

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO.3

Service Tax Appeal No.10130 of 2021

(Arising out of OIA-CCESA-SRT-APPEAL-PS-127-2020-21 dated 27/11/2020 passed by
Commissioner of Central Excise, Customs and Service Tax-SURAT-I)

HOTEL UTSAV

DABHEL CHECK POST
DAMAN-GUJARAT

.....Appellant

VERSUS

C.C.E. & S.T. SURAT-I

NEW BUILDING...OPP. GANDHI BAUG,
CHOWK BAZAR, SURAT, GUJARAT-395001

.....Respondent

APPEARANCE:

Shri. Pratika Chawla, Chartered Accountant for the Appellant
Shri. Dinesh Prithani, Assistant Commissioner (Authorized Representative) for
the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU**

Final Order No. 10218 /2022

DATE OF HEARING: 23.02.2022

DATE OF DECISION: 07.03.2022

RAMESH NAIR

The brief facts of the case are that the appellant M/s Hotel Utsav are engaged in providing service as catering service at restaurant for which they are holding service tax registration. On the scrutiny of records of the appellant by CERA Audit for the period from 2013-14 to 2017-18 (upto June 2017) it was noticed that the appellant having a hotel cum restaurant in which they provide catering service at restaurant. At the orders of the customers, they also supply the cooked food after packing the same to the customers for which they invoice as parcel of food. Though the appellant have been paying service on food supply in the restaurant but they were not paying service tax on food cooked and supplied in package to the customers as per their direction. A show cause notice dated 09.09.2019 was issued wherein it was contended that as per clause (i) of Section 66E of the Finance Act, 1994, service portion in any activity wherein goods, being food or any other articles of human consumption or any drink

(whether or not intoxicating) is supplied in any manner as a part of activity is a declared service. It was further contended that as per Rule 2C of Service Tax (Determination of Value) Rules 2006, the value of service portion in any activity wherein goods, being food or any other article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of activity at restaurant or as outdoor catering shall be specified percentage of the total amount charged for such supply in terms of the following table.

Sl. No.	Description	Percentage of the total amount
(1)	(2)	(3)
1.	Service portion in an activity wherein goods, consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of the activity, at a restaurant.	40
2.	Service portion in outdoor catering wherein goods, being food or any other article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of such outdoor catering.	60

It was further stated in the show cause notice that the activity of cooking and supplying the food as parcel to the customers as per their direction is also an activity in which the food is supplied to the customers. Accordingly, it is declared as service in view of the aforesaid provision. The activity has neither being mentioned in the negative list nor has been exempted vide any Notification thus, the appellant was required to pay service tax on such services. Accordingly, the show cause notice has proposed to demand service tax amounting to Rs. 10,89,201/- and also proposed to demand interest and penalties. The adjudicating authority vide order in original No. DIV-I/DMN/AC/01/2020-21 dated 20.07.2020 confirmed the demand with interest and imposed penalties. Being aggrieved by the said order in original dated 20.07.2020, the appellant filed appeal before the Commissioner (Appeals) who concurred with the Learned Adjudicating Authority and upheld the order in original and

rejected the appeal filed by the appellant. Therefore, the present appeal filed before us.

2. Ms. Pratika Chawla, Learned Chartered Accountant, appearing on behalf of the appellant submits that the food is sold in the packed form as take away and not served in the restaurant, therefore, it is a sale of food and no service is involved. She submits that issue has been settled by the Hon'ble High Court of Madras in the case of Anjappar Chettinad A/C Restaurant reported at 2021 (51) GSTL 125 (MADRAS).

3. Shri Dinesh Prithani, Learned Assistant Commissioner (Authorized Representative) appearing on behalf of the Revenue reiterates the findings of the impugned order.

4. We have carefully considered the submission made both the sides and perused the records. We find that the appellant have been discharging the service tax in respect of food served in the restaurant to their customers. However, they are not paying service tax in respect of packed food which is sold as take away either on the counter of the restaurant or through delivery boys to the customer's place. In this undisputed fact, the food is not served in the hotel whereas the same is sold in the packed form therefore, as per the nature of this activity, it is clearly a sale of food, no service is involved. This issue is no longer res-integra as the same has been considered by the Hon'ble Madras High Court in the above cited judgement wherein the Hon'ble High Court has passed following detailed order:

21. Service tax was initially levied on the sale of food and drink in all restaurants without exception and Entry 19 of Notification 25 of 2012 levied tax on services provided in relation to serving of food and beverages by a restaurant, eating joint or mess.

