



**Confederation of
GST Professionals
and Industries**

RESEARCH PAPER ON TAXABILITY OF SUPPLY OF FOOD IN RESTAURANTS BY SERVING, TAKE AWAYS AND HOME DELIVERY

For:

Intensive Study Circle Meeting of Members of CGPI

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1. Subject Matter:

This paper is based on an research on taxation of supply of food and beverages by restaurants through serving, take away and home delivery. It intends to bring on face various interpretations aligned with the provisions of law and principles laid down by Courts.

Knowledge is knowing a Tomato is a fruit. Wisdom is not putting it in a fruit salad. Philosophy is wondering if that means ketchup is smoothie.

Anonymous

In our respective lives, all of us, we first eat food and then we do everything else. However in terms of taxation on food, that “everything else” is as much complicated as the above phrase is in context of Tomato.

The law in respect of levy of Indirect Taxes on supply of food items under composite contracts has evolved after lot of legal scrutiny by various courts up to the Supreme Court of India. Before introduction of GST in India, the concept of VAT / Sales Tax on food items was almost settled and levy of service tax in composite contracts was evolving. However, with advent of GST, the goalposts have changed and it seems the point of contention by the taxpayer and the tax collectors has also taken a summer-slat. The main reason for this, which the paper writer can comprehend is due to language of Entry 6(b) in Schedule-II under Section 7(1A) of the CGST Act 2017 and its interplay with definition of composite supply under Section 2(30) of the Act. To add to the confusion, the definition of “Restaurant Service” in Notification No. 11/2017-CT (Rate) dated 28.06.2017 has made its sincere contribution.

The aim of this paper is to declutter the issue arounds taxability of Supply of Food on Take Away and Home Delivery Basis through analysis of various precedents, inter-connection of various definitions and sections in this regard added with some logical interpretation of paper writer. The conclusion drawn through this paper should be treated as addition to the multiple views available on given subject.

2. Pre-GST Regime:

Old Legacy under Erstwhile Laws and developed Jurisprudence on Taxation of Food related transactions

Sales Tax/VAT

Prior to 46th Constitutional Amendment Act

Definition of Sale (Almost similar in all State Sales Tax Acts)

‘Sale’ with all its grammatical variations and cognate expressions means every transfer of the property in goods by one person to another in the course of trade or commerce, for cash, or for deferred payment, or for any other valuable consideration

In this context, there was a judgment in case of **State of Himachal Pradesh Vs. Associated Hotels of India Ltd. (1972 – 29 STC, 474) (SC)**, where it was held supply of food to resident guests did not amount to a sale of food and was therefore, not liable to sales tax.

Further in case of **Northern India Caterers (India) Ltd. Vs. Governor of Delhi (1978 – 42 STC, 386) (SC)**, it was held that when food is supplied to in-house guests, at a composite charge, there is no sale of food. Further, supply of food to visitors in the restaurant

for a lumpsum charge or even when calculated per dish did not amount to a transaction of sale.

Later, in case of **Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi (1980 – 45 STC, 212 – SC)** review of the above mentioned case was rejected.

In case of Durga Bhavan And Ors. vs The Deputy Commercial Tax [1981 47 STC 104 AP], the Hon'ble Andhra High Court, summarized the position which emerged from aforesaid 3 judgments which is reproduced as under:

13. To summarise the position at the end of the three decisions of the Supreme Court discussed earlier appears to be as follows :

- 1. If there is no right to carry away the food there would be no sale in favour of the customer.*
- 2. Even if there is a right to carry away if in essence the transaction is a transaction of service and not a transaction of sale it would not be exigible to tax.*
- 3. If, however, where the customer has a right to take away the food if the dominant object is the sale of food and the rendering of service is merely incidental, then the transaction would be a transaction of sale and not a service contract.*
- 4. The question whether the dominant object was the sale of food or rendering of service would depend upon the facts and circumstances of each case which has to be decided by the assessing authority in the light of the evidence before it.*

The Court also observed that:

In this connection, we may observe that sales across the counter will obviously be transactions of sale. It may be that in doing so some services are rendered by packing the food-stuffs, etc., but this part of the service is so infinitesimal and insignificant that the transaction would nevertheless be one of sale. Even in a case where a customer is asked to sit down in a chair or a more comfortable seat while the food-stuff is packed and handed over to him, still we consider that the transaction would be one of sale.

Thus to overcome the lack of authority to levy Sales Tax on supply of Food Items in case of Composite Contracts, an amendment was carried out in the Constitution of India.

Post 46th Constitutional Amendment Act

An amendment was carried out through 46th Constitutional Amendment Act, 1982 wherein Article 366(29A) was inserted to the Constitution of India which was read as under:

Article 366(29A)

“tax on the sale or purchase of **goods**” includes—

(f) a tax on the **supply**, by way of or as part of any service **or in any other manner whatsoever, of goods, being food** or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,

and such transfer, delivery or **supply of any goods** shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made.

Then in case of **The East India Hotels vs. Union of India: (121) STC 46 (SC)- 9**. According to Section 2(g), all movable properties, materials, articles or commodities are

goods. Therefore, food in a restaurant has necessarily to be regarded as goods. In the present case, when a customer goes to a restaurant and orders food and in respect of which he pays the price indicated therein and the said food items are supplied to him, it would clearly be a case of transfer of property in goods to the customer. Whether the customer eats the entire or part of the dish or chooses not to eat at all would make no difference if he pays for the dishes supplied.

Also in case of **K Damodarasamy Naidu And Bros Etc Vs State Of Tamil Nadu And Anr. Etc [2002-TIOL-884-SC-CT-CB]**, SC held that 'While selling food items, soft drinks, water and other edibles at such counters the services are materially absent or minimal – The tax, is on the supply of food or drink and it is not of relevance that the supply is by way of a service or as part of a service. In our view, therefore, the price that the customer pays for the supply of food in a restaurant cannot be split up'.

Service Tax

Under the provisions of the Finance Act 1994, i.e. under Service Tax, to levy tax on service component under a composite contract of food, Section 66E(i) was brought in with effect from 1-7-2012.

Section 66E. Declared services. – 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.

Service Tax (Determination Of Value) Rules, 2006

Rule 2C. Determination of **value of service portion involved** in supply of food or any other article of human consumption or any drink in a restaurant or as outdoor catering

When the 2 regimes were separate, Constitution brought 366(29A)(f) under deemed sale of goods. Service Tax Law only picked up service portion in an activity where goods are supplies as a part.

However in case of Kerala High Court in the case of **Kerala Classified Hotels and Resorts Association Vs. Union of India [2013 – 64 VST, 462 (Ker)]** has struck down the levy of service tax on the ground that service formed part of the sale of goods.

Whereas in case of **Indian Hotels and Restaurant Association Vs. Union of India (2014 – 71 VST 386 – Bom)**, the Bombay High Court, while upholding the levy of service tax on restaurant services has held that service tax is a tax on serving food or beverage by the restaurant within its premises and cannot be equated to a tax on sale or purchase of goods.

With this background, now levy of GST of GST On Take-Aways and Home Delivery is discussed in light of Constitutional Amendment and various provisions of the law.

3. Constitutional Position under GST regime

Goods and Services Tax Act(s) derive the power from Article 246A of the Constitution of India brought in by Constitution (101st Amendment) Act, 2016. Article 246A provides as under:

246A. Special provision with respect to goods and services tax.—(1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.

