Excise Duty Exemption or Duty will be charged @ 6% for Food and Food Related Industry

Introduction

We are grateful to the Mother Nature that she provides to the mankind various things like vegetables, fruits, cereals, pulses etc. She is very kind to the mankind. It is said that 'God helps those, who helps themselves'. Thus, for producing various things like cereals, pulses, vegetables, farmers toil very hard on the land and for the hard work done by the farmers, Mother Nature showers her kindness and gives production manifold compared to the quantum of inputs sown.

On the products produced by farmers, various processes are being done on them and the same is being put in manufacture or production of various items. During this, many persons also provides various services in this regard. Many dishes are also produced and are consumed. For all this activities, processes, an attempt has been made to study the impact of Indirect taxes more particularly central excise and service tax and the said impact has been explained in subsequent paragraphs.

Tax on activity of Production of Agriculture Produce

As per section 3 of Central Excise Act, 1944, 'There shall be levied and collected in such manner as may be prescribed, a duty of excise to be called the Central Value Added Tax (CENVAT), on all excisable goods (excluded goods produced or manufactured in special economic zones) which are produced or manufactured ***'

Thus, central excise duty is there on manufacture or production of goods.

The term manufacture is defined by section 2(f) of the Central Excise Act, 1944 which reads as under:

'"manufacture" includes any process,—

- incidental or ancillary to the completion of a manufactured product;
- which is specified in relation to any goods in the Section or Chapter notes of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture; or
- which, in relation to the goods specified in Third Schedule involves packing or re-packing of such goods in a unit container or labeling or re-labeling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer,

and the word "manufacturer" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account;'

The above definition of manufacture is inclusive definition and does not explain the concept of manufacture in detail. The same has been explained by his lordships in the case of **UOI v. Delhi Cloth & General Mills (1963) AIR 791 (SC)** wherein it has been held that 'The word 'manufacture is generally understood to mean as bringing into existence a new substance' and does not mean merely' to produce some change in a substance' therefore,' manufacture' implies a change but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation, a new and different article must emerge having a distinctive name, character or use".

In **CCE v. Kiran Spinning Mills, 1988 (34) E.L.T. 5 (S.C.)** similar view has been expressed by the Apex Court regarding the expression 'manufacture'. It has been observed in that case, by the Court as under 'It is true that etymological word 'manufacture' properly construed would doubtless cover the transformation, but the question is whether that transformation brings about fundamental change, a new substance brought into existence or a new different article having distinct name, character or use results from a particular process of particular activity."

In **Hindustan Polymer v. CCE, 1989 (43) E.L.T. 165** the Apex Court has defined the expression 'manufacture' as under :- "manufacture' under the Excise Law is the process or activity which brings into being articles which are known in the market as goods and to be goods these must be different, identifiable and distinct articles known to the market as such. It is then and then only that manufacture takes place attracting duty."

Thus, a process whereby farmer converts the seeds into vegetables, cereals, fruits, flowers, etc., which is very much raw material for food industry is manufacture as new different product comes into existence which has its independent use, character, identity and satisfies the test of manufacture as set by Hon' Apex court in the case of **UOI v. Delhi Cloth & General Mills (1963) AIR 791 (SC).**

Every product is known by a HSN (Harmonized System Nomenclature). In order to know where a product is classifiable, one has to refer to First Schedule of Central Excise Tariff Act, 1985. Whether a particular product is chargeable to duty of excise or not will depend upon rate of duty specified in the Central Excise Tariff Act, 1985 read with any exemption Notification, if any.

Chapter I contains the products of animal origin like meat, milk etc. Most of them either are non-excisable or chargeable to NIL rate of duty. Even the products such as butter milk, cheese, ghee, butter (except condensed milk having sweetener) are also chargeable to NIL rate of duty.

All vegetables like potato, tomato, cabbage, coconut, cashew, mango, dried fruits, rice, tea (with few exceptions), maize, copra are chargeable to Nil rate of duty (with few exceptions) and are contained in chapter 6 to 14 of the Central Excise Tariff Act, 1985.

Services Relating to Agriculture

Once the products are produced by a farmer or dairy produce is made by a person, then many processes are being done on the same before the same is put to use for any other purpose. If because of such process on the products made results in a new, distinct product, then the same amounts to manufacture; however, if the same does not alter the product, then the same does not amount to manufacture.

