आयुक्त (अपील) का कार्यालय,

Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद

Central GST, Appeal Commissionerate, Ahmedabad

जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

07926305065- टेलेफैक्स07926305136

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(ST)32/EA-2/Ahd-South/2019-20/16037 TO 16041

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-037-APP-36-2020-21**

दिनाँक Date : **31-08-2020** जारी करने की तारीख Date of Issue 20/10/2020

श्री अखिलेश कुमार आयुक्त (अपील) द्वारा पारित

Passed by Shri. Akhilesh Kumar, Commissioner (Appeals)

ग Arising out of Order-in-Original No **CGST/Dem/04/BSM/AC/D-VIII/2019-20** दिनाँक: **18.10.2019** issued by Assistant Commissioner, Div-VIII, Ahmedabad South.

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

M/s Patel Enterprise, Dev Aurum, Shop No.9, Anandnagar Char Rasta, Anandnagar, Ahmedabad-380015.

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 issued under the Central Excise Act 1944,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।

(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) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने 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 में हो माल की प्रकिया के दौरान हुई हो।

(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.

(b) 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।

(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 मामले में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) 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।

(c) 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 जो ड्यूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (न.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(d) 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 अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनॉक से तीन मास के भीतर मूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष 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.

(2) रिविजन आवेदन के साथ जहॉं संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/– फीस भुगतान की जाए और जहॉं संलग्न रकम 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 सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:–

Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) **केंद्रीय जीएसटी** अधिनियम, 2017 की धारा 112 के अंतर्गत:–

Under Section 112 of CGST act 2017 an appeal lies to :-

(क) उक्तलिखित परिच्छेद 2 (1) क 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

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor,Bahumali Bhawan,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 होते हुए भी कि लिखा पढ़ी 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 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 शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर 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.

(24) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपीलो के मामले में **कर्तव्य मांग** (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)

(25)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

(i) *(Section)* **खंड** 11D **के तहत निर्धारित राशि;**

(ii) **लिया गलत सेनवैट क्रेडिट की राशि;**

(iii) **सेनवैट क्रेडिट नियमों के नियम** 6 **के तहत देय राशि.**

⇨ **यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, 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:

(xxviii) amount determined under Section 11 D;
(xxix) amount of erroneous Cenvat Credit taken;
(xxx) amount payable under Rule 6 of the Cenvat Credit Rules.

इस 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।

6(I) 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."

II. **Any person aggrieved by an Order-In-Appeal issued under** the Central Goods and Services Tax Act,2017/Integrated Goods and Services Tax Act,2017/ Goods and Services Tax(Compensation to states) Act,2017,may file an appeal before the appellate tribunal whenever it is constituted within three months from the president or the state president enter office.

ORDER-IN-APPEAL

This order arises out of an appeal filed by the Assistant Commissioner, Central GST, Division – VIII, Ahmedabad South (hereinafter referred as "the department") in terms of Review Order No. 28/2019-20 dated 30.01.2020 issued by the Principal Commissioner, Central GST, Ahmedabad South (hereinafter referred as the "Reviewing Authority") against the Order-in-Original No. CGST/Dem/04/BSM/AC/D-VIII/2019-20 dated 18.10.2019 (hereinafter referred as the "impugned order") passed by the Assistant Commissioner, Central GST, Division – VIII, Ahmedabad South (hereinafter referred as "the adjudicating authority") in case of M/s. Patel Enterprise, Dev Aurum, Shop no. 9, Anandnagar Char Rasta, Anandnagar, Ahmedabad, Gujarat-380015 (hereinafter referred as "the respondent").

2. Facts of the case, in brief, are that the respondent are engaged in providing Restaurant Service and holding Service Tax Registration Number AARFP1445KSD001. Audit of the records of the respondent was conducted for the Financial Year 2015-16 and Financial Year 2016-17 by the officers of Central GST, Audit, Ahmedabad. It was observed vide Revenue Para-2 of FAR No. 692/2017-18 Service Tax dated 02.01.2018 issued by the Audit Officers that the respondent had not paid the Service Tax on the take away parcel service claiming it to be exempted service. They were informed vide letter dated 10.11.2017 that such service would attract Service Tax. The respondent did not agree with the audit para and hence they were served with the Show Cause as per details given below demanding Service Tax along with interest and penalty under Sections 76 and 78 of the Finance Act, 1994:

Table-1

Sr. No.	Show Cause Notice File No.	Date	Issued by	Period	Amount of ST not paid (Rs.)
1.	VI/1(b)-215/C-IV/Audit/AP-28/Ahmd/17-18	19.01.2018	Assistant Commissioner Circle-IV, Central Tax Audit, Ahmedabad	F.Y. 2015-16 to F.Y.2016-17	2,98,278/-
2.	D.VIII/O&A/12A/Patel/18-19	14.02.2019	Assistant Commissioner Division VIII, Central GST, Ahmedabad South	F.Y.2017-18 (upto June,2017)	88,326/-