(2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.

Article 366 of the Constitution defines relevant terms as under:

(12A) “goods and services tax” means **any tax on supply of goods, or services or both** except taxes on the supply of the alcoholic liquor for human consumption;

(12) “goods” includes all materials, commodities, and articles;

(26A) “Services” means anything other than goods;

On a corroborative analysis, goods and services are identified as per Constitutional definitions and then levy is authorised. In **The East India Hotels vs. Union of India: (121) STC 46 (SC) (supra)** it was held that food in a restaurant is essentially goods. Thus effectively all food items are goods in accordance with the aforesaid definition.

Hence a question may arise that is it legally possible to alter goods as defined under the Constitution as services or vice-versa through a deeming fiction in CGST or SGST Laws?

The answer to this question, would depend on perusal of provisions of the CGST and SGST Acts to find out if they alter the nature of goods or services or they classify activities or transactions as supply of goods or supply of services.

Provisions under CGST Act 2017

Before delving upon the research on the topic, the paper writer understands, the context of certain provisions of the Act needs to be set right.

4. Insight into Scope of Supply

The levy of tax under GST is on supplies of goods or services or both. The scope of supply has been laid down in law under Section 7.

4.1 Concept of Goods/Services and Supply of Goods or services or both

For the sake of simplicity this discussion is firstly limited for transactions having single element only, is every activity or transaction of goods a supply of goods *per se*? For this, it is assumed that such transaction is made or agreed to be made for a consideration by a person in the course or furtherance of business.

(52) “**goods**” means every kind of **movable property** other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply;

(102) “**services**” means **anything** other than goods.....

To establish levy under the act, first the existence of goods or services in the transaction has to be identified. The goods have been precisely defined as every movable property. Services are defined in a residuary manner that what is not goods are services.

Now when there is a transaction of goods simplicitor, it should be covered under the scope of supply of goods assuming other conditions of consideration, person and business are satisfied.

So as far as the elements are not multiple, it is decided at the very front that the transaction is a form of supply of goods or supply of service, then only it can be covered in the scope of supply in Sec. 7(1)(a).

SECTION 7. Scope of supply. – (1) For the purposes of this Act, the expression “supply” includes –

(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;

(b) import of services for a consideration whether or not in the course or furtherance of business; and

(c) the activities specified in Schedule I, made or agreed to be made without a consideration;

*(1A) where certain activities or transactions, **constitute a supply in accordance with the provisions of sub-section (1)**, they shall be treated either as supply of goods or supply of services as referred to in Schedule II.*

4.2 Schedule II

ACTIVITIES OR TRANSACTIONS TO BE TREATED AS SUPPLY OF GOODS OR SUPPLY OF SERVICES

1. Transfer

(a) any transfer of the title in goods is a supply of goods;

(b) any transfer of right in goods or of undivided share in goods without the transfer of title thereof, is a supply of services;

6. Composite supply

*The following **composite supplies** shall be treated as a supply of services, namely :—*

*(b) supply, **by way of** or as part of any service or in any other manner whatsoever, of goods, being food or any other article **for** human consumption or any drink (other than alcoholic liquor for human consumption), where such supply **or** service is for cash, deferred payment or other valuable consideration.*

4.3 Generic Supply of Goods can be treated as Supply of Service?

A transaction of supply for example sale of goods or renting of goods, should first fall within the scope of supply under Section 7 (1) of the Act. These transactions (mentioned above) may in generic sense on plain reading of Section 7(1) may be read as supply of goods. However, once the scope of supply is covered by Section 7(1), its nature either as supply of goods or as supply of services can be determined in accordance with Section 7(1A). Hence out of two transactions, sale of goods shall remain supply of goods but renting of goods shall become supply of service (in spite being a transaction in goods) in accordance with Section 7(1A) read with Schedule-II.

Thus, on the above basis, supply of food can be made in various forms (by way of serving, take away or home delivery) and to analyse the tax implications on all the forms of transactions, a corroborative reading of all above provisions is required.

4.4 Implication of supply of goods or services “or both”

When food is served by a restaurant to its customers, it is mandatory to decide if it is supply of goods or supply of service while determining the scope of such supply under Section 7(1) of the Act? Since tax is either on supply of goods or supply of service, if it is not clear what is the nature of supply in terms of goods or services, can levy itself fail? The fact which needs to be considered here is that Section 7(1) is neither subjected to Section 7(1A) or Section 8 of the Act. Hence the scope of the supply has to be read strictly within Section 7(1).

In this regard, emphasis is laid on use of words “or both” after supply of goods or services. In the humble understanding of the paper writer, a transaction of which can be either consist of both supplies of goods and services or a transaction in which prima-facie concrete identification whether the supply is of goods or is of service is not clear but it is evident that it has both the elements, then the words “or both” comes to the rescue to keep the levy intact.

Once the first test of scope is identified, it can be further filtered down to either of supply of goods or services with the help of Section 7(1A) or Section 8, as the case maybe.

Thus, to start with, under Section 7(1)(a), the confusion of classification of supply of food in a restaurant or through take away or through home delivery shall not be of much significance and hence all these transactions are within the scope of supply.

5. Concept of Composite Supply

Definition

The definitions of composite supply, principal supply and mixed supply are reproduced here for understanding:

(30) “composite supply” means a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply;

(90) “principal supply” means the supply of goods or services which constitutes the predominant element of a composite supply and to which any other supply forming part of that composite supply is ancillary;

(74) “mixed supply” means two or more individual supplies of goods or services, or any combination thereof, made in conjunction with each other by a taxable person for a single price where such supply does not constitute a composite supply.

On the basis of definition, a supply should have following ingredients to be termed as a composite supply:

- A supply consisting of two or more supplies
- Both the supplies should be taxable supplies under GST
- Supply can be either of goods or services or a combination of both
- Both or more supplies should be naturally bundled

- Both or more supplies should be supplied in conjunction with each other
- It should be in ordinary course of business
- Out of both or more supplies, one supply should be a principal supply

Example: When a consumer buys a television set and he also gets warranty and a maintenance contract with the TV, this supply is a composite supply. In this example, supply of TV is the principal supply, warranty and maintenance service are ancillary.

A supply

As evident from the definition, the term composite supply is defined as ‘a supply’. This indicates that the transaction is one supply in essence which consists of two or more taxable supplies.

This interpretation is further buttressed by observing the definition of mixed supply which does not use the words **a supply** but on the contrary, uses the phrase **two or more individual supplies**.

It means that in a mixed supply, the supplies separately have an individual identity, significance to the recipient and capability of being supplied without being bundled in a single transaction.

However, since composite supply is one supply, there is one contract in essence and the other taxable supplies are ancillary to the predominant element of the transaction only.

In a given subject of study, supply of food in a restaurant or at take-away or by way of home delivery can all be treated “a supply” contract governed by the provisions of the Indian Contract Act 1872.

Two or more supplies

These words are very important for the concept of composite supply. Section 7 portrays that activity is subset of a supply and these words of the definition of composite supply portray that supply is a subset of composite supply.

Two or more elements cannot form a composite supply until and unless those components are so self-dependent to be able to be identified as two or more supplies per se.

Hence there must be two or more activities/transactions which can be covered under the scope of supply under Section 7 per se. Only then they can constitute a composite supply on fulfillment of other criteria.

Whether an activity is a mere component of a supply or it can be treated as a supply in itself would depend upon the terms of the contract. If an activity is integral to the main supply in such a way that without which the main supply cannot exist then such activity cannot be treated as a supply in itself.

