आयुक्त(अपील)काकार्यालय,
Office of the Commissioner (Appeal),
केंद्रीय जीएसटी, अपील आयुक्तालय,अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्वमार्ग, अम्बावाड़ीअहमदाबाद३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
☎ 07926305065- टेलेफैक्स07926305136

DIN :20211064SW000000B60E

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/156/2021 /HOHO TO HOHH

ख अपील आदेश संख्या Order-In-Appeal Nos.**AHM-EXCUS-003-APP-28/2021-22**
दिनाँक Date : **20-09-2021** जारी करने की तारीख Date of Issue 20.10.2021

आयुक्त (अपील) द्वारापारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)

ग Arising out of Order-in-Original No.**04/D/GNR/NRM/2020-21** दिनाँक:**27.04.2020** issued by Assistant Commissioner, CGST& Central Excise, Division Gandhinagar, Gandhinagar Commissionerate

घ अपीलकर्ता का नाम एवं पताName & Address of the **Appellant / ~~Respondent~~**

M/s Shree Sainath Canteen A
D 11, Kirti Dham Society,
Vavol, Gandhinagar, Gujarat-382016

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्कअधिनियम, 1994 की धाराअततनीचेबताए गए मामलों के बारेमेंपूवोक्त धाराको उप–धारा के प्रथमपरन्तुक के अंतर्गतपुनरीक्षणआवेदन अधीनसचिव, भारतसरकार, वित्तमंत्रालय, राजस्वविभाग चौथीमंजिल, जीवन दीपभवन, संसदमार्ग, नईदिल्ली : 110001 को की जानीचाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदिमालकीहानि के मामलेमेंजब ऐसीहानिकारखानेसेकिसीभण्डागार या अन्य कारखानेमें या किसीभण्डागारसेदूसरेभण्डागारमेंमाललेजातेहुए मार्गमें, या किसीभण्डागार या भण्डारमेंचाहेवहकिसीकारखानेमें या किसीभण्डागारमेंहोमालकीप्रकिया के दौरानहुईहो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(क) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(A) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ख) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(B) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जोडयूटीकेडिटमान्य की गईहैऔर ऐसेआदेशजोइस धारा एवंनियम के मुताबिकआयुक्त, अपील के द्वारापारित वो समय पर या बादमेंवित्तअधिनियम (नं.2) 1998 धारा 109 द्वारानियुक्तकिए गए हो।

(c) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गतविनिर्दिष्टप्रपत्र संख्या इए–8 मेंदोप्रतियोंमें, प्रेषितआदेश के प्रतिआदेशप्रेषितदिनाँकसेतीनमास के भीतरमूल–आदेश एवंअपीलआदेश की दो–दोप्रतियों के साथउचितआवेदनकियाजानाचाहिए।उसकेसाथ खाता इ.कामुख्यशीर्ष के अंतर्गत धारा 35–इ मेंनिर्धारितफी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रतिभीहोनीचाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजनआवेदन के साथजहाँ संलग्नरकम एक लाख रूपये या उससे कम होतो रूपये 200/–फीसभुगतान की जाए औरजहाँ संलग्नरकम एक लाख सेज्यादाहोतो 1000/– की फीसभुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवंसेवाकरअपीलीय न्यायाधिकरण के प्रतिअपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्कअधिनियम, 1944 की धारा 35–बी/35–इ के अंतर्गतः–

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) उक्तलिखितपरिच्छेद 2 (1) क मेंबताए अनुसार के अलावा की अपील, अपीलो के मामलेमेंसीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवंसेवाकरअपीलीय न्यायाधिकरण(सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबादमें2nd माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद–380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor,BahumaliBhawan,Asarwa,Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होत हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरणको एक अपील या केन्द्रीय सरकारको एक आवेदन किया जाता हैं।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्कअधिनियम 1970 यथासंशोधित की अनुसूचि–1 के अंतर्गतनिर्धारितकिए अनुसारउक्तआवेदन या मूलआदेश यथास्थितिनिर्णयनप्राधिकारी के आदेशमेंसेप्रत्येक की एक प्रतिपर रू.6.50 पैसेकान्यायालय शुल्कटिकटलगाहोनाचाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इनओरसंबंधितमामलोंकोनियंत्रण करनेवालेनियमों की ओरभी ध्यानआकर्षितकियाजाताहैजोसीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवंसेवाकरअपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 मेंनिहितहै।