2.1. The adjudicating authority vide the impugned order dropped the demand against the respondent assessee.

2.2. Being aggrieved by the impugned order, the department has filed this appeal on following grounds:

(a) The TRU letter D.O.F 334/3/2011-TRU dated 20.2.2011 was issued under the pre-negative list regime under which the classification system of services was in existence and the clarification was issued in light of the definition of restaurant services at Section 65 (105)(zzzzv) of the Finance Act, 1994 which reads as under:

> *services provided or to be provided, to any person, by a restaurant, by whatever name called, having the facility of air-conditioning in any part of the establishment, at any time during the financial year, which has license to serve alcoholic beverages, in relation to serving of food or beverage, including alcoholic beverages or both, in its premises*

With the introduction of the negative-list regime, the provisions of Section 65(105)(zzzzv) of the Finance Act, 1994 were omitted w.e.f. 1.7.2012 by virtue of Notification No. 20/2012 ST dated 20.6.2012. W.e.f. 1.7.2012, the same was declared as a service under the provisions of Section 66E(f) of the Finance Act, 1994 which is defined as under:

> *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.*

(b) The letter C.No. ST-20/STD/Misc./Sevottam/62/12/4693 dated 13.8.2015 issued by the Deputy Commissioner, Service Tax Division, Chandigarh does not clarify the period for which the clarification has been given. Further, the same is a letter addressed to M/s Apex Restaurants P Ltd. and would not be applicable universally. It is a settled position of law that only instructions of clarification issued under Section 94(2)(m) of the Finance Act, 1994 are binding on the department.

(c) The adjudicating authority's reliance on the case of M/s Kerala Bar Hotel Association in Writ Appeal No.1125 of 2013 reported at 2014 (36) STR 1205 (Ker) is misplaced since the matter under consideration in the said case was prior to 1.7.2012. Further, the said case has not attained finality and an appeal has been admitted by the Supreme Court against the said judgment as reported at 2018 (16) GSTLJ170 (SC).

3. The respondent has vide letter dated 27.02.2020 filed cross-objection in the matter. It was contended that Rule 2C of the Service Tax (Determination of Value) Rules, 2006 will not be applicable to transaction involving home delivery of food from the restaurant as in such cases the dominant nature of transaction is sale. It was further contended that when the legislature has provided for charge of service tax on value of service portion wherein goods, being food or any other article of human consumption or any drink are served in any manner, in a restaurant, the meaning of same can not be extended so as to cover even the transaction involving home delivery of food or any other article of human consumption or any drink. It was further contended that their firm was operating under franchise model and operating a software which would generate invoices in case of take away food which did not contain service tax. Hence, they were under

bonafide belief that service tax was not applicable on transactions involving home delivery or take-away.

4. Personal Hearing in the case was held on 24.08.2020. Shri Brij Shah, Chartered Accountant, and Shri Samir Patel, Partner, appeared for the hearing. The CA re-iterated the submissions in cross-objection. He further stated that the review order was passed after three months and hence it was hit by limitation.

5. Before proceeding onto the merits of the issue involved, let me first examine the contention of the respondent that the review order is hit by limitation as it was passed after three months. The appeal under reference is filed under Section 84 of the Finance Act, 1994 on the basis of Review Order issued under the Section and sub-section 2 of the said Section stipulates for issue of review order under sub-section (1) within three months from the date of communication of the order under review. It is observed that the impugned order was passed on 18.10.2019 and it was communicated to the Review Section on 06.11.2019. The Review Order in the matter is issued on 30.01.2020, i.e. within three months from the date of communication of the order and hence the Review Order is issued well within the period stipulated under Section 84(2) of the Finance Act, 1994. Therefore, I do not find any merit in the contention of the respondent that the Review Order is hit by limitation and accordingly, the same is rejected.

5. I have carefully gone through the facts of the case, grounds of appeal in the Appeal Memorandum and the submissions made by the respondents, both written as well as oral. It is observed that the issue to be decided in the present appeal is whether the respondents are liable for payment of service tax on the take-away parcels/home delivery parcels which were sold in their restaurant. The demands pertain to period 2015-16, 2016-17, and 2017-18 (up to June 2017).

6. It is observed that the department has contended that since the demand pertained to negative-list regime i.e. the period after 1.7.2012, the adjudicating authority had committed error in dropping demand relying upon the legal provisions and clarifications issued in context of legal provisions of period before 1.07.2012. I find force in the argument of the department as the matter in the instant case has to be dealt in terms of legal provision in the negative list regime only. I find that during the relevant period, the legal provisions contained under Section 66 E(i) of the Finance Act, 1994 are applicable which reads as under:

> "*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 part of their activity*".

