

## The mess in the mess

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Various issues relating to the service tax liability in connection the canteen run by the employers for the benefit of the employees are analyzed in this article. Two transactions are involved here, viz., (i) the employer appointing a contractor to run the canteen, where the contractor charges the employer. (ii) The employer collecting nominal amount from the employees, for the food, snacks, beverages consumed by the employees;

### **Upto to 30.06.2012.**

#### **Contractor's liability:**

"Outdoor catering" is a taxable service, under Section 65 (105) (zzt) of the Finance Act, 1994. The term "Outdoor caterer" is defined in section 65 (76a) of the Act as "*outdoor caterer means a caterer engaged in providing services in connection with catering at a place other than his own but including a place provided by way of tenancy or otherwise by the person receiving such services*". The services provided by the contractors to the employers, whereby the contractor runs the canteen in the employer's premises would constitute "outdoor catering" service and the contractor would be liable to service tax, after prescribed abatement. Such service tax was also being allowed as cenvat credit to the employer (subject to other conditions as to eligibility under Cenvat Credit Rules, 2004) upto 31.03.2011. From 01.04.2011, such cenvat credit has been specifically barred, by virtue of clear exclusion of such service in the definition of input service, under CCR, 2004.

#### **Employers' liability.**

As per section 65 (105) (zzzzv) of the Act, the following is a taxable service.

*"Any service provided or to be provided to any person, by a restaurant, by whatever name called, having the facility of air-conditioning in any part of the establishment, at any time during the financial year, which has licence to serve alcoholic beverages, in relation to serving of food or beverage, including alcoholic beverages or both, in its premises".*

A question may arise, in the absence of any definition for the word "restaurant" in the Act, whether the canteen run by an employer for the benefit of the employees can be considered as a restaurant or not, so as to attract the levy of service. There is no need to attempt to answer the question, as none of such canteens would be having the licence to service alcoholic beverages, so as to get attracted under the levy. Hence, the amounts collected by the employers from the employees for sale of food and beverages in the canteen are not at all liable to service tax upto 30.06.2012.

## **Post 01.07.2012.**

### **Employers' liability.**

From this date, individual definition of taxable services has been done away with and the term "service" has been defined under section 65 B (44) of the Act, with a list of activities declared as a service under section 66 E. As per clause (i) of the said section 66 E, the following is declared as a service.

*"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".*

This would cover the transactions of sale and serving of food and beverages in any place, including a factory canteen. The manner of determination of the value of such taxable service has been prescribed under Rule 2 C of the Service Tax (Determination of Value) Rules, 2006 as 40 % of the total amount charged.

But, the following exemption has been provided under Notification 25/2012 ST Dated 20.06.2012.

*19. Services provided in relation to serving of food or beverages by a restaurant, eating joint or a mess, other than those having (i) the facility of air-conditioning or central air-heating in any part of the establishment, at any time during the year, and (ii) a licence to serve alcoholic beverages.*

As the canteens run by the employers would not be having a licence to serve alcoholic beverages, the amount charged by the employers from the employees for sale of food and beverages in the canteen would not be liable to service tax and the above exemption can be claimed.

But, with effect from 01.04.2013, the above exemption has been amended as below:

*19. 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.*

By virtue of the above, only those canteens run by the employers, which are not having the facility of air-conditioning or central air-heating can claim exemption from 01.04.2013 and in respect of canteens, having such facility, service tax is payable by the employer for the amounts collected from the employees, from this date. It may also be noted only the services provided by the employees to the employers is kept outside the definition of service and this is a case of employer providing a service to the employees.

Vide Notification 14/2013 ST Dated 22.10.2013, the following exemption has now been provided for, from 22.10.2013.

*19A. Services provided in relation to serving of food or beverages by a canteen maintained in a factory covered under the Factories Act, 1948 (63 of 1948), having the facility of air-conditioning or central air-heating at any time during the year.*

By virtue of the above, even a canteen having air-conditioning or central air-heating facility and maintained in a factory covered under the Factories Act, 1948 would be exempted from payment of service tax from 22.10.2013. It may be noted that to claim this exemption, only the factory must be covered under the Factories Act, 1948 and it is not necessary that the canteen is run as per the obligation cast under the said Act (having more than 250 employees). In other words, even though a factory is not required to maintain a canteen (having less than 250 employees), still, if the factory is otherwise governed by the Factories Act, 1948, this exemption would be available.

But, the canteens in administrative offices, software companies, etc. which cannot be considered as a "factory", cannot claim such exemption, if they are having the facility of air-conditioning or air-heating.

#### **Contractor's liability:**

Though the definition of "outdoor caterer" referred to above has ceased to exist from 01.07.2012, the value of taxable service in respect of the service portion involved in outdoor catering service is prescribed at 60 % under Rule 2 C of the Service Tax (Determination of Value) Rules, 2006, which suggests that the law still recognizes the services provided by an outdoor caterer, as a distinct service and fixed the value of such taxable service.

It may be noted that the above exemptions under S.No. 19 or 19 A of Notification 25/2012, covers only the services provided in relation to serving of food or beverages **by a restaurant / by a canteen** to the customers. The services provided by the contractors to the employers cannot be covered under these entries. In case of the canteens run by the employers, these are canteens / eating joint / mess / restaurant in the hands of the employers and they provide service to the employees. So the benefit of exemptions under S.Nos. 19 & 19 A ibid can be claimed by such canteens / eating joint / mess / restaurant, i.e the employers. When the contractors provide service to the employers, the contractor is distinct from the canteens / eating joint / mess / restaurant and they provide service **to** these canteens / eating joint / mess / restaurant, run by the employers.

Hence, the contractors would continue to be liable to pay service tax.

Let us tabulate the above,

S.No.	Activity	Period	ST Liability
1	Amount collected by the employers from the employees for sale of food and beverages in the canteen	Upto 30.06.2012	Not liable. Not a taxable service at all.
		From 01.07.2012 to 31.03.2013	Not liable, if they are not having air-conditioning and air-heating <b>and</b> licence to serve alcoholic liquor. Even air-conditioned canteens are not liable, if they are not having licence to service alcoholic liquor. S.No. 19 of Notification 25/2012.
		From 01.04.2013 to 21.10.2013	Canteens having the facility of air-conditioning or air-heating are liable to service tax. Canteens which do not have these facilities are not liable to service tax. S.No. 19 of Notification 25/2012, as amended.
		From 22.10.2013	Canteens which do not have air-conditioning or air-heating – they are not liable to pay service tax under S.No. 19 of Notification 25/2012.  Canteens maintained in a factory, covered by the Factories Act, are exempted, even if they are having air-conditioning or air-heating facility. S.No. 19 A of Notification 25/2012.
		From 22.10.2013	Canteens having the facility of air-conditioning or air-heating and maintained in offices, which are not "factory". They continue to be liable to service tax.
2	Services provided by the Contractors to the employers in connection with cooking, serving, etc.	Prior to 30.06.2012	Liable to service tax under outdoor catering service. Abatement 50 % under Notification 1/2006 ST Dt. 01.03.2006.
		From 01.07.2012 to till date	Liable to service tax. Value of service 60 % of total amount as per Rule 2 C of Service Tax (Determination of Value) Rules, 2006.