Attention in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(14) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवंसेवाकरअपीलीय न्यायाधिकरण(सिस्टेट),के प्रतिअपीलो के मामलेमेंकर्तव्यमांग(Demand) एवंदंड(Penalty) का10%पूर्वजमाकरनाअनिवार्यहै। हालांकि, अधिकतमपूर्वजमा10 करोड़रुपएहै।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act. 1994)

केन्द्रीयउत्पादशुल्कऔरसेवाकरकेअंतर्गत, शामिलहोगा "कर्तव्यकीमांग"(Duty Demanded)-

(i) *(Section)* खंड 11D केतहतनिर्धारितराशि;
(ii) लियागलतसेनवैटक्रेडिटकीराशि;
(iii) सेनवैटक्रेडिटनियमोंकेनियम 6 केतहतदेयराशि.

⇨ **यहपूर्वजमा 'लंबितअपील' मेंपहलेपूर्वजमाकीतुलनामें, अपील' दाखिलकरनेकेलिएपूर्वशर्तबनादियागयाहै.**

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

Under Central Excise and Service Tax, "Duty demanded" shall include:
(xxv) amount determined under Section 11 D;
(xxvi) amount of erroneous Cenvat Credit taken;
(xxvii) amount payable under Rule 6 of the Cenvat Credit Rules.

इसइस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

ORDER-IN-APPEAL

The present appeal has been filed by M/s. Shri Sainath Canteen (A), D11, Kirtidham Society, Vavol, Gandhinagar (hereinafter referred to as the appellant) against Order in Original No. 04/D/GNR/NRM/2020-21 dated 27-04-2020 [hereinafter referred to as "*impugned order*"] passed by the Assistant Commissioner, CGST, Division- Gandhinagar, Gandhinagar Commissionerate [hereinafter referred to as "*adjudicating authority*"].

2. The facts of the case, in brief, is that the appellant was having Service Tax Registration No. ASGPJ4013NSD001 for providing "Outdoor Catering Service". During the course of audit of the records of the appellant by departmental officers covering the period from April, 2016 to June, 2017, it was observed on scrutiny of their ST3 returns that they had availed the benefit of Notification No. 24/2012-ST dated 06.06.2012. The appellant submitted a certificate issued by the Local Hostel Authority of Samras Government Boys Hostel, Ahmedabad to the effect that the outdoor catering services were provided to Children of Pre-Primary and Primary Sections and they were not liable to pay Service Tax under Sr.No. 9 (c) of Notification No. 25/2012-ST dated 20.6.2012, as amended. It was communicated to the appellant that as per the definition of 'Educational Institution', Samras Boys Hostel to whom they were providing catering services were not falling within the ambit of 'Educational Institution' as per Clause (oa) of the said notification in as much as it only provided accommodation to the students and no education was imparted there. The appellant was requested to pay the Service Tax amounting to Rs.33,82,759/- along with interest and penalty.

2.1 The appellant further informed that the entire food for the students of the hostel was prepared in the kitchen provided by the hostel authority and was served to the students in the said premises and it was a kind of mess. They claimed exemption from payment of Service Tax under Sr. No. 19 of Notification No. 25/2012-ST dated 20.6.2012. They also informed that the hostel mess was not having any air conditioning facility. The department was of the view that the appellant was engaged in catering or providing canteen services at the boys hostel which is at a place other than his own and considering the other terms and

conditions of the Tender document, the services provided by the appellant were in the nature of outdoor catering only and would not be within the ambit of mess as envisaged in Sr.No. 19 of the said notification. As per the said Sr. No.19 the exemption was only applicable to services provided by a 'mess' and hence the exemption as not applicable to the service provided by the appellant as they did not fall within the coverage of the term 'mess'.