Many processes are required to be done on the product that has grown on the land before the same gets consumed by the ultimate consumer, either directly or indirectly. After product has been grown in the land by the farmer, the processes like harvesting, cutting, transportation, cleaning, storing and many other process are done. These processes may be done by the farmer directly or by an independent person for this purpose. A question as to whether the charges for the processes incurred on agriculture produce is liable to be taxed?

In the Finance Act, 1994, Negative list has been introduced from 01.07.2012, whereby there will be tax on all the activities other than those specified in Negative List as well as those which are exempt. One such activity which is covered in the Negative list is 'services relating to agriculture' [Section 66D(d) of the Finance Act, 1994]

Section 66D(d) states that the under-mentioned Services relating to agriculture is covered in the negative list which are provided by way of –

- Agricultural operations directly related to production of any agricultural produce including cultivation, harvesting, threshing, plant protection or seed testing;
- Supply of farm labour;
- Processes carried out at an agricultural farm including tending, pruning, cutting, harvesting, drying, cleaning, trimming, sun drying, fumigating, curing, sorting, grading, cooling or bulk packaging and such like operations which do not alter essential characteristics of agricultural produce but make it only marketable for the primary market;
- Renting or leasing of agro machinery or vacant land with or without a structure incidental to its use;
- Loading, unloading, packing, storage or warehousing of agricultural produce;
- Agricultural extension services;

- Services by any Agricultural Produce Marketing Committee or Board or services provided by a commission agent for sale or purchase of agricultural produce.

Thus, on the above services provided, there will be no service tax thereon.

Certain FAQ.

Q. Explain the meaning of 'agriculture', 'agriculture extension', 'agriculture produce'?

A.**"Agriculture"** means the cultivation of plants and rearing of all life-forms of animals, except the rearing of horses, for food, fibre, fuel, raw material or other similar products; [Section 65B(3)]

A.**"Agricultural extension"** means application of scientific research and knowledge to agricultural practices through farmer education or training; [Section 65B(4)]

A.**"Agricultural produce"** means any produce of agriculture on which either no further processing is done or such processing is done as is usually done by a cultivator or producer which does not alter its essential characteristics but makes it marketable for primary market; [Section 65B(5)]

Q. Whether the activities like breeding of fish (pisciculture), rearing of silk worms (sericulture), cultivation of ornamental flowers (floriculture) and horticulture, forestry included in the definition of agriculture?

A. Yes. These activities are included in the definition of agriculture. [Para 4.4.2 of Education guide]

Q. Would potato chips or tomato ketchup qualify as agricultural produce?

A. No. In terms of the definition of agricultural produce, only such processing should be carried out as is usually done by cultivator producers which does not alter its essential characteristics but makes it marketable for primary market. Potato chips or tomato ketchup are manufactured through processes which alter the essential characteristic of farm produce (potatoes and tomatoes in this case). [Para 4.4.5 of Education guide to service tax.]

A. Though the above will not qualify for agriculture produce and will not continue in the negative list as per section 66D(d) of the Finance Act, 1944, but manufacture of tomato ketchup (Chapter heading 21032000) from tomato and potato chips from potato amounts to manufacture.

A. As per section 66D(f), Any process amounting to manufacture or production of goods is covered in the negative list, and thus, by virtue of section 66D(f), there will be no service tax on such process as the same amounts to manufacture of goods.

A. Whether excise duty will be leviable on the goods manufactured or not will further depend upon the rate of duty as contained in CETA, 1985 read with exemption notification, if any.

Q. Would agricultural products like cereals, pulses, copra and jaggery be covered in the ambit of 'agricultural produce' since on these products certain amount of processing is done by a person other than a cultivator or producer?

A. 'Agricultural produce' has been defined in clause (5) of section 65B as 'any produce resulting from cultivation or rearing of plants, animals including all life- forms, on which either no further processing is done or such processing is done as is usually done by the cultivator or producer which does not alter essential characteristics of agricultural produce but make it marketable for primary market'. The processes contemplated in the said definition are those as are 'usually done by the cultivator or producer'. [Para 4.4.7 of Education Guide]

Q. If any processing is done on animal produce which are relating to dairy which does not amount to manufacture, then whether service tax will be leviable on the such activities?

A. What is covered in the Negative list is services relating to agriculture. However, the term agriculture does not include activities relating to dairy. Thus, if a dairy gives its milk for heating on a job work basis to another dairy or for pasteurization, then on such services, service tax will have to be paid.

