Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

Service Tax Appeal No. 259 of 2010

(Arising out of OIO-STC/05/COMMR/AHD/2010 dated 26/02/2010 passed by Commissioner of Service Tax-SERVICE TAX - AHMEDABAD)

Hakamichand D & Sons **……Appellant**
G-4, Nityanand Apartment,
Vakil Wadi, Near Punit Ashram, Maninagar,
Ahmedabad, Gujarat

VERSUS

C.S.T.-Service Tax - Ahmedabad **……Respondent**
7 Th Floor, Central Excise Bhawan, Nr. Polytechnic
Central Excise Bhavan, Ambawadi,
Ahmedabad, Gujarat – 380015

WITH

Service Tax Appeal No. 273 of 2010

(Arising out of OIO-STC/05/COMMR/AHD/2010 dated 26/02/2010 passed by Commissioner of Service Tax-SERVICE TAX - AHMEDABAD)

C.S.T.-Service Tax - Ahmedabad **……Appellant**
7 Th Floor, Central Excise Bhawan, Nr. Polytechnic
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Ahmedabad, Gujarat - 380015

VERSUS

Hakimchand D & Sons **……Respondent**
Nityanand Apartment,
Vakilwadi Punit Road, Maninagar,
Ahmedabad, Gujarat

APPEARANCE:
Shri Nilesh V Suchak, Chartered Accountant appeared for the Appellant
Shri J.A Patel, Superintendent (Authorized Representative) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. P.ANJANI KUMAR

Final Order No. A/ 10413-10414 /2022

DATE OF HEARING: 17.11.2021
DATE OF DECISION: 06.05.2022

RAMESH NAIR

These appeals are filed by both, Appellant and Revenue against impugned Order-In-Original No. STC/05/COMMR/AHD/2010 dated 26.02.2010.

2. The brief fact of the case is that the appellant are engaged in the business of providing catering service and supply of Bedroll kits in various Train of Indian Railway as per the licence/ contracts provided by IRCTC, thereby providing services i.e. "Outdoor Catering Services" and "Business Auxiliary Service". Intelligence gathered revealed that they are involved in evasion of Service tax by way of providing taxable service but not paying appropriate amount of Service tax. Therefore, appellant was asked to furnish Balance Sheet, ST-3 returns, sales ledger etc. for the period 2003-04 to 2007-08. It was found that assessee had been providing services of supply of bedroll kits to the passengers of train on behalf of IRCTC and not paid the service tax. The services bedrolls kits supplied to the passengers on behalf of IRCTC are squarely covered under the clause no. (ii) of the definition of 'Business Auxiliary Service' defined under Section 65(19) of the Finance Act 1994. Further investigation carried out and found that they also engaged in the business of providing Railway Catering Services covered under the Outdoor Catering Service as defined under Section 65(76a) of the Finance Act 1994. The Registration for the said service obtained from March 2006 and service provider had not calculated the appropriate value of railway catering service provided by them during the period from 01.03.2006 to 31.03.2008. Detail Show cause notice was issued proposing service tax of Rs. 55,47,317/- under the category of Outdoor Catering Service and Service tax amount of Rs.42,20,893/- under the category of Business Auxiliary Service. The adjudicating authority after considering the submissions made by the appellant dropped the demand related to the catering service and confirmed the demand on supply of bed rolls kits under the category of Business Auxiliary Service along with interest and penalties. Hence assessee and Revenue both are before this Tribunal.

3. Shri Nilesh V Suchak, Learned Chartered Accountant appearing for the appellant submits that Learned Commissioner has erred in confirming the demand on bed roll kits considering the same as taxable service under the category of Business Auxiliary Service. IRCTC is a Govt. of India Enterprises and it had vide letter dated 2.01.2009 categorically written to the Assistant Commissioner, Anti Evasion, in response to its letter dated 02.05.2008 that service tax is not applicable on work providing bed rolls as 'customer care service' under the category of "Business Auxiliary Service" within the meaning of Section 65(19) of the Act. It was independent wok and has not been included as a taxable service in the Act.

3.1 The term 'on behalf of' means representing someone to a third party. Hence 'on behalf if' is used only in situation where there are three parties in the arrangement and one is representing another to third party. This view also supported by CBEC Clarification vide paragraphs 18.2 of the Circular No. 80/10/2004-ST dated 17.09.2004. In their case they are granted license (permission) to merely supply the bedroll. The consideration depends on the number of bedrolls supplied. This agreement for supply cannot be equated with the provision of any service. Also the terms of agreement with IRCTC also does not specify anything that they are required to provide any customer care service. He placed reliance on the decision General Pre cured Treads Pvt. Ltd. Vs. CCE, Trichy – 2009 (15) STR 724(Tri. Chen.)

