

GST on Food & Beverages – Goods or Service?

Introduction

In the certainty of law lies the safety of the citizens. An old principle which is only declared prior to elections on international stage. In GST changes area dime a dozen every quarter. GST was to have a single rate for goods and services – a utopian idea. Now, we have dozens of rates and within the same tariff head at times 4 rates!!! A dormant issue has been reignited by the recent clarification on the taxability under GST on cloud kitchens and ice cream parlours – When does the supply of food & beverages tantamount to supply of goods/supply of services? It seems that government is following the popular idiom – ‘if you can’t convince them, confuse them’. In the article, we look at the present state of affairs and provide the way forward for the trade/ restaurants/ hotel/ online supplies and possible suggestions to obtain clarity.

Pre-GST tax position & GST Circular:

Section 7 of the CGST Act, read with Schedule II clause 6(b) reads as follows:

*(6) The following composite supplies shall be treated as a supply of service, namely -
(b) supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (other than alcoholic liquor for human consumption), where such supply or service is for cash, deferred payment or other valuable consideration.*

The inevitable question that arises is, to what extent of the process of preparation, service and consumption of food & beverages would be covered as a ‘service’, and which part would need to be considered as ‘food’.

In the erstwhile regime, based on various case laws (referred below), it is clear that mere supply of food cannot be construed to be a supply of service. Facilities such as serving the food, ambience, personal service, etc. is what brings in the service element.

- *Northern India Caterers Limited Vs Govt of Delhi (1978) 4 SCC 36*
- *Durga Bhavan and Others Vs The Deputy Commercial Tax 1981 47 STC 104 AP*

In the ***Hon’ble High Court of Madras (W.P. Nos.13469 of 2020) in the case of Anjappar Chettinad A/C Restaurant***, salient features of this Service Tax ruling are as follows:

- The actual preparation of the food and drink would not attract the levy of tax.
- 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, décor, music and dance, both live and otherwise, the services of Maître D’Or, hostesses, liveried waiters and the use of fine crockery and cutlery, among others.

- The provision of the aforesaid niceties is 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.

Circular 164/2021-GST dated 6th October 2021, departed with this view, went in a different direction and clarified the following:

- Takeaway and door delivery activity form part of restaurant services [totally against the considered view]
 - Cooking and delivery function includes elements of service [against the settled view]
- Supply of ice cream by ice cream parlours would be supply of goods as there is no cooking /preparation aspects involved.

The Circular is deficient, as it does not consider any of the jurisprudence on the matter and Schedule II 6(b) entry has not been considered in its sum and substance.

Clarification with regard to service element in service of ice cream products at ice cream parlours have not been provided. Seating facility, ambience, cutlery, personal service, etc. can be considered to ensure that activity may be liable at 5% as services instead of goods at 18%.

The Circular may also lead to absurd interpretations such as, manufacturers who supply packaged food items can consider the activity to be a supply of service and not supply of goods.

Various F&B Supplies – Present Practice Vs GST law

Example	Type of Supply	Present Practice	Taxability \$
Juice shop/food carts	Over the sale counter - preparation of food	<i>Service – 5%</i>	<i>Goods – various rates</i>
Cakewala - Bakery	Over the sale counter - pre-prepared food	Goods – 5%/18%	Goods
Provision store	Over the sale counter - sale of packaged food	Goods – various rates	Goods – various rates
Cloud Kitchen & as above#	Over the sale counter - take away/delivery	<i>Service – 5%</i>	<i>Goods – various rates</i>
KFC/Darshini	Self-service restaurant - food	Service – 5%	Service – 5%
Havmor (ice cream)	Self-service restaurant - ice cream (with seating)	Service – 5%	Service – 5%
as above	Self-service restaurant - take away/delivery	<i>Service – 5%</i>	<i>Goods – various rates – ice cream - 18%</i>
Baskin Robbins (ice cream)	Take away/delivery only	<i>Service – 5%</i>	<i>Goods – 18%</i>
Nagarjuna	Service restaurant - food	Service – 5%	Service – 5%

Example	Type of Supply	Present Practice	Taxability \$
Pabbas & other restaurants	Service restaurant - ice cream	Service - 5%	Service - 5%
as above	Service restaurant - take away/delivery	<i>Service - 5%</i>	<i>Goods - 18%</i>
Room service*	Service restaurant - food in room	Service - 5%	Service - 5%

* **Note** – Where accommodation is > Rs. 7,500/day/unit then restaurant rate would be 18% with ITC. 5% mentioned above would have ITC restrictions as per rate notification 11/2017-CT(R).

Note – As per Circular they have categorised the takeaway/delivery activity as services – although this does not have a clear interpretational backing and may not hold up in the court of law. Delivery function cannot be construed as restaurant services as there are a host of other services which are available at a restaurant which cannot be supplied through take away/delivery.

