IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-DB

COURT –II

Service Tax Appeal No.ST/54205/2014 -CU [DB]

[Arising out of Order-in-Original No.DEL-svtax-adj-com-066-14-15 dated 13.05.2014 passed by the Commissioner, Service Tax, New Delhi]

M/s. EIHA (Unit of Oberoi Flight Services) ...Appellant

Vs.

C.S.T., Delhi ... Respondent

Present for the Appellant : Mr.Rachit Jain, Advocate

Present for the Respondent: Mr.Amresh Jain, D.R.

Coram: HON'BLE MR. V.PADMANABHAN, MEMBER (TECHNICAL)

HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing: 06.06.2018

Pronounced on :26.06.2018

FINAL ORDER NO. 52308/2018

PER: RACHNA GUPTA

Present is an appeal filed being aggrieved of the order of Commissioner in Adjudication dated 29th April, 2014 vide which Service Tax demand of Rs.2,79,83,203/- has been confirmed for a period w.e.f. April, 2004 to 31st March, 2007 alongwith interest for the said entire period and the penalty has also been imposed. 2. Facts in brief for the purpose are that the appellant is engaged in the business of providing food to various airlines alongwith the responsibility of packing and handling of food loading and transportation of food trolleys, storage and handling of dry stores, cleaning of equipment and laundry services. The appellant was handing over all food to the airlines staff and the appellant was paying Service Tax on the consideration of the said services. Vide show cause notice dated 16th December, 2008, the Revenue has asked the appellant to include the cost of food supplied by him to the airlines, in the value of the said services for the purpose of paying the Tax. The said show cause notice had been adjudicated against the appellant and thus the present appeal. 3. We have heard Mr. Rachit Jain, ld. Advocate for the appellant and Mr. Amresh Jain, ld. DR for the Department.

4. It is submitted on behalf of appellant that he is selling the packed food to the airlines and is paying VAT on the value thereof. The Department has wrongly raised the liability of Service Tax on the said amount. Emphasis is made on a Notification No.12/2003-ST dated 20th June, 2003 under which the appellant is entitled for exemption. Emphasis has also been placed on Article 366 (29A) of the Constitution of India which provides for tax on sale or purchase of goods. 5. While rebutting these arguments, the emphasis as has been laid by the appellant on the legal provisions is vehemently denied. It is submitted that however the Notification of the year 2006 provides for 50% abatement in the case of outdoor catering services, hence, the appellant is liable to pay the Service Tax including the value of food supplied and can avail the said abatement. The appeal is prayed to be disposed of, accordingly. 6.

After hearing both the parties, we are of the opinion as follows:- 6.1 The 46th Amendment to the Constitution whereby Article 366(29A) was inserted in order to provide that the tax on sale or purchase of goods includes a tax on the supply by way of or as part of any other manner whatsoever of goods being food or any other article for human consumption or any drink. It is relevant to note that pursuant to the 46th Amendment the supply of food or drinks either by way of or part of any service was treated as a sale or purchase of goods.
6.2. Supreme Court in the case of **K. Damodharaswamy Naidu and Brothers Vs. State of Tamil Nadu (2000) 117 STC 1** held that the price which the customer pays for supply of food in restaurant cannot be split up and Sales tax is levaible on the entire amount that is charged to the customers. The decision analyzed the 46th Amendment, its purport and object. 6.3. A levy of service tax on outdoor catering was introduced in the year 1997 w.e.f 01.08.1997 and since the serving was not popular it was withdrawn w.e.f 01.06.1998. This was brought back by Finance Act, 2004 w.e.f 10.09.2004 in the form of introduction of Section 65(105)(zzt) seeking to impose service tax on the services rendered by an outdoor caterer. 6.4. The Department though has relied on Tamil Nadu Kalyana Mandapam Association Vs. Union of India 2004-TIOL-36-SC when the Supreme Court while upholding held that "a tax on services rendered by outdoor caterers is in pith and substance, a tax on services and not a tax on sale of goods or hire purchase activities. But we opine that these findings were on the ground that services rendered by outdoor caterers are clearly distinguishable from the services rendered in a restaurant or a hotel in as much 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 with the food is to be served. But the case of restaurant, the choice of food is limited to the menu card, for the customers. 6.5. Delhi High Court in the case of Indian Railways Catering and Tourism Corporation has held as under: "5A *The transaction of supply of food, snack and water to passengers in the train is not an outdoor catering service. There is no choice for passenger and the cannot ask for a different item or more items or substitute items he has no role to play and hence there is no element of service except the heating of cooked food and serving the food and beverages. In fact the service component in a restaurant is more than the service component in a train. 5B The property in the goods passes from IRCTC to Indian Railways when the food is loaded in the trains. The moment the food is loaded, the food belongs to Indian Railways. The fact that the food is served while the train is moving through another State is immaterial. It is not possible to accept that property in goods is transferred only when the food is served to the passenger as it would lead to impossible situations."* 7. In the case of **Narang Hotels and Resorts Vs. State of Maharashtra (2004) 135 STC 289** wherein the Bombay High Court held that sale by a flight kitchen of eatables or goods is complete when the goods are loaded in the supply unit and dispatched when food is supplied and served simultaneously it is outdoor catering else it is sale of goods especially when invoice shows it as separate element.
8. In the **Gannan Drunkerley's** case, it was held that if the contract treats the sale of material separately from cost of the labour, the sale of materials would be taxable. It is in the case of indivisible works contract, where it is not

possible to levy sales tax on the transfer of property in the goods involved in the execution of such contract as in such cases there is no sale of the materials as such and the property in them does not pass as the movables. 9. In the present case the invoice of the appellant is showing sale of food separately from the charges of other services rendered in addition to supply food. Apparently and admittedly, appellant is not serving the said food on board hence as far as supply of food is concerned property therein stands transferred the moment it is loaded on the air craft trolley. 10. In the result of the entire above discussion, we hereby held that since the appellant was simply supplying the food and was not serving the same to the passengers on board, it was specifically a sale of goods, Appellant has already discharged the VAT liability thereof. The same cannot be the outdoor catering services. For remaining services the appellant is discharging liability under service tax. The demand of Revenue in the given circumstances is not sustainable and the order under challenge is set aside and the appeal is allowed. [Pronounced in the open Court on 26.06.2018] **(RACHNA GUPTA) (V.PADMANABHAN) MEMBER (JUDICIAL) MEMBER (TECHNICAL)** Anita