

GST on Icecream – a cold affair

Recently in its 45th meeting the GST council decided to clarify certain issues relating to Ice Cream Industry, as per this directive, CBIC has issued a circular (164/20/2021-GST dated 6.10.2021). Through this article we would like to highlight certain interpretational issues germinating from this circular which may result in litigation and hassles to the industry in future.

I. Facts:

1. Many Ice Cream manufacturers in India primarily sell ready ice cream to its distributors who further sell it to retailers, restaurants and caterers. They also have their own or franchisee run ice cream parlours which are of 2 types:
 - a. Some outlets have decent ambience, sitting arrangement and air-conditioning where the ice-cream is served over the counter and the customer has the facility either to sit and consume the ice cream then and there or to carry it away and consume at a place of his choosing.
 - b. Some parlours / outlets do not have any sitting arrangement and may or may not have air-conditioning facility. Ice cream is given to the customer over the counter.

2. Further, these outlets serve different forms of desserts other than just ice-cream, like Milk Shakes, Ice-cream scoops, Sundaes, Ready Ice-cream cones, Ice cream family, party and bulk packs.

Some of the products from the above list like Family, Party and bulk packs are sold on 'Off the shelf basis', in other words consumer does not intend to nor is he allowed to consume it within the premises using the seating facility as these are MRP products whereby the prices are printed on their packaging.

II. Legal and factual aspects involved

1. When GST was introduced, Ice-cream as goods was classified in Schedule III of notification 1/2017-CTR in entry 22 and is taxable @ 18%:

2105 00 00 - Ice cream and other edible ice, whether or not containing cocoa

2. Section 7 read with Schedule II

Section 7 (1A) of the CGST Act says that if an activity is a supply in accordance with section 7(1) then the activities mentioned in Schedule II shall be classified as supply of goods or service as mandated therein

Entry 6 of Schedule II lists out certain transactions which are composite supplies and mandates that they would be classified as 'Supply of Service', Restaurant Service is one of them. Said entry reads as under:

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.

On plain reading of above entry it is clear supply of food or drink for human consumption as a part of service shall be treated as supply of service.

3. Concept of Composite Supply

Section 8 of the CGST Act prescribes the mechanism as to how to classify a transaction where 2 or more supplies are being made. It mandates that classification in such a transaction would be done basis the principal supply out of the 2 supplies being made.

- 4.** Further, entry 7 (ii) of the Notification 11/2017-CTR provides for taxing of 'Restaurant Service' @ 18 % (with ITC) initially and with effect from 15.11.2017 rate in this entry was reduced to 5% (without ITC).

a. Said entry read as under:

Heading 9963 (Accommodation, food and beverage services)

(ii) Supply of 'restaurant service' other than at 'specified premises'

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)]

b. Term 'Restaurant Service' is defined in notification 11/2017-CTR as under:

(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.

c. Explanation 4 (ii) of notification 11/2017 CTR reads as under, it prescribes a 'Scheme of Classification' by way of an Annexure:

(ii) Reference to "Chapter", "Section" or "Heading", wherever they occur, unless the context otherwise requires, shall mean respectively as "Chapter, "Section" and "Heading" in the **annexed scheme of classification of services (Annexure)**.

d. Scheme of classification – SAC 9963 reads as under:

Sr. No.	Chapter, Section, Heading or Group	Service Code(Tariff)	Service Description
71	Heading 9963		Accommodation, food and beverage services
80	Group 99633		Food, edible preparations, alcoholic and non-alcoholic beverages serving services
81		996331	Services provided by restaurants, cafes and similar eating facilities including takeaway services, room services and door delivery of food

83		996333	Services provided in canteen and other similar establishments
88		996339	Other food, edible preparations, alcoholic and non-alcoholic beverages serving services nowhere else classified

e. Explanatory Notes to the Scheme of Classification of Services read as under:

9963 Accommodation, food and beverage services

99633 Food, edible preparations, alcoholic & 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.

*996339 Other food, edible preparations, alcoholic & non-alcoholic beverages serving services n.e.c. **This service code includes services provided by refreshment stands, fish-and-chips stands, **fast-food outlets without seating etc; services of ice-cream parlours and cake serving places; provision of meals and snacks prepared on the premises dispensed through vending machines; dining car services; mobile food services, i.e. preparing and serving food and beverages for immediate consumption from motorized vehicle or non-motorized carts*****

III.Recent Circular

In its 45th meeting the GST council decided to clarify certain issues, as per this directive, CBIC has issued a circular (164/20/2021-GST dated 6.10.2021) which in para 4 clarifies important issues relating to rate applicable for the act of supplying of ice cream by ice cream parlours. The circular reads as under:

4. Supply of ice cream by ice cream parlors

4.1 Representations have been received requesting for clarification regarding the supplies provided in an ice cream outlet.

4.2 Ice cream parlors sell already manufactured ice-cream and they do not have a character of a restaurant. Ice-cream parlors do not engage in any form of cooking at any stage, whereas, restaurant service involves the aspect of cooking/preparing during the course of providing service. Thus, supply of ice-cream parlor stands on a different footing than restaurant service. Their activity entails supply of ice cream as goods (a manufactured item) and not as a service, even if certain ingredients of service are present.

4.3 Accordingly, as recommended by the Council, it is clarified that where ice cream parlors sell already manufactured ice-cream and do not cook/prepare ice-cream for consumption like a restaurant, it is supply of ice cream as goods and not as a service, even if the supply has certain ingredients of service. Accordingly, it is clarified that ice cream sold by a parlor or any similar outlet would attract GST at the rate of 18%.

Important interpretation coming out from this circular can be explained as under:

- Ice cream parlour sells **already manufactured ice-cream**

- Parlour does not have a **character of a restaurant**.
- Ice-cream parlours **do not engage in any form of cooking** at any stage, whereas, **restaurant service involves the aspect of cooking/preparing** during the course of providing service.
- Thus, supply of ice-cream parlour stands on a different footing than restaurant service.
- Their activity entails supply of ice cream as goods (a manufactured item) and not as a service, even if certain ingredients of service are present.

FINAL CONCLUSION IN CIRCULAR

Accordingly, as recommended by the Council, it is clarified that

- Where ice cream parlours sell already manufactured ice- cream and
- do not cook/prepare ice-cream for consumption like a restaurant,
- it is supply of ice cream as goods and not as a service, **even if the supply has certain ingredients of service**.
- Accordingly, it is clarified that ice cream sold by a parlour or any similar outlet would attract GST at the rate of 18%.

IV. Pronouncements from Appellate and Authority for Advance Ruling

A. Arihant Enterprise – Naturals Ice-cream

Arihant Enterprise is franchisee of Natural Ice-cream. In their case the Authority for Advance (AAR) ruling vide its order no. GST-ARA-126/2018-19/B-29 dated 19.03.2019 2019 (4) TMI 808 - AUTHORITY FOR ADVANCE RULING, MAHARASHTRA held that the supply of ice cream by the applicant from its retail

outlets would be treated as supply of “goods” and taxed @ 18%. Aggrieved with this order, department appealed the matter to the Appellate Authority for Advance Ruling (AAAR).

The AAAR after due deliberations declared the earlier order by the AAR as void-ab-initio as the earlier order was vitiated by the process of suppression of material facts.

B. Hatsun Agro Product Ltd. – IBACO Ice cream and Venkateswara Agencies – Scoops Ice cream

In both the above rulings, there is common thread which is that the outlets shall be classified as Restaurants if the customer is given a choice of consuming the food inside the premise by providing seating arrangement and therefore icecream sold in these parlours would be taxed @ 5%

V. Is the circular Retrospective or Prospective

Almost the entire industry was in sync with the interpretation of restaurant service, all top brands, be it Baskin Robin, Gelato, Café Coffee Day, Vadilal, Havmor etc had classified their activities under Restaurant Services. Almost all the advance rulings were in sync saying that Ice Cream Parlours will be taxed as Supply of service @ 5%. Infact, AAR ruling in case of Arihant Enterprise which said that ice cream parlours were taxable at 18% was declared void ab initio because the DGGI Pune had started search proceedings against the franchisor seeking to demand tax as Supply of Restaurant Service and there was allegation of suppressing important transactional facts.