3. A notice bearing No. 54/19-20 dated 04.06.2019 from F.No. VI/1(b)-2/C-VIII/MIS/19-20 was issued to the appellant calling upon them to show cause as to why : i) The claim for exemption as mentioned in their ST3 returns should not be denied; ii) The service tax not paid amounting to Rs.33,82,759/- should not be demanded and recovered from them under proviso to Section 73 (1) of the Finance Act, 1994; iii) Interest should not be demanded and recovered from them under Section 75 of the Finance Act, 1994 and iv) Penalty under Section 78(1) of the Finance Act, 1994 should not be imposed upon them.

4. The said SCN was adjudicated by the adjudicating authority vide the impugned order wherein he has :

A) Ordered recovery of Service Tax Amounting to Rs.33,82,759/- under the proviso to Section 73(1) of the Finance Act, 1994;

B) Imposed penalty of Rs.33,82,759/- under the provisions of Section 78(1) of the Finance Act, 1994; and

C) Ordered recovery of interest under Section 75 of the Finance Act, 1994;

5. Aggrieved with the impugned order, the appellant firm has filed the instant appeal on the following grounds:

i) They had entered into a contract with the Director, Scheduled Castes Welfare, Department of Social Justice and Empowerment to provide canteen/meal service in Boys and Girls Hostels located in five different cities of Gujarat. In terms of the contract, the appellant was to cook and supply meals to the residents of the hostel as per the menu prescribed using the kitchen equipment, fittings, piped gas, water etc. provided by the hostel authority The appellant was to arrange for vegetables, fruits,

spices etc. for cooking and also provide the utensils, cooking vessels, cutlery items, crockery.

ii) From the scope of the work it is evident that the entire food for the students of the hostel was prepared in the kitchen provided by the hostel authority and was served to the students in the said premises which is a kind of mess. The contract was for a period of 12 months, a substantial longer period.

iii) Sr.No.19 of Notification No. 25/2021-ST dated 20.6.2012 exempted services provided in relation to serving of food in a mess from the whole of the service tax leviable thereon under Section 66B of the Finance Act, 1994. As per Cambridge Dictionary 'mess' means " A large public rooms where people have their meals". Based on the conjoint reading of the above, the services provided by them to Samras Boys Hostel is a service of food and beverages to a hostel mess, which is not having any air conditioning and they are eligible to claim the benefit of exemption in respect of hostel mess.

iv) Merely because all kitchen related equipment, utensils, cooking vessels, cutlery and crockery items are provide by the appellant or that service is provided at the premises owned by someone else are not enough to make the service an outdoor catering service.

v) As per the Oxford Dictionary outdoor catering means "The provision of food and drink at a social event or other gathering". The mess service provided by them at Samras Boys Hostel is for 12 months which can be considered as a substantial time and not for a specific event or gathering. Outdoor catering relates to serving of food in a specific event or other occasional gathering. In view of the above, it can be said that the meal services provided by them will fall within the ambit of Sr.No.19 of Notification No. 25/2012.

vi) The allegation that the appellant suppressed the facts is completely untenable. Even assuming that the Service Tax demanded is payable, they submit that the issues raised in the impugned notice escaped the attention even of the service tax authorities. The Service Tax sought to be recovered is based on differing interpretation of law. There was no suppression of facts with an intent to evade payment of service tax and therefore, the entire demand is barred by limitation. They are maintaining

regular books of accounts, discharging appropriate service tax and duly filing the periodic service tax returns.

vii) They were under the bonafide belief that the meal provided to the students at the hostel is exempted from the net of service tax by virtue of Sr.No. 19 of Noti.No.25/2012. They rely upon the decisions in the case of 1) NRC Ltd Vs. CCE reported at 2007 (5) STR 308 (Tri-Mumbai); 2) Secretary, Town Hall Vs. Commissioner reported at 2007 (8) STR 170 (Tri.-Bang.); 3) Continental Foundation Vs CCE reported in 2007 (216) ELT 177 (SC).

