax as an outdoor catering service u/s 65(76a) read with Section 65(24) of the Finance Act, 1994; (iii) the assessee charges amounts in cash from individual customers for food, eatables and beverages supplied according to rates stipulated in the menu card and hence there is neither a supply of food, eatables or beverages to NTPC or LANCO nor is there any service provided to those authorities. NTPC and LANCO provide a place for running the canteen on rent and certain expenses for maintenance and running. However, the cost of food and beverages sold by the assessee to individual customers is not reimbursed; (iv) to be an outdoor caterer as defined in Section 65(76a), a person must be a caterer as defined in Section 65(24) and must supply food, edibles and beverages at a place other than his own to persons receiving such services and since food and beverages are not supplied to NTPC or LANCO, no Service Tax can be levied; and (v) in any event, no penalty could have been levied u/s 78 which is *pari materia* to Section 11AC of the Central Excise Act, except on a finding of fraud, collusion, willful misstatement or suppression of fact with an intent to evade payment of Service Tax. Hence, a deletion of the penalty of Rs. 10,40,803/- is warranted.

4. On the other hand, it has been urged on behalf of the Revenue that (i) the assessee is a caterer within the meaning of Section 65(24) of the Finance Act, 1994 since he is a person who supplies food, edibles and beverages for any purpose; (ii) the assessee is an outdoor caterer within the meaning of Section 65(76a) since (a) the assessee is a caterer; and (b) he is engaged in providing

services in connection with catering at a place other than his own including a place provided by way of tenancy or otherwise by the person receiving such services. Consequently, the assessee provides a taxable service u/s 65(105)(zvt); (iii) the assessee provides service of an outdoor caterer as defined in Section 65(76a) to NTPC and LANCO. Under the agreements with those two entities, the assessee has agreed to provide the facility of a canteen where food, edibles and beverages are made available. The fact that food, beverages or edibles are consumed by employees of those entities or, as the case may be, by those who use the guest house or facility, makes no difference to the position that the service is provided by the assessee to NTPC or, as the case may be, to LANCO. Once the assessee provides an outdoor catering service within the meaning of Section 65(76a) under the agreement with NTPC or LANCO respectively, that would attract Service Tax; (iv) the taxable event in respect to the levy of Value Added Tax is not the same as the taxable event which attracts the liability to pay Service Tax. VAT is imposed on a sale of goods, as defined with reference to the provisions of Article 366(29A)(f) of the Constitution. On the other hand, under the Finance Act, 1994, the liability to pay Service Tax is attracted once a taxable service is provided. The assessee having provided a taxable service falling u/s 65(105)(zvt), the liability to pay Service Tax was attracted; and (v) the penalty u/s 78 was validly imposed since the assessee suppressed information of having provided taxable services; failed to file returns and to discharge its liability to the Revenue to pay Service Tax.

5. These submissions now fall for consideration.

6. u/s 65(105)(zvt) of the Finance Act, 1994, the expression "taxable service" is defined to mean any service provided or to be provided to any person by an outdoor caterer. The expression "caterer" is defined in clause (24) of Section 65 as follows:

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.

The expression "outdoor caterer" is defined in clause (76a) of Section 65 thus:

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.

7. Analyzing the provisions of clause (24) of Section 65 of the Finance Act, 1994, in order to be a caterer, a person should be one who supplies food, edible preparations, beverages (alcoholic or non-alcoholic) or crockery and similar articles or accoutrements for any purpose or occasion. The supply may be made directly or indirectly. Consequently, there has to be, firstly, a supply of food, edibles, beverages or crockery and similar articles or accoutrements. Secondly, this supply may be for any purpose or occasion. A purpose is an effectuation of a particular object. An occasion is an event defined with reference to time which

may take place either as an isolated occurrence or be sporadic or periodical. Thirdly, the supply may be directly by the person himself or indirectly through another. In order to be an outdoor caterer within the meaning of clause (76a), a person must, at the outset, be a caterer. Clause (76a) provides a statutory definition of who is regarded as an outdoor caterer. A caterer is an outdoor caterer because services in connection with catering are provided at a place other than his own. The use of the expression "in connection with catering" broadens the ambit of the definition by bringing within its purview not merely a service of catering but a service which has a connection with catering. The place where the service is to be provided must be a place other than that of the caterer himself. The inclusive part of the definition includes a place which may be provided to the caterer by the person receiving the service either by an agreement of tenancy or otherwise.

