आयुक्त का कार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeals Ahmedabad Commissionerate
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी, अहमदाबाद-380015
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सत्यमेव जयते

आज़ादी का अमृत महोत्सव

By Regd. Post

DIN No.: 20221164SW000000AACC

(क)	फ़ाइल संख्या / File No.	GAPPL/COM/STP/603/2022-APPEAL/4125-29
(ख)	अपील आदेश संख्या और दिनांक / Order-In-Appeal No. and Date	AHM-EXCUS-003-APP-061/2022-23 and 22.11.2022
(ग)	पारित किया गया / Passed By	श्री अखिलेश कुमार, आयुक्त (अपील) Shri Akhilesh Kumar, Commissioner (Appeals)
(घ)	जारी करने की दिनांक / Date of issue	23.11.2022
(ङ)	Arising out of Order-In-Original No. 02/AC/DEMAND/2021-22 dated 13.12.2021 passed by the Assistant Commissioner, CGST & CE, Division-Mehsana, Gandhinagar Commissionerate	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	M/s Decent Restaurant Address:- F-1-F-7, Devarshi Enclave, Visnagar Road, Mehsana, Gujarat-384001

कोई व्यक्ति इस अपील-आदेश से असंतोश अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील अथवा पुनरीक्षण आवेदन प्रस्तुत कर सकता है, जैसा कि ऐसे आदेश के विरुद्ध हो 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 शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली: 110001 को की जानी चाहिए :-

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 : -

(क) यदि माल की हानि के मामले में जब ऐसी हानिकार खाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार मे हो माल की प्रकिया के दौरान हुई हो।

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.

(ख) 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।

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.

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

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

(घ) अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो डयूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अंपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं 2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

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.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतरमूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ का मुख्य शीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर-6 चालान की प्रति भी होनी चाहिए।

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.

(3) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम होतो रूपये 200/- फीस भुगतान की जाए और जहाँ संलग्नरकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान 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 एवं सेवा कर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गत:-
Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(2) उक्तलिखित परिच्छेद में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2nd माला, बहुमाली भवन, असरवा, गिरधरनागर, अहमदाबाद-380004।

To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2ndfloor, Bahumali Bhawan, Asarwa, Girdhar Nagar, Ahmedabad: 380004. In case of appeals other than as mentioned above para.

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 होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को 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 notwithstanding 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 शुल्क अधिनियम 1970 यथा संषोधित की अनुसूची -1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर रू 6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

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) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

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

(6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) एके प्रति अपीलो के मामले में कर्तव्यमांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है। (Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवाकर के अंतर्गत, शामिल होगा कर्तव्य की मांग (Duty Demanded)।

(1) खंड (Section) 11D के तहत निर्धारित राशि;
(2) लिया गलत सेनवैट क्रेडिट की राशिय;
(3) सेनवैट क्रेडिटं नियमों के नियम 6 के तहत देय राशि।

यह पूर्व जमा ' लंबित अपील' में पहले पूर्व जमा की तुलना मेंए अपील' दाखिल करने के लिए पूर्व शर्त बना दिया गया है।

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:

(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules.

(6)(i) इस 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."

अपीलिय आदेश / ORDER-IN-APPEAL

This Order arises out of an appeal filed by M/s. Decent Restaurant, F-1-F-7, Devarshi Enclave, Visnagar Road, Mehsana - 384001 [hereinafter referred to as the appellant] against OIO No. 02/AC/Demand/2021-22 dated 13.12.2021 [hereinafter referred to as the impugned order] passed by Assistant Commissioner, Central GST, Division: Mehsana, Commissionerate: Gandhinagar [hereinafter referred to as the adjudicating authority].

2. Briefly stated, the facts of the case is that the appellant are holding Service Tax Registration No. AAFFD0547CSD001 and are engaged in providing Restaurant Services. During the course of EA-2000 Audit of the records of the appellant conducted by the Officers of Central Tax Audit Commissionerate, Ahmedabad, it was observed that during the period April, 2015 to June, 2017, the appellant had not paid service tax on the take away parcels as well as home delivery of food parcels claiming it to be exempt service. The appellant was issued a Query Memo dated 16.07.2020 wherein they were requested to pay service tax on food parcels/packed foods. The appellant vide letter dated 27.07.2020 informed that the Finance Ministry vide Circular 173/8/2013-ST dated 07.10.2013 had clarified on levy of Service Tax in relation to serving of food or beverages by a restaurant, eating joint or mess. They further contended that in case of Home delivery of food, the dominant nature of the transaction is sale of goods and not providing service and therefore, service tax would not be applicable on such cases. They also relied upon the letter No. ST-20/STD/Misc/Sevottam/62/12/4693 dated 13.08.2015 of Service Tax department, Chandigarh vide which it has been clarified that free home delivery / pick up of goods is not liable to service tax.