The GST Council or the Board never came up and clarified that the rulings or the inquiry being initiated by DGGI were not in sync with the legal position until now. There was no vagueness whatsoever in the legal understanding of the trade as a whole. Therefore, the rules laid down by the Supreme Court in the case of Martin Lottery would hold good in this case as well because the recent Circular is deviating from the legal position enumerated in the law and therefore the interpretation even if held correct cannot be held retrospective in nature and effect.

VI. Questions that arise from the circularised interpretation:

Following questions arise in view of the recent circular:

1. What would be the GST rate applicable on the various desserts being sold from parlours having seating facility?
2. Is the interpretation given by the circular retrospective in nature?
3. If it is agreed that products sold in parlours are taxable @ 18% would the ice cream parlour be eligible for availing GST input tax credit of past periods?
4. Would increasing rates invite anti profiteering action against the parlours

VII. Analysis of facts and legal aspects involved:

- 7.1 As discussed above, these outlets are of 2 kinds, some having seating facility and some don't.
- 7.2 Further, all these 2 outlets cook / prepare / sell different kinds of desserts including ice cream

The 2 kinds of outlets have one thing in common which is that they sell Ice-cream and related products of 2 types, one which can be sold 'off the shelf' and other which needs preparation of some sort. For example, a person can walk into any of the outlet

and buy a packaged cone or a party pack and walk away while another may walk-in and order a Sundae which the attendant will have to prepare in a customised manner by mixing 2 or more flavours of ice cream, sugar or sugar syrup, toppings, sauces and serve it in a special bowl and give it to him with or without a tissue paper.

7.3 Ice cream Retailer versus an Ice Cream Parlour

There is difference between a retailer / trader and an ice cream parlour, the latter are not merely reselling shops but they are eating places as enunciated in Service Accounting Code 996331 and 996339. They buy in bulk forms, change its form by adding toppings, sauces, serve it in a waffle cone or a paper cup, provide seating arrangements, ambience, experience, table cleaning services to name a few.

7.4 For a service to be a 'Restaurant service' it must have following ingredients:

- a. Restaurant service means supply of food or drinks meant for human consumption **as a part of any service**
- b. Provided by a **restaurant, eating joint including mess, canteen,**
- c. Whether for consumption inside the premises or away where such food or any other article for human consumption or drink is supplied.

One can see from the above dissected definition that if any food or drink is supplied as a part of **ANY** service, it shall be construed as a restaurant service. In other words any supply of goods must be part of an overall service offering. However, the circular restricts this definition by mandating that only cooking or preparing would be covered as 'Service' and not considering seating and overall customer experience for the same.

7.5 It would be pertinent to discuss the fact that when 'Restaurant Service' was first brought in the net in the Service tax law, the board vide letter no. D.O.F.No.334/3/2011-TRU dated the 28th February, 2011 chose to justify the new levy as under and the same is self explanatory:

1. Services provided by a restaurant

*1.1 Restaurants provide a number of services normally in combination with the meal and/or beverage for a consolidated charge. **These services relate to the use of restaurant space and furniture, air-conditioning, well-trained waiters, linen, cutlery and crockery, music, live or otherwise, or a dance floor. The customer also has the benefit of personalized***

service by indicating his preference for certain ingredients e.g. salt, chilies, onion, garlic or oil. The extent and quality of services available in a restaurant is directly reflected in the margin charged over the direct costs. It is thus not uncommon to notice even packaged products being sold at prices far in excess of the MRP.

7.6 It is important to note that the term Restaurant is not defined in the law, hence its definition in reputed dictionaries can be referred upon.

- a business establishment where meals or refreshments may be purchased
~ Merriam Webster
- A restaurant is a place where you can eat a meal and pay for it. In restaurants your food is usually served to you at your table by a waiter or waitress.
~ Collins Dictionary

7.7 On further reading the definition of 'Restaurant Service', Council has chosen to use 4 words, Restaurant, Eating joint, Mess and Canteen, single thread going through all these 4 premises is that they all have earmarked seating spaces where the customer can consume food if he so chooses to. Hence it can be deduced from the definition that for premise to become a restaurant it is mandatory to have some form of seating arrangement where the customer can sit and consume the food if he so chooses, it may so happen that the customer then chooses to take the food home and consume.