A. Similarly, on the activities of refrigeration of dairy produce, service tax will have to be paid.

Q. Whether service tax will have to be paid on all services relating to diary produce or is there any exemption?

A. There is no service tax on transportation of Services provided by a goods transport agency by way of transportation of agriculture produce, foodstuff including flours, tea, coffee, jaggery, sugar, milk products, salt and edible oil, excluding alcoholic beverages; [Sr No 21(a) and Sr No 21(d) of **Notification No 25/2012-ST dated 20.06.2012** as amended]

A. There will be no service tax on Services by way of transportation by rail or a vessel from one place in India to another of agriculture produce, foodstuff including flours, tea, coffee, jaggery, sugar, milk products, salt and edible oil, excluding alcoholic beverages; [Sr No 20(h) and Sr No 20(i) of Notification No 25/2012-ST dated 20.06.2012 as amended]

Taxation on eatables/ its raw materials manufactured and sold in the market.

There are many eatables available in the market like chocolates, ready to eat food like potato wafers, ready to cook products like maggi, soup, biscuits. The taxation aspect of some of the product is discussed hereunder:

In the Budget of 2011, Government of India has introduced tax on certain items at 1%, if Cenvat credit of inputs and input services are not taken, otherwise, tax at 5%. In the Budget of 2012, the said rates have been increased to 2% and 6% respectively. Certain commodities have been brought into the Central Excise net. The details of some of them are as under:

- Paws, Mudi, Mamra
- Sauces, Ketchup and their preparations
- Ready to eat foods packaged food such as Potato chips and the like. What is to be observed is that it must be ready to eat and not ready to cook. However, Notification No 12/2012-CE has granted exemption to sweetmeats, (known as 'misthans' or 'mithai' or by any other name), namkeens, bhujia, mixture, chabena and similar edible preparations in ready for consumption form, papad and jaljeera. [Sr No 37 of Notification].
- Further, there are various persons who sell the foods on their counter like puff, sandwhiches, pizzas. However, the same are not packaged food, hence, the same is exempt. [Sr No 38 of Notification No 12/2012]
- For further details, one may refer to **Notification No 1/2011-CE** and **2/2011-CE dated 01.03.2011** in this regard as well as Notification No 12/2012-CE]
- In addition to above, one may refer to **Notification No 12/2012-CE** which contains the details regarding taxability or otherwise. Some of the things are worth noting and are mentioned below:
- Biscuits:

Generally, the rate of excise duty on sweet biscuit is 6%. However, where biscuit cleared in a packaged form wherein per kg retail price do not exceed Rs 100/-, then such biscuit is exempt from central excise duty.

In market, generally, we see biscuit available in quantity of 100 gms, 250 gms and so on. The price also varies between different packages of the same brand and same company and the price do not increase uniformly with increase in quantity. In such case, the excise duty leviability will be as under:

- Say, a biscuit of 100 gms is available for Rs 15, then its 1 kg equivalent will come to 15 x 1000/100 = Rs 150/- per kg. In such case, excise duty will be at 6%.

Wafer Biscuits (except coated with chocolate) are chargeable at 6%. However, wafer biscuit coated with chocolate are chargeable at 12%.

- Ice Creams

Ice creams are chargeable to excise duty @ 6% (Refer 21050000). However, ice-creams are also manufactured and sold in many canteens, shops and various organizations in a vending machines. There is no duty on ice cream and non alcoholic beverages prepared and dispensed by vending machines. [Sr No 29 of Central Excise notification No. 12/2012-, dated 17th March, 2012,]

Besides, Mineral water is chargeable to excise duty @ 12%.

The above stated are some of the instances. For detailed, one is required to refer to the Notification in order to arrive the correct rate of duty. The rate of duty stated above are subject to change, hence, the reader is required to consider the amendments, if any, in the above details.

Eatables and Service Tax at Restaurant.

When there is a manufacture, then it shall be levied to central excise duty, if the product is excisable and chargeable to rate of duty. Many products are manufactured in a restaurant.

For Eg: when one takes a flour and makes chapatti from the flour, it is called manufacturing of chapatti from flour.

When one takes rice and makes biryani or pulao, then the same amounts to manufacture.