2.1 The reply of the appellant was not accepted by the Audit and the appellant was issued Show Cause Notice No. 30/2020-21 dated 28.09.2020 from F. No. VI/1(b)-184/Decent Restaurant/IA/AP-57/19-20 wherein it was proposed to recover service tax amounting to Rs. 2,12,558/-, for the period F.Y. 2015-16 to F.Y. 2017-18 (upto June-2017), under the proviso to Section 73 (1) of the Finance Act, 1994 along with interest under Section 75 of the Finance Act, 1994. Imposition of penalty under Section 78 of the Finance Act, 1994 was also proposed.

2.2 The SCN was adjudicated vide the impugned order wherein the demand for service tax was confirmed along with interest. Penalties equivalent to the service tax confirmed were also imposed under Section 78 of the Finance Act, 1994.

3. Being aggrieved with the impugned order, the appellant has filed the instant appeal on following grounds:

(i). They are registered under the category of Restaurant services with Service Tax department and are paying taxes regularly. That the charges for food served in a restaurant is a composite charge for the food as well as the services. Being a composite charge for levy of service tax, an abatement was allowed vide Rule 2C of the Service Tax (Determination of Value Rules) which said that service tax should be charged only on 40% of the Food Bill (inclusive of service charge) and not on the total bill.

(ii) They also relied on the CBIC Circular No. 173/8/2013-ST dated 07.10.2013 wherein it was clarified that "Services provided in relation to serving food and 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." The department has clarified in writing that in case of income from delivery of food, the dominant nature of the transaction is that of sale of goods and not providing services and therefore service tax would not be applicable in case of home delivery of food.

(iii) They also relied on letter D.O.F. No. 334/3/2011-TRU dated 28.02.2011 vide which the service tax on restaurants was introduced in the year 2011 and while introducing the said levy, it was intended to clarify that service tax 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. They also reasoned that service tax is not leviable on takeaway or home deliveries, as no service element is involved. Such deliveries made free of cost are in the nature of sale of meals rather than a service.

(iv) They further relied on letter C. No. ST-20/STD/Misc/Sevottam/62/12/4693 dated 13.08.2015 of Service Tax department, Chandigarh vide which it has been clarified that free home delivery / pick up of goods is not liable to service tax.

(v) They further stated that, Restaurant Service is declared service as per clause (i) of Section 66E of the Finance Act, 1994 and provision of the same is as under:

> *(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.*

From, the above it is clear that service tax is payable only on service portion of transaction. Inferences drawn from the above explanations are quite evident that as far as take away or free home deliveries are concerned, they are out of purview of service tax. So, take aways are fully exempt, hence, no service tax liability arises since it's a mere sale of eatables with absence of any service element.

(vi) They relied upon the judgment of the Hon'ble Madras High Court in [W.P No. 13469 of 2020, 28789 & 28095 of 2019 and 1748 & 5935 of 2021 decided on May 20, 2021]. It was held in the said judgment that provision of food and drink to be taken-away in parcels by restaurant tantamount to the sale of food and drink and thus, shall not attract service tax under the Finance Act.

(a) The Hon'ble Madras High Court relied upon the decision of the Hon'ble Supreme Court in case of federation of Hotel and Restaurants Association of India Vs. Union of India [2018 (359) ELT 97 (SC] ;

(b) The Hon'ble court also relied upon the definition of service under Section 65B (44), which excludes the transfer of title in goods by way of sale. In light of this exclusion, parcel sales or take away food would stand outside the ambit of service tax.

(c) 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 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, the provision of food and drink to be taken away in parcels by the restaurant tantamounts to sale of food and drink and does not attract service tax.

Hence, from the above they construed that they were not liable for service tax on service provided by way of take away service from restaurant. So they requested to drop the demand of service tax.

(vii) They further contended that, the entire demand was time barred as the period covered was from 01.04.2014 to 30.06.2017 and the SCN was issued on 28.09.2020 invoking extended period of limitation. However, since there was no suppression or willful misstatement on part of the appellant hence, extended period cannot be invoked and the SCN is liable to be dropped.

(viii) As per above para since there was no suppression on part of the appellant therefore Penalty under Section 78 of the Finance Act, 1994 cannot be imposed. They relied on the decision of Hon'ble Gujarat High Court in the case of Steel Cast Ltd. 2011 (21) STR 500 (Guj.).

