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# Service tax cannot be levied on takeaway of food items and sharing of expenses for use of space by associated enterprise - SC

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## Summary

The Supreme Court (SC) has upheld the decision of the Customs Excise Service Tax Appellate Tribunal (CESTAT) Delhi Bench, wherein it was concluded that service tax could not be levied on the activity of takeaway of food items, as it would amount to the sale of goods. The CESTAT had observed that the element of services, such as dining facility, washing area, and clearing of the tables, was not involved in the takeaway activity. The CESTAT referred to the circulars wherein it was clarified that no service tax is to be levied on takeaway food items and emphasised that the department also accepted this position. The CESTAT also held that permitting an associated enterprise to use a part of the premises to sell its product would not amount to sub-letting and would be considered as sharing of expenditure, which cannot be treated as a service.


## Facts of the case

- The Haldiram Marketing Private Limited (the appellant) is engaged in the business of running food outlets, and the appellant also provides the facility of the 'takeaway' of food items.
- During an audit, the department noticed that the appellant had not paid service tax on the activity of takeaway of food items and the share of rent received from the associated enterprise.
- A show cause notice (SCN) was issued alleging that the appellant had failed to pay for the aforementioned services.
- Subsequently, the petitioner submitted its reply, with the authorities claiming that it was not required to pay service tax on the impugned activities, and therefore, the SCN is invalid.
- After that, the commissioner confirmed the demand.
- Aggrieved by the order and the SCN issued by the authorities, the appellant filed an appeal before the CESTAT.

## Appellant's contentions:

- The appellant contended that the takeaway of food items is not exigible for service tax, as it constitutes a pure sale transaction without any service element.
- The appellant relied on the decision of the Madras High Court (HC) in the case of Anjappar Chettinad, wherein it was held that the provision of food and drink through takeaway would be tantamount to the sale of food and would not attract service tax levy.
- Further, the appellant relied on the circulars issued by the department dated 24 September 1997 and 10 September 2004, which clarified that the delivery of food without dining service and free home delivery by restaurants should not attract a service tax, respectively.
- Also, the appellant placed reliance on a circular dated 28 February 2011, which clarifies that pick-up or delivery of food or goods sold at the maximum retail price (MRP) would be considered a sale and not levied to service tax.
- The payment of VAT and service tax is mutually exclusive.
- The value of pre-packaged goods should not be included in the taxable value, and because machinery provisions with respect to valuation are not present under law, therefore, the

activity of takeaway cannot be levied to service tax.

- The service tax cannot be levied on the amount received from the associated enterprise because this is an internal arrangement between the appellant and the associated enterprise for sharing expenses. For this, there is no privity of contract between the appellant and its associated enterprise.
- The extended period of limitation could not have been invoked. Therefore, the demand is time-barred.

### Respondent's contentions:

- The appellant was providing 'restaurant services', which is a declared service under Section 66E(i) of the Finance Act.
- The activity related to food or any article for human consumption performed in restaurants having air-conditioning facilities would be subject to service tax.
- The activities performed by the appellant involve preparations and supply of food items.
- Therefore, the consideration charged for the takeaway of food items involves the value of goods and materials used by the appellant to prepare food items and the service portion of the preparation, packing, and delivery of food. Thus, this would fall under 'restaurant services'.

### Issue before the CESTAT:

Whether service tax is leviable on the activity of the takeaway of food and sharing of rent expense by associated enterprise for permitting the use of part of its restaurant space to sell its products?

### CESTAT New Delhi observations and judgement [Order No. - Final Order No. 50122/2023, Order dated 13 February 2023]:

- **Selling of packaged food items over the counter amounts to sale:** The CESTAT stated that the appellant meets the criteria for the sale of goods since it sells packaged or food items over the counter. The activities of preparation of food and packing by the appellant are merely conditions of sale of takeaway food items where the customer intends to buy such packaged products and not to avail of any restaurant services.

- **Service tax cannot be levied on the activity of takeaway of food items:** The CESTAT relied on the decision of the Madras HC in the case of Anjappar Chettinad (supra). Further, the CESTAT observed that the department also accepted this order and emphasised that it is not open to the department to take a contrary stand in this appeal. Therefore, the CESTAT ruled that no service tax should be levied on the takeaway of food items.

- **Service tax is not leviable on the share of rent received from the associated enterprise:** The CESTAT observed that this is an internal arrangement between the appellant and the associated enterprise for the sharing of expenses, and for this, there is no privity of contract between the appellant and its associated enterprise. The associated enterprise is also not a party to the agreement between the appellant and the lessor for renting out the appellant's premises. The associated enterprises are benefiting with respect to the space. This arrangement would, therefore, fall under the category of sharing of expense and would not be leviable to service tax.

### SC's observations and judgement [Civil Appeal No. 6147 of 2023, Order dated 25 September 2023]:

The SC found no merit in the Revenue's appeal and, therefore, upheld the CESTAT's order dismissing the present appeal filed by the department.

### Our comments

Earlier, the Madras HC, in the case of Anjappar Chettinad, had 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. A similar view was taken by various tribunals in other cases.

This is a welcome judgement by the SC, which will settle one of the contentious issues on the taxability of takeaway food under the erstwhile service tax regime. It further highlights that the Revenue cannot take contrary stand to its own clarifications.

With respect to the use of space by the associated enterprise, the SC has observed that there was no contractual relationship between the associated enterprises and the appellant or the lessor of the premises. Therefore, the payment made by the associated enterprise to the appellant was not a consideration for any specific service but a form of cost-sharing between them. This is in line with SC's decision in the case of Gujarat State Fertilizers & Chemicals Ltd., wherein it was held that the sharing of expenditure cannot be treated as service rendered by one to another.

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