A restaurant is a business establishment which prepares and serves food and drink to customers in return for money, either paid before the meal, after the meal, or with a running tab. Meals are generally served and eaten on premises, but many restaurants also offer take-out and food delivery services. Restaurants vary greatly in appearance and offerings, including a wide variety of the main chef's cuisines and service models. (Source: http:// en. wikipedia. org/wiki/ Restaurant).

A part from manufacturing various dishes, there is also service element involved in the services provided by a restaurant.

The restaurant does manufacturing because it brings into existence a new, different, distinct product into existence which has independent use, character, identity, use. For Eg., When a person makes 'uttapam' or 'dosa' or 'idli' from dough, it is also manufacture as a new, different product comes into existence. Making a 'pulao' amounts to manufacture and when the same is served to the customer who has visited in a restaurant, then the activity of serving to the customer is a service.

Thus, in a restaurant, a person, apart from food, a person also gets various services like waiter who serves the food, listening of music, and many other things apart from manufactured food. The service tax on services provided by Restaurant has been introduced w.e.f 01.05.2011. The scope of service tax on services provided by restaurant has been explained by **DOF Letter No 334/3/2011-TRU dated 24.04.2011** whose relevant extracts are reproduced below:

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.

Initially, there was service tax on services provided or to be provided by a restaurant having the facility of air-conditioning in any part of the establishment, at any time during the financial year, which has licence to serve alcoholic beverages, in relation to serving of food or beverage, including alcoholic beverages or both, in its premises.

Generally, it becomes difficult to segregate the service portion and goods portion in an activity performed by a restaurant. As the activity done by a restaurant is that of manufacture of food as well as provision of service,

hence, in order to tax only service portion, abatement of 70% was provided in terms of **Notification No 1/2006-ST**, as amended, provided Cenvat credit of inputs and input services are not availed. Also, if the benefit of **Notification No 12/2003-ST** has been taken, then benefit of abatement was not available.

With the introduction of negative list w.e.f 01.07.2012, Government has declared 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 as service. [Declared Service – Section 66E(i) of Finance Act, 1994]. However, by virtue of Sr No 19 of Notification No 25/2012-ST, Government had granted exemption to the units which do not have air conditioning facility and licence to serve liquor (upto 28.02.2013).

Thus, on introduction of negative list, initially, there was no change in the scope of service, except that along with air conditioning unit in a restaurant at any part of establishment during the year, the restaurants having a central heating unit are also included in the concept of service.

However, w.e.f 01.03.2013, All the air conditioned restaurants have made at par and service tax is required to be paid by all restaurants irrespective of fact whether such restaurants have licence to serve liquor or not. Thus, because of this, the services provided by all restaurants which do not have facility of air-conditioning or central air-heating in any part of the establishment, at any time during the year, is exempt. Sr No 19 of **Notification No 25/2012- ST** w.e.f 01.03.2013 reads as under:

Sr No 19 of Notification No 25/2012-ST

'Services provided in relation to serving of food or beverages by a restaurant, eating joint or a mess, other than those having the facility of air-conditioning or central air-heating in any part of the establishment, at any time during the year;'

The value of service portion has been kept at 40% (increased by 10%) of the total value charged by the restaurant. It is to be noted that the restaurant does two things, viz., manufacturing as well as providing service and both are embedded in one thing. For segregating both the goods and service portion, Government is treating service portion as 40% of the total amount [Rule 2C of Service Tax (Determination of Value) Rules, 2006]. Thus, by reducing 10% abatement, the government is allowing credit of input services (subject to restrictions contained in the definition of input services) as well as of inputs, except the inputs covered under chapter 1 to 22 of the Central Excise Tariff Act, 1944. Thus, credit of any eatables which are inputs most of which are covered under chapter 1 to 22 of Central Excise Tariff Act, 1944, on which central excise duty is leviable, is not allowed by the government.

Explanation 1 to Rule 2C of Service Tax (Determination of Value) Rules, 2006 states that "total amount" means the sum total of the gross amount charged and the fair market value of all goods and services supplied in or in relation to the supply of food or any other article of human consumption or any drink(whether or not intoxicating), whether or not supplied under the same contract or any other contract, after deducting-

- the amount charged for such goods or services, if any; and
- the value added tax or sales tax, if any, levied thereon:

However, the fair market value of goods and services so supplied may be determined in accordance with the generally accepted accounting principles.

Certain FAQs.

