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Dear Professional Colleagues,

Service tax implication on AC Restaurants vide the Finance Bill, 2013

With effect from July 1, 2012, Service is defined under Section 65B(44) of Chapter V of the Finance Act, 1994 ("**the Finance Act**") means any activity carried out by a person for another person for a consideration is service, which *includes a declared service*. Further service tax is applicable unless said service falls under the negative list of services or otherwise exempted specifically.

In terms of Clause (i) of Section 66E, service portion in an activity wherein goods, being food or other articles of human consumption or any drink is supplied in any manner as a part of the activity is a declared service. Thus it implies that service provided by restaurant or caterer is a declared service chargeable to service tax.

Further, the Government vide S. No. 19 of Mega Notification No. 25/2012-ST dated June 20, 2012 ("**Notification 25/2012**") granted exemption from payment of service tax to restaurants, eating joint or a mess providing service in relation to food or beverages, other than those having:

- (i) facility of air-conditioning or central air-heating in any part of the establishment, at any time during the year, **and**
- (ii) a license to serve alcoholic beverages.

Thus all AC restaurants having license to serve liquor were exigible to service tax.

However post Union Budget 2013-14, the Central Government vide Notification No. 03/2013-ST dated March 1, 2013 ("**Notification 03/2013**") which will come into effect from April 1, 2013 has amended S. No. 19 of Notification 25/2012, and deleted point (ii) thereof.

For the sake of clarity, it means that the exemption from service tax to restaurants, eating joints, mess etc. will be available only when such restaurant doesn't have the facility of air conditioning or central air heating in any part of the establishment, at any time during the year.

Resultantly, now, all air-conditioned restaurants, eating joints or a mess including eating joints or mess which are run by companies for the benefit of their employees or run by clubs, associations or Hospitals or by State owned Tourist Homes and air-conditioned restaurants like Pizza huts, McDonalds, KFC, etc., will come under the service tax net irrespective of fact whether they serve alcoholic beverages or not.

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Further, the Consumers would be required to pay service tax even in case of eating joints like Pizza Huts, McDonalds where no liquor is served but simply because of the fact that such places are air-conditioned. Thus customers would end up paying more even at eating joints with self-service, as while levying service tax no distinction is made between premium restaurants and normal eating joints with self- service.

Thus this enhanced scope of service tax will directly impact Aam Adami due to increased cost in the form of tax will be recovered from the consumers.

Contentious & Other Issues:

- 1. AC facility for part of the year:** The service tax will be levied even where the air-conditioning facility has operated for a part of the year or in any part of establishment.
- 2. Self-service or Pick up or home delivery:** Lack of clarity exist that whether Self-service or Pick up or Home delivery/ supply of food or beverages, etc. will come under the purview of service tax or not. As discussed above, service tax is exigible when service provided in relation to serving of food or beverages by restaurants, eating joints or mess having facility of air-conditioning or central air-heating in any part of the establishment, at any time during the year.

Hence, it is debateable whether home delivery or supply of food/drinks amounts to serving of food/drinks or not. Also it is pertinent to note that in case of home delivery or supply of food or beverages outside the restaurant say at home or office, the service of well-trained waiters, linen, cutlery and crockery, personalised service by indicating preference for certain ingredients e.g. salt, chillies, onion, garlic or oil or ambience furniture, air-conditioning, music - live or otherwise, etc., are not available.

Furthermore, it will not be out of place to mention that Home delivery or pick up was out of ambit of service tax regime in terms of TRU Letter No D.O.F. 334/3/2011-TRU, Dated 28-2-2011 vide which it was stated that *“the levy is intended to be confined to the value of services contained in the composite contract and shall not cover either the meal portion in the composite contract or mere sale of food by way of pick up or home delivery, as goods sold at MRP.”*

It can be extrapolated that intention of law maker was to keep mere sale of foods by way of pick up or home delivery out of ambit of service tax.

- 3. Double Taxation of VAT and Service:** The existing problem of double taxation of VAT and Service tax will continue to persist. Pursuant to Rule 2C of Service Tax (Determination of Value) Rules, 2006 {reproduced here in below} inserted vide

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Notification no 24/2012-ST dated 6.6.2012, which provides for determination of value of taxable services involved in supply portion of an activity wherein goods, being of food and other drinks (whether intoxicating or not) in restaurant and the value for the purpose of Service Tax shall be 40% of total gross amount charged excluding VAT/ Sales tax, if any, levied thereon.

“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.- Subject to the provisions of section 67, the value of 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 at a restaurant or as outdoor catering, shall be the specified percentage of the total amount charged for such supply, in terms of the following Table, namely:-

Table

Sl. No.	Description	Percentage of the total amount
(1)	(2)	(3)
1.	<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, at a restaurant</i>	40
2.	<i>Service portion in outdoor catering 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 such outdoor catering</i>	60

Explanation 1.- For the purposes of this rule, “total amount” means the sum total of the gross amount charged and the fair market value of all goods and services supplied in or in relation to the supply of food or any other article of human consumption or any drink(whether or not intoxicating), whether or not supplied under the same contract or any other contract, after deducting-

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

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

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Explanation 2.- For the removal of doubts, it is clarified that the provider of taxable service shall not take CENVAT credit of duties or cess paid on any goods classifiable under Chapters 1 to 22 of the Central Excise Tariff Act, 1985 (5 of 1986).”.

4. Exemption to Small Scale Service Provider: The benefit of Service Tax exemption would be available to small scale service providers (AC Restaurants) up to aggregate value not exceeding ten lakh rupees in any financial year from the whole of the service tax leviable thereon U/S 66B of the said Finance Act in terms of Notification No. 33/2012-ST dated. 20-6-2012 provided the aggregate value of taxable services from all premises in preceding financial year does not exceed ten lakh rupees. Further, it is to be noted that this exemption shall not apply to,-

- (i) Taxable services provided by a person under a brand name or trade name, whether registered or not, of another person; or
- (ii) Such value of taxable services in respect of which service tax shall be paid under Reverse Charge as specified under sub-section (2) of section 68 of the Finance Act read with Service Tax Rules, 1994.

Conclusion: Apart from double taxation of VAT and Service Tax, above amendment has impacted the related Industry widely resulting into increase in cost of such services and ultimately public at large will have to face the repercussion of rising prices.

Hope the information will assist you in your Professional endeavours. In case of any query/information, please do not hesitate to write back to us.

Thanks & Best Regards,

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