For example, cooking of food is treated as manufacturing activity. In case of contract of supply of food in any form i.e. serving in restaurant, take away or by home delivery, cooking cannot be treated as a sperate supply in itself in given contracts. However if someone has been contracted to only cook food for the recipient then in that case cooking can be treated a separate supply of cooking.

Essentially, according to the paper writer, it gives an inference that any activity or transaction, being part of a contract of supply, if has the capacity to alter the nature of the supply due to its

absence then it cannot be treated a separate supply in itself but is only a condition to contract for supply.

However, if any component of a supply though part of the contract of supply, in its absence may hamper the enjoyment of a supply but would not alter the nature then in that case it shall be separate supply part of supply contract.

Further, one more view which strikes by a literal reading of the definition of composite supplies is that it requires two or more taxable supplies. However, it does not restrict non-taxable supplies. As long as there are two or more taxable supplies, a non-taxable supply in the bundle cannot bring a transaction out of ambit of composite supply.

On this ground, can it be said if a supply consists of two taxable supplies and one non-taxable supply may still qualify as composite supply?

For example, if a supply of entry to a restaurant including supply of food along with Alcohol for Human Consumption is made, whether it is a composite supply? In the humble view of the paper writer, such supplies subject to fulfillment of other conditions of the definition of composite supply can be covered here.

Thus on basis of above, in given subject of study, whether in all three cases, the components are separate supplies or only separate elements of a supply shall be a question of fact and according to paper writer the most important point of consideration.

Naturally bundled

Having passed the difference between two or supplies in a contract vs two or more components in a contract, the next test is bundling of such supplies. The term Naturally Bundled has not been defined under the GST Acts. However under the erstwhile Service Tax regime the term “Bundled Services” was explained in the Education Guide issued by CBEC in the year 2012 as under –

“Bundled service’ means a bundle of provision of various services wherein an element of provision of one service is combined with an element or elements of provision of any other service or services. An example of ‘bundled service’ would be air transport services provided by airlines wherein an element of transportation of passenger by air is combined with an element of provision of catering service on board. Each service involves differential treatment as a manner of determination of value of two services for the purpose of charging service tax is different.

Illustrations –

•A hotel provides a 4-D/3-N package with the facility of breakfast. This is a natural bundling of services in the ordinary course of business.

•A 5 star hotel is booked for a conference of 100 delegates on a lump sum package with the following facilities :

- Accommodation for the delegates
- Breakfast for the delegates,
- Tea and coffee during conference
- Access to fitness room for the delegates
- Availability of conference room
- Business centre.

As is evident a bouquet of services is being provided, many of them chargeable to different effective rates of tax. None of the individual constituents are able to provide the essential

character of the service. However, if the service is described as convention service it is able to capture the entire essence of the package. Thus, the service may be judged as convention service.

Whether services are bundled naturally would depend upon the normal or frequent practices followed in the area of business to which services relate. Such normal and frequent practices adopted in a business can be ascertained from several indicators some of which are listed below –

1. **The perception of the consumer or the service receiver.** If large number of service receivers of such bundle of services reasonably expects such services to be provided as a package, then such a package could be treated as naturally bundled in the ordinary course of business.
2. **Majority of service providers in a particular area of business provide similar bundle of services.** For example, bundle of catering on board and transport by air is a bundle offered by a majority of airlines.
3. The nature of the various services in a bundle of services will also help in determining whether the services are bundled in the ordinary course of business. **If the nature of services is such that one of the services is the main service and the other services combined with such service are in the nature of incidental or ancillary services which help in better enjoyment of a main service.**
4. Other illustrative indicators, not determinative but indicative of bundling of services in ordinary course of business are –
 - a. There is a **single price or the customer pays the same amount**, no matter how much of the package they actually receive or use.
 - b. The elements are **normally advertised as a package**.
 - c. The **different elements are not available separately**.
 - d. The **different elements are integral to one overall supply** - if one or more is removed, the nature of the supply would be affected.

No straight jacket formula can be laid down to determine whether a service is naturally bundled. Each case has to be individually examined in the backdrop of several factors.

In context of given subject, in all three cases, supply of food in a restaurant or at take away or through home delivery, all components are naturally bundled.

Supplied in conjunction with each other

This is one of the determinants of composite supply under GST that the supplies must be made in conjunction with each other.

The words have not been further defined in the Statute. Going by general meaning of the words, it means that the supplies must be made together.

In given subject for study, the supplies in all three cases are made together at same time only.

In ordinary course of business -

These words have been used in the definition of composite supply in continuation of the other characteristics requiring that the supplies are naturally bundled and supplied in conjunction with each other in ordinary course of business.

These words appear to be used along with the words in conjunction with each other. Hence, a composite supply should consist of supplies which are supplied in conjunction with each other in ordinary course of business.

In given subject of study, in all three cases, all the activities are in normal course of business only.

Principal Supply

One of total supplies in Composite Supply should be a principal supply which has been defined under Section 2(90) of the Act as

(90) “principal supply” means the supply of goods or services which constitutes the predominant element of a composite supply and to which any other supply forming part of that composite supply is ancillary;

Now in light given definition, in our subject of study, in all three transactions the pre-dominant element of supply can be identified and hence given conditions is satisfied.

Applying overall conditions of a Composite Supply to 3 types of transactions under Study

Particulars	Supply of food in Restaurants	Supply of food at Take Away	Supply of Food by Home Delivery
A Supply	Yes	Yes	Yes
Two Taxable Supplies	Maybe / Maybe not If Yes- Components are Food + Serving + Ambience + Music	Maybe / Maybe not If Yes- Components are Food + Packing?	Maybe / Maybe not If Yes- Components are Food + Delivery
Naturally Bundled	Yes	Yes	Yes
In Conjunction in Ordinary Course of Business	Yes	Yes	Yes
Principal Supply	Serving	Food	Food

6. Corroborative Analysis of Section 2(30), Section 7, Section 8 and Section 15

6.1 Can Schedule II govern Composite supplies?

The point of discussion in given case is Entry 6(b) of the Schedule II of the Act. For contextual understanding it is reiterated that Entry 6 is applicable only on composite supplies. Hence any supply which does not satisfies the definition given under Section 2(30) of the CGST Act 2017 cannot fall under Entry 6 of the CGST Act 2017.

Under Section 7(1) of the Act, scope of supply for the purposes of the Act has been laid down and accordingly, it includes all forms of supply of goods or services or both.

From the above provision, to fall under the ambit of Section 7(1) only, it is essential to clearly identify a transaction as **supply of goods or supply of services or supply of both**.

Section 7(1A) further provides that **activities or transactions which constitute a supply in accordance with the provisions of sub-section (1)** will be governed and treated as per Schedule II.

Thus, unless a transaction is classified under one of these categories under Section 7(1), Section 7(1A) cannot be made applicable.

Analysing supplies under Schedule II on this test, it is fundamental to understand and interpret that supplies covered under Clause 6 of Schedule II are a supply of both goods and services which are composite in nature and hence it means that composite supplies are covered under Section 7(1) and therefore out of whole species of composite supplies, two of them are governed by provisions of Section 7(1A).