22. The levy was restricted to sales in air-conditioned restaurants alone, *vide* Notification No. 3 of 2013-S.T., dated 1-3-2013, commonly referred to as the mega exemption notification, that carved out specified exclusions from the coverage of the Act. By virtue of Notification 3 of 2013, the levy of tax was restricted only to those restaurants, eating joints or mess, that have the facility of air-conditioning or central heating in any part of the establishment at any time during the year.

23. Section 66E declares that specified services shall attract the levy of service tax and reads as follows :

Section 66E. Declared services. - The following shall constitute declared services, namely :-

- (a) renting of immovable property
 (b) xx xx xx
 (i) service portion in an activity wherein goods, being food or any other article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of the activity.

24. In Circular 173/8/2013-S.T., dated 7-10-2013, the Board considers various representations raising doubts and queries in regard to the leviability of service tax in restaurants, both air-conditioned and non-air-conditioned. The doubts raised and the clarifications provided are as follows :

F. No. 334/3/2013-TRU
 Government of India
 Ministry of Finance
 Department of Revenue
 Central Board of Excise & Customs
 Tax Research Unit
 North Block
 New Delhi, 7th October, 2013

To

Chief Commissioners of Central Excise and Customs (All),
 Director General (Service Tax), Director General (Central Excise Intelligence),
 Director General (Audit),
 Commissioners of Service Tax (All)
 Commissioners of Central Excise (All),
 Commissioners of Central Excise and Customs (All).

Madam/Sir,

Subject : Restaurant Service- clarification – Regarding

As part of the Budget exercise 2013, the exemption for services provided by specified restaurants extended *vide* serial number 19 of Notification 25/2012-S.T. was modified *vide* para 1(iii) of Notification 3/2013-S.T. This has become operational on the 151 of April, 2013.

2. In this context, representations have been received. On the doubts and questions raised therein clarifications are as follows :

	Doubts	Clarifications
1	In a complex where air-conditioned as well as non-air-conditioned restaurants are operational but food is sourced from the common kitchen, will service tax arise in the non-air-conditioned restaurant?	Services provided in relation to serving of food or beverages by a restaurant, eating joint or mess, having the facility of air-conditioning or central air heating in any part of the establishment, at any time during the year (hereinafter referred as 'specified restaurant') attracts service tax. In a complex, if there is more than one restaurant, which are clearly demarcated and separately named but food is sourced from a common kitchen, only the service provided in the specified restaurant is liable to service tax and service provided in a non-air-conditioned or non-centrally air-heated restaurant will not be liable to service tax. In such cases, service provided in the non-air-conditioned/non-centrally air-heated restaurant will be treated as exempted service and credit entitlement will be as per the Cenvat Credit Rules.
2	In a hotel, if services are provided by a specified restaurant in other areas e.g.	Yes. Services provided by specified restaurant in other areas of the hotel are liable to service tax.

	swimming pool or an open area attached to the restaurant, will service tax arise?	
3	Whether service tax is leviable on goods sold on MRP basis across the counter as part of the Bill/invoice.	If goods are sold on MRP basis (fixed under the Legal Metrology Act) they have to be excluded from total amount for the determination of value of service portion.

3. Trade Notice/Public Notice may be issued to the field formations and taxpayers. Please acknowledge receipt of this Circular. Hindi version follows.

25. In Circular No. 334 of 2011, dated 28-2-2011, the scope of various new services including restaurant service, all newly introduced in 1-4-2011, were explained. The explanation is illuminating, reading thus :

‘1. Services provided by a restaurant

1.1 Restaurants provide a number of services normally in combination with the meal and/or beverage for a consolidated charge. These services relate to the use of restaurant space and furniture, air-conditioning, well-trained waiters, linen, cutlery and crockery, music, live or otherwise, or a dance floor. The customer also has the benefit of personalized service by indicating his preference for certain ingredients e.g. salt, chilies, onion, garlic or oil. The extent and quality of services available in a restaurant is directly reflected in the margin charged over the direct costs. It is thus not uncommon to notice even packaged products being sold at prices far in excess of the MRP.

