

Read 1. Application dt. 4.6.07 by M/s. Tiptop Enterprises holder of TIN No. 27660009188V.

2. Written Submission dt. 29.3.08 by the applicant.

Heard . Shri. C.B.Thakar, Chartered Accountant on behalf of the applicant

PROCEEDINGS

(U/s. 56 (1)(e) and section 56(2) of the Maharashtra Value Added Tax Act, 2002.)

No.DDQ11/2007/Adm-3/21/B- 1

Mumbai, Date : 25/05/2009

An application is received from M/s Tiptop Enterprises seeking determination on the following questions :

1. Whether in relation to food sales included in Composite Banquet charges, the sales tax/ VAT tax payment on 40% portion (i.e. net of 60% Service Charges which are subject to Service Tax), is correct in relation to each bill dated 22/4/2004, 14/4/2005 and 1/4/2006.
2. Whether the payment of tax on sale of Sweets/farsan from shopping area as per respective entries C-94(a)/(b) is correct?
3. Whether discharging tax liability @ 8% under composition on restaurant/Banquet hall food charges and food supplies in room services is correct?

02. FACTS OF THE CASE

The applicant is a firm carrying on business as a reseller and is also running a hotel, Banquet Halls and eating house. They own a hotel TIP TOP PLAZA at LBS Marg, Check Naka, Thane (W)-400601. The building has Basement/Ground plus 7 floors. The composite hotel, Tip Top Plaza Premises is admeasuring aggregate about 9,991 Square Meters (excluding Basement Area). There are various Banquet halls of different sizes which are allowed for different functions like marriages etc. These halls are situated on ground floor as well as further up to 4th floor. These halls are also given certain names. Every floor has a separate kitchen to cater the needs of halls situated on the said floor. There is one restaurant- a Thali Restaurant which is on the third floor.

There are about 72 hotel rooms situated on 5th to 7th floors where lodging and boarding is provided. On the ground floor, there is a shopping area where there are shops for different products including garments and sweets and farsan. The applicant has stated that he possesses the required registration/licences under applicable Acts. The list is as under.

Licenses/permissions:

The firm has obtained following Licenses/permissions as are applicable for Hotel Industry.

- Certificate of Registration under section 22/22A of the Bombay Sales Tax Act, 1959 effective from 25.4.2003.
- Registration Certificates under the Shops and Establishment Act, 1948 dated 6/5/2004.
- License to open or keep a place of Public Entertainment under section 33(1) (W) of the Bombay Police Act, 1951 dt.30.6.2005.
- Certificate of Registration under section 69 of the Finance Act, 1994 towards Service Tax as Mandap keeper and Convention Services dt.8.9.2004.
- Certificate of Registration under section 8 of the Maharashtra Tax on Luxuries (in Hotels and Lodging Houses) Act, 1987 dt.5.9.2005.
- Food licenses from Thane Municipal Corporation effective from 8th March, 2004 for food items of Restaurant, Banquet Halls, Mithais, Cakes, Ice cream, Namkeen, Cold drinks, for sale, for storage.
- Consent to operate under section 26 of the Water (Prevention and Control of Pollution) Act, 1981 dt.9.8.2005.

It is stated by the applicant that the treatment given to the transaction for sales tax purpose is as under.

For the services in Banquet Halls, a composite bill is prepared wherein food charges @ 40% are indicated in the bill itself. On portion relating to Hall charges, Decoration and allied services i.e. on 60% of composite banquet charges, service tax is charged separately and paid to Service Tax Dept. On the portion relating to catering i.e. food charges VAT is paid. The said VAT is paid under composition scheme @ 8%. A bill bearing No.1 dt.1.4.2006 is enclosed for reference.

Prior to 1.4.2006, the system of billing was different. The bill copies bearing No.1 dt.22.4.2004 and bill No.23 dt.14.4.2005 are enclosed by the applicant. The applicant has stated that the taxes were paid accordingly under BST/MVAT Act, 2002 on portion relating to food. In practice, on the service element, Service Tax is charged to customers

and paid to Service Tax Dept. and on food sale element sales tax/VAT is paid to Sales tax Dept. by the applicant.

It is informed that on the sale in 'Thali Restaurant' the VAT tax under Composition Scheme @ 8% is paid. A sample bill bearing No.B134 & B135 dt.31/3/2007 is enclosed by the applicant. For sale in shopping area (where counter sales take place) the tax is paid as per rate applicable to goods sold. For example, on sale of sweets/farsan tax is paid @ 4% u/e. C-94(a) and C-94(b) respectively. On sale of tax free items like Cloth, Mangoes no tax is paid being exempt u/e. A-24/A-45.

The sample bill copies as under are enclosed for ready reference.

- Bill NO.3 & 4 dated 01.06.06 for sale of sweets.
- Bill NO.57 & 58 dated 30.04.05 for sale of Mangoes.
- Bill NO.C 32 dated 31.12.04 for sale of Cloth.

It is stated that the food sale taking place in hotel rooms is added in Restaurant sales and tax is paid under composition scheme @ 8%. A bill bearing No.28523 dt.21/3/2007 is enclosed by the applicant.

It is requested that if any of above issues are held to be against them or in other words the disputed sales are held to be subject to higher rate of tax or at higher amount then the determination be given prospective effect on facts of the case.

DETAILED WRITTEN SUBMISSION MADE BY THE APPLICANT

Subsequently, the applicant gave a written submission dt.29.3.2008, the details of which are given below:.

It is stated therein that the basic issue in this determination application is about the sale price for the purpose of discharging tax liability under the MVAT Act, 2002 as well as earlier BST Act, 1959. As elaborated along with photographs, applicant has a building consisting of ground plus seven floors. It consists of separate shops for sale of sweets, fruits etc. It also has a restaurant where lunch and dinner are served by 'thali' system. There are also residential rooms where food services are given and for which separate charges are made. There are also various banquet halls where marriage parties or other functions are held by customers. The main issue is regarding sale price relating to the banquet halls.

In relation to banquet halls it is submitted that the applicant was raising separate bills for hall charges and for food services. This was done upto 31.3.2006. In such cases,

the tax was paid on food services under the BST Act/MVAT Act as per the period applicable. The bills relating to the said periods are also enclosed with the application. It is requested that the sale price be decided in respect of these charges as submitted in the hearing. It is also submitted that since there were separate charges for the food, there is no controversy and paying sales tax on said separate charges was correct as per law, so far as BST Act/MVAT Act is concerned. In this respect, the applicant has stated that reference can also be made to judgment in case of Imagic Creative P. Ltd. (12 VST 371(SC)) where in the making of separate charges for various separate items has been upheld by Supreme Court.

From 1.4.2006, the applicant is charging composite charges in relation to the banquet halls. It is stated that in other words, there are no separate charges for hall and food services. However, in relation to these charges applicant is required to discharge service tax liability also. As per Service Tax Rules, they have to pay service tax on 60% portion of composite charges and 40% deduction is allowed towards the food services. Accordingly on the 60% charges, applicant is paying Service Tax and on 40% he is paying tax under MVAT Act. The applicant has stated that in order to have a clear legal position as to whether applicant is correctly discharging liability under MVAT Act, this application is filed. It is stated that, in the oral submission it is submitted that they are paying tax on 40% portion according to the settled legal position.

It is submitted that as per the definition of 'sale', the 'deemed sale' of food by way of service is considered to be sale. The said definition of 'sale' is as under in section 2(24) of MVAT Act, 2002.