6.2 Section 7(1A) Vs. Section 8 – Contradiction or Harmony?

Schedule II of the Act takes powers from Section 7(1A) to provide that composite supplies (listed thereunder Clause 6) shall be treated a supply of services. While Section 8 of the Act provides for the manner in which tax liability on a composite or a mixed supply shall be determined and according to it, the manner is that a composite supply comprising two or more supplies, one of which is a principal supply, shall be treated as a supply of such principal supply.

Now, the question which arises here is that where both Section 7(1A) and Section 8 are not non-obstante provisions, and none of them are less relevant for concerned composite supplies, how can both of them be read in harmony.

On in-depth reading of both the provision, a point of view is drawn that once a transaction is covered under Entry 6 of Schedule II, it shall be treated as a supply of service by the language of statute. It shall surrender the status of a composite supply. Hence, the application of Section 8 is not warranted in case of such supplies as those supplies i.e. works contract and supplies of food governed by Entry 6(b) shall be now single supply of a service only.

6.3 On the contrary, whether Schedule II Clause 6 supplies are deemed composite supplies?

Entry 6 of Schedule II starts from the term 'Composite Supply'. It provides the treatment of composite supplies namely works contract and supply of food in clause b).

The point of contention shall be that whether test of a supply being a composite supply should be done first and then on satisfactory results, elements of entry 6(b) should be read or it is the other way round that because a supply may fall under 6(b) hence it shall become a composite supply?

The term composite supply has been defined in the Act under Section 2(30). Whether a transaction has to be tested to be covered under the said definition or is it deemed as composite supply by virtue of Schedule II.

The tests as discussed for composite supply are two or more taxable supplies, by a taxable person, natural bundling, provision in conjunction with each other in ordinary course of business and one of the bundle being principal supply.

In this discussion, the factor to be brought forward is whether there is any principal supply identifiable reasonably in supplies covered under Schedule II.

To address this, following jurisprudence from ECJ can be resorted:

Faaborg-Gelting Linien A/S vs Finanzamt Flensburg.

In a Restaurant Services, goods are immediately consumed, however restaurant transactions are characterized by a cluster of features and acts, of which the provision of food is only one component and in which services largely predominate. They must therefore be regarded as supplies of services -

Thus, it appears that the test of composite supply as per definition in the statute must be satisfied for a supply to be covered under Entry 6 of Schedule II.

6.4 Harmonious Interpretation of Section 2(30) and Section 15(2)(c)

Next issue which may create confusion is possible overlapping in elements due to presence of definition of composite supply and compulsory inclusion in valuation under Section 15(2)(c) of the Act.

For purpose of context, Section 15 contains the valuation provisions under the Act and relevant extract of the Section is as under:

SECTION 15. Value of taxable supply. – (1) *The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply.*

(2) *The value of supply shall include –*

(c) *incidental expenses, including commission and packing, charged by the supplier to the recipient of a supply and any amount charged for anything done by the supplier in respect of the supply of goods or services or both at the time of, or before delivery of goods or supply of services;*

On an in-depth and corroborative reading of Section 2(30), Section 7 and the above valuation provisions, it is analysed that a composite supply is also covered under ‘**a supply of goods or services or both**’ and hence its valuation must also be governed by the provisions of Section 15 including 15(2)(c).

Now the discussion is taken forward with the example cited in definition of composite supply under the Act.

Illustration. - Where goods are packed and transported with insurance, the supply of goods, packing materials, transport and insurance is a composite supply and supply of goods is a principal supply;

In the above example, let's assume a registered person supplies goods along with packing, transport and insurance at following prices:

Description	Value	Independent Tax rate
Value of Goods	50,000	18%
Packing Expenses	5,000	18%

Freight	2,000	5%
Insurance	1,000	18%

Taking forward the illustration that the supply is a composite supply. Section 2(30) can only define a supply as composite supply and Section 8 can only instruct the manner of determination of tax liability, according to which the composite supply has to be treated as its principal supply. Hence according to these provisions this supply must be treated as supply of goods and be taxed at 18%.

Do these provisions in isolation without application of Section 15 guide what is the taxable value of this composite supply to be taxed at 18%? Infact if Section 8 is applied in isolation, a composite supply shall be treated as supply of its principal supply, which means value should also be taken for principal supply only.

The valuation of this composite supply has to be made as per provisions of Section 15 only.

Bringing Section 15(2)(c) in this context, all the incidental expenses including packing, transportation or insurance should be included in the value of composite supply.

Applying this provision, it can be derived that taxable value of the composite supply is Rs. 58,000 and as per Section 8 it should be taxed at 18%.

However, it is understood by the paper writer that Section 15(2)(c) does not covers only situations of ancillary supply in a composite supply transaction. Rather it is understood that its scope is larger and includes values of those elements of a supply which are essential but ancillary in a single supply transaction.

Thus in case subject of study, in all three cases, i.e. supply of food in restaurant or at take away or through home delivery, the value of all components shall be included for purpose of levying tax by virtue of Section 15(2)(c). However it cannot be a determining factor to identify if the supply is a composite or mixed supply.

6.5 Multiple Elements or activities - Single Supply or Multiple Supplies

A cursory reading of the definitions of Composite Supply and Mixed Supply indicate that to be capable to fit under composite or mixed supply, the existence of two or more **supplies** is *per se* required.

However, it is very important to understand that merely two or more activities comprising in a single supply must not seen as two or more supplies to make them fit under these concepts.

For example, when a manufacturer contracts to sell manufactured goods to his customer, in essence he promises to complete multiple tasks for him including manufacturing including various processes required, packing, storage etc. It does not mean that the manufacturer supplied multiple services to the customer namely, carrying out the manufacturing operations, packing and storage services. **In the normal course, the supply can be said to be only sale of goods, and manufacturing can only said to be an activity in undertaking the supply of sale of goods.**

An activity is a sub set of supply, supply is a subset of Composite and/ or Mixed Supply.

Only multiple elements cannot form a composite supply, there must be two or more taxable supplies.

So the test is - Whether these elements can be separately identified as supplies? If yes, further determinants of composite or mixed supply to be examined.

However if no, then there is no need to divide the single transaction and go further for classifying them as composite or mixed supply.

In fact reliance can be placed in case of **Hindustan Shipyard Ltd. v. State of Andhra Pradesh — (2000) 6 SCC 579** wherein it was held by the Hon'ble Supreme Court that

*The recitals of the contract may also be read in the light of the few provisions of Chapter III of The Sale of Goods Act. In a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. Sections 20 to 24 contain rules for ascertaining the intention of the parties in this regard. **When something remains to be done on the date of the contract to bring the specific goods in a deliverable state the property does not pass until such thing is done and brought to the notice of the buyer.** The risk in such case remains with the seller so long as the property therein is not transferred to the buyer though the delivery may be delayed.*

In case of Indian Railways Catering & Tourism Corporation Ltd Vs Govt of NCT of Delhi & Ors [2010-TIOL-517-HC-DEL-ST] it was observed that

26. What we have to decide is as to whether the transaction between the petitioner company and Indian Railways is a contract of providing service or a composite contract of providing service and selling goods or a contract only for sale/supply of goods.

*42. The judgment in the case of Bharat Sanchar Nigam Ltd. (supra) also is of no help to the petitioner since **the transaction of providing meals and snacks to the passengers, to our minds, is not a composite contract of service and sale, but is a transaction of outright sale by the petitioner-company to the Indian Railways. The service component, involved in the transaction, is purely incidental and minimal necessary for the purpose of sale of those goods.***

6.6 Integral, Ancillary or Incidental ('IAI') Identification

Where a supply consists of more than one component of supply, the supply is a Composite supply if there is clearly one overall supply being made to which the remaining components of supply are IAI. This means that whilst the components may be either minor or significant in their own right and may be capable of being supplied separately, they are an IAI of the main supply.

