

## True Colour Of 'Take Away Transactions' - ECJ Ruling and Indian Perspective

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What constitutes 'sale'? What Constitutes 'service'? What is the predominant element in a composite supply consisting of sale and service?

### **ECJ Ruling**

The above questions have arisen for consideration of Courts in jurisdictions having VAT/Sales tax regimes several times in spite of there being accurate definitions for 'sale' 'service' and 'composite supplies'. The recent ruling of ECJ in the matter of **J.K. Vs. The Dyrektor Izby Administracji Skarbowej w Katowicach (Director of the Chamber of Tax Administration in Katowice, Poland) in C 703/19**<sup>[1]</sup> presents one more of such scenario where the question was whether 'take away' supply of food is liable to fall under 'Restaurant and Catering Services' taxable at 5% (as supply of services) or is taxable as supply of prepared meals and dishes taxable at 8% (as sale of goods).

The assessee in the above matter was a Franchisee of a Fast Food chain and was engaged in providing both 'dine in' and 'take away' supplies. They had collected lesser rate of 5% VAT on 'take away' services categorizing same as 'Restaurant and catering services'. Revenue demanded tax at higher rate of 8% treating same as supply of food products.

While addressing the question, ECJ had before them, the scope of Restaurant and Catering Service as prescribed by Article 6 of Implementing Regulation No 282/2011. The Article reads as below:

*Paragraph 1 : Restaurant and catering services mean services consisting of the supply of prepared or unprepared food or beverages or both, for human consumption, accompanied by sufficient support services allowing for the immediate consumption thereof. The provision of food or beverages or both is only one component of the whole in which services shall predominate. Restaurant services are the supply of such services on the premises of the supplier, and catering services are the supply of such services off the premises of the supplier.*

*Paragraph 2 : The supply of prepared or unprepared food or beverages or both, whether or not including transport but without any other support services, shall not be considered restaurant or catering services within the meaning of paragraph 1.*

A plain reading of above legal provision would show that, in order to qualify as a restaurant supply, there should be accompaniment of 'support services'. 'Sufficient support service' is a broad and vague expression, which creates doubt as to whether the extent of support service is to be measured quantitatively or qualitatively. On this aspect the ECJ had earlier given various indicative factors in the matter **of Bog & Others** in C 497/09<sup>[2]</sup> decided on 10.03.2011. It is worth quoting few important principles of said judgment in this context.

**Bog and Others** was a case which involved examination of the nature of supply in cases of supply of food from mobile snack bars, foodcourt in cinema halls, party catering etc. In its discussion, the ECJ had applied the principle that *when there exists a bundle of elements, regard must be given to all circumstance in which the transaction takes place*. One argument that is discouraged by ECJ while deciding the matter was that the series of services from cooking food to its physical service of providing food is only one component of service, but same is not predominant enough to qualify entire activity as supply of service. ECJ had invited attention at this point to the fact that supply of any commodity involves minimum level of service as display of the product, or raising invoice etc. Therefore such services are not the predominant determinant factor of support services. Another important observation made is that *if the facilities offered are rudimentary which requires negligible human intervention, they are to be treated as ancillary to supply of goods*. ECJ held that *the predominant element is to be determined from point of view of a typical consumer*. Therefore it is often not the quantitative, but the qualitative element that determines the nature of supply. The restaurant service is qualified by support services as waiters, advice to customers on food, service of taking orders and transmitting same to kitchen, enclosed spaces, and facilities as cloak rooms, lavatory etc.

Following above ratio in Bog and Other, ECJ in the matter of JK Vs. Director of the Chamber of Tax Administration remanded the matter to the respective National Court to determine the extent of support service involved and decide the tax liability accordingly.

### **Tax treatment of Takeaways under Indian Indirect tax:**

Now let us see, whether a similar treatment is available for supply of 'takeaways' under Indian GST. Whether the 5% rate applicable to supply of restaurant service, applies equally to supplies in nature of 'dine in' and 'take away'? Before addressing this question, an analysis of the relevant provision before the introduction of GST is not out of context.