viii) Omission to inform the department cannot be equated with suppression of facts. The allegation against them is that they have not intimated the department and hence, have escaped proper assessment and therefore, extended period of limitation was invokable.

ix) With regard to non applicability of extended period of limitation, they rely upon the following case 1) Padmini Products Vs. CCE reported at 1989 (43) ELT 195 (SC); 2) Tamil Nadu Housing Board Vs. Collector reported at 1994 (74) ELT 9 (SC); 3) Binlas Suplux Limited Vs. CCE reported at 2007 (7) STR 561 (Tri.Del); 4) Kamal Auto Finance Ltd Vs. Commissioner of Service Tax reported at 2012 (26) STR 46 (Tri.-Del); 5) Hero Honda Motors Ltd Vs. Commissioner of Service Tax reported at 2021 (27) STR 409 (Tri.-Del); 6) Cosmic Dye Chemical Vs. CCE reported at 1995 (75) ELT 721 (SC).

x) Demand of interest is dependent upon liability for payment of duty. If there is no liability of duty, no interest can be demanded. They rely upon the decision in the case of Prathibha Processors Vs. UOI reported at 1996 (88) ELT 12 (SC).

xi) There is no contravention of any of the provisions of the Act as alleged in the notice or the impugned order. They have always acted with a bona fide intention and deposited appropriate service tax.

xii) They rely upon the following decisions : i) Sanghi Industries Ltd. Vs. CCE reported at 2009 (16) STR 696; ii) CCE Vs. Hira Automobiles reported at 2009 (16) STR 408; iii) Sands Hotel Pvt Ltd Vs. Commissioner reported at 2009 (16) STR 329.

xiii) Section 80 of the Act states that no penalty shall be imposable on the assessee for any failure referred to in the said provisions, if the assessee

proves that there was reasonable cause for the said failure. They rely upon the decisions in the following cases : I) Flyingman Air Courier (P) Ltd Vs. CCE, Jaipur reported at 2004 (170) ELT 417 (Tribunal); II) CCE Vs. Gamma Consultancy (P) Ltd reported at 2006 (4) STR 591 (Tribunal); III) Vinay Bele & Associates reported at 2008 (9) STR 350 (Bom); IV) Ashish Patil reported at 2008 (10) STR 8 (Bom.

xiv) Penalty should not be ordinarily imposed unless and until mens rea on the part of the defaulter is proved beyond all reasonable doubts. The notice has failed to bring out the essential mens rea or guilty mind of the appellant. In fact there was no intention to evade payment of service tax on part of the appellant.

xv) They rely upon the following cases : i) Hindustan Steel Ltd Vs. State of Orissa reported at 1978 (2) ELT 159 (SC); ii) Aurobindo Pharma Ltd Vs. Commissioner of Vishakapatnam reported at 2011 (265) ELT 358 (Tri.-Bang); iii) Commissioner of Central Excise, Rajkot Vs. Adishiv Forge P. Ltd reported at 208 (9) STR 534 (Tri-Ahmd); iv) Wiptech Peripherals Pvt Ltd Vs. Commissioner of C.Ex., Rajkot reported at 2008 (232) ELT 621 (Tri.-Ahmd); v) Fibre Foils Ltd Vs. Commissioner of C.Ex, Mumbai reported at 2005 (190) ELT 352 (Tri.-Mum).

6. Personal Hearing in the case was held on 16.09.2021 through virtual mode. Shri Rishit Bagadia, CA, appeared on behalf of the appellant for the hearing. He reiterated the submissions made in appeal memorandum.