However, in humble understanding of the paper writer, if any component of a supply is only integral condition to the fulfilment of the contract, then such component cannot be treated as an individual supply in itself and thus it shall be a single supply only.

In this background following factual questions should be asked before proceeding to Schedule-II:

Take Away

- In case of Take Away, whether cooking, packing, handing over etc are optional or mandatory?

- In case of Take Away, if any of the elements of cooking, packing or handing over are absent can the contract of supply become defunct or impossible to perform or it will be a deficient enforceable contract?
- In case of Take Away, if contract is as such in a way that food will be cooked and supplied in the container of the receiver then in such cases, if packing is done, whether packing can become an incidental supply and transaction can be treated as composite supply?
- In Take Away, if option is given to the receiver to consume the food at premises of the restaurant after taking it away, will it make any difference in nature of supply?
- In case of supply at take away, if access to premises where food is served is also available whether the nature of supply would change?
- In case of Take Away, if there is a waiting area and water is served before handing over delivery whether it shall be change nature of supply treated as composite supply?

Home Delivery

- In case of Home Delivery, whether a contract can be treated as deficiently performed if food is cooked and packed but not delivered at the home of the receiver?
- In case of Home, Delivery, whether delivery at home is optional and if such option is exercised, whether it shall make any difference in terms of the contract as mentioned in point no 1?
- In case of Home Delivery, if Delivery charges are mentioned separately, will it make any difference?
- In case of Home Delivery, if the contract is such that initial order was placed for self-pick up and during cooking it was changed to home delivery, will it make any difference?
- In case of Home Delivery, if cutlery is also provided with the food, will it make any difference?

Restaurants

- Is there any pre-dominant element in serving of food at restaurant?
- Is there any ancillary element in serving of food at restaurants?
- If in a restaurant food is not served but other amenities are intact, can the contract be treated as deficient or into performed at all?
- If in a restaurant, the service is poor, will the contract be deficient or not performed at all?
- If in a restaurant, chair is not given to sit, will the contract be deficient or not performed at all?
- If in a restaurant, music is not played but it was mentioned as one of the inclusions and money is refunded, whether it shall become a pre-dominant supply?
- If in a restaurant there is a cover charge and the customer may or may not eat food but still it will be required to pay such charge. In such a case, can supply of food be treated as incidental?

7. Schedule II – Entry 6(b)

In aforesaid background, now entry 6(b) should be interpreted:

*The following **composite supplies** shall be treated as a supply of services, namely :—*

*(b) supply, **by way of** or as part of any service or in any other manner whatsoever, of goods, being food or any other article **for** human consumption or any drink (other than alcoholic*

liquor for human consumption), where such supply or service is for cash, deferred payment or other valuable consideration.

The elements of Supply in Entry 6(b) of Schedule II have to be understood in detail:

- **Supply, by way of** any service of goods, being food
- **Supply, as part of** any service of goods, being food
- **Supply** in any other manner whatsoever of goods, being food

7.1 Supply, by way of any service, of goods, being food

The Collins Dictionary defines the term “**by way of**” as “If you do something by way of a particular method, you use that method to do it.” Therefore, if you are supplying food by way of service, you are actually supplying the service. These words imply to cover a composite transaction where goods are being supplied and the manner or mode of the supply of food is a service. General example for same which is understood is supply of food to a casual visitor in a restaurant fits in such category where a person walks in the restaurant and food is served to him.

7.2 Supply, as part of any service, of goods, being food

Supply as part of any service indicates that there is composite transaction of supply of service and supply of goods which is viewed as a single supply from economic point of view as per natural bundling concepts, wherein services largely dominate. The supply of goods is made or agreed to be made as a part of such supply of service.

For example, supply of breakfast as a part of accommodation service to a resident in a hotel.

7.3 Supply, in any other manner whatsoever, of goods, being food

These words ‘any other manner whatsoever’ have been used along with the words by way of or as part of any service.

These words are very wide in their literal meaning to cover every supply of goods being food in any other manner whatsoever. Interestingly, there is no settled principle in this regard in erstwhile regime as to what is the nature of transaction which can be covered here. In fact in earlier regime, this phrase had no real value since levy of sales tax on pure sale transactions of food or in transactions where service element was minimal was already settled in favour of the revenue.

The important point to note here is Article 366(29A) of the Constitution of India was for “**tax on the sale or purchase of goods**” which by deeming fiction included a tax on supply, by way of or as part of any service **or in any other manner whatsoever, of goods, being food**. However since GST in itself is a tax on supply of good or services hence it does not need any deeming fiction to treat aforesaid transactions as tax on sale of goods. Thus, in sense, if any transaction which is enumerated under Entry 6(b) of Schedule II does not have element of sale of goods, then also GST can be levied on the same.

Hence supply of goods in any other manner whatsoever is already included in the scope of supply. Now the issue which arises is that whether this phrase can be given a wider meaning to include all types of supply transaction of food?

However, it is a well settled principle of interpretation that words in a statute which are otherwise wide but are associated in the text with more limited words indicating a same class or genus must be read in the limited scope as of the general class of words preceding them.

The principle has been enunciated in case of **Siddeshwari Cotton Mills (P) Ltd Vs Union Of India And Anr [2002-TIOL-206-SC-CX]**

*The expression ejus-dem-generis - 'of the same kind or nature' - signifies a principle of construction whereby words in a statute **which are otherwise wide but are associated in the text with more limited words are, by implication, given a restricted operation and are limited to matters of the same class or genus as preceding them.** If a list or string or family of genus-describing terms are followed by wider or residuary or sweeping-up words, then the verbal context and the linguistic implications of the preceding words limit the scope of such words.*

In 'Statutory Interpretation' Rupert Cross says:

".....The draftsman must be taken to have inserted the general words in case something which ought to have been included among the specifically enumerated items had been omitted....." [page 116]

The principle underlying this approach to statutory construction is that the subsequent general words were only intended to guard against some accidental omission in the objects of the kind mentioned earlier and were not intended to extend to objects of a wholly different kind. This is a presumption and operates unless there is some contrary indication. But the preceding words or expressions of restricted meaning must be susceptible of the import that they represent a class. If no class can be found, ejus-dem-generis rule is not attracted and such broad construction as the subsequent words may admit will be favoured. As a learned another puts it:

".....if a class can be found, but the specific words exhaust the class, then rejection of the rule may be favoured because its adoption would make the general words unnecessary; if, however, the specific words do not exhaust the class, then adoption of the rule may be favoured because its rejection would make the specific words unnecessary."

In fact the words 'in any other manner' used in earlier laws with certain preceding words have been interpreted by the Tribunal applying the same principle in case of **D. Ankinedu Chowdry Versus Commissioner Of Customs, Chennai [2014 (301) E.L.T. 367 (Tri. - Del.)]** as under:

*In order that a person is penalised under the above provision, it has to be established that he acquired possession of or was in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other manner dealing with any goods which, he knew or had reason to believe, were liable to confiscation under Section 111 of the Act. **The expression "in any other manner dealing with" has to be understood ejusdem generis with the preceding words/expressions in the clause** in terms of the Apex Court's ruling in *Thakur Amar Singhji v. State of Rajasthan [AIR 1955 SC 504]*.*

The Court held thus :-

"the true scope of the rule of 'ejusdem generis' is that words of a general nature following specific and particular words should be construed as limited to things which are of the same nature as those specified and not its reverse, that specific words which precede are controlled by the general words which follow."