(ix) As the issue involved in the case pertains to interpretation of statutory provisions hence as a settled principle of law, no penalty can be levied. In this context they relied on the following citations:

Bharat Wagon & Engg.Co.Ltd Vs Commissioner of Central Excise, Patna, (146) ELT 118 (Tri.-Kolkata)

Goenka Woollen Mills Ltd. Vs Commr.of cen.Ex., Shillong, 2001(135) ELT 873 (Tri.Kolkata)

Bhilwara Spinners Ltd. Vs Commr. of cen.Excise, Jaipur, 2001 (129) ELT 458 (Tri. Delhi).

4. Personal hearing in the case was held on 09.09.2022. Shri Vipul B. Khandhar, Chartered Accountant, appeared as authorized representative of the appellant for hearing. He reiterated the submissions made in appeal memorandum. He also relied upon the decision in case of Anjappar Chettinad A/c Restaurant Vs

GST, Chennai, South – 2021 (51) GSTC 125 (Mad.) and submitted additional written submission during the hearing.

4.1. In the additional written submissions, the appellant submitted copies of the decisions of Hon'ble Madras High Court in the case of Anjappar Chettinad A/C Restaurant Vs Jt. Commissioner of GST & Central Excise, Chennai South [2021 (51) GST 125 (Mad.)] and Hon'ble Supreme Court of India in the case of Federation of Hotel and Restaurant Associations of India Vs Union of India – [2018 (359) ELT 97 (S.C)]. He also submitted copies/print out of electronic Sales Register of the appellants for the period 01.04.2015 to 30.06.2017, copies of Gujarat VAT returns for the period 01.04.2016 to 31.03.2017 and from 01.03.2017 to 31.03.2018.

5. I have gone through the facts of the case, submissions made in the Appeal Memorandum, oral submissions made during the personal hearing, additional written submissions and materials available on records. The issue before me for decision is whether the appellant is liable to pay service tax in respect of take away parcels of food and home delivery of food from their restaurant. The demand pertains to the period F.Y. 2015-16 to F.Y. 2017-18 (upto June, 2017).

6. It is observed that in the SCN, the demand of service tax in respect of the take away food parcel and home delivery of food has been made primarily on the basis of Section 66 E (i) of the Finance Act, 1994, which is reproduced as below:

> *"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".*

6.1 A plain reading of the above provision of law indicates that what is taxable in an activity involving supply of food or drinks is only the service portion. I further find that the adjudicating authority has observed that there are no specific provisions in CBEC Circular No. 173/8/2013-ST dated 07.10.2013, which grants exemption to home delivery of food.

6.2 It is also observed that while arriving at the decision of confirming the demand, the adjudicating authority has heavily relied on the decision of Hon'ble *Bombay High Court in the case of Indian Hotels and Restaurants Association Vs.*

Union of India [2014 (34) ELT 522] wherein the Hon'ble Court has held that the provision of take-away food and drinks involves rendition of service and the mode of sale i.e. by parcels has no bearing in the matter. Upon going back to the Judgement of the Hon'ble Court, at Para-34 the Hon'ble Court has re-iterated the decision of the Hon'ble Supreme Court as under:

> *34. In the State of Punjab v. M/s. Associated Hotels of India Limited reported in (1972) 1 SCC 472, the respondents before the Hon'ble Supreme Court carried on business as hoteliers and....*
>
> ...
>
> *14. The transaction in question is essentially one and indivisible, namely, one of receiving a customer in the hotel to stay. Even if the transaction is to be disintegrated, there is no question of the supply of meals during such stay constituting a separate contract of sale, since no intention on the part of the parties to sell and purchase food stuff supplied during meal times can be realistically spelt out. No doubt, the customer, during his stay, consumes a number of food stuffs. It may be possible to say that the property in those food stuffs passes from the hotelier to the customer at least to the extent of the food stuffs consumed by him. Even if that be so, mere transfer of property, as aforesaid, is not conclusive and does not render the event of such supply and consumption a sale, since there is no intention to sell and purchase. The transaction essentially is one of service by the hotelier in the performance of which* ***meals are served as part of and incidental to that service****, such amenities being regarded as essential in all well conducted modern hotels. The bill prepared by the hotelier is one and indivisible, not being capable by approximation of being split up into one for residence and the other for meals. No doubt, such a bill would be prepared after consideration of the costs of meals, but that would be so for all the other amenities given to the customer. For example, when the customer uses a fan in the room allotted to him, there is surely no sale of electricity, nor a hire of the fan. Such amenities, including that of meals, are part and parcel of service which is in reality the transaction between the parties.*
>
> .....