From the above provision, it is clear that any activity wherein food or any other article of human consumption or any drink is supplied in any manner as a part of activity, then the service portion involved in the said activity would be a declared service within the

meaning of Section 66E(i) of the Act. Therefore, for ascertaining the taxability of the activity, the manner of supply of goods would be irrelevant and the crucial factor would be presence of element of service in the said activity. It is the case of the department that there is a service element involved in the activity undertaken by the restaurant irrespective of the fact whether the food is consumed within the restaurant or supplied as take away parcels or home delivery. Such a view has been put forth on the grounds that the restaurant prepares and supplies food or beverages or articles of human consumption as per the choice of the customer and that for the purpose of supplying a particular food preparation, the restaurant undertakes the activities of procuring the necessary ingredients, necessary pre-processes before cooking, packing in containers, etc. for the customer and that it is only after undertaking the said activities that the restaurant is in a position to supply the food/beverages to the customers and in a nut shell, the activity of the restaurant is a composite activity comprising of service portion as well as supply of food and that the restaurant is inevitably required to undertake the above-mentioned processes for the customer during the course of delivery of the take away parcels and home delivery and it is an undisputed fact that the restaurant charges the customers for such take away parcels and thus the ingredients of service as defined at Section 65B(22) (44) are fulfilled in as much as the restaurant is undertaking an activity for the customers for a consideration. It is also contended that the act of preparing and offering food tantamount to service of food.

7. It is clear from the above contentions that what the department intend to describe as an element of service in the matter is the activity of the preparation of food for the customer by the restaurant. This view of the department is not tenable in law in view of the fact that the activity of preparation of food by a restaurant is an activity which falls within the ambit of Central Excise Act, 1944. Food preparations which are prepared and served in a hotel, restaurant or retail outlet whether or not such food is consumed in such hotel, restaurant or retails outlet, were exempted as they were chargeable to "Nil" rate of duty as per entries at Sr.No.12 and 13 of Central Excise Notification No.12/2012-CE 17.03.2012 which was in operation till 30.06.2017. The excisability of various food preparations made in the kitchens of Hotels/Restaurants have been confirmed by the Hon'ble Tribunal, Delhi in their decision in the case of Bharat Hotels Ltd Vs. Commissioner of Central Excise, Delhi-I [2018 (15) GSTL 71 (Tri.-Del.)]. Further, the processes which amounted to "manufacture or production of goods", which has been defined in section 65B of the Act as a process on which duties of excise are leviable under section 3 of the Central Excise Act, 1944 (1 of 1944), were covered under Negative List under Section 66D of the Act till 30.03.2017 and thereafter were covered under Sr.No.30 of the Mega Exemption Notification No.25/2012-ST dated 20.06.2012. The Central Board of Excise & Customs in their Service Education Guide, issued in the context of 'Negative List Regime' has clarified that if Central Excise duty is leviable on a

particular process, as the same amounts to manufacture, then such process would be covered in the negative list even if there is a central excise duty exemption for such process. In view of the position of law as discussed above, it is observed that the activity of preparation of food by a restaurant for its customer would not fall within the ambit of 'service' as defined under the provisions of the Act. The activities of procuring the necessary ingredients, necessary pre-processes before cooking, packing in containers, etc., which the department intend to characterize as services are in fact activities which are integral part of the activity of preparation of food, which falls within the ambit of excise law. Further, the said activities also cannot be said to have carried out for the customers as the customer is concerned with the supply of food he ordered which the restaurant prepares as per their recipe. Therefore, it is held that service element cannot be attributed to such activities.

8. It is observed that in the case of take away parcels or home delivery of food, the customer is only purchasing the food upon payment and no service of any kind is availed by him. What he pays to the restaurant is the cost of food he purchased. The nature of transaction in the case is purely outright sale of food. The activity involved is delivery or supply of goods against payment and no service element is involved in the said activity. Delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution explicitly stand excluded from the definition of 'service' as defined under Section 65B(44) of the Act. Apart from the activities discussed in the previous para which falls under the ambit of excise law, the department could not bring out any other aspect of service in the activity of supply of goods in the case of take away parcels or home delivery. That being so, it is to be concluded that there is no element of service in such activity of supply of goods in the form of take away parcels or home delivery and consequently there cannot be any levy of service tax for the said activity.