Q. Restaurant also sells food article to the persons who do not consume them at the restaurant but take the parcel from the restaurant, which is generally called as 'take away meal'. Is service tax leviable on the same? If No, how the same can be proved to the department?

A. As in the take away meals, no service component is involved, like serving, in such a case, no service tax will be leviable on the same. However, it has been observed that some restaurants charge extra cost for packing of the food. In such case, on the packing of the same, service tax at full rate is required to be paid.

In case of take away meals which are sold across the counter, there is no service tax. In such a case, two invoice books may be kept, one for selling over the counter and another for serving inside the restaturant so as to avoid any kind of dispute.

Q. When a person goes to an air conditioned restaurant and consumes various dishes and the bill comes of Rs 500. What is the service tax involved in this?

A. Service tax is on service portion. Service portion in case a person goes to an air conditioned restaurant is 40% of the total amount charged. Total amount charged is Rs 500. Service portion is 40% of Rs 500/-. Thus, service portion is Rs 200/-. The service tax that a person is required to pay is Rs 24.72 (12.36% of 200). The effective rate comes to 4.944%.

Q. Whether service tax is leviable on goods sold on MRP basis across the counter as part of the Bill/invoice.

A. 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. [Sr No 3 of Circular No.173/8/2013 – ST dated 07.10.2013]

Generally, the service portion is 40% of the total amount charged as per Rule 2C of Service Tax (Determination of Value) Rules, 2006. However, when goods are sold under MRP basis, then the same have to be excluded from total amount for the determination of value of service portion.

Following examples will make things clear:

- Mineral water is subject to provision of MRP and it is valued as per Section 4A of the Central Excise Act, 1944. Customer orders two mineral water bottles during its lunch whose MRP is Rs 40/- per bottle. Thus, Rs 80/- will not be included in computation of service tax while calculating total amount for the purpose of determining service portion. This is direct sale of bottle.
- Suppose, MRP of bottle is 40/- and Restaurant charges the same from the customer at Rs 60/-, then Rs 20/- becomes service portion as what is to be excluded is MRP in calculation of total amount charged. Thus, on this Rs 20/-, service tax @ 12.36% will have to be

Q. Will the services provided by taxable restaurant in other parts of the hotel e.g. swimming pool, or an open area attached to a restaurant be also liable to Service Tax?

A. The taxable services provided by a restaurant in other parts of the hotel e.g. swimming pool, or an open area attached to the restaurant are also liable to Service Tax as these areas become extensions of the restaurant. [Sr No 2 of **Circular No. 139/8/2011-TRU dated 10.05.2011**]

Q. If a restaurant is there in a complex where there is a hotel, and food is served in a hotel, then, whether service tax is required to be paid on food served in a hotel, which is generally known as 'in room dining'?

A. When the food is served in the room, service tax cannot be charged under the restaurant service as the service is not provided in the premises of the air-conditioned restaurant with a licence to serve liquor. Also, the same cannot be charged under the Short Term Accommodation head if the bill for the food will be raised separately and it does not form part of the declared tariff. [Sr No 3 of Circular No. 139/8/2011-TRU dated 10.05.2011]

Q. Restaurants also supply food on order with some cost for delivery or free of cost. Is service tax leviable on services provided by restaurant of free home delivery?

A. Service tax can only be levied if there's an element of 'service' involved which would typically be the case where food is served in a restaurant. In case where food is just bought as 'takeaways' or in case of home deliveries, there's no service or it is incidental to the actual sale of food.

Q. In a complex where air conditioned as well as non-air conditioned restaurants are operational but food is sourced from the common kitchen, will service tax arise in the non-air conditioned restaurant?

A. 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 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. [Sr No 1 of Circular No.173/8/2013 – ST dated 07.10.2013]

Thus, it must be noted that there should not be mere separate sitting arrangement, but both Air conditioned and Non Air conditioned restaurant must be separately demarcated and named. Thus, what it essentially wants to convey that the one would be able to distinguish between Air Conditioned (Centrally Air heated restaurant) and Non Air conditioned Restaurant (Non -Centrally Air heated restaurant) and should be separately demarcated as such

Q. Is service tax required to be paid on VAT charged by restaurant?
A. For the purpose of service tax, State Value Added Tax (VAT) has to be excluded from the taxable value. [Sr No 4 of Circular No. 139/8/2011-TRU dated 10.05.2011]

Q. Since a restaurant also manufactures food items and then serves the same, of which service portion is only 40% of the total amount, balance 60% represents goods or for manufacturing activity. There is no excise duty on manufacture of items which are sold in a restaurant. The restaurant avails Cenvat credit on services received by it to the extent eligible. Can they avail full service tax credit or they are required to reverse to the extent the same represents manufacturing activity which is 60% of the total amount charged in terms of Rule 6(3) of Cenvat Credit Rules, 2004?

