आयुक्त (अपील) का कार्यालय
Office of the Commissioner (Appeals)
केंद्रीय जीएसटी अपील आयुक्तालय - अहमदाबाद
Central GST Appeal Commissionerate- Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

टेलेफैक्स26305136 - 079 : 26305065-079 :

DIN-20210364SW0000444C33

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/86/2020

ख अपील आदेश संख्या Order-In-Appeal No. **AHM-EXCUS-001-APP-77/2020-21**
दिनाँक Date : 25.02.2021 जारी करने की तारीख Date of Issue : 11.03.2021

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

ग Arising out of Orders-in-Original No. 09/DC/Div-I/MK/2019-20 dated 20.02.2020.

ध अपीलकर्ता का नाम एवं पता Name & Address of the Appellant

M/s Atma Mangal Corporation,
Shrusti-III, Shop No.1/GF,
Near Zagadiya Bridge,
Nr. L.G. Corner, Maninagar,
Ahmedabad.

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 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.

(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 जो डयूटी 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 (नं.2) 1998 धारा 109 द्वारा नियुक्त किए 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 अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक 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 जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/– फीस भुगतान की जाए और जहाँ 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 अपीलः–

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

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–बी/35–इ एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत के अंतर्गतः–

Under Section 35B/ 35E of Central Excise Act, 1944 or Under Section 86 of the Finance Act, 1994 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.

(2) The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of 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 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 adjudicating authority shall bear 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 contained in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) 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)

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:

(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.

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."

ORDER-IN-APPEAL

This appeal has been filed by M/s Atma Mangal Corporation, Shrusti-III, Shop No.1/GF, Near Zagadiya Bridge, Nr. L.G. Corner, Maninagar, Ahmedabad (hereinafter referred as "*the appellant*") against the Order-in-Original No. 09/DC/Div-I/MK/2019-20 dated 20.02.2020 (hereinafter referred as the "*impugned order*") passed by the Deputy Commissioner, Central GST, Division – I, Ahmedabad South (hereinafter referred as "*the adjudicating authority*").

2. Briefly stated, the facts of the case are that the appellant are engaged in providing Restaurant Service and holding Service Tax Registration No.AARFA2433LSD002. During the course of audit of the financial records of the appellant by the officers of Central GST, Audit, Ahmedabad, it was observed that the appellant had not paid the Service Tax on the take away food and home delivery of food parcel claiming it to be exempted service. They were informed vide letter dated 20.02.2019 that such service would attract Service Tax. The appellant did not agree with the audit para and hence they were served with a Show Cause No.VI/1(b)-334/C-I/AP-04/Audit/Ahd/18-19 dated 28.03.2019 demanding Service Tax amounting to Rs.13,43,521/- along with interest and penalty under Section 78 of the Finance Act, 1994 (hereinafter referred to as "*the Act*") covering the period from 2013-14 (October-March) to 2017-18 (upto June, 2017). The said Show Cause Notice was decided by the adjudicating authority vide the impugned order wherein he had confirmed the demand of service tax along with interest and also imposed penalty under Section 78 of the Act.

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

- Adjudicating authority has erred in concluding that sale of food by way of "Home delivery" or "take away" is not sale of goods and hence liable to Service Tax as per provisions contained in Finance Act, 1994;
- The transactions made by them are not liable to service tax as transactions made by them is not at all service as provided in the statute;
- The transaction made by them were transactions of sale according to Article 366 (29A) of Constitution of India as in the case of their transactions, there was transfer of goods against money consideration and they transferred their owner ship of goods to the buyers;
- The transactions made by them are transaction of sale as per the definition of sale under Section 4 of the Sale of Goods Act, 1930 as food parcels supplied by them qualifies to be goods as defined under clause (25) of Section 65B of the Act and there is transfer of title of the goods against money consideration;

- The food items prepared and sold by them are goods liable to central excise duty at nil rate in terms of Notification No.12/2012-CE dated 17.03.2012 vide entry at Sr.No.12 and 13 therein. The process of preparation of food items is simply a manufacturing process of food items not liable to service tax;

- In the given case, food items are being prepared at their premises which are being taken away by the consumers from them and no service element is present in the same;