"(24) "sale" means a sale of goods made within the State for cash or deferred payment or other valuable consideration but does not include a mortgage, hypothecation, charge or pledge; and the words "sell", "buy" and "purchase", with all their grammatical variations and cognate expressions, shall be construed accordingly;

Explanation,-for the purposes of this clause,-

- a) A sale within the State includes a sale determined to be inside the State in accordance with the principles formulated in section 4 of the Central Sales tax Act, 1956;
- b) The transfer of property in any goods, otherwise than in pursuance of a contract, for cash, deferred payment or other valuable consideration;
- c) the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;
- d) a delivery of goods on hire-purchase or any system of payment by installments;

e)the transfer of the right to use any goods or any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
f)the supply of goods by any association or body of persons incorporated or not, to a member thereof or other valuable consideration;
g)the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other articles for human consumption or any drink (whether or not intoxicating), where such supply or service is made or given for cash, deferred payment or other valuable consideration."

It is stated by the applicant that it is clear that, the supply of food by way of service is taxable under the MVAT Act as 'sale'. It is also stated that, in case of banquet hall the charges are made of two components, i.e. two separate constituents. The one part is relating to hall charges itself. In case of banquet hall, the hall is given to one particular party for a particular time period. In other words, the hall gets engaged for particular slot (shift) of 4 hours or 8 hours etc., as per the terms of the contract. In addition, there being a party function, the applicant has to provide various services like flower decoration, arrangement for band, arrangement for welcoming girls and others. So this is one component of price which is towards rent and services in the hall.

It is stated that the other portion is towards rendering the food services in the hall. The food is served only for one or two hours during these whole time slot. The food portion includes the food value as well as the serving portion of the food. It is argued that so, as per definition, the component relating to the food supply and services relating to the food supply will only be considered to be a sale. It is further argued that, the hall charges and decoration charges etc. for the hall cannot be considered as sale under the MVAT Act. So this component needs to be separated and no tax can be levied on the same. It is argued by the applicant that simply because composite charges are made the sales tax department cannot get any jurisdiction to charge the component towards services, particularly when service tax is levied on such portion.

In this respect reference is made to the judgments by the applicant which are decided by various courts.

- The Supreme Court judgment in case of K. Damodarsamy Naidu [(2000) (117 STC 1)]. It is stated that in this case Hon. Supreme Court has held that the total consideration received towards the restaurant sale is liable to tax. In that case, the argument was that in restaurant there is also a service portion and that should not

be taxed and that portion should be allowed as a deduction. However, Supreme

Court has negated this contention and held that the whole price is a sale for the purpose of sales tax. In this respect it is submitted by the applicant that the issue before Hon. Supreme Court was about restaurant. In case of restaurant, there is no such hiring of hall or decoration of hall which is separate component in case of banquet hall. It is argued that in case of restaurant, a person comes and after taking meal leaves the premises without occupying it alone or for any longer duration. There is no intention of charging rent for the use of the restaurant premises and the charges are for food and services related to food. It is argued that in case of banquet, on the contrary, the whole hall is given for a particular period to a particular party and the charges are filed in relation to the duration of the occupation of hall. If the hall is taken for one shift i.e. 4 hours, the charges will be lower, but if taken for 8 hours, the charges will be higher. The charges are towards the reservation of the hall for one particular party without allowing use to any other party and also for the duration of occupation of the hall. Secondly, the charges also include charges for very peculiar decoration. For example, in marriage the arrangements are very elaborate. It is submitted that, decoration is also a matter of bargain between the parties and accordingly this also is a matter of separate component of price. so the judgment related to the restaurants cannot apply to the banquet hall. It is submitted that till today there is no judgment about the charging of tax on banquet hall. Therefore, it is requested that the issue be seen accordingly in light of the settled position and guidance available from the same.

- It is argued that , in case of K. Damodarasamy Naidu and Bros. [(2000) (117 STC 1)] the Hon. Supreme Court has also dealt with other issues i.e. charging of tax on the food services in case the residential hotels. In case of Residential hotels the charges are composite i.e. including the staying charges and food charges. In that relation Hon. Supreme Court has said that the Government cannot charge sales tax on full amount but the deduction is required to be given towards the residential portion. Only the charges towards the food portion are to be charged to sales tax. Because of this ruling of Hon. Supreme Court, a specific rule has been provided in MVAT Rules i.e. Rule 59 where deduction at various percentages is given for calculating the tax when the charges are composite charge for lodging

and boarding. It is stated that the same principle is applicable in case of banquet hall. In case of residential hotels the rooms are given for a day or a particular time and charges are composite. In case of banquet hall the whole hall is given in similar way for particular duration and charges are composite including for food. The applicant has argued that their case fits into this category dealt with by Hon. Supreme Court. It is argued that as held in that case, as also in the present case, government cannot levy tax on the full amount charged for banquet hall. Hon. Supreme Court has observed as under in relation to taxable price for sales tax in a residential hotel where composite charges are made.

Accordingly, it is argued that in light of above, the charges are required to be divided as done in their case at 40% and 60%. On 40% value the VAT can be levied.

It is stated that though the matter about taxable price under VAT is made clear in above submissions, there was no issue that service tax on certain portion of the price was also paid. It is argued that it is now well settled that if the composite price is charged and some price is liable to service tax then on the said price no VAT can be levied. In other words, there cannot be double taxation on the same amount. It is further argued by the applicant that this principle has now been settled by none other than Hon. Supreme Court in case of Bharat Sanchar Nigam Ltd. (145 STC 91)(SC)(BSNL) and the observations are as below:-

"85. This brings us to the decision of the Kerala High Court in Escotel [2002] 126 STC 475.

86. In that case Escotel was admittedly engaged in selling cellular telephone instruments, SIM cards and other accessories and was also paying Central Sales Tax and Sales Tax under the Kerala General Sales Tax Act, 1963 as applicable. The question was one of the valuations of these goods. The State Sales Tax Authorities had sought to include the activation charges in the cost of the SIM card. It is contended by Escotel that the activation was part of the service on which service tax was being paid and could not be included within the purview of the sale. The Kerala High Court also dealt with the case of BPL, a service provider. According to BPL, it did not sell cellular telephones. As far as SIM cards were concerned, it was submitted that they had no sale value. A SIM card merely represented a means of the access and identified the subscribers. This was part of the service of a telephone connection. The Court rejected this submission finding that the SIM card was "goods" within the definition of the word in the State Sales Tax Act.

It is not possible for this Court to opine finally on the issue. What a SIM card represents is ultimately a question of fact as has been correctly submitted by

the States. In determining the issue, however the Assessing Authorities will have to keep in mind the following principles: If the SIM card is not sold by the assessee to the subscribers but is merely part of the services rendered by the service providers, then a SIM card cannot be charged separately to sale tax. It would depend ultimately upon the intention of the parties. If the parties intended that the SIM card would be a separate object of sale, it would be open to the Sales Tax Authorities to levy sales tax thereon. There is insufficient material on the basis of which we can reach a decision. However, we emphasize that if the sale of a SIM card is merely incidental to the service being provided and only facilitates the identification of the subscribers, their credit and other details, it would not be assessable to sales tax. In our opinion the High Court ought not to have finally determined the issue. In any event, the High Court erred in including the cost of the service in the value of the SIM card by relying on the aspects doctrine. That doctrine merely deals with legislative competence. As has been succinctly stated in Federation of Hotel and Restaurant Association of India Vs. Union of India (1989) 3 SCC 634- "subjects which in one aspect and for one purpose fall within the power of a particular legislature may in another aspect and for another purpose fall within another supplied by the service provider. As far as the SIM cards are concerned, the issue is left for determination by the Assessing Authorities.

