

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.
PRINCIPAL BENCH – COURT NO.III**

Service Tax Appeal No.51465 of 2017 (DB)

(Arising out of Order-in-Original No.DLI-SVTAX-003-COM-89-16-17 dated 25.05.2017 passed by the Commissioner, Service Tax, Delhi-III Commissionerate)

M/s. PVR Limited

61, Basant Lok,
Vasant Vihar,
New Delhi-110 057.

Appellant

Versus

Commissioner of Service Tax

Engineers India Ltd.,
Annexe Building, 5th Floor,
Bhikaji Cama Place,
R.K. Puram,
New Delhi.

Respondent

With

Service Tax Appeal No.51466 of 2017 (DB)

(Arising out of Order-in-Original No.DLI-SVTAX-003-COM-89-16-17 dated 25.05.2017 passed by the Commissioner, Service Tax, Delhi-III Commissionerate)

**Shri Nitin Sood, Chief Financial Officer,
M/s. PVR Limited**

61, Basant Lok,
Vasant Vihar,
New Delhi-110 057.

Appellant

Versus

Commissioner of Service Tax

Engineers India Ltd.,
Annexe Building, 5th Floor,
Bhikaji Cama Place,
R.K. Puram,
New Delhi.

Respondent

With

Service Tax Appeal No.51467 of 2017 (DB)

(Arising out of Order-in-Original No.DLI-SVTAX-003-COM-89-16-17 dated 25.05.2017 passed by the Commissioner, Service Tax, Delhi-III Commissionerate)

**Shri Ajay Bijli, Managing Director
M/s. PVR Limited**

61, Basant Lok,
Vasant Vihar,
New Delhi-110 057.

Appellant

Versus

Commissioner of Service Tax

Engineers India Ltd.,
Annexe Building, 5th Floor,
Bhikaji Cama Place,
R.K. Puram,
New Delhi.

Respondent**And****Service Tax Appeal No.51468 of 2017 (DB)**

(Arising out of Order-in-Original No.DLI-SVTAX-003-COM-89-16-17 dated 25.05.2017 passed by the Commissioner, Service Tax, Delhi-III Commissionerate)

**Shri Brijesh Arora, Senior Vice President,
M/s. PVR Limited**

61, Basant Lok,
Vasant Vihar,
New Delhi-110 057.

Appellant

Versus

Commissioner of Service Tax

Engineers India Ltd.,
Annexe Building, 5th Floor,
Bhikaji Cama Place,
R.K. Puram,
New Delhi.

Respondent**APPEARANCE:**

Shri V. Lakshmikumaran, Sr. Advocate with Mr. Manish Gaur and Ms. Purvi Asati, Advocates for the appellant.

Ms. Jaya Kumari, Authorised Representative for the Respondent.

CORAM:**HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)****HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)****FINAL ORDER NOS. 51577-51580/2023****DATE OF HEARING:09.08.2023****DATE OF DECISION:30.11.2023****BINU TAMTA:**

The appellant has challenged the Order-in-Original No.DLI-SVTAX-003-COM-89-16-17 dated 25.05.2017 passed by the Commissioner of service Tax confirming the demand of service tax under Section 73(1) of the Finance Act, 1994 (hereinafter referred to as the Act) on supply of food and beverages at their counters provided in the cinema halls.

2. The appellant is primarily engaged in the business of running a chain of Multiplexes under the brand name "PVR" for exhibition/screening of movies in theaters. For this, the appellant has various categories of screens i.e. normal screens and premium screens i.e. Gold Class Screens and Director's Cuts. The appellant along with the activity of screening of movies has also provided for the facility of sale of food and beverages over the counters/stalls set up by them in the common lobby of the multiplexes.