- The subject transactions are not covered under the scope of declared service as per Section 66E (i) of the Act. The said provision prescribes that the service portion in supply of food items or drinks will be considered as declared service. Meaning thereby, under the above entry only those supplies of food wherein there is an element of service involved can only be taxed. Accordingly, to levy tax under the above entry and to get covered the transaction under declared service, first there has to be presence of the element of service. The above provision applies where the dominant nature of the transaction is service and not the transfer of title in goods whereas subject transactions are covered in the transfer of title of goods;

- Since the inception, they are very clear about the provisions and impact of the same under various Indirect Taxation Acts. Accordingly, invoices issued to Dine-in customers specifically mention the same and service tax is also charged and paid on the same. For take aways and home delivery of goods, being sale of goods on which excise duty is exempted, service tax is neither collected nor paid

- As per clarification issued vide D.O.F.No.334/3/2011-TRU dated 28.02.2011, it is very clear that the covered supplies were mere sale of goods and not liable to service tax. The said clarification is applicable even in Negative list regime since it is not made with reference to the definition of service , the same clarifies the scope of service. Thus, it becomes crystal clear that Government intention is not to include the food supply by way of pick up or home delivery in Service Tax;

- Proviso to Section 73(1) of the Act cannot be invoked for the covered subject transactions as there is no fraud of collusion or wilful statement or suppression of facts as contained in the said Section as they are not liable to pay any service tax for activities carried on by them is merely transfer of title in goods and disclosure of which is not required at all anytime while filing service tax return;

- Since subject transaction is transfer of title in goods, service tax is not applicable and since tax is not applicable, interest cannot be levied; and

- The impugned OIO completely fails to prove its allegation that they suppressed the facts with intent to evade payment of taxes, Merely suppression of facts cannot invoke penalty under Section 78 there has to be an element of intent to evade which has nowhere been discussed least proven in the SCN. There being no suppression, penalty under Section 78 is not applicable as none of the five conditions for imposition of penalty under the Section are applicable.

4. Personal Hearing in the matter was held on 20.01.2021 through virtual mode. Shri Nitesh Jain, Chartered Accountant, appeared for the hearing. He re-iterated the submissions made in Appeal Memorandum.

5. I have carefully gone through the facts of the case, grounds of appeal in the Appeal Memorandum and the oral submissions made by the appellant. It is observed that the issue to be decided in the present appeal is whether the appellants are liable for payment of service tax on the take-away parcels/home delivery parcels which were sold in their restaurant. The demand pertains to the period from 2013-14 (October-March) to 2017-18 (upto June, 2017).

6. It is observed that the demand in the case has been raised on the premise that the activity of the appellant was covered as declared service in clause (i) of Section 66E of the Act during the period of dispute and was therefore liable to pay service tax on the same. The legal provisions contained under Section 66 E(i) of the Finance Act, 1994 are reproduced below for better appreciation of facts:

> "*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 been 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, it is to observe 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. The contentions raised in the show cause notice and the impugned order for the demand on the issue fails to survive in the eyes of law and therefore, the impugned order passed by the adjudicating authority confirming the demand is liable to be set aside for being not legally sustainable both on facts and merits. When the demand fails, there does not arise any question of interest or penalty in the matter.

12. Accordingly, the impugned order passed by the adjudicating authority is set aside and the appeal of the appellant is allowed.

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.

25 February, 2021

(Akhilesh Kumar)
Commissioner (Appeals)
Date: 25.02.2021.

Attested:

(Anilkumar P.)
Superintendent (Appeals)
CGST, Ahmedabad.

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

To

M/s Atma Mangal Corporation,
Shrusti-III, Shop No.1/GF,
Near Zagadiya Bridge,
Nr. L.G. Corner, Maninagar,
Ahmedabad.

Copy to:

1. The Chief Commissioner, Central GST & Central Excise , Ahmedabad Zone.
2. The Principal Commissioner, Central GST & Central Excise, Ahmedabad South.
3. The Deputy/Assistant Commissioner, Central GST & Central Excise, Division-I, Ahmedabad South.
4. The Asst. Commissioner (System), Central GST & Central Excise, Ahmedabad South. (for uploading the OIA)
5. Guard File.
6. P. A. File.