B) There may be a transfer of right to use goods as defined in answer to the previous question by giving a telephone connection.

C) The nature of the transaction involved in providing the telephone connection may be a composite contract of service and sale. It is possible for the State to tax the sale element provided there is a discernible sale and only to the extent relatable to such sale.

D) The issue is left unanswered.

E) The aspect theory would not apply to enable the value of the services to be included in the sale of goods or the price of goods in the value of the service."

It is argued that it is also necessary to keep in mind that the Parliament itself has contemplated service portion in case of composite charges for food supply and others like banquet hall. The Supreme Court has analyzed the constitutional amendment of 'deemed sale' in above case of BSNL and held that out of six deemed sales categories two deemed sale transactions are considered to be divisible. Hon. Supreme Court has observed as under in para 45 of judgment in BSNL.

"45. Of all the different kinds of composite transactions the drafters of the 46th Amendment chose three specific situations, a works contract, a hire purchase contract and a catering contract to bring within the fiction of a deemed sale. Of these three, the first and third involve a kind of service and sale at the same time. Apart from these two cases where splitting of the service and supply has been constitutionally permitted in clauses (b) and (g) of Clause 29A of Art, 366, there is no other service which has been permitted to be so split."

Thus the deemed sale category of supply of food (catering) is considered to be divisible by Supreme Court. It is argued that this fully proves their issue that in case of banquet hall the composite charge is divisible keeping into account the intention of Parliament and as held by Supreme Court. Only on the portion relating to food supply tax can be levied under Sales Tax Laws.

It is submitted that in light of this holding of the Hon. Supreme Court there is no doubt that the portion on which the applicant has paid service tax, sales tax cannot be again levied under MVAT Act.

The applicant has also referred to the judgment of the Tribunal in the case of Tata Engineering and Locomotive Company Ltd. (S.A. 1589 of 2003 dt.27.10.2005). In this case the question was about levying sales tax on hire charges received from the customer. On portion of the hire charges the appellant was liable to pay services tax. Hon. Tribunal has held that to the extent of the portion on which the service tax is paid sales tax cannot be levied and such portion cannot be included in the sale price under Sales Tax Laws. It is argued that this judgment is also directly applicable to their case.

The applicant has cited the judgment of Hon. Supreme Court in case of T.N. Kalyan Mandpam (135 STC 480)(SC). It is stated that in this case also the pertinent issue was about levy of tax on mandap services. One of the arguments of the appellants in that case was that the transaction of mandap services falls in the category of deemed sale as there is supply of food by way of service. It was argued that, therefore, no service tax can be levied on this transaction and sales tax will be attracted. Hon. Supreme Court has negated this contention. It is stated that the Supreme Court has observed that in case of mandap services, the portion relating to services is also very important. The relevant observations of Hon. Supreme Court are as under:

"In regard to the submission made on article 366(29A)(f), we are of the view that it does not provide to the contrary. It only permits the State to impose a tax on the supply of food and drink by whatever mode it may be made. It does not conceptually or otherwise include the supply of services within the definition of sale and phrase contained in the said sub-article "such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods."

In other words, the operative words of the said sub-article are supply of goods and it is only supply of food and drink and other articles for human consumption that is deemed to be a sale or purchase of goods. The concept of catering admittedly includes the concept of rendering service. The fact that tax on the goods involved in the said service can be levied does not mean that service tax cannot be levied on the service aspect

of catering. Mr. Mohan Parasaran, learned Senior Counsel for the appellant, submitted that the High Court before applying the aspect theory laid down by this Court in the case of federation of Hotel & Restaurant Association of India v. Union of India ought to have appreciated that in that mater article 366(29A)(f) of the Constitution was not considered which is of vital importance to the present matter and that the High Court in which the service aspect was distinguished from the Federation of Hotel & Restaurant Association of India" and, in particular, on the aspect theory is, therefore, apposite and should be upheld by this Court. In view of this, the contention of the appellant on this aspect is not well founded.

The legislative competence of Parliament also does not depend upon whether in fact any services are made available by the Mandap Keepers within the definition of taxable service contained in the Finance Act. Whether in the given case taxable services are rendered or not is a matter of interpretation of the statute and for adjudication under the provisions of the statute and does not affect the vires of the legislation and/or the legislative competence of parliament. In fact, a wide range of services are included in the definition of taxable services as far as Mandap Keepers are concerned. The said definition includes services provided "in relation to use of Mandap in any manner" and includes "the facilities provided to the client in relation to such use" and also the services "rendered as a caterer".

It is submitted that in light of the above it will be appreciated that in a composite contract of banquet hall, which is also synonymous to Mandap Keeper Services, the service portion is equally important and as held by Hon. Supreme Court, no tax can be levied on the service portion even if there is a composite charge including food. The applicant has stated that the Supreme Court has clearly laid down (underlined portion) that the sales tax can be levied only on food supply services and not mandap keeper services.

It is stated that though the legal position is clear from the above judgments of the Tribunal and Supreme Court, attention is also drawn to the services tax levy as perceived by the Central Government. As stated above the banquet charges are liable to Service Tax in the category of mandap keeper services. When this levy was introduced, the issue has been clarified by Central Government itself by Circular NO.6 of 1997 dt.1.7.97 and dt.24.9.97. It is stated that it can be seen that banquet halls are covered in mandap keeper services. The service is considered to be a very important portion and it is not like restaurant. In case of restaurant there is no service tax. However in case of banquet hall service element is there and that is why service tax is levied. The applicant has submitted that under the above circumstances the service portion is a very important portion in case

of banquet hall and hence the said portion is required to be deducted before levying sales tax under MVAT Act.

In this connection, applicant has also cited judgment of Hon. Karnataka High Court in the case of Nirmal Agencies (86 STC 450). In this case taxation of lottery ticket was involved. The Hon. High Court held that the taxable portion of the lottery ticket is only portion which related to right to participate and not the whole amount charged for the ticket. Thus, in composite price also only the amount which is relating to the sale of the 'goods' as per the Sales Tax Law can be charged to tax and not whole portion. It is argued that the same principle is applicable in case of applicant and accordingly tax paid on 40% be confirmed in the DDQ.

In this respect, applicant has also cited judgment of Hon. Gauhati High Court in case of Shree Sanyeeji Ispat Pvt. Ltd. vs. State of Assam (147 STC 146) (Gau.). In this case the High Court has held that there should be harmony in various Government Departments. Each Government Department cannot consider its position separately ignoring the position adopted by other Govt. Depts. In other words, all Govt. Depts. should take uniform action or adopt uniform interpretation. It is stated that in their case, as already shown, the Service Tax Dept. i.e. Central government Dept. has taken a view that 60% is service and 40% is food. It is prayed that the Sales Tax Department should, in light of principle of uniformity and harmony, accept the said decision and levy the tax accordingly on 40% value.

It is argued that if this interpretation is not adopted then there will be double taxation on same amount. It is informed that apart from legality it will also increase the tax burden and will result in exorbitant rise in cost to customer. This will be unpalatable and will also affect the business.