I find that the words and phrases quoted by the adjudicating authority (in bold letters supra) was actually rendered by the Hon'ble Apex Court with an intent to explain the term 'Transaction'. Considering the facts and circumstances of the present case, I find that the reliance on this case law is not relevant.

6.3 It is also observed that the adjudicating authority has relied on the decision of the Hon'ble Delhi High Court in the case of Federation of Hotels and Restaurants Association Vs Union of India arising out of Writ Petition (C) No. 6482 of 2011 wherein the Hon'ble Court held that:

> *" Parliament has legislative competence to enact Section 65(105)(zzzzv) of Finance Act, 1994. Carving out of service portion of composite contract of supply of food and drinks has sound constitutional basis as deploying legal fiction is legally permissible. Even if some part of composite transaction involves rendering of service, Union Government has power to bring to tax that portion.*

Accordingly, there was no infirmity in levying Service Tax on provision to any person by restaurant having facility of air-conditioning in any part of its establishment serving food or beverage, including alcoholic beverages or both. Further, Section 66E(i) making said service as 'declared service' was also valid.

It was further held that Rule 2C of Service Tax (Determination of Value) Rules, 2006 was also constitutionally valid as it enables assessing authority to put definite value to service portion of composite contract of supply of goods and services in air-conditioned restaurant. Correspondingly, there is abatement for that portion which pertains to supply of goods in form of food and drinks which would be amenable to sales tax or Value Added Tax. Further levy and collection mechanism has also been provided in Rules ibid.

Upon comparing the facts and circumstances of the present case with the above citation, I find that the decision of the Hon'ble Delhi High Court was delivered in a totally different context and the same cannot be generalized to be made applicable to the facts of this case.

6.4 I also find that the findings of the adjudicating authority are not adequately supported by any proper evidence / citations, rather they are based on assumptions. Further, even in the SCN issued to the appellant, there is no allegation that the appellant is collecting service charge as part of the cost of the takeaway food parcel or home delivery of food. In the absence of any allegation in the SCNs and also considering the fact that there is no evidence in the findings of the adjudicating authority that the cost of takeaway parcels and home delivery includes service charge, the findings arrived at by the adjudicating authority are not sustainable.

7. The appellant had, in their submissions before the adjudicating authority, relied upon CBIC Circular No. 334/3/2011-TRU dated 28.02.2011. However, the same was rejected by the adjudicating authority on the ground that the same is no more in vogue, as the Negative List of Services regime was made effective from 01.07.2012. However, for better understanding of the issue, the relevant part of the said Circular dated 28.02.2011 is reproduced as below:

"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." [Emphasis supplied]

8. It is further observed that the issue involved in the case has been decided by the Hon'ble Madras High Court in the case of Anjappar Chettinad A/C Restaurant Vs. Joint Commissioner, GST & Central Excise, Chennai South – 2021 (51) GSTL 125 (Mad.), which has been also relied upon by the appellant. I find that, in the said judicial pronouncement, the Hon'ble High Court, had at Para 27 of their judgment, held that:

> *"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 categoric 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." [Emphasis supplied]*

8.1 It is further observed that the Hon'ble CESTAT, Ahmedabad has in the case of Hotel Utsav Vs. CCE & ST, Surat – I, vide Final Order No: 10218/2022 dated 23.02.2022 (Service Tax Appeal No. 10130 f 2021) held that "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 …". It was held as under:

> "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."

8.3. Respectfully following the above judicial pronouncements, I am of the considered view that the appellant is not liable to pay service tax in respect of take away parcels of food and home delivery of food from their restaurant. The demand confirmed vide the impugned order is not legally sustainable and is liable to be set aside.

9. In view of the above, the demand for service tax, confirmed vide the impugned order along with interest and penalty are set aside and the appeal is allowed with all consequential reliefs.

10. अपीलकर्ताद्वारादर्जकीगईअपीलकानिपटाराउपरोक्ततरीकेसेकियाजाताहै।
The appeals filed by the appellant stands disposed of in above terms.

22nd November, 2022.

(AKHILESH KUMAR)
Commissioner (Appeals)
Dated: 22nd November, 2022

Attested:

(Somnath Chaudhary)
Superintendent (Appeals),
CGST, Ahmedabad.

BY RPAD / SPEED POST

To
Decent Restaurant, F-1-F-7,
Devarshi Enclave, Visnagar Road,
Mehsana - 384001
Copy to:

1. The Principal Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Gandhinagar.
3. TheAssistant Commissioner, CGST & Central Excise, Division : Mehsana, Commissionerate : Gandhinagar
4. The Dy/Assistant Commissioner (Systems), CGST Appeals , Ahmedabad. (for uploading the OIA)
5. Guard File.
6. P.A. File.