IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 20.05.2021

CORAM:

THE HON'BLE Dr.JUSTICE ANITA SUMANTH

W.P. Nos.13469 of 2020, 28789 & 28095 of 2019 and 1748 & 5935 of 2021
and
WMP. Nos. 16637 of 2020, 28539, 27715 of 2019, 1951 & 6571 of 2021

Anjappar Chettinad A/C Restaurant,
Represented by its Partner A Kandaswamy,
No.5, Dev Apartments, 1st Main Road,
KB Nagar, Adayar,
Chennai 600 020 .. Petitioner in W.P. No.13469 of 2020

M/s RSM Foods (P) Ltd,
Represented by its Director,
Mr.N.Murali,
No.50, Ganapathy Nagar,
Velachery, Chennai – 600 042. .. Petitioner in W.P. No.28789 of 2019

M/s.Thalapakatti Hotels Pvt. Ltd,
Represented by its Managing Director,
Mr.D.Nagasamy,
F.11, 2nd Main Road,
Chennai – 600 102 .. Petitioner in W.P. Nos.28095 of 2019
and W.P. No.1748 of 2021

M/s Prasanam Foods (P) Ltd.
Represented by its Director,
Mr.Pradyumna Acharya,

No.103/82, G.N.Chetty Road,
T.Nagar, Chennai 600 017. .. Petitioner in W.P. No.5935 of 2021

Vs.

Joint Commissioner,
Office of the Commissioner of GST and Central Excise,
Chennai South Commissionerate,
No.692, MHU Complex, 5th Floor,
Anna Salai, Nandanam,
Chennai – 600 035. .. Respondent in W.P. No.13469 of 2020

The Commissioner of GST and Central Excise,
Chennai South,
No.692, MHU Complex, 5th Floor,
Anna Salai, Nandanam,
Chennai – 600 035. .. Respondent in W.P. Nos.28789, 28095 of 2019 & 1748 of 2021

The Additional Commisioner of GST and
Central Excise, Office of the
Commissionerate of GST & C.Ex.,
Chennai South Commissionerate,
No.692, MHU Complex, 5th Floor,
Anna Salai, Nandanam,
Chennai – 600 035. .. Respondent in W.P. No.5935 of 2021

Prayer in W.P. No.13469 of 2020: Writ Petition filed under Article 226 of the Constitution of India praying to Writ of **Certiorari** to call for the records in Order in Original No.06/2020-JC dated 30.04.2020 in C.No.V/15/206/2018-CS Adj issued by the Respondent and quash the same as arbitrary and illegal.

Prayer in W.P. No.28789 of 2019: Writ Petition filed under Article 226 of the Constitution of India praying to Writ of **Certiorarified Mandamus** to call for the

records of the respondent comprised in the impugned Order-in-Original No.13/2019 (c) dated 20.05.2019 and quash the same and direct the respondent to hear the petitioners on the merits and dispose of the same after affording sufficient opportunity of personal hearing.

Prayer in W.P. No.28095 of 2019 and 1748 of 2021: Writ Petition filed under Article 226 of the Constitution of India praying to Writ of **Certiorari** to call for the records relating to the impugned order-in-original no.12/2019 (c) dated 17.05.2019, 27/2020 (C) dated 07.12.2020 issued by the Respondent in C.No.V/15/209/2018 CS Adj, C.No.V/15/2/2019-CS Adj and quash the same.

Prayer in W.P. No.5935 of 2021: Writ Petition filed under Article 226 of the Constitution of India praying to Writ of **Certiorarified Mandamus** to call for the records of the respondent comprised in the impugned Order-in-Original No.20/2020 ADC dated 31.08.2020 and quash the same and direct the respondent to hear the petitioners on the merits and dispose of the same after affording sufficient opportunity of personal hearing.