It is stated that in the DDQ application another question regarding sweet and farsan sold from the shopping area is also posed. It is stated that the applicant has the entire building. The halls are situated on higher floors and shop is situated on ground floor which has no sitting arrangements etc. In the shop, sweets and farsans are sold at the counter. These are covered by entry C-94(a)/(b) and accordingly the tax is being discharged at 4%. It is stated that this issue has been raised because the assessing authority may take a view that the whole building is a hotel and may say that the shop

sale from counter is also part of hotel sales and may be clubbed along with the restaurant and other food sales done in the banquet halls etc.. The issue is raised for clarity of the above issue.

It is submitted that the last issue raised in the DDQ application is about paying of tax under 8% composition scheme in relation to restaurant, banquet hall food charges and food supplied in the room services. It is stated that in composition notification dated 1.6.2005 regarding hotel, restaurant etc. there is no distinction between sales by way of restaurant or by way of service in the rooms or in banquet hall. These are all either covered under the catering category or restaurant category. It is argued that therefore discharging tax at 8% under composition scheme is correct.

03. HEARING

The case was fixed for hearing on 11.03.08. Shri C.B. Thakkar, C.A. attended on behalf of the applicant. He stated that the applicant lets out banquet halls to customers. The charges are composite. The applicant provides banquet service for marriage function, birthdays, anniversaries etc. He also serves food in the function. They are liable to pay service tax on the banquet halls i.e. on 60% of the total charges. They pay VAT on 40% of the total charges. He referred to the Supreme Court judgement in the case of BSNL. He contended that the State cannot levy tax on service. They argued that the letting out of banquet halls is a service. The State cannot levy tax on it.

04. OBSERVATIONS

I have gone through the extensive arguments made by the applicant in the application as also through the written submission dt. 29.03.08. The basic issue is the determination of the sale price on which VAT could be leviable in respect of the transaction of letting out the banquet halls where marriage parties or other functions are held by customers. The main issue is regarding the sale price relating to the banquet halls. The applicant has placed two transactions for determination.

a) Bill No.1 dt. 22.04.04 in which separate charges are shown for the hall and catering charges. The total amount in the bill is for Rs. 54,000/- out of which Rs. 32,400/- is shown as charges towards for letting out of hall and Rs. 21,600/- is shown as charges for catering.

b) Bill No.1 dt. 01.04.06 in which composite charges are levied for the hall as well as the catering and the total amount charges is Rs. 57,726/-. It is stated in the bill

that the rates are inclusive of food charges @ 40%. The balance amount is for the service rendered for hall and decoration.

The applicant has sought determination of sale price in respect of these charges.

The main issue here is whether sales tax could be leviable on the entire amount shown in the bill or it is levied only on the catering charges. The applicant has argued that the sales tax cannot be levied on the banquet hall charges and it could be levied only on the catering charges.

In their submission, the substance of the argument is that letting out banquet hall is a service transaction on which sales tax cannot be levied. The other argument is that the letting out of banquet hall already attracts service tax under the Central enactment.

I, however, do not agree with the contention of the applicant. The supply of food became taxable and became a deemed sale through the 46th amendment to the definition of sale. This constitutional amendment was incorporated in the sales tax enactments wherein the definition of sale was widened and came to include the supply of food or any article for human consumption. The definition of sale under the VAT Act is given under clause 24 of Section 2 of the Maharashtra Value Added Tax Act.

(24) "sale" means a sale of goods made within the State for cash or deferred payment or other valuable consideration but does not include a mortgage, hypothecation, charge or pledge; and the words "sell", "buy" and "purchase", with all their grammatical variations and cognate expressions, shall be construed accordingly;

Explanation,-for the purposes of this clause,-

a) A sale within the State includes a sale determined to be inside the State in accordance with the principles formulated in section 4 of the Central Sales tax Act, 1956;

b) The transfer of property in any goods, otherwise than in pursuance of a contract, for cash, deferred payment or other valuable consideration;

c) the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

d) a delivery of goods on hire-purchase or any system of payment by installments;

e) the transfer of the right to use any goods or any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

f) the supply of goods by any association or body of persons incorporated or not, to a member thereof or other valuable consideration;

g) the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other articles for human consumption or any drink (whether or not intoxicating), where such supply or service is made or given for cash, deferred payment or other valuable consideration."

Sub-entry (g) of Clause (24) of Section 2 enables the State to tax the supply of goods being food or any other articles for human consumption by way of or as part of any service or in any other manner. Before the 46th amendment, the meals served in hotels could not be subject to Sales Tax, as supply of meals are in the nature of service provided and could not be identified as a transaction of sale. The Apex Court in the case of M/s Northern India Caterers (42 STC 386) said that the revenue was not entitled to split up the transaction into two parts- one of service and the other of sale as the charge is on the meal as a whole. In order to overcome this judgment and several others, the 46th amendment brought certain transactions within the definition of deemed sale and one of this was supply of food. Even if these are composite contracts where sale could not be bifurcated from service and sale and service are inextricably linked, the amendment empowered the state to levy sales tax on such transactions. The purpose behind these amendments was to ensure levy of sales tax on these transactions even if they involved elements of both services and sale.

The words 'supply by way of or is part of any service' are significant here. This has to be taken to mean that the entire amount charged is liable to tax. The amendment was itself brought to tide over the difficulty in taxing transactions which involve both sale and service and in such a case the amendment envisages that such transactions which involved elements of service and sale can be taxed now. In such a scenario, it was not contemplated that the sale and service be bifurcated and tax be levied only on the element of service in the context that sale includes a tax on the supply of food as part of service. Therefore, what follows is that the entire transaction becomes amenable to tax and the fact that tax would be levied on service as part of the supply of food was intended in the amendment. What the applicant argues in this case is that the service of the letting out of the banquet halls be segregated. Such a contingency is not acceptable for the reason that the definition of sale enables the State to levy tax on the entire transaction. The marriage party and birthday function involve supply of food to the guest. It is important to note that the transaction is not of pure letting out of banquet hall. If it had been the case of letting out of banquet halls without any supply of food then such a transaction would probably be a service transaction. But in the case of catering

contracts which are tied up with the letting out of banquet halls, the charges are levied on per person per plate basis.

The question whether in transactions of supply of food in hotel, the sale part could be split from service was considered by the Bombay High Court in the case of *M/s East India Hotel Vs The State of Maharashtra* (99 STC 197). In this case the applicant carried on business as a Hotelier and ran a Five Star Hotel in the course of his activity as a Hotelier. The applicant served food and drinks to the resident and non resident customers. The applicant claimed that having regard to the high rates charged by it for food and drinks, it could not be said that they were only for supply of food and drinks and that the charges recovered by the applicant for the service of food and drinks should be bifurcated into two parts, 50% being for supply of good and 50% being for other factors such as atmosphere and other amenities. The Court observed the following:-

..."Tax is leviable under section 3 of the Act, inter alia, on the turnover of sales of a dealer. The expression "turnover of sales" has been defined in clause (36) of section 2 of the Act to mean --

"the aggregate of the amounts of sale price received and receivable by a dealer in respect of any sale of goods made during a given period after deducting the amount of sale price, if any, refunded by the dealer to a purchaser, in respect of any goods purchased and returned by the purchaser within the prescribed period."

"Sale price" as defined in clause (29) of section 2, means :

"the amount of valuable consideration paid or payable to a dealer for any sale made including any sum charged for anything done by the dealer in respect of goods at the time of or before delivery thereof, other than the cost of insurance for transit or of installation, when such cost is separately charged."