7. I have gone through the facts of the case, submissions made in the Appeal Memorandum, and submissions made at the time of personal hearing and evidences available on records. I find that the crux of the issue which requires to be decided is whether the appellant was liable to pay service tax on the service provided by them to the Samras Government Boys Hostel or whether they were eligible for exemption under Notification No.24/2012 dated 06.06.2012 as declared in ST-3 Returns and Notification No. 25/2012 dated 20.06.2012 claimed subsequently. The demand pertains to the period F.Y. 2016-17 and F.Y. 2017-18 (up to June, 2017). I also find that there is no dispute regarding the taxability of the service being provided by the appellant.

8. I find that the appellant had claimed the benefit of exemption in terms of Sr.No.9 (c) of Notification .No. 24/2012-ST dated 06.06.2012. I however, find that said notification was issued to amend the Service Tax (Determination of Value) Rules, 2006 and make the Service Tax (Determination of Value) Second Amendment Rules, 2012. There is no Sr. No. 9 (c) in the said notification and nor is the said notification an exemption notification. Therefore, it appears that the appellant had in their ST-3 Returns wrongly claimed exemption under a non applicable notification.

8.1 The appellant, subsequently, claimed the benefit of Notification No. 25/2012-ST dated 20.6.2012 on the grounds that they were providing outdoor catering services to children of pre-primary and primary sections. Educational Institutions is defined in Clause (oa) of the said notification and reads as :

> " 'educational institution' means an institution providing services by way of :
>
> (i) pre-school education and education up to higher secondary school or equivalent;
>
> (ii) education as a part of a curriculum for obtaining a qualification recognised by any law for the time being in force;
>
> (iii) education as a part of an approved vocational education course."

8.2 When the appellant was informed that the catering service provided by them was not within the ambit of 'educational institution' as per clause (oa) of the said notification, they claimed exemption as per Sr.No. 19 of Notification No.25/2012-ST dated 20.6.2012. Therefore, it is necessary to refer to the said Sr. No. 19 of the said notification, which reads as :

> "Services provided in relation to serving of food or beverages by a restaurant, eating joint or a mess, other than those having the facility of air-conditioning or central air-heating in any part of the establishment, at any time during the year."

8.3 The appellant have claimed that the service provided by them to the Hostel is service of food and beverages to a hostel Mess and since the contract was for a period of 12 months and not for a specific event or gathering the same is not an outdoor catering service. I do not find any merit in the contention of the appellant. At the outset, it needs to be appreciated that the service provided by the appellant is not to the residents of the hostel but to the Hostel Authority with whom they are under contract.

8.4 There is no element of doubt as regards the appellant being a caterer supplying food, beverages. Caterer is defined to mean " *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 of occasion*". In the present case, the appellant is supplying food and beverages using his utensils, cooking vessels, cutlery items and crockery to the boys hostel. Therefore, they clearly fall within the definition of caterer. Further, the appellant has been given a contract for cooking and supplying meals of wholesome quality and sufficient quantity to the residents of the hostel. The menu is prescribed by the Hostel Authority and the appellant clearly has no say in this regard. The appellant is providing these services using the kitchen equipment, fittings etc. provided by the hostel authority and at the hostel premises. Even as per the commonly understood meaning of the term, the service provided by the appellant is nothing but Outdoor Catering service. Hence, it is clearly evident from the records that the appellant is engaged in providing outdoor catering services. It is also pertinent to mention that the appellant is registered with the Service Tax department for Outdoor Catering Services.

9. In arriving at the above conclusion, I find support in the decision of the Hon'ble Tribunal in the case of L. & T. Grahak Sahakari Sansthan Maryadit Vs. C.S.T., Mumbai-II reported at 2017 (49) S.T.R. 561 (Tri. - Mumbai). In the said case it was held by the Hon'ble Tribunal at para 8 that :

> "It remains to be seen if such service is taxable as 'outdoor catering service'. The primary difference between a 'caterer' and an 'outdoor catering service' is that the latter operates from a premise other than its own. It is not the case of the appellant that service is rendered from its own premises.