For Petitioner : Mr.Joseph Prabakar
in W.P. No.13469 of 2020
Mr.Hari Radhakrishnan,
in W.P. No.28095 of 2019 & 1748 of 2021

Mrs.P.Jayalakshmi
in W.P. No.28789 of 2019 and 5935 of 2021

For Respondents : Mr.Rajnish Pathiyil,
Senior Standing Counsel
in W.P. No.13469 of 2020
Mr.A.P.Srinivas,
Senior Standing Counsel
in W.P. No.28095 of 2019 & 1748 of 2021
V.Sundareswaran,
in W.P. No.28789 of 2019 and 5935 of 2021

COMMON ORDER

This batch of Writ Petitions involves an interesting question as to the liability to service tax under the Finance Act, 1994 (in short 'Act'), on food that is 'taken away' or collected from restaurants or eateries, in parcels.

2. All four petitioners run air-conditioned restaurants under the name and style of Anjappar Chettinad (A/c Restaurant), Thalapakkatti Hotels, RSM Foods and Prasanam Foods, the latter two being franchisees of Sangeetha restaurant, respectively.

3. The facts in common are that the petitioners hold service tax registration for providing restaurant services, outdoor catering services and mandap keeping

services. Audit was undertaken in all the cases and the conclusion arrived at by the Department was that service tax had not been discharged in relation to 'take away/parcel services' for various periods upto June, 2017 when Goods Services Tax Act, 2017 came into force.

4. Heard Mr.Joseph Prabakar, learned counsel for the petitioner in W.P.No.13469 of 2020, Mr.Hari Radhakrishnan, learned counsel for the petitioner in W.P.Nos.28095 of 2019 and 1748 of 2021 and Mrs.P.Jayalakshmi, learned counsel for the petitioner in W.P.Nos.28789 of 2019 and 5935 of 2021 and Mr.Rajnish Pathiyil, learned Senior Standing Counsel for the respondents in W.P.No.13469 of 2020, Mr.A.P.Srinivas, learned Senior Standing Counsel for the respondents in W.P.Nos.28095 of 2019 and 1748 of 2021 and Mr.V.Sundareswaran, learned Senior Panel Counsel for the respondent in W.P.No.28789 of 2019.

5. According to the petitioners, there is no liability for sale of food at the take-away counter or by parcel. They would state that the sale of packaged food constitutes pure trading activity and there is no component of service involved therein. They rely on the definition of 'service' under Section 65B(44), which excludes the transfer of title in goods by way of sale. In the light of this

exclusion, parcel sales or take away food would stand outside the ambit of service tax.

6. According to them, in parcel sales, there could be no artificial splitting of transactions between one of 'service' and one of 'sale' with the attempt to bring the same under the purview of the former. The petitioners rely on letter bearing No.DOF 334/3/2011-TRU dated 28.02.2011 which had, according to them, clarified that service tax is not intended to cover sale of food that is collected or picked up for consumption elsewhere.

7. Restaurant service, by definition means that all attributes of a restaurant such as organised seating, air-conditioning, service at the table, live music and enhanced hospitality are included. These attributes are absent in a transaction of take-away. In fact, service tax on restaurant services have itself been restricted only to service in air-conditioned restaurants.

8. The petitioners rely on the judgment of the Supreme Court in the case of [1]*Federation of Hotel and Restaurant Associations of India V. Union of India*, wherein the federation had sought a declaration that the provisions of the Standards of Weights and Measures Act, 1976 and allied enactments and rules were not applicable to services rendered in hotels/restaurants. While allowing the

[1] (2018 (359) ELT 97

appeals, the Court observed, at paragraph 10, that there could be no artificial division or distinction made between the sale and service elements when it comes to service of food in a restaurant.

9. The petitioners also refer to the judgment of the Supreme Court in the case of [2]*Tamil Nadu Kalyana Mandapam Association V. Union of India* wherein the challenge was to the constitutional validity of Sections 65, 66 and 67 of the Act in terms of which, service tax was levied on mandap keepers and catering services. My attention is drawn to para 55 wherein the Bench, while deciding the question of taxability of the mandap keepers, makes a distinction between services rendered in a restaurant or a hotel, vis-à-vis services rendered by an outdoor caterer.