According to the above doctrine, the meaning of the expression "in any other manner of dealing with" should be understood in a sense similar or comparable to how the preceding words viz. carrying, removing, depositing etc. are understood. In other words, "any other manner of dealing" with the goods is also some physical manner of dealing with the goods.

The principle of *Ejusdem generis* being applied in the present context, gives the colour of the genus of the words 'by way of or as part of any service' along with which the words '**in any other manner whatsoever**' are used.

By this implication, the words 'in any other manner whatsoever, will mean that the supply of food can be in any other manner but there **must be an element of service in the transaction**. The paper writer concurs with said view.

The given understanding is also supported, if under mentioned highlighted words of the entry 6(b) are interpreted in given context

b) supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (other than alcoholic liquor for human consumption), **where such supply or service is for cash, deferred payment or other valuable consideration**.

It is evident that law makers, have envisaged that not only a contract of service but even a contract of supply of goods being food or any other article of human consumption which is composite in nature can fall in given entry. Because if such interpretation is not given, then the phrase, where such supply is or cash, deferred payment or other valuable consideration shall become infructuous.

8. Pragmatic Application of Concepts

8.1 Whether mere sale of food items can be a supply of service?

On the basis of above analogy, a transaction of mere sale of food items without any service element in the transaction between supplier and recipient cannot be covered under supply of food in any other manner whatsoever in Entry 6(b) of Schedule II.

The food items are movable property and well covered in the definition of the goods. Further, in a transaction of mere sale of food items, there is transfer of property from seller to the buyer and such sale is a supply of goods which is already covered in Entry 1 of the Schedule-II.

Also it has to be noted, that entry 6 is only applicable on composite supplies and hence mere sale of food items does not have element if composite supply and hence cannot be made part of Entry 6(b).

8.2 Can cooked food be treated as goods?

As mentioned earlier, Goods as defined under law precisely means movable property. Further, the term services has been defined in a residuary manner. What are not goods are services.

Some food items are bought and sold as it is. Some are cooked and then sold on take away basis. Does cooking make any impact?

Cooking is a process to manufacture the food item to be sold. When the food finally cooked is sold across the counter, the transaction between the seller and buyer is that of sale. The recipient is concerned with the process but the goods which have been cooked. It is pure sale of goods like any other sale of manufactured goods.

Reliance is placed on decision of **BHARAT HOTEL LTD.: 2018 (15) G.S.T.L. 71 (Tri. - Del.)**

5. We have heard both the sides and perused the appeal record. On the main issue regarding the excisability of various food preparations made in the kitchen of the appellant and served to the customers, we have examined the various tariff entries from Chapter 16 to Chapter 20. The method of preparation of various food items now under consideration is of common knowledge. As correctly contended by the Learned AR, it is nobody case that prepared fish or chicken curry ready to serve can be equated to a raw fish or a chicken curry + some spices. The starting point with various ingredients and the ending point with combination of these ingredients involving different duration of preparation requiring heating, boiling and various other processes will certainly result in the new identifiable and marketable prepared food. The test laid down by the Hon'ble Supreme Court in Delhi Cloth and General Mills Co. Ltd. (supra) case is fully satisfied in such situation. The duration of shelf life by itself will not decide the marketability or excisability. This has been a well settled principle by the Apex Court. What is needed is to see whether a new, commercially identifiable product emerged after processes undertaken on the raw materials which are distinct from the finished product. We have no hesitation to hold that the finished products, in the present case are different types of food preparations and are new marketable products and are liable to excise duty subject to due classification as available in the Central Excise Tariff.

Thus in view of the paper writer, cooked food are goods.

8.3 Whether predominance to be tested for Entry 6(b)?

One important aspect for interpretation of Entry 6 of Schedule II has been covered that the test of composite supplies has to be applied and satisfied to proceed for application of Entry 6 of Schedule II. Thus principal supply needs to be identified while entering to Entry 6(b).

In such a case, will it make any difference if predominant element of composite supply is goods but not services? Can such transactions be still covered in the entry 6(b) of Schedule-II?

Since it has been understood above by the paper writer that supply of goods by way of service or as part of service or any other manner where service may be incidental or ancillary. Thus in understanding of the paper writer it is tabulated as below

Particulars	Principal Supply	Ancillary Supply
Supply of food by way of service	Serving of food	Supply of Food
Supply of food as part of service	Serving of food	Supply of Food
Supply of Food in any other Manner	Supply of food	Service involved in such supply of food

The above hypothesis is based on understanding that that predominant element of service is exhausted in scenarios where supply of food is by way of or as part of service. Hence what can be comprehended to be left in any other manner whatsoever, by applying principles of *ejusdem-generis*, a transaction where service is incidental but still part of the contract.

8.4 Can supply of food by a Restaurant to its customers through serving be treated as Composite Supply?

The given issue, according to the paper writer has academic value though may not change the fate of taxability of supplies of given nature. It has been understood by the paper writer in the

aforesaid paragraphs that for being a composite supply there should be at least 2 supplies. Now, in case of serving of food by restaurant, it is settled that main supply is that of service. The only issue to deliberate is whether there is separate supply of food or it is an integral part of supply of service without which the supply of service cannot be executed.

In this context, the reference is again drawn to the decision of **M/s. Northern India Caterers (India) Limited V. Lt. Governor of Delhi (1978) 4 SCC 36**

The Apex Court has made the following observations:

- 1) The essence of the transaction is not to transfer the property of such food or drink, but to satisfy his appetite or thirst.
- 2) The customer does not become owner of food. He is just privileged to eat.
- 3) The true essence of the transaction is service in the satisfaction of a human need or desire, ministry to a bodily want.
- 4) Before consumption title does not pass; after consumption there remains nothing to become the subject of title.
- 5) What the customer pays for is a right to satisfy his appetite by the process of destruction.
- 6) The consideration he pays is more than for the food. It includes the factor of other personal services provided to him.

Thus on basis of above and reading the same with definition of composite supply and the interpretation given by the paper write, it is understood (by paper writer off course) that in these transactions, there is no separate supply of goods which his incidental and hence it is not a composite supply.

Thus for such supplies, one need to head towards entry 6(b) of the Schedule-II or Section 8 and in generic sense should be treated as supply of service only.

Only to the extent, where in case of left over food, post completion of service, on the request of the customer, it is packed and given away by the restaurant, it can be argued that incidentally the transfer in title to such goods have arose during the execution of the contract of service for which no separate consideration has been charged (unless a packing charge is recovered). Since such transfer of title is without consideration (of left over food), hence it is not a generic supply under Section 7 and hence would not become a taxable supply for the purpose of definition of composite supply.

Hence in view of the paper writer, generic restaurants which serves to the customers in ala carte, do not make any composite supply. It is a pure supply of service.

However, in cases where there is a cover entry charge where various elements like music, sports, ambience, amusement and food are provided in such a case, supply of food can be treated as ancillary supply. It may in that case be covered by Entry 6(b). However the rate of tax may still be on the basis of nature service and may be governed by “Restaurant Service”.