3. An investigation was conducted by the Directorate General of Goods and Service Tax Intelligence (hereinafter referred to as "DGGSTI") and it was observed that the appellant has failed to pay due service tax on the activity of sale of food and beverages. Accordingly, show cause notice dated 13.10.2014 for the period 2013-2014 and also another show cause notice dated 15.10.2015 for the period 2014-2015 involving demand of Rs.10,26,97,058/- + Rs. 14,64,87,052/- = Rs.24,91,84,110/- on the ground that the service portion in the supply of food and beverages by the appellant from its air-conditioned establishment/outlets is a taxable service w.e.f. 01.04.2013 and also as per Rule 2C of the Service Tax (Determination of Value) Rules, 2006, the value of service portion involved in the supply of food and beverages is 40% of the total amount charged for the said supply. On adjudication, the demand under the said two show cause notices was confirmed, holding that the activity of the appellant is much more than the sale of the food and beverages as it involves an element of service by way of delivery of food and beverages and hence, is covered under Section 66 E (i) of the Finance Act, 1994. Being aggrieved by the said order, the appellant has filed the instant appeal.

4. Having heard both sides at length and having examined the records of the case, we need to consider the question as to whether the supply of food and beverage in the cinema complex falls within the definition of 'service'

and 'declared service' in terms of Section 65B(44) and Section 66 E of the Act.

5. In nutshell the argument of the learned counsel for the appellant is that the activity of supply of food and beverages in the cinema hall is a pure transaction of sale as it does not involve any service element rendered to the customers. He distinguished the same by submitting that no services like dining facility, washing area, clearing of the tables after the food has been eaten etc is involved. The learned Counsel relied on series of decisions which we will be considering later. The learned Authorised Representative for the Revenue reiterated the findings of the Adjudicating Authority to say that the activity of sale of food and beverages within the premises of the cinema hall involves an element of service as well along with supply of food which is taxable in terms of section 66E(i) of the Act.

6. It is relevant to extract the provisions of the Finance Act, defining 'service' and 'declared service' as per section 65B (44) and 66E :-
Section 65 B (44) of the Finance Act defines 'service' and the relevant portion is reproduced below:-

"65 B (44) 'service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—

- (a) an activity which constitutes merely, --
 - (i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or
 - (ii) such transfer, 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; or
 - (iii) a transaction in money or actionable claim."

Section 66 (E) deals with 'declared services' and the relevant portion is reproduced below:-

"Declared Services.

66 E. The following shall constitute declared services, namely:-

(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”.

The definition of ‘Service”, provides an exclusion clause whereby transfer of title in goods or immovable property by way of sale is not service. Consequently, the declared service has to be understood and interpreted in light thereof. Therefore, the Revenue by way of Circulars clarified that service tax shall not be leviable where the transaction amounts to sale of goods.

The first circular we need to take note of is the Circular dated 24.9.1997, which clarified that delivery of food where there is no dining and service extended, would not be subject to service tax and subsequently the Circular dated 10.09.2004 clarified that free home delivery of food by hotels and restaurants would not be subject to service tax. Further, Circular No. 96/7/2007 dated 23.8.2007 provided as :

“Service is not leviable on a transaction treated as sale of goods and subjected to levy of sales tax/VAT. Service Tax is not leviable on a transaction treated as sale of goods and whether a given transaction between the service station and the customer is a sale or not, is to be determined taking into account the real nature and material facts of the transaction. Payment of VAT/Sales Tax on a transaction indicates that the said transaction is treated as sale of goods.”

7. On the introduction of restaurant services in 2011, the Circular dated 28.02.2011 clarified that pick up or delivery of foods or goods sold at MRP would amount to sale and would be outside the purview of service tax. In view of the various representations, raising doubts and queries with

regard to the liability of service tax in restaurants, both air-conditioned and non-air conditioned clarification was provided by the Board vide Circular No. 173/8/2013- ST dated 7.10.2013, whereby non-air conditioned restaurants were not chargeable to service tax. Coupled with the said circular, the Deputy Commissioner, Central Excise and Service Tax Division, Chandigarh issued the clarification vide letter dated 13.08.2015 once again clarifying that service tax can be levied if there is an element of service involved, the relevant part thereof is quoted herein:-