10. Then again, in [3]*Safety Retreading Co. (P) Ltd. V. Commissioner of Central Excise, Salem* , the Supreme Court considered the taxability of a contract of re-treading of tyres and whether service tax would be leviable on the total amount charged including the value of machinery supplied and used in the execution of the re-treading contract. The Court concluded that the assessee in that case would be liable to pay tax only on service component which, under the Statute was quantified at 30%.

[2] (2006 (3) STR 260)
[3] 2017 (48) STR 97

11. The Andhra Pradesh High Court in [4]*Bhimas Hotels Pvt. Ltd. V. Union of India* considered the taxability of food supplied to workers at subsidised rates. While confirming that the same would be part of an employers' service as an overall part of an industrial obligation, the Court holds that the value of such food can, in no circumstances, be liable to service tax and the levy was thus quashed.

12. Per contra, the revenue would draw my attention to the provisions of Section 66E(1) of the Act which declares the activity of 'supply of food or any other article of human consumption or any drink' as a taxable service. Thus, according to them, there is absolutely no infirmity in the impugned orders that have brought to tax the receipts from parcel sales/take away sales. They rely on a decision of the Bombay High Court in [5]*Indian Hotels and Restaurant Association V. Union of India,* wherein the Court holds that restaurants primarily provide service and the sale undertaken in the course of rendition of service, is only incidental. Thus, according to the revenue, the provision of take-away food and drinks involves the rendition of service and the mode of sale, that is, by parcels, has no bearing in the matter. The transaction in question should thus be bifurcated into one that involves both the components of sale and service and brought to tax accordingly.

[4] 2017 (3) GSTL 30
[5] 2014 (34) ELT 522

13. In response, the petitioners rely upon the judgments of the Supreme Court in the case of [6]*K.Damodarasamy Naidu and Bros. V. State of Tamil Nadu and another*,[7]*State* of *Himachal Pradesh V. Associated Hotels of India Ltd. a*nd [8] *Northern India Caterers (India) Ltd. V. Lt. Governor of Delhi*, to oppose the argument advanced by the learned counsel for the respondents that one should envisage an artificial split between the activity of service and the activity of sale in a transaction of 'take away'.

14. A Division Bench of the Chhattisgarh High Court in [9]*Hotel East Park V. Union of India* was concerned with a challenge to the validity of Section 66 E(1) and held the same to be valid. In a batch of matters dealt with by the first Bench of this Court in [10]*Hotel Chandra Towers (P) Ltd. and others V. Government of India and others,* the challenge was for a declaration that Section 65(105) (ZZZZV) and (ZZZZW) were unconstitutional and unenforceable. The aforesaid provisions relates to the service of food and beverages by restaurants, bars and eateries.

15. The challenge was rejected stating, at paragraph 36, that no mechanism has been provided for bifurcation of sales tax (VAT and Luxuries Tax) and

[6] 2000 (1) SCC 521
[7] (1972) 29 STC 474
[8] (1978) 4 SCC 36
[9] 2014 (35) STR 433 (DB-chatt)
[10] W.P.Nos.12649 to 12653 of 2014 (order dated 12.09.2014)

service tax under the statutory provisions challenged. The Bench left it open, and in fact urged the State Government to issue a clarification/direction as to how the value of the two components, i.e., sale and service, will be arrived at, as expeditiously as possible.

16. The revenue also relies on a decision in the case of [11]*Federation of Hotels and Restaurants Association V. Union of India,* where the challenge to provisions of Section 65 (105) (ZZZZV) and (ZZZZW) was considered by the Delhi High Court and rejected. Rule 2C of the Service Tax Rules, 2006 (in short 'Rules') provided for an artificial bifurcation of sale and service component, attributing 40% of the value of the composite contract of supply of food and drinks, to service component, and this was also challenged on the ground that it was arbitrary and without basis.

17. The challenge was rejected by the Bench holding that Rule 2C does not seek to arbitrarily determine the measure of tax, but only provides for abatement, particularly useful in matters where no accounts are maintained by an assessee. Moreover, Rule 2 C only provides for such methodology in cases where the assessee was unable to provide an exact manner of determining the value of service/sale and in a case where an assessee was able to demonstrate suitably an

[11] 2016 (44) ELT 3

accurate quantification in the receipts from service and from sale, Rule 2C would have no application at all.