It is clear from the above definition that it is the amount payable to a dealer as consideration for the sale of goods which constitutes sale price. The test is what is the consideration passing from the purchaser to the dealer for the sale of goods. It is immaterial to enquire as to how the amount of consideration is made up. The only relevant question to ask is as to what is the amount payable by the purchaser to the dealer as consideration for the sale and not as to what is the net consideration which according to the seller is attributable to the real price of the goods. The concept of real price or actual price is irrelevant for the purpose of determining sale price. The price of a commodity may be a particular amount because of various factors, but on sale there is only one consideration, viz, the amount paid by the purchaser because when a seller offers goods for sale, it is for him to fix the price. If the buyer agrees to the same, it is not for him to consider how it is made up. As held by Goddard L.J., in *Love v. Norman Wright (Builders) Ltd.* (1944) 1 All ER 618 :

"So far as the purchaser is concerned, he pays for the goods what the seller demands, namely, the price.....That is the whole consideration for the sale and

there is no reason why the whole amount paid to the seller by the purchaser should not be treated as the consideration for the sale and included in the turnover."

"The ratio of the above decision applies with full force to case before us. In this case, the uncontroverted factual position is that the amount paid by the customer for food and drinks was the price stated in the menu card for supply of such food and drinks. How and why the price was fixed was not the look out of the customer. So far as he is concerned, he had to pay the price specified in the menu card if he wanted to take the food or drink. No option was given to him to buy it at half the price if he intended to carry it home. On the other hand, if he wanted to buy any item of food or drink from the assessee, he had to pay the amount demanded by him. In such a case, we fail to appreciate how the assessee can even contend that half of the sale price or a part of it should only be regarded as sale price for the purposes of section 2(29) of the Act and the balance amount should be regarded as payment for the comfort and luxury of a five star hotel. There is no justification whatsoever for such a contention. It is a well-known fact that prices of all commodities vary from shop to shop, area to area and town to town. The prices are often much higher in posh areas and in big air-conditioned stores than the prices in smaller shops in other areas or in roadside stall. Various factors like huge investment in shop premises, decoration, beautification, air-conditioning or maintenance thereof might have weighed with the dealer in fixation of high prices of the goods offered by it for sale.. But that can in no way render the price fixed by him as price plus something. The whole of the amount is price which the purchaser has to pay as consideration for the purchase, if he wants to buy the same. That being so, the whole of the amount paid by the purchaser would be the sale price.

Thus, the Court unequivocally ruled out the splitting up of the price of the food in service and sale- it held that the entire price charged in the menu is taxable.

It was observed by the Supreme Court in the case M/s K. Damodarswami & Brothers (117 STC 1) as follows:-

." The provisions of sub-clause (f) of clause (29A) of article 366 need to be analysed. Sub-clause (f) permits the States to impose a tax on the supply of food and drink. The supply can be by way of a service or as part of a service or it can be in any other manner whatsoever. The supply or service can be for cash or deferred payment or other valuable consideration. The words of sub-clause (f) have found place in the Sales Tax Acts of most States and, as we have seen, they have been used in the said Tamil Nadu Act. The tax, therefore, 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 as suggested by learned counsel. The supply of food by the restaurant owner to the customer though it may be a part of the service that he renders by providing good furniture, furnishing and fixture, linen, crockery and cutlery, music, a dance floor and a floor show, is what is

the subject of the levy. The patron of a fancy restaurant who orders a plate of cheese sandwiches whose price is shown to be Rs. 50 on the bill of fare knows very well that the innate cost of the bread, butter, mustard and cheese in the plate is very much less, but he orders it all the same. He pays Rs. 50 for its supply and it is on Rs. 50 that the restaurant owner must be taxed.

The judgment cited clearly states that when the consideration is paid as a whole for services in hotel, then no splitting should be done. If the splitting up is done, that would itself defeat the purpose of the said amendment. The bifurcation itself being non permissible, the question of legislative competence of State to levy tax on the so called services of provide banquet does not come in question. The method of the service tax to levy service tax only on 60% is a separate issue.

In order to have first hand information on the actual transactions effected, the Sales Tax Officer (Legal Matters) was deputed to pay a visit to the premises of the company .The following is the report :

As directed visit was paid to M/s. Tip Top Enterprise, Thane on 16th January,2009. Mr. Manoj Shah, Partner was present at the time of visit.

Mr. Shah has explained that M/s. Tip Top Enterprises is having 10 Halls in the premises of the building Tip Top Plaza situated at L.B.S. Marg, Thane as under :

A/C. No.	Name of Hall	App. Capacity (Guest)
301	Harbour Hall	500 to 850 Guests
302	Crystal Hall	500 to 800 Guests
303	Regal Hall	500 to 800 Guests
304	Lotus Hall	200 to 300 Guests
305	Jasmine Hall	60 to 75 Guests
306	Daffodils Hall	60 to 75 Guests
308	Just 4 Fun Hall	100 to 250 Guests
309	Diamond Hall	300 to 400 Guests
310	Studio - 99 Hall	60 to 75 Guests

The firm is having a restaurant at 3rd floor and rooms at 5th to 7th floors. Mr. Manoj Shah partner has handed over sample copies of bills for the above mentioned halls. Mr. Shah was asked to explain the billing system to which it is explained that charges are calculated per guest as per charges of menu finalized, e.g. if 'X' a party selects 'Crystal Hall' and finalises menu which costs Rs. 300/- per thali then the total charges will be number of guest * Rs. 300/-. He has further stated that the total charges are then bifurcated in the proportion to 60% for Hall charges and services rendered and 40% for food

charges. Mr. Shah has also explained the booking system of Halls and handed over sample copies of Hall Booking forms.

Observations :

- ❖ It is observed at personal visit to these Halls/ Banquets that all the Halls/Banquets are self decorated (photograph of Hall on middle page of brochure) only variable decoration seems possible on the stage.
- ❖ It has been observed from the bills that the variation of charges on account of charges for Hall and services rendered is very high. For example it is seen from the form of booking and bill of the party 'Yashwant Ghodke', Crystal Hall was booked for 9.12.2008 for marriage between 9 am to 11 pm and charges for Hall and Decoration were Rs. 2,74,367/-. And for the party 'Narayan Singh Khanka' charges of Crystal Hall for function of marriage dt. 8.12.2008 for the very timing were charged at Rs. 1,69,748/-. Logically, the charges of the Hall has to be constant qua timing.
- ❖ Commonly, normal services at marriage hall are (i) Providing Vidhi Sahitya (ii) Providing 'Akshata' (iii) Providing fresh flowers decoration on the stage (iv) Providing Raja Rani Chairs (v) Providing Sprayer with liquid sent etc. These services do not lead to heavy variation in service charges.
- ❖ In connection with the charging system it was asked to Mr. Shah, Partner that, if for instance a party books a Hall for 200 guests and it happens that for the very function 250 guests visits, what will be the method for further charges ? Mr. Shah replied that they charged for the additional 50 guests by multiplying the rate of thali. This clearly indicates that the firm charges for and on food only. The other services rendered seem to be for service of food.

It is true that the guests attend the function of marriage but it is also a custom that in such functions foods are offered to the guests. It is common experience that the expenses towards the cost of foods are higher than that of the other expenses. Even decorative arrangement of food items also covers the cost of food and not otherwise.