“It is clarified that in case of the transaction involving pick up or home deliveries of the food sold by the restaurant, the dominant nature of the transaction is that of sale and not service as the food is not served at the Restaurant and further no other element of service which is offered at the Restaurant, be it, ambience, live entertainment, if any, air-conditioning, or personalised hospitality is offered. The service tax can be levied If there’s an element of ‘Service’ involved which would typically the case where food is served in restaurant. The above transaction is not liable to service tax, being in nature, only if, no amount is charged for free delivery of food.”

8. This Tribunal in **M/s. Ambedkar Institute of Hotel, Management V Commissioner, Central Excise & Service Tax, 2015 (40) STR 823**, where the activity undertaken by the appellant of providing midday meals to the schools of Chandigarh Administration under the Government Scheme was held to be not covered under the definition of “Outdoor Caterer” as per section 65(106)(zzt) as the appellant was not found to be involved in serving of the meals in any manner. Following the said decision, the Mumbai Bench of the Tribunal in **Suruchii Caterers V Commissioner of Central Excise, Mumbai, 2016(9) TMI 430**, where also the appellant was engaged in providing mid-day meals to various schools, set aside the order whereby the

demand of service tax liability was affirmed by the authorities below on supply of mid-day meals. The decision of the Telangana High Court in **M/s Bhimas Hotels Pvt Ltd Vs. Union of India – 2017-TIOL-799-HC-AP-ST** considered the issue whether the food supplied by an employer to the workers at a subsidised rate would come within the meaning of the expression 'service', irrespective of whether the food is supplied within the premises or outside the premises, observed once the activity undertaken by the petitioner in the form of supply of food to its workers at the subsidised rate is concerned to be part of the industrial obligation, it is unthinkable, the same can be construed as a service falling within the definition of the expression 'service' under section 65B (44) of the Finance Act. Once again, in the case of **M/s Hotel Priya Vs. Commissioner of G.S. & Central Excise, Chennai, 2018 (9) TMI 1663**, the Tribunal following the decision in **M/s Ambedkar Institute of Hotel Management** (supra) upheld the contention of the appellant that service element in 'outdoor catering service' is catering to the need of the customer which includes serving the food whereas in the present case where the appellant is engaged in supply of food to M/s Mitsubishi Heavy Industries, there is only sale of the food which is delivered to their premises and therefore the activity does not fall within the definition of outdoor catering service. We now refer to the decision of the Madras High Court in **Anjappar Chettinad AC Restaurant Vs. Joint Commissioner, the Commissioner of GST and Central Excise 2021 (6) TMI 226**, where the liability to service tax under the Finance Act on food that is taken away or collected from restaurants or eateries in parcels was in issue. Referring to the decisions of the Apex Court in **Federation of Hotel and Restaurant Association of India Vs. Union of India – 2006 (3) STR 260** on the principle that there could be no artificial division or distinction between the sale and service elements when it comes to service of food in a restaurant and similarly in **Tamil Nadu Kalyana Mandapam**

Association V Union of India, where the Court has made a distinction between services rendered in a restaurant or a hotel *via-a-vis* services rendered by an outdoor Caterer and further taking note of the Circular No. 334/2011 dated 28.2.2011 and Circular No. 173/8/2013-ST dated 7.10.2013 observed as follows :

“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 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 arrangement for seating, décor, music and dance, both live and otherwise, the services of Maitre 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 categorical 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.”