> Further, there is no dispute that the appellant is in the business of catering because it is specialized in supply of food and beverages in the canteen premises belonging to M/s. Larsen & Toubro. Therefore, it would appear that all the requirements for taxability in accordance with Section 65(105)(zzt) of Finance Act, 1994 is in place."

9.1 It was therefore, held by the Hon'ble Tribunal that :

> **"13.**It is clear from the enunciation of the factual matrix that the appellant has been engaged to render a service on behalf of the employer and compensated for by the employer with some portion of the cost. The appellant cannot escape the liability of tax in view of the provision of service which is taxable under the Finance Act, 1994."

10. Similarly, in the case of Indian Coffee Workers Co-Op. Society Ltd. Vs. C.C.E. & S.T., Allahabad reported at 2014 (34) S.T.R. 546 (All.) the Hon'ble High Court had held that :

> **"9.** 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.
>
> **10.** 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."

11. I find that the service provided by the appellant satisfies all the ingredients to be covered by the ratio of the above judgements of the Hon'ble Tribunal and the Hon'ble High Court, therefore, I am of the considered view that there is no merit in the contention of the appellant and they are rejected.

12. The appellant have also raised the issue of limitation. I find that the appellant had at different times claimed benefit of exemption under different notifications. In fact, one of the notifications claimed by them was not at all relevant to the issue. Subsequently, they put forth their claim for exemption under a different notification. This act of the appellant it appears was only with a view to somehow avoiding payment of Service Tax. If they had any doubts regarding the exemption they might have very well approached the department for a clarification, which I find has not been done by the appellant. It is a settled point of law that the onus is on the person claiming the exemption to satisfy all the conditions to be eligible for exemption. The appellant have failed to do so and therefore, the extended period of limitation has been rightly invoked by the department. I am also fortified in my view regarding the applicability of extended period of limitation by the decision of the Hon'ble Tribunal in the case of L. & T. Grahak Sahakari Sansthan Maryadit Vs. C.S.T., Mumbai-II reported at 2017 (49) S.T.R. 561 (Tri. - Mumbai). In the said case it was held by the Hon'ble Tribunal at para 14 that :

> "Appellant claims that the demand is barred by limitation of time because there was a *bona fide* belief of non-taxability. Reliance was placed on the decision in *Larsen & Toubro Ltd* v. *Commissioner of Central Excise, Pune*-II [2007 (211) E.L.T. 513 (S.C.)]. We do not believe that the circumstances present in the case decided upon by the Hon'ble Supreme

Court is relevant to the present proceedings because the appellant has been rendering the service for long and also happens to be a co-operative society which could not have been unaware of the legal provisions of taxation."

13. The appellant have also contended that penalty is not imposable upon them as there was no *mens rea* and have relied upon various judgements in their support. However, I find that the appellant despite being registered with Service Tax department for 'Outdoor Catering Service' have failed to discharge their service tax liability by resorting to wrong claim for exemption under different notifications at different point of time. This act on the part of the appellant clearly indicates their intention to not pay service tax on the service provided by them in the capacity of a outdoor catering service provider. Therefore, their claim on lack of *mens rea* is without merit.

14. In view of the above discussions and the above decisions of the Hon'ble Tribunal, In view of foregoing discussion, I reject the appeal filed by the appellant and uphold the impugned order.

15. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

The appeal filed by the appellant stands disposed off in above terms.

20th September, 2021

(**Akhilesh Kumar**)

Commissioner (Appeals)

Date: .09.2021.

Attested:

(N.Suryanarayanan. Iyer)
Superintendent(Appeals),
CGST, Ahmedabad.

F No.GAPPL/COM/STP/156/2021

BY RPAD / SPEED POST

To

M/s Shri Sainath Canteen A,
D11, Kirtidham Society,
Vavol, Gandhinagar.

Appeliant

The Assistant Commissioner,
CGST & Central Excise,
Division- Gandhinagar

Respondent

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Gandhinagar.
3. The Assistant Commissioner (HQ System), CGST, Gandhinagar.
   (for uploading the OIA)
4. Guard File.
5. P.A. File.