Service tax on AC Restaurants - A peep into Legal Interpretation

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THE Central Government, by the stroke of a pen, has brought tens of thousands of air-conditioned restaurants, which do not have licenses to serve liquor, into the service tax net, by deleting the words "and (ii) a license to serve alcoholic beverages", in Item No. 19 of the Mega Exemption Notification No. 25/2012-ST dated 20-6-2012.

The amended Item No.19 reads as under, with effect from April 1, 2013:

> ***"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".***

In this piece, I have attempted to analyse word by word the meaning of this culinary fare -

Firstly â€¦â€¦.let us look at the words restaurant, eating joint or a mess
'â€¦ one can clearly see a pattern here. All of these denote places where food is served to outside customers for a price. The question that arises here isâ€¦ can a canteen run by an educational institution or a factory or a software company or a canteen run by a sports club for the benefit of its members be treated, at par, with a restaurant, eating joint or a mess. In my view, the answer is a strong and loud 'No', as a canteen which does not allow outsiders to buy food on a commercial basis cannot be treated on par with a restaurant, eating joint or a mess, as no food is normally sold to outsiders. Also, in most cases, these canteens are run on cost recovery basis with no commercial motive, unlike restaurants, eating joints, mess, etc.

As we know, under the 'new' service tax law that has come into effect from 01/07/2012, most 'activities' are taxable unless they are included in the Negative List or are specifically exempted by way of Notification. Looking at Item No. 19 of the Mega Exemption Notification, one gets the idea that, restaurants, eating joints and messes which are air-conditioned are liable to service tax. Applying the well-known principle of ***ejusdem generis,***
a view can be taken that, air-conditioned canteens (which cannot be treated at par with restaurants, etc) since they are not run on commercial basis cannot be subjected to service tax. Talking specifically of canteens run by companies, even if they are air-conditioned, no service tax can be levied, in my opinion (despite the view expressed by the Board that employee/staff canteens are taxable to service tax).

Secondly
â€¦â€¦.in the Mega Exemption Notification, the word 'establishment' has been used. Of course, this word has not been defined. The most appropriate definition of 'establishment' that would be relevant to restaurants, etc. would be the one contained in the Shops and Establishments Acts of the States.

Section 2(9) of the Delhi Shops Act, 1954 is reproduced belowâ€¦..

> ***"establishment" means a shop, a commercial establishment, residential hotel, restaurant, eating-house, theatre or other places of public amusement or entertainment to which this Act applies and includes such other establishment as Government may, by notification in the Official Gazette, declare to be an establishment for the purpose of this Act;".***

It is, therefore, apparent that the definition contained in the Shops and Establishments Act would be most relevant to interpret the word 'establishment' in the Mega Exemption Notification.

And which means to say that the word 'establishment' appearing in Item No. 19 of the said Notification should be read to mean the 'establishment' of the restaurant, eating joint, mess, etc. There is no logic to interpret the word 'establishment' independent of the words 'restaurant, eating joint or a mess'.

Accordingly, for a restaurant, eating joint or mess to be taxable, the air-conditioning has to be directly linked to the restaurant. The very rationale of levying service tax on 'services' rendered by restaurants with effect from 1-5-2011 can be traced to Para 1.3 of the Board Circular D.O.F. No. 3334/3/2011-TRU dated 28-2-2011, which read as follows:

"The new levy is directed 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 goods at any eating house, where such services are materially absent or so minimal that it will be difficult to establish that any service in any meaningful way is being provided".

Although one may opine that this Circular has lost its significance w.e.f 01/04/2013, the fact of the matter is that if one omits the words "license to serve liquor" the rationale given in the Circular may continue to hold good. Inasmuch as unless the air-conditioning is directly linked to the restaurant ***viz. providing condition and ambience in a manner that service provided may assume predominance over the food,*** it cannot be said that a service has been provided.

As such, there is no reason to warrant a view that the term 'establishment' should be taken to mean the whole of the premises in which the restaurant is housed or its part and that, even if the air-conditioning is available in a part of the premises that is not linked or related to the restaurant, the restaurant would still be liable to service tax.

I am also reminded of some of the judicial decisions on interpreting exemption notifications. In Union of India v. Ranbaxy Laboratories Ltd (2008) 7 SCC 502, the Supreme Court has held that, while construing an exemption notification, not only a pragmatic view is required to be taken but also the practical aspect of it to avoid anomaly and absurdity and that, full effect to the exemption may be given by adopting a purposive construction. In Hemraj Gordhandas v H.H. Dave *[2002-TIOL-351-SC-CX]* the Supreme Court had held that, if the tax payer is within the plain terms of the exemption notification, he cannot be denied the benefit calling in aid, any supposed intention, and the language of the notification has to be given effect to. In Oxford University Press v. Union of India AIR 1993 SC 1325, the Supreme Court held that, if the literal meaning of the exemption provision exposes it to challenge on the ground of being irrational or arbitrary, some qualification may have to be read consistent with the object of the provision.

Before concludingâ€¦

There is a lot of confusion in the matter of levy of ST on air-conditioned restaurants. Most of these restaurants are also charging service tax on self-service, take-away/parcel as also on home delivery, which seems highly unjustified. Truly speaking, these are transactions of sale, with a negligible service component.

The CBEC should come out with a Circular and remove the cooking fumes from the restaurant kitchen rather than keeping mum and allowing others in the 'establishment' to have their fill!