A. The entire activity is of services by a restaurant is bifurcated into two parts; one is service component, which is 40% of the total value and balance is manufacturing component, which is 60% of the total value.

Rule 2C of Service Tax (Determination of Value) Rules, 2006 states that the provider of taxable service shall not take CENVAT credit of duties or cess paid on any goods classifiable under Chapters 1 to 22 of the Central Excise Tariff Act, 1985 (5 of 1986)

The logic of raising reducing the abatement by 10% is that the industry is able to utilize credit on capital goods, specified inputs (other than chapter 1 to 22 i.e. foods and beverages) and input services. Thus the taxable portion is being raised but the move is expected to be business-friendly. [Sr No 17 of D. O. F. No 334/1/2012-TRU dated 16.03.2012].

Considering above, of the total value, only 40% represents service component. Since service tax is paid on full value, while availing service tax on input services, no service tax is required to be reversed in terms of Rule 6(3) of Cenvat Credit Rules, 2004.

Further, of the total value, balance 60% represents manufacturing component, on which, at present no central excise duty is required to be paid. As a result, the goods that are required in manufacturing of articles for human consumption, which falls within chapter 1 to 22 of the CETA, 1985, has been denied.

Thus, in a way, Rule 6 of Cenvat Credit Rules, 2004 has been complied with as a person is not availing Cenvat credit of inputs used in manufacturing of exempted goods.

Q. How to calculate basis exemption limit in case a person wants to avail the said limit?

A. Notification No 33/2012-ST grants exemption from taxable services of aggregate value upto ten lakh rupees in any financial year from the whole of the service tax leviable thereon under section 66B of the said Finance Act.

The exemption has been granted from taxable service.

In case of restaurants, the service portion is 40% of the total amount charged. Thus, to calculate exemption, what is to be seen is the service portion and not total amount.

Q. Can the credit of services provided by Restaurants / outdoor caterer is eligible as an input service?

A. The definition of input service contained in Rule 2(l) of Cenvat Credit Rules, 2004 excludes services such as such as those provided in relation to outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, life insurance, health insurance and travel benefits extended to employees on vacation such as Leave or Home Travel Concession, when such services are used primarily for personal use or consumption of any employee.

Thus, if the services of restaurant has been taken for personal use or consumption of an employee, then its credit is not admissible. However, when the services of restaurant has been taken for business purpose, say taking important guests of a company for dinner or taking auditor for lunch, then its credit is admissible.

Services of food in an Air Conditioned Canteen.

Section 66E(i) states the declared services as '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 canteen can be air conditioned or without air conditioned. The canteen which are not having any facility of air condition or central heating system at any time during the year are exempt from service tax. [Sr No 19 of Notification No 25/2012-ST]

However, certain factories are such which are by virtue of the provisions contained in Factories Act, 1948 are required to maintain canteen facility of canteen in their factory. The Services provided in relation to serving of food or beverages by a canteen maintained in a factory covered under the Factories Act, 1948 (63 of 1948), having the facility of air-conditioning or central air-heating at any time during the year [Sr No 19A of Notification No 25/2012-ST].

Thus, to those canteens which have facility of air conditioning in any part of establishment or have facility of central air heating and to such institutions, Factories Act, 1948 do not apply, in such case, service tax will be applicable.

Services of Out Door Caterer.

In case of restaurants, the services are provided 'within the premises' of restaurant itself. It is to be noted that tax is on service component and not on the food component.

Many a times, it has been observed that few persons are there at a function who cooks the food and serves the guests at the event. The food would have been cooked at the instance of organizer, the rate would have been decided considering the food to be served, the place where it is to be served and many other things. Thus, the service component is more in case where an outdoor caterer does catering at the place of event.