Until introduction of 46<sup>th</sup> Constitutional amendment in the year 1982, the definition of 'sale' under State Sales Tax Legislations involved only such transactions where transfer of property in goods for cash or deferred payment or other valuable consideration was involved. In other words, the concept of sale covered only such transactions where '*chattel*' was transferred as '*chattel*' and the transaction was dominated by absolute transfer of title. Therefore composite transactions involving components of sale and service were not automatically captured within the definition and any attempt to capture 'sale component of such composite transactions were thwarted by various High courts and Supreme Court as beyond the legislative powers conferred under Entry 54 of List II to the Constitution of India.

While the proposals for 46<sup>th</sup> Constitutional Amendment for capturing composite transaction involving goods with in ambit of Sales tax were progressing, there were two important decisions of the Supreme Court which made it necessary to incorporate 'supply of food as forming part of service' also with in concept of deemed sales. One of the Judgment was given in the year 1972 in the matter of *State of Punjab v. M/s. Associated Hotels of India Ltd*<sup>[3]</sup> decided on 01.01.1972, wherein the Hon'ble

Supreme court held that the supply of food to guest staying in a hotel is part of variety of services offered by the hotelier and hence revenue cannot split the transaction in to two so as to levy sales tax on sale component of food.

The second landmark judgment was in the year 1978, in the matter of *Northern India Caterers India Ltd Vs. Lt. Governor, Delhi* [4], the Supreme Court held that when meals were served to casual visitors in the restaurant, service must be regarded as providing for the satisfaction of human need and could not be regarded as constituting a sale of food. The court had based its judgment on observing the key factors as the visitors were not entitled to remove or carry away uneaten food, the restaurant had provided facilities as furniture and furnishings, linen, crockery and cutlery and there was also music, dancing and perhaps a floor show. It has been observed in the review petition that *"the substance of the transaction, the dominant object, the life-style and other telling factors must determine whether the restaurantier did sell the goods or only supply a package of services. It is established from facts that substance of the transaction, as evidenced by dominant object is sale of food and service is only incidental, the transaction would be subject to sales tax"*.

Therefore, considering the impact of above two judgments, the Statement of object and reasons to the 46<sup>th</sup> Constitutional Amendment bill [5] stated thus:

*8. Besides the above mentioned matters, a new problem has arisen as a result of the decision of the Supreme Court in Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi (A.I.R. 1978 S.C. 1591). States have been proceeding on the basis that the Associated Hotels of India case was applicable only to supply of food or drink by a hotelier to a person lodged in the hotel and that tax was leviable on the sale of foodstuffs by a restaurant. But over-ruling the decision of the Delhi High Court, the Supreme Court has held in the above case that service of meals whether in a hotel or restaurant does not constitute a sale of food for the purpose of levy of sales tax but must be regarded as the rendering of a service in the satisfaction of a human need or ministering to the bodily want of human beings. It would not make any difference whether the visitor to the restaurant is charged for the meal as a whole or according to each dish separately.*

*9. It is, therefore, proposed to suitably amend the Constitution to include in article 366 a definition of "tax on the sale or purchase of goods" by inserting a new clause (29A). The definition would specifically include within the scope of that expression tax on*

*vi) the supply, by way of or as part of any service, of food or any drink for cash, deferred payment or other valuable consideration.*

Therefore, in article 366 of the Constitution, after clause (29), the following clause was inserted, namely:-

*(29A) "tax on the sale or purchase of goods" includes-*

*(f) a tax on the 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 (whether or not intoxicating), where such supply or service is for cash, deferred payment or other valuable consideration,*

Ever since introduction of this Amendment, States were able to levy sales tax on sale portion in respect of composite contracts. The service portion was subsequently taxed vide Chapter V of Finance Act, 1994.