Conclusion :-

The composite charges in the bill are nothing but charges on account of food and proportion of charges is illogical. Even the charges towards Hall form the part of costing of food without which it would not be possible to serve the food.

The report is self-explanatory. The information obtained from the Partner of the company indicates that the charges are levied per thali basis. If the number of guests increases, then the charges are to be levied on a per thali basis. Thus, it is seen that the entire transaction in the present case is on the basis of the food served. The charges are levied as per thali and then the total charges are bifurcated into banquet hall charges and food charges. Such a bifurcation is artificial as the service of the banquet hall is only along with the supply of food. The supply of food is as a part of the service of letting out

the banquet which is taxable as per the expanded definition of sale as per the 46th amendment. Therefore, the price that the customer pays for the supply of food in a restaurant cannot be split up. The subject of the levy is the price of the food /thali supplied by the applicant to the customer.

The judgment in the case of M/s East India Hotels (cited supra) has stated that what is material is the consideration that has passed from the buyer to the seller. In a specific hall booked, the number of guest being constant, what changes or what influences the ultimate price paid by the customer is the 'menu' selected by him. What is the net consideration paid by the customer depends upon the 'food' selected by the customer. In the East India Hotel case, the Court observed that when the customer came to the restaurant what he paid for the food was the consideration. The amenities provided cannot be split up from the price paid by the customer. *In the present case, the price charged is as per the menu and not as per the hall.* The variations which could take place and the choices offered are as per the menu and not as per the choice of the hall. Therefore, what is of prime consideration is the food served as per the menu chosen. The pricing offered by the applicant determines the nature of the transaction. It is clear from the report that when a customer selects a hall, say 'Crystal' hall or selects the 'Harbour' Hall , then the charges are the same (timing being constant)- the charges will vary as per the menu chosen. A menu costing Rs. 275 per person and including certain dishes will not cost more or less as per the hall chosen- the charges will vary as per the certain food items chosen. All these facts invariably prove that the prime consideration is the supply of food and the other things provided are only as a part of the food.

The dealer had referred to the case of the Tamilnadu Kalyan Mandapam Association (135 STC 480) decided by the Supreme Court. The applicant in this case had challenged the levy of service tax on the services rendered by Mandap Keepers. The applicant had challenged the legislative competence of the Parliament to impose a tax on services. In replying to this query, the Supreme Court held that, the fact that the tax can be levied on the sale of goods involved in the said services does not mean that a service tax cannot be levied on the service aspects of catering. It also observed that the legislative competence of the Parliament to impose a tax on services does not depend upon whether any services falling within the definition of taxable services contained in the Finance Act

are made available by Mandap Keepers. The levy of service tax cannot be struck down on the ground that it does not conform to a common understanding of the word 'services' so long as it does not transgress a specific restriction in the Constitution. Thus the issue in this case was the legislative competence of the Parliament to impose tax on the services rendered by Mandap Keeper. The Supreme Court clearly observed that, when the tax can be levied on the sale of goods then the service tax also can be levied on the service aspects. I am unable to see how this judgment would in any way affect the conclusion reached by me. Under the Sales Tax Act, and because of the 46th amendment a tax can be levied on the supply of food as a part of services. The Supreme Court only says in the above referred case that the Parliament can levy tax on the service aspects and what the common man sees as a service or as not a service would not affect the legislature view on it. This judgment dealt with particular aspects of the legislative competence to levy tax on services rendered by Mandap Keeper. In the present case, it cannot be denied that the supply of food is as a part of the service. Therefore, the tax would be on the entire contract. The fact that the Union Government chooses to tax a part of it does not preclude the State from levying the tax on the whole of it especially when it is empowered by a constitutional amendment.

The applicant has also referred to the Supreme Court judgment in the case of BSNL (cited supra). However, in both the judgements in the case of M/s East India Hotels (cites supra) and in the case of M/s K Damodarswami Naidu (cited supra) the Supreme Court has taken an unambiguous stand that the supply of food by way of and as a part of service cannot be split up. In any case, even if it be assumed that on some points the two judgments do not stand together, it must be pointed out that the SC judgment in the case of M/s Damodarswami Naidu (cited supra) is a five-bench judgment while BSNL is a three-bench judgment.

The applicant has cited the decision in the case of Nirmal Agencies (cited supra) wherein the issue involved was the sale price of lottery tickets. It was held that, *"The transfer of the right to participate in the draw which takes place on the sale of a lottery ticket amounts to a transfer of goods whereas, to the extent that it involves the transfer of the right to claim a prize, depending on a chance, it is an assignment of an actionable claim. Therefore, the sale of a lottery ticket is only in part a sale of goods, and the sale price would have to be split accordingly. To the extent that it is a price for transfer of goods it is liable to tax. To the extent*

that it is not it is not liable to tax. It would be for the assessing authority to determine in every case the extent of the sale price that is so taxable. It would be possible to come to such a conclusion if reference is made to the statistics governing a particular lottery. It is needless to say that it would be obligatory for the dealer to place before the assessing authority such statistics as it may require". The present issue is in the context of the supply, by way of or as part of any service or in any other manner whatsoever, of food or any drink or any other articles for human consumption. Thus, it is provided in the legislation itself that the supply of food or drink is by way of or as part of any service or in any other manner whatsoever. The service element involved in the nature of such transactions involving supply of food or drink is an essential or permanent attribute of the definition itself. The legislative competence in levying tax on such a transaction involving both supply and service is unquestionable. The crux of the issue is an abatement of the sort provided under the Service Tax legislation. With respect to this, I have to say that I have to interpret an issue in terms of the existing provisions. My interpretation is to be restricted to the framework of the legislation. I cannot read something which is not provided for by the makers of the legislation. The existing provisions are for all to see and hence, the applicant does not make a point in referring to the judgment.

The applicant has cited yet another decision in the case of Shree Sanyeeji Ispat Pvt. Ltd. (cited supra) wherein it was held that, *"Two different departments of a Government cannot adopt policies which are contrary to, and inconsistent with, each other for the citizens must know what the policy of the Government of the State is. The Government must, therefore, as unwarranted by the Constitution, behave with the responsibility as is conceived under the Constitution."* The applicant by citing the above judgment has put forth the argument that the portion on which the applicant has paid service tax cannot be again subject to sales tax levy under the MVAT Act. In this respect, I would like to invite the attention of the applicant to the decision of the Supreme Court in the case of Avinder Singh v. State of Punjab AIR 1979 SC 321 wherein it has been held that merely because a transaction is amenable to service tax, there is no ban to tax the same transaction for sales tax. It would be useful to reproduce the said observations herein –

"A feeble plea that the tax is bad because of the vice of double taxation and is unreasonable because there are heavy prior levies was also voiced. Some of these contentions hardly merit consideration, but have been mentioned out of courtesy to counsel. The last one, for instance, deserves the least

attention. There is nothing in article 265 of the Constitution from which one can spin out the constitutional vice called double taxation. (Bad economics may be good law and vice versa). Dealing with a somewhat similar argument, the Bombay High Court gave short shrift to it in Western India Theatres Ltd. AIR 1954 Bom. 261. Some undeserving contentions die hard, rather survive after death. The only epitaph we may inscribe is : Rest in peace and don't be re-born ! If on the same subject-matter the Legislature chooses to levy tax twice over there is no inherent invalidity in the fiscal adventure save where other prohibitions exist."

It would be needless to say that the above would put to rest any arguments advanced by the applicant in respect of double taxation.