8. In the present case, the assessee is a caterer. The assessee is a person who supplies food, edibles and beverages for a purpose. The purpose is to cater to persons who use the facility of a canteen which is provided by NTPC or, as the case may be, by LANCO within their own establishments. NTPC and LANCO have engaged the services of the assessee as a caterer. The assessee is an outdoor caterer because the services which he provides as a caterer are at a place other than his own. The place is provided by NTPC and LANCO. The inclusive part of clause (76a) expands the definition to a place provided by way of tenancy or otherwise by the person receiving such services. NTPC and LANCO have engaged the services of the assessee as an outdoor caterer and the assessee is an outdoor caterer because services in connection with catering are provided by it at a place other than a place of the assessee.

9. Consequently, on a plain and literal construction of the provisions of Section 65(105)(zzt) read with the definitions of the expressions "caterer" and "outdoor caterer" as contained in clauses (24) and (76a), it is evident that the assessee is subject to the levy of Service Tax. The assessee provides to any person, to wit, NTPC or LANCO, the service of an outdoor caterer. In our view, there is a fundamental fallacy in the submission of the assessee that it should be held not to fall within the definition of the expression "outdoor caterer" on the ground that the food, edibles or beverages are provided not to NTPC or LANCO but to their employees, customers and guests. That, in our view, begs the question. The taxable catering service cannot, in our view, be confused with who has actually consumed the food, edibles and beverages which are supplied by the assessee. Taxability or the charge of tax does not depend on whether and to what extent the person engaging the service consumes the edibles and beverages supplied, wholly or in part. What is material is whether the service of an outdoor caterer is provided to another person and once it is, as in the present case, the charge of tax is attracted.

10. We find no merit in the contention that since the assessee is liable to pay Value Added Tax on the sale involved in the supply of goods at the canteen, it is

not liable to the payment of Service Tax. The charge of tax in the cases of VAT is distinct from the charge of tax for Service Tax. Entry 54 of the State List to the Seventh Schedule to the Constitution empowers the State legislatures to impose a tax on the sale of goods. Article 366(29A) was introduced by the Forty Sixth Constitutional Amendment so as to provide a deeming definition of the expression "sale" to comprehend situations within the purview of its several sub-clauses including the sale of goods involved in the execution of a works contract. The charge of Service Tax is not on the sale of goods but on a taxable service provided. Unlike a tax which is imposed on the sale of goods, the charge of Service Tax is on the provision of a taxable service provided by the assessee. Hence, the fact that the assessee may be paying VAT on the sale of goods on the supply of food and beverages to those who consume them at the canteen, would not exclude the liability of the assessee for the payment of Service Tax in respect of a taxable service provided by the assessee as an outdoor caterer.

11. Learned counsel appearing for the assessee, relies upon the judgment of a Constitution Bench of the Supreme Court in *M/s. K. Damodarasamy Naidu and Bros. Etc. Etc. Vs. The State of Tamil Nadu and Another Etc. Etc.*, . Under the Tamil Nadu General Sales Tax Act, as amended in 1984, the definition of "sale" was expanded to include a supply of goods being food or drink by way of or as part of service or in any other manner. Initially, exemptions were granted on the sale of food and drink by hotels, restaurants, sweet stalls and other eating houses. In 1997, a provision was introduced, by which the exemption was provided to those whose total turnover was not more than Rs. 25 lacs. The submission of the restaurant owners was that it is only in 1997 that the legislature evinced an intent to tax the supply of food and drink. This submission was rejected. It was also contended that a tax on food served in restaurants could not be levied on the total price charged to the consumer and the bill had to be split up between the charge for food and charge for service. The Supreme Court held that the tax under sub-clause (f) of Article 366(29A) was on the supply of food or drink and it was not of relevance that the supply is by way of service or as part of a service. The judgment of the Supreme Court, in fact, supports the principle that a tax on the supply of food and drink is not a tax on service. It is the supply of food by the restaurant owner to the customer which is subject to levy though this may be part of a service which may be provided to the customer.