9. The above paragraphs have been reiterated later by the Ahmedabad Bench of the Tribunal in **Hotel Utsav V CCE & ST, Surat, 2022 (3) TMI 329**. Lastly, we would take note of the latest decision of the Principal Bench of the Tribunal in the case of **Haldirams Marketing Pvt Ltd Vs. Commissioner, Central Goods and Service Tax, GST Delhi Commissionerate, New Delhi—2023 (2) TMI 783 (CESTAT-New Delhi)** and the limited issue in dispute was of cooked food sold by way of Takeaway on which service tax was levied. Referring to all the above decisions and the Circulars particularly clarification dated 13.8.2015 issued by the deputy commissioner, central excise and service, tax division, Chandigarh. It was accordingly held by the Tribunal that in case of take away of food, the appellant sells the food or packaged items, as chosen by the customer, over the counter, and this would amount to sale of goods. Services such as dining facility, washing area, clearing of the tables after the food has been eaten, therefore, not involved. The activities of preparation of food and packing thereof by the appellant in case of takeaway items are conditions of sale of such food, wherein the intention of the customer is to merely buy such packaged product from the appellant and not to avail any restaurant services. The appeal filed by the Department against the said decision has been dismissed by the Apex Court as reported in **2023 (10) TMI 174 (SC).**”

10. The learned counsel for the appellant has placed on record the decision of a three Judge Bench of the Apex Court in **Northern India Craters (India) Ltd. Vs. Lt. Governor of Delhi 1978 (4) SCC 36**, though the decision relates to the pre-service tax era, however, the principal laid down therein are relevant for our consideration. The appellant therein was running a hotel in which lodging and meals were provided on “inclusive terms” to residents and also meal was served to the non-residents in the restaurant located in the hotel. The contention of the appellant was that the service of meals to residents and non-residents could not be regarded as a sale and therefore sales tax could not be levied in respect thereof. The observations made by the Court observed are quoted herein below :-

“Like the hotelier, a restaurateur provides many services in addition to the supply of food. He provides furniture and

furnishings, linen, crockery and cutlery, and in the eating places of today he may add music and a specially provided area for floor dancing and in some cases a floor show. The view taken by the English law found acceptance on American soil, and after some desultory dissent initially in certain states it very soon became firmly established as the general view of the law. The first edition of American Jurisprudence sets(3) forth the statement of the law in that regard, but we may go to the case itself, *Electa B. Merrill v. James W. Hodson*(4), from which the (1) *Innkeepers & Hotels*, para 169.

(2) 4 Burr. 2065.

(3) Vol. 46 p. 207 para 13.

(4) 1915-B L.R.A. 481.

statement has been derived. Holding that the supply of food or drink to customers did not partake-of the character of a sale of goods, the Court commented:-

"The essence of it is not an agreement for the transfer of the general property of the food or drink placed at the command of the customer for the satisfaction of his desires, or actually appropriated by him in the process of appeasing his appetite or thirst. The customer does not become the owner of the food set before him, or of that portion which is carved for his use, or of that which finds a place upon his plate, or in side dishes set about it. No designated portion becomes his. He is privileged to eat, and that is all. The uneaten food is not his. He cannot do what he pleases with it. That which is set before him or placed at his command is provided to enable him to satisfy his immediate wants, and for no other purpose. He may satisfy those wants; but there he must stop. He may not turn over unconsumed portions to others at his pleasure, or carry away such portions. The true essence of the transaction is service in the satisfaction of a human need or desire, ministry to a bodily want. A necessary incident of this service or ministry is the consumption of the food

required. This consumption involves destruction, and nothing remains of what is consumed to which the right of property can be said to attach. Before consumption title does not pass; after consumption there remains nothing to become the subject of title. What the customer pays for is a right to satisfy his appetite by the process of destruction. What he thus pays for includes more than the price of the food as such. It includes all that enters into the conception of service, and with it no small factor of direct personal service. It does not contemplate the transfer of the general property in the food supplied as a factor in the service rendered."