The applicant has cited the decision in the case of Tata Engineering and Locomotive Company Ltd. (cited supra) wherein the issue involved was whether hire premium charges, i.e finance/interest charges form part of sale price. In a notification issued under the Service Tax Act, it was clarified that "the interest/finance charges, is the revenue or income and is credit to the revenue account. Such interest/finance charges together with the lease management fee/processing fee etc., is the consideration for the services rendered and therefore, they constitute the value of taxable service and service tax is payable on this value. The question in the present case is not as to what would form the sale price. As observed earlier, it is not disputed that the sale price herein is consideration for the supply, by way of or as part of any service or in any other manner whatsoever, of food or any other articles for human consumption or any drink. The applicant herein wants to attract attention to the abatement as provided under the Service Tax Act. I have observed earlier also that the method determined to levy service tax only on 60% is a separate issue. I am concerned herein to ascertain whether sales tax could be levied on the entire amount shown in the bill or it is leviable only on the catering charges and this ascertainment includes an interpretation of sub-clause (f) of clause (29A) of Article 366 of the Constitution. This Article was certainly not the subject of interpretation in the Tata Engineering and Locomotive's case cited supra. The constitutional and legislative provisions discussed above all lead to the conclusion that in transactions of such a nature as the one being discussed herein, the levy of tax is on the consideration which includes consideration for supply as well as service. I need to add here that the Tribunal has allowed a Reference Application by its order dt.06.05.2006 in Commissioner of Sales Tax V/s. M/s. Tata Engineering and Locomotive Company Ltd.

[Reference Application No. 9 of 2006 in Second Appeal No. 1589 of 2003] whereby the decision of the Tribunal that hire premium charges do not form part of sale price has been referred to the Hon. High Court, Bombay for its decision on the issue.

The applicant has cited the decision in the case of Imagic Creative Pvt. Ltd. (cited supra) wherein the making of separate charges for various separate items has been upheld by the Supreme Court. I have perused the judgment. The facts therein were such that the appellant was an advertising agency and raised bills wherein separate charges were shown for content development, concept, design, photography scanning and other charges such as system charges including colour sketch pen or computer used design software etc. A Division Bench of the Karnataka High Court [reported in 12 VST 366] had confirmed that the sale of printed material with a background of providing the concept was an indivisible activity liable to tax at 4% as a whole. The Supreme Court held that it was a case of composite contract of a service provider. In such a case, it was observed that sales tax would not be payable on the value of the entire contract irrespective of the element of services provided. It would be worthwhile to reproduce herein the observations of the Court :

Payments of service tax as also the VAT are mutually exclusive. Therefore, they should be held to be applicable having regard to the respective parameters of service tax and the sales tax as envisaged in a composite contract as contradistinguished from an indivisible contract. It may consist of different elements providing for attracting different nature of levy. It is, therefore, difficult to hold that in a case of this nature, sales tax would be payable on the value of the entire contract; irrespective of the element of service provided.

The facts of the present case are not similar to the facts in the above referred case. In the present case, there are no separate charges for various separate items in the instant case as in the case of M/s. Imagic Creative Pvt. Ltd. (cited supra). The brochures produced in the instant case reveal that the charges for letting out of banquet halls are levied on per person per plate basis. Let me reproduce herein the wordings on two such brochures as follows :

Brochure No. 1

FOOD PACKAGE RATE FOR (4 HOURS) ONLY
Rs.275 only
For minimum 75 and above guest only
For Jasmine Daffodil & Studio 99
60 to 70 guest Rs.300 only
.....
.....

Brochure No. 2

.....
FOOD PACKAGE RATE FOR (4 HOURS) ONLY
Rs.250 only
For minimum 75 and above guest only
For Jasmine Daffodil & Studio 99
60 to 70 guest Rs.275 only
.....
.....
.....

The above brochures bring out the fact that for letting out a banquet hall such as Jasmine, Daffodil & Studio 99, the charges are based on the supply of food in the said hall. It is seen that the letting out of banquet hall is a transaction which is tied up with the catering or supply of food. The charges are on per person per plate basis. The consideration received by the applicant does not comprise of charges levied on various accounts. There is only one charge and that is the charge for the supply of food. The consideration is paid as a whole in terms of per person per plate basis and there is no break-up of the charges. The composite charges in the bill are nothing but charges on account of food. It is informed by the applicant proprietor himself that the charges are levied per thali basis and if the number of guests increases, then the charges for the additional 50 guests are calculated by multiplying the rate of thali. This clearly indicates that the consideration received comprises of charges on account of food only. A copy of the bill raised by the applicant for sales in the Banquet Halls could be reproduced to reveal the treatment accorded by the applicant to such sales.

Item Code	Description	Quantity	Rate Rs.	Unit	Amount Rs.
306	DAFFODIL BANQUATE Above Rates are inclusive of Food Charges @ 40% Rs.19101.2 The Balance Amount is for the services Rendered Hall Charges Decoration & allied services.	1,000	44601.200	UNIT	44601.20
	Service Tax				3060.00
	Educational cess				91.80
Rs. FORTYSEVEN THOUSAND SEVEN HUNDRED FIFTY THREE ONLY					47753.00

As seen above, a composite bill is prepared. A mention is made as regards the rate being inclusive of food charges @ 40%. A mention is also made as regards the balance amount being for the services rendered, hall charges, decoration and allied services. As

per the provisions under the Service Tax Act, the dealer avails the abatement @ 40% and pays service tax on the balance 60%. Such provision for abatement is not available under the MVAT Act, 2002. Further, we have seen above that composite charges in the bill are nothing but charges on account of food. The bill is prepared with regard to the number of persons attending the banquet hall. The bifurcation of charges as shown by the dealer is artificial and contradicts what the applicant has informed that the charges are levied per thali basis and if the number of guests increases, then the charges for the additional 50 guests are calculated by multiplying the rate of thali. The charges consist of a single element and that is the charges on account of food served by the applicant to the number of people attending the banquet hall. Such a bifurcation is artificial as the service of the banquet hall is only along with the supply of food. I have already observed earlier that the supply of food is as a part of the service of letting out the banquet which is taxable as per the expanded definition of sale as per the 46th amendment. I have also discussed earlier that the pricing offered by the applicant determines the nature of the transaction. The customer agrees to the prices so offered and pays accordingly. All the above discussion, as well as, the discussion on the earlier pages clearly indicate, that the consideration received comprises of charges on account of food only. In such circumstances, the ratio of the decision in the case of M/s. Imagic Creative Pvt. Ltd. (cited supra) cannot be made applicable.

Having dealt exhaustively with the first question about whether in relation to food sales included in composite banquet charges, the sales tax/VAT tax payment on 40% portion is correct or otherwise, the next question to determine, preferably, should be the tax rate applicable to restaurant/Banquet hall food charges and food supplies in room services. This happens to be the third question posed by the applicant. Nevertheless to maintain continuity in the discussion on the issue, I proceed to determine the third question which is whether the discharging of tax liability @ 8% under composition on restaurant/Banquet hall food charges and food supplies in room services is correct.