\$ **Note** – Various Goods w.r.t food and beverages listed below which may have varying HSN and rate, generally covered from Chapter 1 to Chapter 23 of Customs Tariff:

1. *Food* – Chaats, Soups, Breads, Dairy products, Sweets & confectionaries, Cut fruits & vegetables, Food items in unit container.
2. *Beverages* – Milk, Butter milk, Coconut water, Lassi, Caffeinated beverages, Fruit juices, Non-aerated beverages, Aerated beverages (may include Cess), Beverages in unit container (may include Cess).
3. *Water* – Potable water, bottled water, aerated & other waters. (Water is not a beverage)
4. *Ice Creams* – Manufactured and packed, prepared at site using ingredients.
5. *Pan Masala, Tobacco & tobacco products*

Goods use for food by end customer – Cups, plates, utensils being non-reusable in nature (classification may vary based on base element, i.e., for example – wood, plastic, etc.)

Classification may also sometimes differ based on preparation of the food & beverages – served as is, boiled, fresh, chilled, roasted, etc.

Some goods may attract Nil rate or exemption, which may lead to ITC reversal under Rule 42/43.

Various Advance Rulings (biased or not) in the past on food/beverages makes the GST-HSN classification exercise paramount.

HSN 2104, 2105, 2106 – covers various food preparations (not elsewhere specifically covered) attracting Nil, 5%, 12%, **18% (general rate)**.

Analysis & Learnings from above

- There is a mismatch between Industry practice and present taxability as per GST law interpretation. May result in tax demands (with interest) for the past which cannot be collected from the customers.
- Ambiguity created by recent Circular can have beneficial construction and may help during litigation proceedings.
- Preparation of food is 'goods', albeit, having certain service elements results in supply of goods and not services.
- Self-service and service-based restaurants fall under same category as certain service elements are common such as – seating facility, ambience, etc.
- Accommodation related in-room dining services would be covered as 'restaurant services' as the activity covers services rendered on or away from the premises.
- When food & beverages supply is considered as 'goods' credit against inward supply would be eligible. This may be beneficial to the industry as a whole to reduce cascading effect of taxes to the ultimate customer.
- Ice cream parlors not having a service element or those with service element but providing takeaway/delivery, faces an issue of 13% additional tax payment with interest from inception of GST (July 2017), considering the supply is considered as goods liable at 18%.
- WAY FORWARD –
 - Representation by Industry on clarification by Government on the contentious issues focusing on need for certainty and based on decided settled principles including sound Court ruling rather than taking a revenue biased view.
 - The Indian Ice-cream Manufacturers' Association (IICMA) has written to the finance ministry to reconsider the levy and make it applicable from October 2021.
 - Clarification that tax demands / endless litigation resulting in taxpayer harassment – reduced ease of doing business due to genuine ambiguity in this area
 - Billing software amendments to include host of HSNs and tax rates (changing frequently)
 - GSTR 1 reporting linking to billing software (automation suggested)
 - Conservative taxpayers – to obtain written legal opinions to avoid disputes for the past and future.

Useful Q&A

1. Whether service charge is liable to GST?

Yes, as this is not a statutory levy, GST would be applicable on charges collected from the customers. HSN & Rate would be same as that of the restaurant services considering composite supply concept.

2. Whether GST is to be charged on alcohol at restaurants?

No, GST would not be applicable on alcohol as it has been specifically kept outside the purview of GST. Although, for the hotelier, such alcohol would be considered as exempt supply for the purpose of ITC reversal calculation as per Section 17 r/w Rule 42/43. Note – Cocktails would be considered as an alcoholic beverage.

3. Whether 18% with ITC can be opted for even if the entity does not have rooms having tariff more than Rs. 7,500/day/unit or any hotel without accommodation services?

The interpretation of the Rate notification indicates that the Government has intentionally not allowed options to the assessee in public interest. Although, legally every taxpayer must have an option to avail either with/without credit option.

4. Whether E-commerce operators are required to charge GST as a deemed supplier of service?

To ensure that the transactions through e-commerce operators are streamlined and tax collections are easier, the burden of tax on food delivery has been shifted to the e-commerce operators (Swiggy, Zomato, etc.) at 5% as restaurant services. This was decided in the 45th GST Council press release, expected to be put into effect from 1st January 2022. The authors are of the view, that such activity may have to be construed as supply of goods and not services.

5. If the new norm that certain supplies are considered as 'Goods' and not 'Services' what would be the GST impact?

- GST would be payable at the respective goods rate. This entails a one-time classification exercise with periodic updation.

- ITC against procurements would be eligible as service rate notification does not apply anymore & section 17(5) allows credit when food & beverages are used to provide outward taxable supplies.
- Common ITC reversal may not be required unless there are exempt goods being supplied.
- A person engaged purely in supply of goods has a higher threshold limit for GST registration i.e., Rs. 40 lakh instead of Rs. 20 lakh against services (not applicable in 10 States).

Conclusion

Ideally, consider the public at large and to ensure easier implementation, for this Industry specifically, all activity to the extent possible must be considered as a service taxable at a single rate. This would help implementation at the ground level and creates a sense of understanding by the common man.

The food and beverages industry impacts almost every person residing in India. F&B industry of Rs. 2 lakh crore (approx.) would provide a significant tax impetus to the government exchequer. The ambiguity in the GST law creates more issues and may lead to taxpayers facing tax demands and notices for the fault of the government. To remedy the issue, representations at higher forums by Industries/Associations would be required. A need to clarify waiver of penalty for bona-fide assessee's can be considered.

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