9. Further, the department's contention that there is a sea change in the definition of the service under consideration seems to be somewhat farfetched. The CBEC, in their Education Guide issued on the context of service tax matter under negative list regime, has explained the nature of activities covered in the said declared service at Section 66E(i) of the Act which are basically supply of food or drinks in a restaurant; and supply of food and drinks by an outdoor caterer. It is undisputed that these two activities were taxable in the pre-negative list regime also as two separately classified services. In the negative list regime, since classification based taxability has been done away with, the said two services were clubbed together and brought under a common category as declared service at Section 66(E)(i) of the Act. It does not seem to be the case that the scope of element of service provided by a restaurant has been enlarged to cover even cases of supply of food in the form of take away parcels or home delivery, as contended

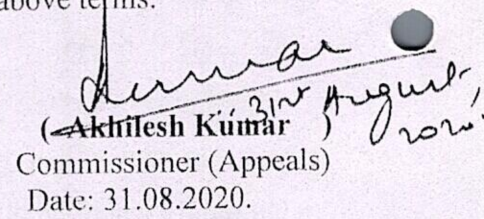
by the department. It is more so when the normal nature of activities carried out or provided by a restaurant remains more or less the same during both the pre-negative list era and the negative list era. It is not the case that the phrase 'supplied in any manner' used in the definition at Section 66(E)(i) of the Act *ipso facto* brings into taxability all activities of supply of food or drinks. It is so only when there exist an element of service in such activity. Therefore, the taxability of the activities carried out by a restaurant remains unchanged during both the tax regimes i.e prior to 01.07.2012 and post 01.07.2012. It is pertinent to note that the nature of services provided in the context of services provided by a restaurant has been clearly explained in the letter D.O.F.No.334/3/2011-TRU dated 28.02.2011 issued by the Ministry on the eve of Budgetary changes made in the service tax law through Finance Bill, 2011. While explaining the scope of service, it has been clarified therein that 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**. This clarification unambiguously makes it clear that in case of pick-up or home delivery, the nature of transaction involved is mere sale of food. When that is so, no element of service can be attributed to the said transaction in the new regime especially when the intention of the new regime is also to cover services only and there is no factual change in the nature of activities carried out by the restaurant during the said regime. Moreover, the sale of goods explicitly stand excluded from the purview of taxability in the new regime also.

10. It is an undisputed fact that the customer in the case of take away parcels or home delivery does not get or avail the privileges or benefits offered to other customers who dine at such restaurants, be it ambience, air conditioning, live entertainment or personalized hospitality. When no such privilege is availed by a customer, there does not arise any question of paying or charging any consideration for any such activity. It is not the case of the department that the appellant in the present case had charged any such amount from the customers of take away parcels or home delivery. In the absence of any evidence to prove that the amount charged by the appellant from the customers of take away parcels or home delivery was not solely against cost of food but also included consideration for service, it cannot be alleged that the nature of supply of goods in such cases is composite in nature so as to apply the provisions of Rule 2C of the Service Tax (Determination of Value) Rules, 2006. Further, I find merit in the contention of the respondent and adjudicating authority that the basic requirement of 'serving of food' is absent in case of take away parcels or home delivery of food by a restaurant. The department's contention in this regard is not tenable as the word "serving" in the context of restaurant services would mean serving the ordered food to the customer at his table inside the restaurant by waiters.

11. In view of the above discussions, it is to be concluded that there is no element of service in the activity of supply of food by the appellant in the case of take away, parcels or home delivery and when there is no service, no service tax is leviable on such supply of food by the restaurant. Therefore, the contentions raised by the department on the merit of the issue are not sustainable in law on facts and merits and hence deserves to be rejected.

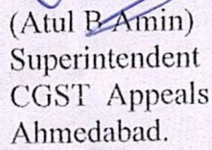
12. Accordingly, I do not find any reason to interfere with the decision taken by the adjudicating authority and therefore, I uphold the impugned order and reject the appeal filed by the appellant being devoid of merits.

13. 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.



(Akhilesh Kumar)
Commissioner (Appeals)
Date: 31.08.2020.

Attested:



(Atul B Amin)
Superintendent
CGST Appeals
Ahmedabad.

BY R.P.A.D./SPEED POST

To

The Assistant Commissioner,
Central GST, Division-VIII,
Ahmedabad South Commissionerate. Appellant

M/s. Patel Enterprise,
Dev Aurum, Shop no. 9,
Anandnagar Char Rasta,
Anandnagar, Ahmedabad,
Gujarat-380015. Respondent

Copy to:

1. The Principal Chief Commissioner, CGST & C.Ex. , Ahmedabad Zone.
2. The Principal Commissioner, CGST & C.Ex., Ahmedabad South Commissionerate.
3. The Asst. Commissioner (System), CGST & C.Ex., Ahmedabad South Commissionerate. (for uploading the OIA)
4. Guard File.
5. P. A. File.