12. The judgment of the Supreme Court in *Tamil Nadu Kalyana Mandapmam am Assn. Vs. Union of India (UOI) and Others*, , was also sought to be relied upon. This decision involved a challenge to the constitutional validity of the provisions of the Finance Act, 1994, insofar as they sought to impose a Service Tax on Kalyana Mandapams and Mandap keepers as defined in clauses (19) and (20) of Section 65. While dealing with the constitutional challenge, the Supreme Court held that mandap keepers provide a wide range of services, apart from allowing a temporary occupation of mandap. In that context, the Supreme Court observed that services of an outdoor caterer are distinguishable from those rendered in a

restaurant or hotel because in the case of an outdoor catering service, the choice of the edibles and drink are of the persons who partake of the services, whereas in the case of a restaurant, the choice of food is limited to the menu card. This observation will not carry the case of the appellant any further. The issue, in the present case, is whether the appellant fulfils the definition of the expression of outdoor caterer in clause (76a) of Section 65. For the reasons that we have indicated, the appellant fulfils that definition.

13. The Circular of the Board of Customs and Central Excise dated 23 August, 2007, which is sought to be relied upon by the assessee, in fact, also contains a clarification that the deeming supply of a food in a restaurant as a sale does not, in any way, bar the levy of Service Tax on the service provided by outdoor caterers, which is primarily a tax on service rendered by the outdoor caterer.

14. For the aforesaid reasons, the authorities below were justified in confirming the demand for Service Tax.

15. That leaves the Court to the question as to whether a penalty u/s 78 of the Finance Act, 1994 was justified. Sub-clause (1) of Section 78 provides as follows:

78. Penalty for suppressing, etc. of value of taxable services. -

(1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reason of -

(a) fraud; or

(b) collusion; or

(c) willful misstatement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or the rules, made thereunder with intent to evade payment of service tax,

the person, liable to pay such service tax or erroneous refund, as determined under sub-section (2) of Section 73, shall also be liable to pay a penalty, in addition to such service tax and interest thereon, if any, payable by him, which shall not be less than, but which shall not exceed twice the amount of service tax so not levied or paid or short levied or short paid or erroneously refunded:

16. Before the provisions of Section 78 can be invoked, there has to be a case of (i) fraud; or (ii) collusion; or (iii) wilful misstatement; or (iv) suppression of facts; or (v) contravention with intent to evade the payment of Service Tax. In the present case, there has been no discussion in the judgment of the CESTAT on whether the fundamental conditions for the imposition of a penalty u/s 78 were fulfilled. In (2009) 18 STJ 138 , a Bench of the CESTAT at Delhi had held, albeit in a briefly reasoned decision, that the assessee who had engaged himself in the preparation and serving of food items at the premises of the company for which all the facilities were provided by the company, would not fall under the category

of outdoor catering services. Undoubtedly, other decisions had taken a contrary view. (See in this connection, the judgment of a Division Bench of Kerala High Court in *Saj Flight Services (P) Ltd. Vs. Supdt. of Central Excise*, and the decision of the Tribunal in (2008) 15 STJ 464 . Having regard to the fact that there were contrary views which had held the field, a case for imposition of penalty was not made out. The essential ingredients of Section 78 were not fulfilled. The penalty would, consequently, have to stand deleted.

17. We, accordingly, answer questions 1 and 2, as framed, by holding that the assessee was liable to the payment of Service Tax as an outdoor caterer within the meaning of Section 65(105)(zzt) read with clauses (24) and (76a) of the Finance Act, 1994. The third question is answered in the affirmative, by holding that the assessee could not have been subject to a penalty u/s 78 since the ingredients of that provision were not fulfilled. The appeal is, accordingly, disposed of. There shall be no order as to costs.