8.5 Can sale of packed food items across counters by a restaurant be a supply of service?

Such transactions of supplies have also been brought in confusion of classification in GST regime.

Following Advance Ruling have been made on this issue:

Kundan Mishthan Bhandar- 2019 (24) G.S.T.L. 94 (App. A.A.R. - GST)

Restaurant services with take away facility - Sweetshop in same premises - Composite supply - Undisputedly, appellant running sweetshop along with restaurant in two distinctly marked separate parts of same premises - They are also undertaking separate billing and maintaining separate records for sweetshop and restaurant - Thus, it is not nature but constituents of individual supply to decide as to whether supply is composite supply or not - When sweets, namkeens, cold drinks and other edible items are supplied to customers in restaurant or as takeaway from restaurant counter which are billed under restaurant head, then such supply is composite supply with restaurant service as principal supply - These would be leviable with GST of 5% applicable to restaurant service without ITC - However, such goods when supplied at sweetshop counter have no direct or indirect nexus with restaurant service - These are not composite supply but individual supply of goods - Such supply would be levied with applicable GST rate with ITC facility available - Impugned order set aside - However, appellant directed to continue to maintain separate records for restaurant and sweetshop. [paras 11, 12, 13, 14]

8.6 Recommendation by GST Council

Even GST Council has recommended that the take away food from a restaurant shall have similar tax treatment as that for the restaurant. **GST Council in its 23rd meeting** held on 10th November 2017 at Guwahati took decisions relating to changes in GST rates on certain services and among others, following recommendation was made:

EXEMPTIONS / CHANGES IN GST RATES / ITC ELIGIBILITY CRITERIA

All stand-alone restaurants irrespective of air conditioned or otherwise, will attract 5% GST without ITC. Food parcels (or takeaways) will also attract 5% GST without ITC.

Thus the understanding of the GST Council has developed on the basis of nature of establishment but not on the basis of nature of supply.

However the paper writer would rely on following judgement in this regard:

Sangu Chakra Hotels Private ... vs The State Of Tamil Nadu [1985 60 STC 125 Mad]

*It is common knowledge that in the case of a restaurant simpliciter, a person may either go to a restaurant merely for the purpose of buying articles of food and taking them home in a parcel, or he may go to the restaurant with the avowed object of ordering out articles of food for the purpose of consumption in the restaurant itself. The question as to whether any service is involved or not, if at all it arises, it will arise only in the second class of cases. **In the first category of cases where articles of food are sold across the counter it is a sale, pure and simple, like any other commodity in any other shop with no element of service involved. If at all any service is involved, it is in no way different from the service involved in an ordinary transaction of sale of any other goods which are sold across the counter.** It is difficult to see how such a transaction which is purely of sale and purchase of articles of food can be outside the taxing power of the State Legislature having regard to entry 54 of List II of the Seventh Schedule to the Constitution. The real difficulty arises only when we deal with the question of legislative competence of the State Legislature to levy sales tax on the supply of goods, which according to the Supreme Court, is a part of service.*

The sale of packaged or ready food items do not have any element of service at all. Even if it has, it cannot be treated as a separate supply in itself. Hence it is sale simpliciter which can be classified only as supply of goods under GST.

The reliance can also be placed on decision of **Andhra High Court in case of Durga Bhavan And Ors. vs The Deputy Commercial Tax [1981 47 STC 104 AP]** which has been already mentioned above. It was held in it that

In this connection, we may observe that sales across the counter will obviously be transactions of sale. It may be that in doing so some services are rendered by packing the food-stuffs, etc., but this part of the service is so infinitesimal and insignificant that the transaction would nevertheless be one of sale. Even in a case where a customer is asked to sit down in a chair or a more comfortable seat while the food-stuff is packed and handed over to him, still we consider that the transaction would be one of sale.

Also reference should be drawn to decision of **Rajasthan High Court - Govind Ram And Ors. vs The State Of Rajasthan And Ors. [AIR 1982 Raj 265, 1982 WLN 1]** in this regard

Thus in case of take away, there is title in goods which gets transferred to the customer on the delivery and hence the given transaction is a supply of goods which is covered by Entry 1(a) of the Schedule-II rather than entry 6(b) of the said schedule since there is no separate supply of service in the given case.

In fact ECJ Court on base of the ruling in case of Faaborg (supra), suggested also that if the transaction have regarded take-away food, a different treatment would have been necessary, as the service would not have been designed to “*enhance consumption on the spot in an appropriate setting*” but instead to enable the customer to take the food with him and not to eat it at the place where it was provided.

However, in exceptional cases, where delivery of food at take away gives right to the customer to sit and consume the food at premises of the restaurant only then such supply has element of transfer of title in food along with right to enjoy the ambience and in such a case, it can be treated as a supply which is bundled with two taxable supplies with other conditions of the a composite supply. Though in such a case, it may fall under Entry 6(b) of the Schedule-II but in the humble understanding of the paper writer it will not qualify as supply of food by way of (method) or as part of (constituent) of a service. Rather it will a supply of food in any other manner whatsoever (i.e. over the counter) which is coupled with a right to enjoy the ambience and hence though the pre-dominant element may be supply of food in given case, it shall be treated as supply of service by virtue of operation of Entry 6(b) of the Schedule-II. It will have impact on tax rate of on such supply.

8.7 Whether home delivery of food is service?

When food is delivered to the recipient at his desired place, there is an element of delivery along with sale of food. Now as discussed initially, the test is whether this transaction has 2 or more supplies or only two or more elements forming a single supply only?

When a customer books a parcel of food to be delivered at its desired place only, the supply has undoubtedly two elements being food and its delivery at desired place. But these two elements are not supplies *per se*. The customer has asked for one single supply of food at its place. The supplier has agreed for the whole transaction at a given price. Hence, it is a single supply of goods being food and has no involvement of supply of service in it. The delivery in given case is the essential element of the supply without which supply of food cannot take place.

There is a thin line of difference when food is bought at its price and the restaurant is requested to deliver it as well for an identifiable charge. In this case, recipient has sought to be supplies one being food and the other being service of transportation of such food to its place.

In such case, it may be termed as a composite supply which in that case will be covered by entry 6(b) of the Schedule-II. However in humble view of the paper writer, the given supply of food shall be by any other manner whatsoever (but not by way of or as part of a service). It will have impact on tax rate of on such supply.

8.8 Tabulation of various scenarios and application of Entry 6(b) of Schedule II

Particulars	Composite Supply (Y/N)	By way of a Service	As part of a Service	In any other manner whatsoever
Pure Restaurant Service	No	NA	NA	NA
Pure Restaurant Service with option to take away left over food	No	NA	NA	NA
Cover Charge for entry to a place where music, entertainment, food is bundled	Yes	No	Yes*	No
Take Away of Food	No	NA	NA	NA
Take Away with Right to enjoy Ambience and consume food at premises	Yes	No	No	Yes
Home Delivery of Food	No	NA	NA	NA
Supply of Food and Home Delivery identified separately	Yes	No	No	Yes

*Tax Rate may be governed by a different category other than HSN 9963.

