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No Service Tax on the amount on which VAT is charged

One of the most talked about topics of recent times that has been circling around is the conflict with regard to charging of Service Tax and Vat on the supply of food and beverages as a part of services provided in restaurants.

The order passed by the Uttarakhand and the Chhattisgarh High Court recently seems to be quite relieving for the concerned industry and the stakeholders as a whole. Hence, discussing the aforesaid judgements becomes indispensable at the moment for clarity in the subject matter.

Service tax (Determination of Value) Rules, 2006 were amended w.e.f. 01.07.2012 by inserting a new Rule 2C, which provided that 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] would be 40% of the total amount and service tax has to be paid on the said amount. However the question arises whether Vat can also be charged on 40% of the billing amount on which service tax has already been charged.

There is a practice of charging Service tax and Vat on the overlapping value by restaurants or hotels within the Hotel Industry. For instance, a customer is billed for an amount of Rs. 100, then as per the applicable service tax provisions, service tax shall be chargeable on 40% of the bill value i.e on Rs.40. On the other hand, Vat is charged on the full value of the bill i.e 100%. therefore, with respect to 40% of the bill value, it suffers both Service tax and Vat. Such a treatment leads to double taxation of the same amount, once as sale of goods and then again as provision of services.

The matter has throughout been in dispute and a number of cases are pending before the authorities at all levels for resolving the same. A landmark judgement was delivered by the Hon'ble Kerala High Court, wherein it was held that levying Service tax on the supply of foods is unconstitutional. this was followed by the judgement of the Bombay High Court reinstating that Service tax should be levied on restaurant services. now a new dimension has come up in the matter with the recent judgement of the Chhattisgarh High Court in which it differed from the earlier decision of the Kerala High Court and held that levy of Service tax on restaurants was intra vires the constitution.

The Chhattisgarh High Court held that Section 66e(i) of the Finance act, 1994 which is titled as Declared Services includes the service portion in an activity wherein goods, being food or any article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of the activity.

Further Section 65B(44) of the Finance act, 1994 includes a declared service but excludes such transfer, delivery or supply of goods which is deemed to be sale within the meaning of clause (29a) of article 366 of the Constitution.

Section 65B (44) as well Section 66e(i) only charges service tax on the service part and not on the sale part. It indicates that the sale of the food has been taken out from the service part as was interpreted by the Supreme Court in the past.

Since levy of Service tax on Service portion is Valid, charging Vat on same value of Service portion on which service tax has already been charged, would lead to double taxation and therefore is not a proper procedure which is being followed.

The decision of the Chhattisgarh High Court has also been affirmed in one of the recent judgements passed by the Uttarakhand High Court in the case of M/s. Valley Hotel & Resorts Vs the Commissioner of Commercial tax, Dehradun wherein it was held that the element of service provided by the restaurants, on which service tax has been charged as per applicable Service tax laws should not be subject to Vat.

The two judgements passed by the Chhattisgarh and the Uttarakhand High Courts are in similar lines, stressing on the fact that where on an amount, service tax has already been charged, Vat should not be levied. These decisions seem to be carving out on all new area of doubts and apprehensions. the effects of such decision may be extended onto other fields of similar tax subjection such as Software industry or Works Contract executors. as such the litigations in these matters are large in number, we hope clarifications would soon be issued in the matter.

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