

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.04.2015

CORAM

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

W.P.No.9619 of 2015
and M.P.No.1 of 2015

M/s.Sree Annapoorna Hospitality Services Pvt.Limited
Rep. By its Managing Director
Mr.R.Venkatesh
No.6/1256, Avinashi Road,
Nava India, Peelamedu,
Coimbatore 641 004 ..Petitioner

Vs

The Commissioner of Customs
Central Excise and Service Tax
O/o The Commissioner of Central Excise
Customs and Service Tax
No.6/7, A.T.D.Street
Race Course, Coimbatore 641 018 ... Respondent

Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus calling for the records comprised in C.NO.V/ODC/15/66/2013-ST (Adj.) order Sl.No.26/2014-Commr dated 26.12.2014 on the file of the respondent, quash the same and consequently direct the respondent to consider the decision of Larger Bench in the case of Hindusthan Aeronautics Ltd., V. Commissioner of Service Tax, Bangalore, 2013 (32) STR 783 (Tri.L.B) and pass a fresh order in accordance with law.

For Petitioner : Mr.K.Magesh
For respondent : Mr.A.P.Srinivas

ORDER

The petitioner has come forward with this writ petition challenging the order of the respondent dated 26.12.2014 and consequently to direct the respondent to consider the decision of Larger Bench in the case of Hindusthan Aeronautics Ltd., V. Commissioner of Service Tax, Bangalore, 2013 (32) STR 783 (Tri.L.B) and pass fresh order.

2. The petitioner is providing services of out-door catering services to various customers including institutional customers such as M/s.Lakshmi Machine Works Ltd., M/s.Hindustan Photo Films,

M/s.Parry Roca Private Ltd., and M/s.Tamil Nadu Newsprint and Papers Ltd., on mutually agreed terms. In the course of their business, the Audit Team of the department sent them a letter dated 03.04.2013 with regard to split up cost of materials and services. Further, a show cause notice dated 20.09.2013 was issued to the petitioner proposing the differential service tax on Out Door Catering Services for the period from 01.04.2008 to 31.03.2012 under proviso to sub-section (1) of Section 73 of Finance Act, 1994. The petitioner sent their reply dated 16.12.2013 to the show cause notice and also attended personal hearing held on 21.04.2014 and opted Notifications as regards sale of ingredients. However, the adjudicating authority held that the petitioner is not eligible for the benefit of Notification No.12/2003-ST and impugned order dated 26.12.2014 has been passed. Aggrieved by the same, the present writ petition is filed.

3. The learned counsel for the petitioner submitted that the Adjudicating Authority has wrongly placed reliance on the decision in the case of Sayyaji Hotels instead of the case of Hindusthan Aeronautics Ltd., Vs. Commissioner of Service Tax, Bangalore 2013 (32) STR 783 (Tri-L.B) and further cited Section 7(1)(b) of Tamil Nadu Value Added Tax Act, 2006 regarding sale of goods by presuming that the petitioner is a dealer and of un-branded nor is the food ready-to-eat. He further submitted that without considering the valuable points adduced by the petitioner, the adjudicating authority had stated in his order that sale means any transfer of the possession of goods by one person to another in the ordinary course of trade or business for cash or deferred payment or other valuable consideration, thus, the adjudicating authority erred in so deciding that the petitioner is not eligible for the benefit of Notification No.12/2003-ST. He further submitted that the petitioner is willing to pay 25% of the impugned demand and prayed this Court to remit the matter to adjudicating authority for consideration.

4. The Adjudicating Authority, in its order dated 11.12.2014 has pointed out that in Notification No.12/2003-ST dated 20.06.2003, the word "sold" is crucial; if during the provision of a service, there is a sale of any goods and the value of such goods are shown separately in the bills then such value will be eligible for abatement in terms of Notification No.12/2003-ST. It also pointed out that a catering contract is generally of three types: (1) the caterer's consideration would be the agreed service charges, plus the actual cost of ingredients used in preparation of the food articles; or (2) the total consideration will be actual cost of food articles plus a specified percentage thereof as service charges; or (3) the total consideration will be composite without any division between the cost of ingredients and service. In the first two cases, the caterer is protecting himself against the vicissitudes of the price of the ingredients. Here, the contract is composite but divisible since the value of service portion and material portion are identifiable. The bill will perforce indicate them separately. On

the other hand, if the contract is of the third type, there is no intention between the parties to apportion the consideration between the cost of service and the cost of ingredients. Therefore, any split-up of cost that may be indicated in the bill will be a notional division only. In the first two cases, Notification No.12/2003-ST comes into play; whereas, in the last case, it does not.