18. Some decisions have been relied on by the respondents in support of their primary argument that the impugned orders are amenable to statutory appeal and that the Writ Petitions were thus not be maintainable on the ground of an efficacious alternate remedy being available.

19. This ground, though referred to, is not very seriously pursued and rightly so, seeing as the issue involved does not bring into play any disputed facts but only a pure question of law on the taxability or otherwise of a particular transaction. The argument of maintainability is thus rejected.

20. Levy of tax on service was under Finance Act, 1994 and the Legislative competence to levy a tax on service involved in the sale of food and drink is no longer res integra as held by the Supreme Court in the case of *Federation of Hotels* (supra footnote 11). Though initially there was some uncertainty on the quantum of the receipts that would attract tax, in time, an abatement was provided for, in recognition of the position that the sale of food and beverages and drinks (including sale of beverages and intoxicating drinks) does involve both aspects of sale as well as service.

21. Service tax was initially levied on the sale of food and drink in all restaurants without exception and Entry 19 of Notification 25 of 2012 levied tax on services provided in relation to serving of food and beverages by a restaurant, eating joint or mess.

22. The levy was restricted to sales in air-conditioned restaurants alone, vide Notification No.3 of 2013-ST dated 01.03.2013, commonly referred to as the mega exemption notification, that carved out specified exclusions from the coverage of the Act. By virtue of Notification 3 of 2013, the levy of tax was restricted only to those restaurants, eating joints or mess, that have the facility of air-conditioning or central heating in any part of the establishment at any time during the year.

23. Section 66 E declares that specified services shall attract the levy of service tax and reads as follows:

> ***SECTION 66E. Declared services***. — *The following shall constitute declared services, namely:—*
>
> *(a) renting of immovable property*
>
> *(b) . . . .*
>
> *(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.*
>
> . . . .

24. In Circular 173/8/2013– ST dated 07.10.2013, the Board considers various representations raising doubts and queries in regard to the leviability of service tax in restaurants, both air-conditioned and non-air conditioned. The doubts raised and the clarifications provided are as follows:

F.No.334/3/2013-TRU

Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise& Customs
Tax ResearchUnit
North Block

New Delhi, 7th October, 2013

To
Chief Commissioners of Central Exciseand Customs (Ali),
Director General (Service Tax), Director General (Central Excise Intelligence), Director General (Audit),
Commissioners of Service Tax (All)
Commissioners of Central Excise (Ali),
Commissioners of Central Exciseand Customs (Ali).

Madam/Sir,
Subject: Restaurant Service- clarification -regarding

As part of the Budget exercise 2013, the exemption for services provided by specified restaurants extended vide serial number 19 of Notification 25/2012-5T was modified vide para 1 (iii) of Notification 3/2013-5T. This has become operational on the 151 of April, 2013.

2. In this context, representations have been received. On the doubts and questions raised therein clarifications are as follows:

	Doubts	*Clarifications*
1	*In a complex where air conditioned as well as non-air conditioned restaurants are operational but food is sourced from the common*	*Services provided in relation to serving of food or beverages by a restaurant, eating joint or mess, having the facility of air conditioning or central air*

	kitchen, will service tax arise in the non-air conditioned restaurant?	*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.*
2	*In a hotel, if services are provided by a specified restaurant in other areas e.g. swimming pool or an open area attached to the restaurant, will service tax arise?*	*Yes. Services provided by specified restaurant in other areas of the hotel are liable to service tax.*
3	*Whether service tax is leviable on goods sold on MRP basis across the counter as part of the Bill/invoice.*	*If goods are sold on MRP basis (fixed under the Legal Metrology Act) they have to be excluded from total amount for the determination of value of service portion.*

3. Trade Notice/Public Notice may be issued to the field formations and taxpayers. Please acknowledge receipt of this Circular. Hindi version follows.