But this hasn't settled the position fully. In respect of 'take away', under Sales tax or VAT wherever different rates were prescribed for supply of food in restaurant and sale of food products, it created confusion whether 'take away' was part of service or pure sale of goods. The following judgments have almost settled the issue in favour of the principle that 'take away' supplies constitute sale of goods.

Sale of food across counter is a transaction of sale even when services as packing of food stuff is involved since such part is insignificant...*Durga Bhavan and Ors. vs. The Deputy Commercial Tax Officer, Anantapur and Ors* [6]. **Govind Ram and Ors. vs. The State of Rajasthan and Ors. (11.01.1982 - RAJHC)**[7]

Concept of deemed sales under Article 366 (29A) is not to further limit powers of the States but to grant them additional powers to tax sales portion in sale of goods involved in service transactions. .. **K.C. Setty vs. Additional Commercial Tax Officer and Ors. (19.11.1992 - KARHC)**[8]

When service tax was levied on service portion in composite supply of food, department started raising service tax demand in respect of 'take away' food. The recent Judgment of Madras Highcourt in **Anjappar Chettinad A/C Restaurant Vs. Joint Commissioner**, [9] has held 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.

Therefore the legal position during pre GST era is in favour of treating 'take away' transactions as pure sale of goods liable only for sales tax or VAT.

## GST SCENARIO

The GST Act, through Section 7 sub section (1A), provides that, where certain activities or transactions constitute a 'supply' in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II. For the purpose of present discussion, we extract Sl. No. 1 and Sl. No. 6 of Schedule II.

*Sl.No.1 (a) : any transfer of the title in goods is a supply of goods;*

*Schedule II at Sl. No. 6 : Composite supply : The following composite supplies shall be treated as a supply of services, 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.

Therefore, if there is transfer of title in goods, it is to be treated as supply of goods. Sl. No. 6 (b) provides that the supply of goods (food or drink or any other article for human consumption except liquor) by way of service or as part of any service or in any other manner is to be treated as supply of service.

Section 2 (52) of CGST Act, 2017 defines 'goods' : *Goods means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract.*

Section 2 (102) defines 'Services' : *services means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged;*

'Sale' is not defined under GST. Therefore Sections of Sale of Goods Act, 1930 governing the principles of sale would apply for understanding what is 'sale' under GST. *Section 4 of the Sale of Goods Act provides that a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price.*

Therefore, if 'take away transactions' are transfer of goods (which is settled through the judicial precedents prior to GT) and not composite transactions, it is a transaction in 'goods' and hence GST rate applicable as per HSN would apply for such supplies. This position is also supported by the following:

### **GST – FAQ on Food Processing Issued by Directorate General of Taxpayer Services on 31-7-2017]**

*What will the rate of tax to be charged for supplies of food made from their takeaway counter?*

Answer: Tax has to be charged @ 18% on supplies of food made from their takeaway counter.

***In Re : Mountain Trail Foods Private Limited [10]:*** *The sale of packed items like packaged food products which cannot be consumed as is basis and that needs further cooking operations and other packaged food products which are not processed by the applicant and sold as purchased are taxable at the appropriate rates and are not covered under the tax rate applicable to Group 99633 (HSN Code) as those relates only to services.*

***In Re: Square One Homemade Treats [11]:*** *Whether resale of food & bakery products fall under restaurant services. No. A restaurant is a place of business where food is prepared in the premises and served based on the orders received from the customer. In the instant case it is a bakery, where ready to eat items are sold and mere facility is provided to have it from the shop.*

***In Re: Kundan Mithan Bhandar 2019 [12]:*** *When sweetmeats, namkeens, cold drink and other edible items are supplied at sweetshop counter have no direct or indirect nexus with restaurant service - These are not composite supply but individual supply of goods - Such supply would be levied with applicable GST rate with ITC facility available.*

But is this the end of the issue regarding GST on 'take away' services? The answer is 'No' for the following reasons:

- *Sl. No. 6 (b) of Schedule II, provides that the supply of goods (food or drink or any other article for human consumption except liquor) by way of service or as part of any service or **in any other manner** is to be treated as supply of service. What meaning is to be attributed to the expression 'in any other manner'? Does it involve supplies by way of 'take aways' too?*
- *The Rate Notification No. 11/2017-Central tax (Rate) has notified 5% as the applicable tax under SAC 9963 for supply of 'Restaurant Service' other than from specified premises. Explanation to the Notification defines at Sl. No. "(xxxii) 'Restaurant service' means supply, by way of or as part of any service, of goods, being food or any other article for human consumption or any drink, provided by a restaurant, eating joint including mess, canteen, whether for consumption on or away from the premises where such food or any other article for human consumption or drink is supplied. The above definition considers supply for consumption away from premises also as part of 'Restaurant Service'.*
- *A perusal of SAC 99631 explains the entry as Services provided by Restaurants, Cafes and similar eating facilities including takeaway services, Room services and door delivery of food.*
- *In Re: Ananya Goel 2018 (14) G.S.T.L. 299 (A.A.R. - GST) a ruling has been given to the effect that manufacturing of food articles and its supply only from take away centre without any sitting facility is a "supply of services" and under Composition Scheme it is liable to 5% GST.*

Therefore, if the definition of restaurant service and SAC includes take away supplies, does it have an overriding effect over the settled principle treating 'take away' transaction of 'sale of goods'? . What is the sanctity to be assigned to the definitions under the Rate Notification and Explanatory notes to Service classification when the same is inconsistent with settled legal principles and statutory provisions under the Act?

The issue needs attention and clarity especially when 'take aways' are common mode of supplies now a days. The restaurants which have a part of their supplies classifiable as 'take aways', and cloud kitchens where entire supplies are made available through 'delivery' or 'take away ' mode are much in need of clarity on the issue.

If the same is a composite supply, same is treated as service. The service Accounting Code 99633 dealing with Food, edible preparations, alcoholic & non-alcoholic beverages serving services would apply. As per the Explanatory Notes, the following

transactions are covered under this category:

996331	Services provided by Restaurants, Cafes and similar eating facilities including takeaway services, Room services and door delivery of food.
996332	Services provided by Hotels, INN, Guest House, Clubs etc including Room services, takeaway services and door delivery of food.
996333	Services provided in Canteens and other similar establishments
996334	Catering Services in Exhibition halls, Events, Marriage Halls and other outdoor/indoor functions.
996335	Catering services provided in trains, flights etc.
996336	Preparation and/or supply services of food, edible preparations, alcoholic& non-alcoholic beverages to airlines and other transportation operators
996337	Other contract food services
996339	Other food, edible preparations, alcoholic& non-alcoholic beverages serving services n.e.c.  This service code includes services provided by refreshment stands, fish-and- chips stands, fast-food outlets <u>without seating etc</u> ; services of ice-cream parlours and cake serving places; provision of meals and snacks prepared on the premises dispensed through vending machines; dining car services; mobile food services, i.e. preparing and serving food and beverages for immediate consumption from motorized vehicle or non-motorized carts

[1] <https://curia.europa.eu/juris/document/document.jsf?text=&docid=240227&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=16377244>

[2] <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009CJ0497&rid=2>

[3] A.I.R. 1972 S.C. 1131

[4] (A.I.R. 1978 S.C. 1591 <https://www.casemine.com/judgement/in/5609abcde4b014971140d5f8>)

[5] <https://www.india.gov.in/my-government/constitution-india/amendments/constitution-india-forty-sixth-amendment-act-1982>

[6] MANU/AP/0061/1980

[7] MANU/RH/0045/1982

[8] MANU/KA/0228/1992

[9] **[TS-234-HC-2021\(MAD\)-ST](#)**

[10] [\[TS-845-AAR-2019-NT\]](#)

[11] [\[TS-931-AAR-2019-NT\]](#)

[12] [\[TS-696-AAR-2018-NT\]](#)