3.2 He also submits that they are filing periodical returns regularly and provided all the information as when demanded by the department. They have not suppressed any information with intent to evade payment of Service tax and there is not an iota of evidence to this effect in the SCN and in the impugned order. Under the bona fide belief that service tax is not payable on supply of bedrolls and hence not paid the same and also

not charged service tax on the bills raised on IRCTC. The IRCTC also guided us that no service tax is payable on supply of bedrolls. Under the circumstance, extended period of limitation cannot be invoked and penalty cannot be imposed. He placed reliance on the following Judgments:

- Bridgestone Financial Services Vs CST, Bangalore – 2007(8)STR 505 (Tr.-Bang)
- NRC Ltd. Vs. CCE, Thane -I – 2007 (5) STR 308 (Tri-Mum)
- Tamilnadu Housing Board Vs CCE 1994 (74)ELT 9 (SC)
- Collector Vs Chemphar Drugs -1989 (40) ELT 276 (SC)
- Apex Electricals (P) Ltd Vs. UOI – 1992(61)ELT 413
- Pahwa Machines Vs Commissioner -2003 (153)ELTA92 (SC)
- White Machines Vs Commissioner – 2003 (153) ELT A92 (SC)
- Continental Foundation jt. Venture Vs CCE, Chandigarh - 2007(216)ELT 177 (SC)
- Dalveer Sing Vs CCE Jaipur – 2008 (9) STR 491 (Tri.-Del)
- CCE Raigad Vs Shield Security Force – 2006(5)STR97(Tri. Mum)
- CCE Bhopal Vs Thyrocare Services – 2006(4) STR 200 (Tri. -Del)
- CCE, Jaipur Vs Sikar Ex- Serviceman Welfare Co-op.-Soc. Ltd. - 2006(4) 213 (Tri.- Del)
- Hindustan Steel Vs State of Orissa – 1978(2) ELT (J159) (SC)
- Cement Marketing Co. -1980 (6)ELT 295(SC)
- CC Vs Seth Enterprises – 1990 (49) ELT 619 (Tri. Del)
- CCE Delhi Vs Soni& Toni Electricals – 2007 (217)ELT 457 (Tri. Del)

4. On other hand, Shri J.A Patel, Learned Superintendent (AR)opposed the contention of the Ld. Counsel and reiterated the findings of impugned orders. He also placed reliance on the decision of **R.C. Goel Vs Commissioner of Central Excise, New Delhi 2017(5) GSTL 324 (Tri. Del)** passed by the Hon'ble CESTAT wherein the Ho'ble CESTAT held that such service are more appropriately classifiable under business auxiliary

Service under the category of " Customer care services provided on behalf of the client under Section 65(11)of the Finance Act 1994.

4.1 In respect of demand dropped by the adjudicating authority, he reiterated the grounds of appeal filed by the revenue and submit that the show cause notice alleges that the valve of catering service has been considered as sale of MRP goods which amount to diversion of taxable value in the books. The adjudicating authority has not addressed this issue at all in his findings. Shri Kishorebhai Hakamichand Chotai, Partner of Appellant's firm in his statement has agreed that to the facts that they had considered some of their purchase like bred, vegetable, fruits and eggs towards re-sales while actually the same were part of the catering services. They have not been able to explain the gross difference in the taxable values declared for catering and re-sale in their books of accounts and taxable value arrived by department on the basis of actual MRP sales. Therefore, it appears that there is a definite case of diversion of taxable value. The Service provider has been paying Service tax after availing benefit of Notification No. 1/2006-ST dated 01.03.2006. One of the conditions which is listed in this notification is "provided that this notification shall not apply in cases where: the service provider has availed the benefit under the Notification No. 12/2003-ST dated 20.06.2003. It becomes obvious that both Notifications are mutually exclusive. The Service provider cannot claim benefit under both these Notifications. The adjudicating authority has erred in considering the Notification No. 12/2003-ST alone and dropping the demand. Since the Service provider is already availing the benefit of Notification No. 1/2006, they cannot avail the benefit of Notification No. 12/2003-ST. If the service provider choose to avail the benefit of Notification No. 1/2006, he cannot avail Notification 12/2003 and can straightway deduct 50% from the gross value of Service. In either case, he has to pay service tax. The Adjudicating authority has erred in interpreting that Notification No.

12/2003 exempts catering service. This was not an issue in the SCN and therefore the OIO has traveled the beyond the scope.