11. The review petition filed by the Department against the aforesaid decision was dismissed on merits by the judgement reported **in 1980 (2) SCC 167**, observing in para 12 of the judgment delivered by Justice Pathak, (as My Lord then was) that where food is supplied in eating house or restaurants, and it is established upon the facts that the substance of the transaction, evidence by its dominant object, is a sale of food and the rendering of services is merely incidental, the transaction would undoubtedly be exigible to sales tax. Justice Krishna Iyer, in his concurring judgement took a further pragmatic view as to the efforts which a business house has to make to attract the customers by going extra mile, the relevant paragraph is quoted:

"17. The learned Solicitor General took us through English and American legal literature of vintage value and alien milieu. They enlightened us but did not apply fully, as explained by my learned brother. Had they been earlier cited, had been seriously considered. But India is India. It lives in its one lakh villages, thousands of towns, millions of pavement pedlars and wayside victuallers, corner coffee shops and tea stalls, eating houses and restaurants and some top-notch parlours. Habits vary, conventions differ and one rigid rule cannot apply in diverse situations. If you go to a coffee house, order two dosas, eat one and carry the

other home, you buy the dosas. You may have the cake and eat it too, like a child which bites a part and tells daddy that he would eat the rest at home. Myriad situations, where the transaction is a sale of a meal, or item to eat or part of a package of service plus must not be governed by standard rule. In mere restaurants and non-residential hotels, many of these transactions are sales and taxable. Nor are additional services invariably components of what you pay for. You may go to an air-conditioned cloth-shop or sweet-meat store or handcrafts emporium where cups of tea may be given, dainty damsels may serve or sensuous magazines kept for reading. They are devices to attract customers who buy the commodity and the price paid is taxable as sale. The substance of the transaction, the dominant object, the life-style and other telling factors must determine whether the apparent vendor did sell the goods or only supply a package of services. Was there a right to take away any eatable served, whether it be bad manners to do so or not? In the case we have, the decision went on the ground that such right was absent. In cases where such a negative is not made out by the dealer-and in India, by and large, the practice does not prohibit carrying home-exigibility is not repelled."

12. The provisions of section 65B (44) and 66E of the Finance Act, defining "service" and "declared services" having been clarified by the Circulars and interpreted in the various decisions, we are of the view that the material issue is no longer res-integra. As noted above in the decisions, in case of take away food, packaged items etc. over the counter, the same amounts to sale of goods and there is no element of service involved therein. The same principle would apply here in the case of PVR Cinemas where fixed menu which is ready to eat is sold by merely reheating, if required. The viewers who have come to watch the movie go to the counters during the interval period, stand in queue and buy the food items which are either already packed or are reheated and sold to people as and when their turn

comes. After buying they bring those items to their respective seats and enjoy it while watching the movie. There is no element of service in such transaction as interpreted in the judgments referred above. The facility of availability of the food items within the complex is only with a view that the duration of the movie is between 2/3 hours and the viewers during this time may like to munch something and most of the time there are little children or even elderly people who normally require to have something to satisfy their urge of hunger. The duration of the interval is so short that it is not possible for the viewers to rush outside the cinema complex to buy food stuff and eat there. Just for making it convenient, the cinema complex provides some packaged or ready to eat food items and drinks. The choice of food stuff or soft drink is limited and the viewers have to accept from what is available. There is another aspect of the matter which is peculiar to the cinema complex, that these counters providing food items are not open to the public at large like any snack bar or restaurant but only those who have bought a ticket for viewing the movie can access them. Thus, the supply of food items and drinks to viewers through the counters in the cinema halls is equivalent to the transaction involved in sale of take away/package food.