5. In my considered view, whether the petitioner is eligible for the benefit of Notification No.12/2003-ST and whether the extended period of time under proviso to Section 73(1) of the Finance Act, 1994 is invokable to the petitioner's case are disputed questions of fact and the same could be raised before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), as the petitioner has remedy of filing appeal against the order-in-original. This Court is of further view that there is no violation of principles of natural justice in passing the order impugned and the procedures stipulated in Finance Act, 1994 has been thoroughly followed. Thus, the petitioner is bound to pay 7.5% of the total service tax demand of Rs.63,79,561/- at the time of filing of appeal before the CESTAT. However, it is the case of the petitioner that the levy itself is unwarranted and as such the mandatory payment will cause undue hardship to them. In my considered view, in terms of the provisions of the Act, payment of 7.5% of the total tax demand is mandatory and that cannot be reduced by this Court and further, the petitioner could raise all the points raised before this Court before the CESTAT to substantiate its case.

6. In view of the above findings, this Court is not inclined to interfere with the order impugned in the present writ petition. Accordingly, the Writ Petition is dismissed. If any appeal is filed by the petitioner, the time spent on this writ petition and till the date of the copy of this order made ready shall be excluded for the purpose of calculating the period of limitation. No costs. Consequently, connected MP is closed.

-s/d-

Assistant Registrar(LA)

True Copy

Sub-Assistant Registrar

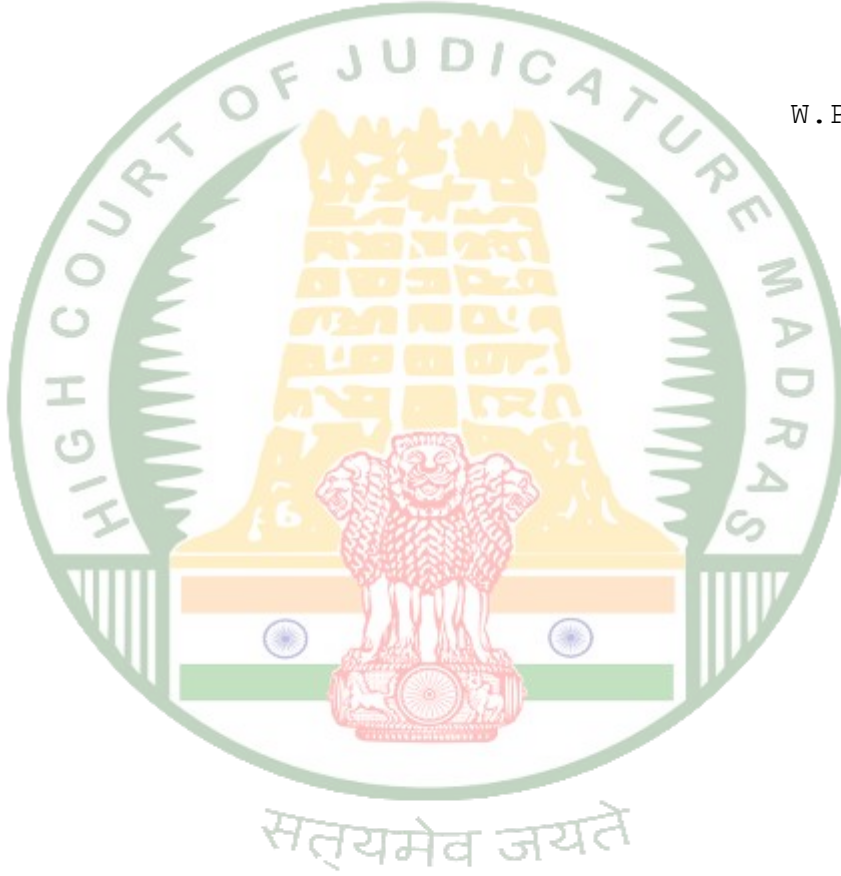
To

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+ 1 cc to M/s.KMagesh, Advocate SR 18528

rsi(co)
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