25. In Circular No.334 of 2011 dated 28.02.2011, the scope of various new services including restaurant service, all newly introduced in 01.04.2011, were explained. The explanation is illuminating, reading thus:

> *'1. Services provided by a restaurant*
>
> *1.1.Restaurants provide a number of services normally in combination with the meal and/or beverage for a consolidated charge. These services relate to the use of restaurant space and furniture, air-conditioning, well-trained waiters, linen, cutlery and crockery, music, live or otherwise, or a dance floor. The customer also has the benefit of personalized service by indicating his preference for certain ingredients e.g. salt, chilies, onion, garlic or oil. The extent and quality of services available in a restaurant is directly reflected in the margin charged over the direct costs. It is thus not uncommon to notice even packaged products being sold at prices far in excess of the MRP.*
>
> *1.2. In certain restaurants the owners get into revenue-sharing arrangements with another person, who takes the responsibility of preparation of food, with his own materials and ingredients, while the owner takes responsibility for making the space available, its decoration, furniture, cutlery, crockery and music etc. The total bill, which is composite, is shared between the two parties in terms of the contract. Here the consideration for services provided by the restaurants is more clearly demarcated.*
>
> *1.3. Another arrangement is whereby the restaurant separates a certain portion of the bill as service charge. This amount is meant to be shared amongst the staff who attend the customers. Though this amount is exclusively for the services it does not represent the full of value of all services rendered by the restaurants.*
>
> *1.4. The new levy is directed at services provided by high-end restaurants that are air-conditioned and have license to serve liquor. Such restaurants provide conditions and ambience in a manner that service provided may assume predominance over the food in many situations. It should not be confused with mere sale of food at any eating house, where such services are materially absent or so minimal that is will be difficult to establish that any service in any meaningful way is being provided.*
>
> *1.5. It is not necessary that the facility of air-conditioning is available round the year. If the facility is available at any time during the financial year the conditions for the levy shall be met.*

> *1.6. 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.*

26. Thus, not all services rendered by restaurants in the sale of food and drink are taxable and it is only certain specified situations that attract tax. The sale of food and drink simplicitor, services of selection and purchase of ingredients, preparation of ingredients for cooking and the actual preparation of the food and drink would not attract the levy of tax. Only those services commencing from the point where the food and drinks are collected for service at the table till the raising of the bill, are covered. This would encompass a gamut of services including arrangements for seating, décor, music and dance, both live and otherwise, the services of Maître D'Or, hostesses, liveried waiters and the use of fine crockery and cutlery, among others. The provision of the aforesaid niceties are critical to the determination as to whether the establishment in question would attract liability to service tax, and that too, only in an air-conditioned restaurant.

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.

28. The petitioners have brought to my notice several orders passed by the Appellate Commissioners stationed in Chennai and any other parts of the State who have taken a view that take away services would not attract liability to Service tax. (Order in Appeal No.445 of 2018 dated 28.09.2018 passed by the Commissioner (Appeals), Chennai, Order in Appeal No.147 of 2019 dated 25.03.2019 passed by the Commissioner (Appeals), Coimbatore and Order in Appeal No.16 of 2020 dated 23.03.2020 passed by the Commissioner (Appeals), Coimbatore. In some cases, I am informed that appeals have not been filed by the

Department and thus the prevailing view, even within the Department is that there would be no service tax liability on take away food.

29. In the light of the discussion as above, these Writ Petitions are allowed and the impugned orders quashed. No costs. Connected Miscellaneous Petitions are closed.

20.05.2021

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Index: Yes/No
Speaking/Non speaking order

To
1.Joint Commissioner,
Office of the Commissioner of GST and Central Excise,
Chennai South Commissionerate,
No.692, MHU Complex, 5th Floor,
Anna Salai, Nandanam, Chennai – 600 035.

2.The Commissioner of GST and Central Excise,
Chennai South, No.692, MHU Complex, 5th Floor,
Anna Salai, Nandanam, Chennai – 600 035.

3. The Additional Commisioner of GST and
Central Excise, Office of the
Commissionerate of GST & C.Ex.,
Chennai South Commissionerate,
No.692, MHU Complex, 5th Floor, Anna Salai, Nandanam, Chennai – 600 035.

DR. ANITA SUMANTH, J.

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