7.8 Further, if the explanatory notes to SAC 996339 are interpreted, it goes a step forward and covers even places which do not have seating arrangement.

7.9 The circular is bringing a completely new paradigm to this self-created interpretation conundrum, whereby it says that because ice cream parlours do not cook or prepare any food in the premises, they lack the character of being a restaurant and therefore ice cream sold from there is taxable as supply of goods. The circular further says that the interpretation won't change even if 'certain ingredients' of service are present. The law does not mandate anywhere that for being a restaurant cooking or preparing food inside the premise is the only condition precedent, while clarifying, having seating arrangement and ambience, most important aspect of having the character of a restaurant is not even mentioned leave alone discussed.

7.10 Lets take an example of Serving Ice-cream scoop in a waffle cone, in this transaction

- i. Customers walks in a parlour, chooses from a wide variety of ice-creams on display as well as mentioned in a menu,
- ii. Select a flavour or 2, he can also select to have 2 different scoops in one serving,
- iii. Customer is then asked whether he wants to have the ice cream in a paper cup or in a waffle cone,
- iv. he can choose to have a topping of sauce of his liking, once he confirms his choices,
- v. the attendant starts preparing the order, he uses a scooper to scoop the chosen flavours into the chosen medium, cup or waffle cone
- vi. attendant then put the sauce on the top
- vii. Serves the cone with a paper tissue to the customer at the table where he is sitting or over the counter.**
- viii. Customer has the option of sitting inside the premises or sitting on bar stools kept outside the premises and consume the ice cream.**

So the question arises, is doing the above set of activities for selling a scoop of ice-cream qualify to be having more than 'certain ingredients of service' and therefore qualify to being a supply of service or does it remain within the undefined boundaries of 'Certain Service' and therefore remains to be a supply of goods.

In the given transaction, the fact that there are 2 separate supplies, one is supply of ice cream and the other is the act of preparing the customised scoop, serving it on table or over the counter, option of seating facility is not in dispute, hence it is important to refer the concept of composite supply (as discussed above).

7.11 Classification would be based on the decision whether supply of ice cream is the principal supply or is preparing the scoop, serving it and giving an option of sitting in a parlour environment and consume the ice cream is the principal supply. Here, in my view, the theory of 'Customer's intent' comes into play. We all know that ice cream is available in pre-packaged form at many outlets, kirana stores, malls, etc., what makes the parlour different from these generic installations is that the customer gets the choice of choosing his flavours, getting the scoop in his desired form and

consuming it immediately in a decent environment, as compared to a Kirana Store, experience of having ice-cream in a Parlour is completely different, this is also the reason that customised ice cream scoops are expensive then pre-packaged ice cream cups.

Similarly selling a Sundae ice cream dish or Milk / thick shake needs lot of preparing and customised serving.

VIII. Conclusion

It can be deduced that the circular is going much ahead of the legal provisions, restricting the term 'Service' to include only cooking / preparing activity is not a legally sound proposition and won't survive the judicial process. Almost all leading ice cream parlour brands barring a few, under a bonafide belief, were classifying themselves under Restaurant Service and paying 5% GST in cash without availing GST input tax credit. In real terms if they had classified their output as Supply of goods and availed Input tax credit, it would have been beneficial to the industry in decreasing the tax cost and consequently would have resulted in lower net tax payments to the government. Hence in comparative terms by paying 5% industry was at a loss.

To hang such a sword on the entire industry and that too after (nearly) 5 years of GST is a travesty, they will be facing the cold both sides, if they charge 18% and avail ITC, officers can assess them as restaurant service saying that they have seating facility and ask them reverse all ITC, if they go ahead with 5%, officer can take a stand that the circular is against them, seating does not qualify to Service enough and demand differential 13% GST.

It is indeed a cold interpretational conundrum.

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