1.2 In certain restaurants the owners get into revenue-sharing arrangements with another person, who takes the responsibility of preparation of food, with his own materials and ingredients, while the owner takes responsibility for making the space available, its decoration, furniture, cutlery, crockery and music etc. The total bill, which is composite, is shared between the two parties in terms of the contract. Here the consideration for services provided by the restaurants is more clearly demarcated.

1.3 Another arrangement is whereby the restaurant separates a certain portion of the bill as service charge. This amount is meant to be shared amongst the staff who attend the customers. Though this amount is exclusively for the services it does not represent the full of value of all services rendered by the restaurants.

1.4 The new levy is directed at services provided by high-end restaurants that are air-conditioned and have license to serve liquor. Such restaurants provide conditions and ambience in a manner that service provided may assume predominance over the food in many situations. It should not be confused with mere sale of food at any eating house, where such services are materially absent or so minimal that it will be difficult to establish that any service in any meaningful way is being provided.

1.5 It is not necessary that the facility of air-conditioning is available round the year. If the facility is available at any time during the financial year the conditions for the levy shall be met.

1.6 The levy is intended to be confined to the value of services contained in the composite contract and shall not cover either the meal portion in the composite contract or mere sale of food by way of pick-up or home delivery, as also goods sold at MRP. Finance Minister has announced in his budget speech 70% abatement on this service, which is *inter alia*, meant to separate such portion of the bill as relates to the deemed sale of meals and beverages. The relevant notification will be issued when the levy is operationalized after the enactment of the Finance Bill.

26. Thus, not all services rendered by restaurants in the sale of food and drink are taxable and it is only certain specified situations that attract tax. The sale of food and drink simplicitor, services of selection and purchase of ingredients, preparation of ingredients for cooking and the actual preparation of the food and drink would not attract the levy of tax. Only those services commencing from the point where the food and drinks are collected for service at the table till the raising of the bill, are covered. This would encompass a gamut of services including arrangements for seating, decor, music and dance, both live and otherwise, the services of Maitre D’Or, hostesses, liveried waiters and the use of fine crockery and cutlery, among others. The provision of the aforesaid niceties are critical to the determination as to whether the establishment in question would attract liability to service tax, and that too, only in an air-conditioned restaurant.

27. In the case of take-away or food parcels, the aforesaid attributes are conspicuous by their absence. In most restaurants, there is a separate counter for collection of the take-away food parcels. Orders are received either over telephone, by e-mail, online booking or through a food delivery service such as swiggy or zomato. Once processed and readied for delivery, the parcels are brought to a separate counter and are picked up either by the customer or a delivery service. More often than not, the take-away counters are positioned away from the main dining area that may or may not be air-conditioned. In any event, the consumption of the food and drink is not in the premises of the restaurant. In the aforesaid circumstances, I am of the categorical view that the provision of food and drink to be taken-away in parcels by restaurants tantamount to the sale of food and drink and does not attract service tax under the Act.

28. The petitioners have brought to my notice several orders passed by the Appellate Commissioners stationed in Chennai and any other parts of the State who have taken a view that take away services would not attract liability to Service tax. (Order-in-Appeal No. 445 of 2018, dated 28-9-2018 passed by the Commissioner (Appeals), Chennai, Order-in-Appeal No. 147 of 2019, dated 25-3-2019 passed by the Commissioner (Appeals), Coimbatore and Order-in-Appeal No. 16 of 2020, dated 23-3-2020 passed by the Commissioner (Appeals), Coimbatore. In some cases, I am informed that appeals have not been filed by the Department and thus the prevailing view, even within the Department is that there would be no service tax liability on take away food.

29. In the light of the discussion as above, these Writ Petitions are allowed and the impugned orders quashed. No costs. Connected Miscellaneous Petitions are closed.

4.1 From the above judgement, it is observed that the fact of the above case is absolutely identical to the facts of the present case inasmuch as the food in packed form is sold either on the counter or through delivery boys to the customers' place. Therefore, the activity is clearly of sale of food and no service is involved. In view of above judgment, the issue is no longer res-integra, accordingly, following the ratio of the above judgement we are of the view that the appellant's activity of sale of food does not fall under the category of service. Hence the same is not liable for service tax. Accordingly, the impugned order is set aside. Appeal is allowed with consequential relief.

(Pronounced in the open court on 07.03.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)