

GST RATE FOR OUTSOURCED CANTEEN FACILITIES

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Introduction:

Generally catering Services are taxable at the rate of 18% with ITC benefit as per Notification No 11/2017 dated 28th June 2017 and supply of food through restaurant, mess, canteen facilities are taxable at rate of 5% without ITC benefit. The following legal issues broke down with respect to the applicable tax rate for the following cases–

- **Canteen Facilities at Work Places or Hospitals:** Canteen facility will be provided by companies or hospitals to meet the requirements of employees or patients. These canteens are maintained by outsourcing the job of food preparation and supply at the respective canteen facility to a caterer. Whether the caterers who supply the food to companies or hospitals (who in turn supply to employees or patients) would attract GST at 5% without ITC benefit (supply at canteen) or at 18% with ITC benefit (supply as caterer)?
- **Food supply in a Hostel maintained by Educational Institutions:** Similar to above, Hostel facility maintained by educational institutions, where the food is served to students by self-preparation or outsourcing the same to a caterer. Whether the educational institution is required to charge GST on such food supply or can it claim exemption as the said supply is part of exempt educational services? In case the food preparation is outsourced, whether the caterer is required to charge GST at 5% without ITC benefit or at 18% with ITC benefit?
- **Supply of Food by Caterers of IRCTC:** Many caterers by virtue of their contract with IRCTC, supply the food to passengers on board, train or on platform. Whether, such caterers are required to charge GST at 5% without ITC benefit or at 18% with ITC benefit?

For example, Company ABC Ltd is engaged in supply of food to its employees through canteen facility by getting the food prepared through outdoor caterer. In this case, the conservative view is that rate of tax applicable for the outdoor catering services obtained by the ABC is 18% and rate of tax applicable for the canteen facility provided by ABC to the employees is at 5%(without ITC) i.e. a total of 23%(18%+5%) tax is being paid by the employees consuming food in such canteen which results in huge tax burden. Upon representation of the issue to the GST council, the council has come up with remedial measures vide their council meeting held on 21st of June 2018.

Taxability under erstwhile regime:

The taxability in the previous regime can be known through the case of **IRCTC V/s Government of NCT of Delhi reported in 2010 (20) STR 437 (Del HC)** wherein it was argued that supply of food on board the trains cannot be considered as outdoor catering service. It has been held by the Hon'ble High Court that

providing of food, snacks and water to passengers on board trains is different from outdoor catering service. The IRCTC or passengers have no choice of articles or quantity served as the same is supplied as per menu fixed by Railway Board. The passengers have no choice as to time and place of services of food. No refund is allowed if food provided is not accepted. No element of service is involved except heating and serving cooked food. Service element in providing food in this case is incidental and base minimum required for selling food. Accordingly, concluded that the caterers are not engaged in providing outdoor catering services but are merely selling the food.

In the case of **Indian Coffee Workers' Co-Op. Society Ltd. Vs. CCE & ST, Allahabad [2014 (34) S.T.R. 546(All.)]**, where in the assessee supplies food, edibles and beverages for employees of LANCO and NTPC at canteen facility provided by NTPC and LANCO in their premises. Assessee contended that he was not an outdoor caterer to pay service tax. It was held that the assessee is an outdoor caterer because the services which he provides as a caterer are at a place other than his own. Accordingly, service tax was demanded under the category of 'Outdoor Catering Services'.

The decision of Indian Coffee Workers' (Supra) and IRCTC (Supra) conflict with each other. While in the case of Indian Coffee Workers', it was held that any person who supply food at a place other than his own would be considered as outdoor caterer and is not merely selling food. The said decision was relied in certain other cases also. Going by the Jurisprudence of the erstwhile regime, it appears that any person who supply food at a place other than his own would be considered as outdoor caterer and accordingly, service tax gets attracted.

Litigation under GST laws:

Coming to GST law, taking into cognizance the litigation took place under the erstwhile regime, assessee approached Advance Ruling Authorities for clarity on rate applicability in the above-mentioned scenarios. In the case **M/s Rashmi Hospitality Services Private Limited**, where the applicant entered into a contract for supply of food, snacks, tea for the employees at the factory premises of his customer. The applicant was requested by the service recipient to charge GST at 5% as the provision of food facility to employees is a statutory requirement and the services are consumed by the employees and not by the service recipient. The AAR has relied in the case of Indian Coffee Workers'(supra) and held that service of catering is provided by the applicant to the recipient and the fact that the meal, snacks, tea etc. are consumed by the workers / employees of the recipient would not alter the nature of service provided by the applicant. Accordingly, it was concluded that the applicant is required to pay GST at 18% with ITC.

In the case of Deepak and Co, the applicant is a caterer of IRCTC engaged in supply food to passengers on platform as well as on train as per the menu decided by IRCTC. The AAR has concluded that the services of the Applicant would come under catering services and cannot be called as a supply like the ones at restaurant, eating joint, mess or canteen etc.

Clarifications Given to Reduce the Rate Of Tax

Pursuant to many representations on hardship by way of high rate of tax, the following circulars, orders are issued to reduce the rate of tax.

- Circular No.28/02/2018 dated 8th January 2018 amended vide corrigendum dated 18th of January 2018 was issued declaring the rate of tax applicable for the mess services provided by educational institutions to the students or staff shall be at 5% irrespective of whether the institution outsources the activity of food supply to an outside contractor.
- Order No. 2/2018 dated 31st of March 2018 was issued declaring the rate of tax as 5% with respect to supplies by the caterers of IRCTC to the passengers whether the supplies are made in a mobile or static unit to maintain uniformity in the applicable rate of tax.
- Pursuant to the above circulars/orders, the GST Council in their 28th meeting, taken a decision to withdraw the above clarifications and incorporate them in Notification No. 11/2018-CT(R) itself to provide that the supplies made at a canteen of a work place or hospital or at platforms or in trains or in mess/hostels of an educational institution would be subject to GST at 5% without ITC irrespective of the fact whether such facilities are maintained on own or outsourced to an outsider. In the regard, Notification No. 13/2018-CT(R) dated 26th July 2018 is issued to amend the Notification No. 11/2018-CT(R).

Conclusion:

In view of the above discussion, though the legal position under pre and post GST regime suggests that the rate of tax as 18% with ITC benefit in case of the services of outsourced caterers who supply food through a canteen or mess of a factory, hospital etc, Government was kind enough to take initiatives to clarify that the applicable tax rate as 5% without ITC benefit. However, there was a delay in making suitable amendments to the relevant rate notifications. The said rate notification was amended only on 26.07.2018 and there was no express clarification whether the amendment is retrospective or otherwise. In view of this reason, the important legal question that remains still unaddressed is that whether such clarificatory circulars issued prior to 26.07.2018 (before the amendment of rate notification) will override the legal position that emanate from the rate notifications? Notifications issued to notify tax rates have greater statutory force compared to a clarificatory circulars or orders. Therefore, ambiguity prevails on the rate applicability for the period prior to 26.07.2018.