In the case of outdoor catering service the food/eatables/drinks are of the choice of the person who partakes of the service; he is free to choose the kind, quantum and the manner in which the food is to

be served. As against this while eating in restaurant or hotel where the customer's choice of the food is bound by the menu card. Again in the case of outdoor catering the customer is at liberty to choose the time and place where food is to be served. In the case of an outdoor caterer the customer negotiates each element of the catering service, including the price to be paid to the caterer. Outdoor catering has an element of personalised service provided to the customer the service element is the more weighty, visible and predominant aspect in the case of outdoor catering. [Sr No 4 vide **F. No. 332/82/97-TRU dated 24.09.1997**]

In this regard, Section 65(24) of the Act defines a caterer to mean any person who supplies, either directly or indirectly, any food, edible preparations, alcoholic or non-alcoholic beverages or crockery and similar articles or accoutrements for any purpose or occasion. Section 65(76a) defines outdoor caterer to mean a caterer engaged in providing services in connection with catering at a place other than his own but including a place provided by way of tenancy or otherwise by the person receiving such services. The under-mentioned examples will make a point clear:

- An agreement is entered with A Ltd where A Ltd will provide food to the employees of ABCD Ltd in a premises provided by ABCD Ltd. The services provided by A Ltd will fall under 'outdoor caterers' service.
- There is a marriage of Mr Y. An agreement is entered with A Ltd whereby A Ltd will provide food during the marriage of Mr Y. The services provided by A Ltd will fall under 'outdoor caterers' service.

In outdoor catering, the service component is more compared to what is there in an air conditioning or centrally heating restaurant, hence, abatement of 50% was provided in terms of Notification No 1/2006-ST, as amended, provided Cenvat credit of inputs and input services are not availed. Also, if the benefit of Notification No 12/2003-ST has been taken, then benefit of abatement was not available.

With the introduction of negative list w.e.f 01.07.2012, value of service component has been considered as 60% of the value of the total amount charged. Thus, in case of ourdoor catering, Government is treating service portion as 60% of the total amount [Rule 2C of Service Tax (Determination of Value) Rules, 2006]. Thus, by reducing 10% abatement, the government is allowing credit of input services (subject to restrictions contained in the definition of input services) as well as of inputs, except the inputs covered under chapter 1 to 22 of the Central Excise Tariff Act, 1944. Thus, credit of any eatables which are inputs most of which are covered under chapter 1 to 22 of Central Excise Tariff Act, 1944, on which central excise duty is leviable, is not allowed by the government.

Explanation 1 to Rule 2C of Service Tax (Determination of Value) Rules, 2006 states that "total amount" means the sum total of the gross amount charged and the fair market value of all goods and services supplied in or in relation to the supply of food or any other article of human consumption or any drink(whether or not intoxicating), whether or not supplied under the same contract or any other contract, after deducting-

- the amount charged for such goods or services, if any; and
- the value added tax or sales tax, if any, levied thereon:

However, the fair market value of goods and services so supplied may be determined in accordance with the generally accepted accounting principles.

For example, in a catering contract received by Mr A from BQR Ltd, it was agreed that BQR Ltd will provide milk for providing a particular dish in a contract valuing of Rs 5,00,000/-. The fair value of milk supplied is Rs 50,000/-. Thus, the value of service in this example will become 60% of Rs 5,50,000.

Supply of food by a Mandap Keeper, Pandal or Shaminana contractor while organizing function.

Many Restaurants provide their space in a hotel for holding certain function like marriage, birthday or any such similar event. If only space is provided for conducting a function, then service tax at full rate will be leviable. However, many a times, such restaurants provide food as well as space for conducting function. In such a case, a common rate would have been agreed which cannot be easily vivisected into

food and space. Such an activity is also provided by Mandap keeper or Pandal and Shaminana Contractor or at club or at any other similar place. Such an activity will be considered as bundled service by way of supply of food or any other article of human consumption or any drink, in a premises (including hotel, convention center, club, pandal, shamiana or any other place, specially arranged for organizing a function) together with renting of such premises. In such case, abatement of 30% is available. i.e., service tax is required to be paid on 70% of the Gross amount charged.

The Cenvat credit of input services can be availed. However, Cenvat credit of inputs falling under chapter 1 to 22 of the Central Excise Tariff Act, 1944 is not available in case abatement of 30% is taken.

Conclusion:

In a food industry, there are many articles which are result of manufacture whereas many are result of provision of service and whereas many are result of combination of manufacture and provision of service. Some of them are taxable (dutiable) whereas some of them are exempt.

Taxation, by its nature, has never remained stagnant. As a result, a detailed understanding of the above points is necessary.