4.2 He further submits that, service provider during the adjudicating proceedings has submitted that he is not an outdoor caterer at all since they have been using the Pentry Car in the trains for which the contract has been granted. This is also incorrect in as much as the wording used in in the Notification No. 19/2004-S.T. dtd. 10.09.2004, make it very clear that catering service provided in trains is liable to service tax but has been exempted vide said Notification. Moreover the definition of Outdoor Caterer provided under 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 way of tenancy or otherwise by the person receiving such service."

4.3 He also submits that in the present matter service provider has submitted that they are paying VAT/Sales Tax on the gross sales and in view of this they are not liable to pay service tax. The Kerala High Court in the case of SAJ Flight Services (P) Ltd. Vs Supdt. Of C.Ex reported in 2006(4) STR 429 held that Payment of sales tax treating the transaction partly as sale of goods does not exonerate the petitioner from liability for Service tax under Central legislation - Since service of food and beverages by caterers to aircraft amounts to sale of goods as well as rendering of service, both Service tax and sales tax under impugned provisions can be levied on very same transaction. The same may be goods (food) but involve service also (preparation of food and taking it to the passenger in the train)

5. We have considered the submissions made by both the sides and perused the records. The following issues have to be decided.

(i) Whether the appellant is liable to pay service tax on supply of bedrolls kits to the passengers in trains under the head 'business auxiliary services'

(ii) Whether the appellant is liable to pay service tax on outdoor catering services on the sale of breakfast, meals, package foods items and beverages in the trains.

5.1 We now deal with the above issues and decide -

(i) Supply of bed rolls under the head 'business auxiliary services'

It is the case of the Revenue that such supply of bed rolls kits amount to supplying services to IRCTC and the same is chargeable to service tax under the head of business auxiliary services. For each such bedroll kit provided by the Appellant to the passengers of a train, a monthly bill had to be raised to IRCTC and IRCTC give a fixed amount per bedroll kit to Appellant. The dispute is regarding levy of service tax on 'business auxiliary services' in clause no. (iii) of the definition i.e. category of "customer care service provided on behalf the client". The relevant definition under Section 65(19) of Finance Act, 1994 is reproduced below for ready reference:

> *(19) "business auxiliary service" means any service in relation to, —*
>
> *(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or*
>
> *(ii) promotion or marketing of service provided by the client; or*
>
> *(iii) any customer care service provided on behalf of the client; or*
>
> *(iv) procurement of goods or services, which are inputs for the client; or*

Explanation. — *For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client;]*

[(v) production or processing of goods for, or on behalf of, the client;]

(vi) provision of service on behalf of the client; or

(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or 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, [but does not include any activity that amounts to manufacture of excisable goods].

*[**Explanation**. — For the removal of doubts, it is hereby declared that for the purposes of this clause, —----------*

5.2 The facts, is not disputed in the present matter that Appellant has supplied bedroll kits to passengers of Air-Conditioned class and other classes on behalf of IRCTC. As per the contract with IRCTC, the Appellant has to compulsorily provide the bedroll kit to passengers on demand. For the said services a monthly bill was raised by the appellant to IRCTC, the appellant for the said services needs not to charge the passengers. The services have been rendered by the appellant to the passengers on behalf of IRCTC. The said services rendered by Appellant for an on behalf of IRCTC to passengers in the nature of a 'customer care service'. Therefore we are of the view that such services appropriately classifiable under business auxiliary services under the category of "Customer care services provided on behalf of the client under Section 65(11) of the Finance Act, 1994". As regards judgment of *General Pre cured Treads Pvt. Ltd. supra* relied upon by the Learned Counsel, we find that the said judgment is on

different facts. Therefore, the ratio of the same is not applicable. As per our above discussion we are of the considered view that the impugned order is sustainable on the above issue. We also find that this is not the case where the issue was under litigation or there is any interpretation of law involved for the reason that all the judgments relied upon by the appellant are on different facts and accordingly the demand of extended period is sustainable. As regard penalty imposed under Section 76 and 78, we are of the view that simultaneous penalty under Section 76 and 78 cannot be imposed. Therefore, the penalty imposed under Section 76 is set aside. Other penalties and interests to the extent demand was sustained is also sustainable. As per our above discussion and finding, impugned order is modified to above extent in respect of demand of supply of Bedroll Kits.