13. The other principle which emerges from the aforesaid decisions is the test to determine the dominant or incidental purpose. If we apply this principle to the cinema complex, their main purpose is to enable the public to view the movie, however to make it more enjoyable and convenient they provide a separate counter outside the movie hall but within the complex where the viewers can themselves go and buy some food or drinks, which implies that the later facility is only incidental and hence cannot be treated as a service within the definition of "service" under the Finance Act, for the charge of service tax. In this regard, we would like to take note of the decision of the Delhi High Court in **Indian Railways C. & T. Corpn. Ltd. Vs. Govt. of NCT of Delhi -2010 (20) STR 437 (Delhi)**, where the

petitioner, a Government company was providing services, including catering on board the trains run by Indian Railways and the Court observed:-

"46. Since there is transfer of goods, by the petitioner company to Indian Railways, for consideration and the property in the goods also passes to Indian Railways, the transactions between them is no doubt a case purely of sale of goods under the provisions of Sale of Goods Acts as well as Delhi Value Added Tax Act and the element of service by way of heating the food, heating/ freezing the beverages and then serving them to the passengers is purely incidental and minimal required for sale of food and beverages in a transaction of this nature. There is no privity of contract between two petitioner company and the passengers travelling in trains."

14. The learned Counsel for the appellant has referred to a decision of Court of Justice (Third Chamber) dated 10.3.2011 in **Finanzamt Burgdorf V Manfred Bog (C-497& 499/09)** which specifically dealt with the issue whether the various activities of supplying food or meals prepared for immediate consumption in cinema halls constitute supply of goods or supply of services and observed that all the circumstances in which the transaction takes place must be taken into account in order to ascertain its characteristic elements and identify its predominant elements. The Court comparing the same with the restaurant transactions where the provision of food is only one component and in which services largely predominate, they are regarded as supplies of services whereas the situation in hand is different where this transaction of taking away the food is not coupled with services designed to enhance consumption on the spot in an appropriate setting, i e. laying the table, advising customer and explaining the food and drink on the menu to him, serving at table and clearing the table after the food has been eaten, there are no waiters, no service properly, speaking consisting in particular in transmitting orders to the kitchen and then presenting and

serving dishes to customers and essentially no crockery, furniture or place settings. Having regard to the qualitatively predominant elements from the point of view of the consumer, the transaction is one of supply of food and not supply of services.

15. The Revenue has taken the plea that appellant has admitted their service tax liability for this activity and the same activity could not be vivisected as taxable for one category and non-taxable for other. Considering the said argument, we would like to distinguish the Gold Class category which is available in the PVR multiplex where apart from special comfortable seats, the viewers are provided with further facilities where a staff member of the multiplex / waiter comes to their seats and take the order and accordingly provide the food and drink to them on a small table like attachment to the seat. After the food is consumed by the viewers, the waiters come and collect the crockery back. This kind of facility is not provided in case of other category of viewers with which we are concerned here and that is the distinguishing feature on which the PVR pays the service tax. The analogy adopted by the earlier Benches of the Tribunal as well as by the High Courts and the clarifications issued by the revenue by way of circulars which are binding on them, will squarely cover the present case. We, therefore are of the firm view that the service tax is not leviable on the sale of food items in packed form or by process of reheating in the cinema halls as there is no element of service involved therein.

16. The learned Authorised Representative has referred to an advance ruling in the case of **In Re HRPL Restaurants Pvt. Ltd. – (2023) 4 Centax 410**, where it was held that when ice creams ordered are supplied along with cooked or prepared food through restaurant outlets, then supply would assume character of composite supply, classifiable under 'restaurant service' with GST leviable at 5%. We are not swayed by the relied on order

for the simple reason that the same has no precedential value in case of another party.

17. Since we have arrived at the conclusion that no service tax can be charged on the sale of food stuff in the PVR complex to the viewers of the movie, the provisions of Service Tax (Determination of Value) Rules, 2006 will not be applicable. We also do not delve on the fact of payment of VAT by the appellant.

18. Infact the other contentions also raised by the appellant needs no further consideration as the same are consequential in the event we would have upheld the applicability of the service tax. As the service tax itself is not chargeable, there is no question of interest and penalty.

19. Consequently, in view of our discussion above, the impugned order deserves to be set aside. Accordingly, the appeals stand allowed.

[Order pronounced on 30th November, 2023]

(Binu Tamta)
Member (Judicial)

(P. V. Subba Rao)
Member (Technical)

Ckp.