9. Insight into Service Rate Notification

9.1 Rate of Tax on Supply of Food under HSN 9963

Relevant Entries in Tariff in relation to supply of food are as under:

Notification No. 11/2017 – CT(Rate) dated 28.06.2017

Sl. No.	Chapter, Section or Heading	Description of Service	Rate (%)	Condition

7	Heading 9963 (Accommodation, food and beverage services)	(i) Supply of 'hotel accommodation' having value of supply of a unit of accommodation above one thousand rupees but less than or equal to seven thousand five hundred rupees per unit per day or equivalent.	6	-
		(ii) Supply of 'restaurant service' other than at specified premises	2.5	Provided that credit of input tax charged on goods and services used in supplying the service has not been taken [Please refer to Explanation No. (iv)]
		(iv) Supply of 'outdoor catering', at premises other than 'specified premises' provided by any person other than— (a) suppliers providing 'hotel accommodation' at 'specified premises', or (b) suppliers located in 'specified premises'.	2.5	Provided that credit of input tax charged on goods and services used in supplying the service has not been taken [Please refer to Explanation (iv)]
		(v) Composite supply of 'outdoor catering' together with renting of premises (including hotel, convention center, club, pandal, shamiana or any other place, specially arranged for organising a function) at premises other than 'specified premises' provided by any person other than— (a) suppliers providing 'hotel accommodation' at "specified premises", or (b) suppliers located in 'specified premises'.	2.5	Provided that credit of input tax charged on goods and services used in supplying the service has not been taken [Please refer to Explanation (iv)]
		(vi) Accommodation, food and beverage services other than (i) to (v) above Explanation.— (a) For the removal of doubt, it is hereby clarified that, supplies covered by items (ii), (iii), (iv) and (v) in column (3) shall attract central tax prescribed against them in column (4) subject to conditions specified against them in column (5), which is a mandatory rate and shall not be levied at the rate as specified under this entry.	9	-

	<p>(b) This entry covers supply of ‘restaurant service’ at ‘specified premises’.</p> <p>(c) This entry covers supply of ‘hotel accommodation’ having value of supply of a unit of accommodation above seven thousand five hundred rupees per unit per day or equivalent.</p> <p>(d) This entry covers supply of ‘outdoor catering’, provided by suppliers providing ‘hotel accommodation’ at ‘specified premises’, or suppliers located in ‘specified premises’.</p> <p>(e) This entry covers composite supply of ‘outdoor catering’ together with renting of premises (including hotel, convention center, club, pandal, shamiana or any other place, specially arranged for organising a function) provided by suppliers providing ‘hotel accommodation’ at ‘specified premises’, or suppliers located in ‘specified premises’.</p>	
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9.2 Restaurant Service definition vs 6B of Schedule-II, Any Difference?

For the purpose of above entries in the Notification, ‘restaurant service’ has been defined:

(xxxii) “Restaurant service” means supply, **by way of or as part of** any service, of goods, being food or any other article for human consumption or any drink, provided by a restaurant, eating joint including mess, canteen, **whether for consumption on or away from the premises** where such food or any other article for human consumption or drink is supplied.

(xxxvi) –Specified premises^{||} means premises providing ‘_hotel accommodation’ services having declared tariff of any unit of accommodation above seven thousand five hundred rupees per unit per day or equivalent.^{||}

Now the important to note here is that Schedule II Entry 6(b) includes 3 phrases:

- **by way of**
- **as part of any service**
- *any other manner whatsoever*

However, the definition of restaurant service deliberately eliminates one of the above phrases i.e. ‘in any other manner whatsoever’.

This gives following understanding:

1. Any “other manner whatsoever” in Entry 6(b) of Schedule II intends to cover supplies of food by suppliers other than restaurant, *eating joint including mess, canteen etc.*
2. Also all manner of supplies of service by restaurant, *eating joint including mess, canteen* is not covered within the definition of restaurant services. Only supplies which are by way of or as part of a service are covered by given definition.
3. Supply of food in “any other manner” has been intended to be classified under some other category of Notification No. 11/2017.

Whether for consumption on or away from the premises

The definition in the notification envisages two situations according to which a restaurant or eating joint can supply food by way of or as part of a service, whether for consumption on or away from premises. The meaning of “on or away from premises” may be given as under:

- 1) The food prepared by the restaurant or eating joint is supplied by way of or part of service and such food is consumed in the same premises only.
- 2) The food prepared by the restaurant or eating joint is supplied by way of a service to guest of a Hotel in their respective rooms with proper serving, cutlery and further clearance
- 3) The food prepared by the restaurant or eating joint is supplied by way of a service at a different location as part of a package to the guest like an open bus, hilltop, sand-dunes etc.

However, according to the paper writer, since it has already been understood that pure delivery of food items may be a composite supply per se and hence may not be a service, hence given definition which has a limited applicability on given notification only will not apply to contracts of supply of food as home delivery and take away. Hence in those cases, though the food is being supplied by restaurant or a eating joint and it may be supplied for consumption away from the premises but since it is not supplied by way of or as part of a service, hence it shall not be governed by this definition and hence the tax rate shall not be applicable on such transaction in accordance with N.N. 11/2017-CT (Rate).

Also, in some cases (as mentioned above), the transaction of take away or home delivery by restaurant or an eating joint may be treated as composite supply but as understood above, it shall be treated as supply of food in any other manner whatsoever. Since such type of transactions is not governed by definition of “restaurant service” hence its rate of tax shall be governed by entry no 7 (vi) i.e. residuary entry where rate of tax will be 18% and ITC will be available.

9.3 HSN Classification 99633

Food, edible preparations, alcoholic and non-alcoholic beverages serving services

996331: Services provided by restaurants, cafes and similar eating facilities including takeaway services, room services and door delivery of food

Whether HSN 996331 has any impact?

In respect of given HSN and related explanatory note, vide press release CBIC has explained that such notes have only guiding value. The text is reproduced as under

The explanatory notes indicate the scope and coverage of the heading, groups and service codes of the Scheme of Classification of Services. These may be used by the assessee and the tax administration as a guiding tool for classification of services. However, it may be noted that where a service is capable of differential treatment for any purpose based on its description, the most specific description shall be preferred over a more general description.

Further these notes are applicable when any supply is a supply of service. Hence for transactions which are supply of goods, for them given notes have no guiding value also.

9.4 Classification and Applicable GST Rates

Nature of Transaction	HSN	Entry of N.N. 11/2017	Rate of Tax
Restaurant to visitors eating at the premises (with option to take away left over food)	9963	7(ii)	5% without ITC
Home delivery of food by eating joints:			
When integral part of order	HSN of respective Goods	Relevant Entry in Goods notification	Applicable rate on relevant entry
When delivery is separate available as an option	9963	7(vi)	12% wit ITC
Take Away Basis by eating joints:			
Supply of food on take away basis	HSN of respective Goods	Relevant Entry in Goods notification	Applicable rate on relevant entry
Supply of food on take away basis with a right to consume at premises also	9963	7(vi)	12% wit ITC

Sources & Acknowledgements:

- 1) Intensive Clause by Clause Discussion on GST Laws by CGPI- Moderated by Adv. Ishaan Pathkar
- 2) Adv Jatin Harjai, Jaipur
- 3) Article on Supply of food | Goods or Service under GST | Taking perspective from earlier laws- CA Shilpi Jain, Vinay Kumar J
- 4) Case Studies on Sale vs Service – Composite Transactions – CA Parind Mehta
- 5) The EU VAT Treatment of Composite Supplies: Evolution Trends and Critical Points- Stefano Conese
- 6) GST – Drawing Splits and Bundles from Composite and Mixed- Manish Sachdeva
- 7) www.cbic.gov.in
- 8) EXCUS
- 9) TaxIndiaonline.com
- 10) Taxmann.com

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