(ii) Outdoor catering services:

5.3 On the issue of outdoor catering service, we find that the adjudicating authority has recorded the finding as under: -

> *76. Regarding the catering services provided on various trains by the firm as per the contract entered with the IRCTC for providing catering services which included breakfast, meals, packed goods items and beverage and sale of A-al-carte items. The contract essentially allows them to sell the various packaged and non packaged food items on the trains. There are some trains like Rajdhani where the meals are not sold but are supplied by the railways and the cost is included in the cost of ticket. There are other trains where the meals are not included in the cost of the ticket. The catering is done by the catering vendors like the noticee who earn their rights to sell food on the trains through a tendering process with IRCTC. This entitles them to sell food items at prescribed rates on the trains. The noticee, has claimed benefit of Notification No. 12/2003-ST dated 20.06.2003 and abetment on account of goods had been claimed. I find that the SCN calculates the*

value of goods sold on the basis of the inputs purchased. Various margins of profit have been added without substantiating the same. In the entire notice the fact that material has been sold on the train has not been challenged. In fact the tax has been demanded on the value of goods sold as is apparent from the Annexure to the SCN.

77. In the instant case it has been found that the purchases were different from those declared in the balance sheet. On the basis of the actual purchase some value of sales has been worked out. But the allegation is that the said packaged material and cooked food of the revised value has been sold on the trains. Notification No. 12/2003-ST dated 20/06/2003 read as under:

> "In exercise of the powers conferred by section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts so much of the value of all the taxable services, as is equal to the value of goods and materials sold by the service provider to the recipient of service, from the service tax leviable thereon under section (66) of the said Act, subject to condition that there is documentary proof specifically indicating the value of the said goods and materials.
>
> *Provided that the said exemption shall apply only in such cases where -*
>
> *(a) no credit of duty paid on such goods and materials sold, has been taken under the provisions of the Cenvat Credit Rules, 2004; or*
>
> *(b) where such credit has been taken by the service provider on such goods and materials, such service provider has paid the amount equal to such credit availed before the sale of such goods and materials.".*

78. We find that they are selling packed foods items and beverages on various train services on Indian Railways, and a-al-carte items on M.R.P. basis as per their agreement with railways to the passengers. I

find that no credit of duty paid on such goods and materials sold to the passengers has been taken under the provision of the Cenvat Credit Rules, 2004.

79. Since the goods have been sold on the train, the benefit of notification becomes available. It has been ascertained that no cenvat credit has been taken. The condition of documentary proof specifically indicating the value of the said goods and materials losses relevance, when the allegations in the SCN itself say that goods have been sold. If it is alleged thar goods have not been sold then there is no revenue which can be taxed. In the show cause notice no where it is alleged/disputed that the goods have not been sold to the passengers on the railways trains.

Now, on the said issue the revenue disputed the finding of the adjudicating authority in their grounds of appeal on the following grounds.

(a) The show cause notice alleges that the value of catering service has been considered as sale of MRP goods which amount to diversion of taxable value in the books. The adjudicating authority has not addressed this issue at all in his finding. Service provider has shown the actual amount of purchase for the month of march 2006 towards catering service as Rs. 3,52,376/- as against the amount of Rs. 8,11,106/- detected by them. For the period 2006-2007 the service provider has declared the value of purchase of Rs. 57,07,745/- against the actual value of purchase of Rs. 1,73,80,882/- detected by them. For the period 2007-08 the service provider has declared the value of purchase as Rs. 57,09,894/- against the acutal value of purchase of Rs. 1,47,98,977/- detected by them. Shri KishorbhaiHakamichandChotai, partner of Appellant in his statement has agreed to fact that they had considered the some of their purchase like bread, vegetables, fruits and eggs towards re-sales while actually the same were part of the catering service. He has agreed to the differential taxable value and paid an amount of Rs. 25,47,919/- . Ld. Adjudicating authority ignored the fact that calculations were based on scrutiny of account ledgers, purchase and sales documents and Balance sheet.

(b) The Adjudicating authority has erred in considering Notification No. 12/2003-S.T alone and dropping the demand. Since the service provider is already availing the benefit of Notification No. 1/2006, they cannot be avail the benefit of Notification No. 12/2003-ST.

5.4 We find that the aforesaid facts has not been examined in the impugned order by the Ld. Adjudicating authority. As a result, the impugned order as regard the said issue is set aside and matter is remanded to the adjudicating authority to consider aforesaid aspects and pass a fresh order, after following the Principle of Natural Justice such as considering the submissions made/to be made by both the parties and granting the sufficient Personal hearing. Revenue Appeal is allowed by way of remand.

6. In result, assessee's appeal is partly allowed and revenue's appeal is allowed by way of remand to the Adjudicating Authority.

(Pronounced in the open court on 06.05.2022)

RAMESH NAIR
MEMBER (JUDICIAL)

P.ANJANI KUMAR
MEMBER (TECHNICAL)

Geeta