The issue about the tax rate in this particular case pertains to the following categories of sale :

1. rate of tax on sale in the banquet hall;
2. rate of tax on sale in the restaurant (thali restaurant);
3. rate of tax on food supplies in room services;

Rate of tax on sale in the banquet hall

There are various Banquet halls of different sizes which are allowed for various functions like marriages etc. These halls are situated on the ground floor as well as further up to the 4th floor. These halls are also given certain names. Every floor has a separate kitchen to cater to the needs of halls situated on the said floor. A marriage hall/ banquet hall is not a restaurant. A "marriage hall" means kalyana mandap, shadi mahal, community hall, a building or part of a building where accommodation is provided for marriage or reception or matters related therewith, whether or not such marriage or reception or matter related therewith are regularly conducted." In the case of M/s. Sahakar Caterers & Restaurant Pvt. Ltd. v. State Of Maharashtra (27 MTJ 126), it has been observed by the Tribunal that *a place is deemed to be a Public Restaurant if it is generally accessible to the public at large. The Marriage Hall or the Banquet Room cannot be called as the places accessible to the public at large. The Hotel or the Restaurant to which such Marriage Hall or Banquet Room are attached may be accessible to public at large but still the Marriage Hall and the Banquet Hall are accessible to limited people only. No person other than invitees can go in such Hall or Room.* Applying the above ratio, it can be inferred that the banquet hall is not a restaurant or hotel. The composition scheme to which the applicant has referred to is for restaurants, eating house, refreshment room, boarding establishment, factory canteen Clubs, hotels and caterers. The notification specifies the following "classes of Sales or Purchases" to which it shall be applicable :

Aggregate of sales of food and non-alcoholic drinks, not being food, alcoholic and non-alcoholic drinks served for consumption in any restaurant or hotel or any part thereof having gradation of "Four Star " and above or supplied by such restaurant, or hotel,

- (a) served for consumption at or in the immediate vicinity of any restaurant, hotel, eating house, refreshment room, boarding establishment, factory canteen or in any club or
- (b) supplied by way of counter-sale by such restaurant, hotel, eating house, refreshment room or boarding establishment or club, or
- (c) served for consumption at any place other than a restaurant, hotel, eating house, refreshment room boarding establishment factory canteen, or any club by a caterer.

The classes of sales or purchases as reproduced above is for sales of food and non-alcoholic drinks served for consumption in any restaurant or hotel or any part thereof having gradation of below "Four Star". The clauses for the purposes of the notification further provide that the food and non-alcoholic drinks may be

1. served for consumption at or in the immediate vicinity of any restaurant, hotel, eating house, refreshment room, boarding establishment, factory canteen or in any club.

The first clause is for the sales by a restaurant, hotel, eating house, refreshment room, boarding establishment, factory canteen or club.

2. supplied by way of counter-sale by such restaurant, hotel, eating house, refreshment room or boarding establishment or club.

The second clause is also for the counter sales by a restaurant, hotel, eating house, refreshment room, boarding establishment, factory canteen or club.

3. served for consumption at any place other than a restaurant, hotel, eating house, refreshment room boarding establishment factory canteen, or any club by a caterer.

The third clause is for the sales by a caterer at any place other than a restaurant, hotel, eating house, refreshment room, boarding establishment, factory canteen or club.

I have observed with regard to the answer to the first question that the entire consideration received by the applicant is amenable to sales tax being consideration for the supply of food and drinks and the same is as a part of the service. From the notification reproduced for, it can be seen that the same is for :

- **sales of food and non-alcoholic drinks** by any restaurant or hotel or any part thereof having gradation of "Three Star " and below which are :

- i **served for consumption**

- ii **supplied by such restaurant, or hotel**

The clauses of the notification bring out the **above two clauses of service and supply** more clearly as follows :

Clause i : served for consumption at or in the immediate vicinity of any restaurant, hotel,.

Clause ii : supplied by way of counter-sale by such restaurant, hotel..

Clause iii : served for consumption at any place other than a restaurant, hotel... by a caterer

I have discussed above as to what a banquet hall is and how it is not a restaurant or hotel. There is no supply by way of counter-sale involved in the supplies of food and non-alcoholic drinks at the banquet hall. There is service for consumption in the supplies of food and non-alcoholic drinks at the banquet hall. So the coverage by the second clause (ii) as regards supply by way of counter sale is out of question.

It is not denied that there is sale of food and non-alcoholic drinks at the banquet hall. The applicant is not having gradation of below "Four Star" and above. Further, there is no counter sale as understood by the clause (ii). It now remains to be seen whether the banquet hall could be covered by the clauses (i) and (iii). The first clause is for the sales of

food and non-alcoholic drinks served for consumption at or in the immediate vicinity of any restaurant, hotel, eating house, refreshment room, boarding establishment, factory canteen or club. Thus, the first clause is for sales by a restaurant, hotel etc. However, the applicant is a banquet hall and not a restaurant, hotel. Hence, the applicant cannot be covered by the first clause (i). It needs now to be seen whether the applicant could be said to be covered by the third clause which pertains to sales of food and non-alcoholic drinks served for consumption at any place other than a restaurant, hotel, etc., by a caterer. The banquet hall not being a restaurant, hotel, etc., the present transaction can be covered by the first limb of the third clause which pertains to "*served for consumption at any place other than a restaurant, hotel, etc.*". Now, the second limb of the third clause pertains to sales by a caterer. The question is could the applicant be termed as a caterer for the activity of supply of food and drinks at the banquet hall? It is seen that every floor has a separate kitchen to cater to the needs of halls situated on the said floor. Hence, could the sales of food from the kitchen be said to mean the sales of food and non-alcoholic drinks by the applicant in his capacity as a caterer? The applicant runs a hotel as well as a banquet hall. Now, the applicant is not a caterer. A sale by a caterer and a hotelier differs on the ground that in a sale by a hotelier, the prices of the food items including the services such as air conditioning, ambience etc., are fixed. A person willing to avail the food supplies in a hotel does not enter into any kind of bargaining with regard to the rates or the manner in which the food will be served. He just enters the restaurant and goes for his choice of food. He has no discretion with regard to the price. The manner of serving is as decided by the restaurant either buffet or to be served on seats provided in the hotel. Whereas in a catering contract, the caterer and the person who engages the services of a caterer have negotiations with regard to the items to be supplied by the caterer, the prices of the food items and the manner in which the food is to be served such as a buffet or the traditional Indian practice of serving to a person sitting at his place. Further, the caterer not only supplies food but also supplies crockery and other things. Thus, in a hotel everything is pre-planned whereas all the details are planned out in a catering contract. The applicant supplies food and non-alcoholic drinks in the banquet hall from his kitchen. The applicant caters to the needs of food and non-alcoholic drinks of the guests/invitees of the banquet hall. For this activity of supply of food and non-alcoholic drinks in the

banquet hall from his kitchen, the applicant can be said to be a caterer who serves food and non-alcoholic drinks for consumption at the banquet hall which is not a restaurant, hotel. The activity of the applicant of supplying food and non-alcoholic drinks in the banquet hall from his kitchen could well be said to be covered by the third clause specified in the notification. The applicant, being a caterer in respect of his activity of supply of food and non-alcoholic drinks in the banquet hall from his kitchen, would be subject to the conditions specified in the notification and be eligible for the benefit of the composition scheme as per the provisions of section 42 of the MVAT Act, 2002 in respect of his sale of food and non-alcoholic drinks at the banquet hall. It is to be noted that the above observation is with regard to the circumstances and facts in the present case. The applicant has a kitchen of his own and the supplies of foods are from this kitchen. It is with regard to these facts that the applicant is termed as a caterer.

Rate of tax on sale in the restaurant (thali restaurant)

As per notification No.VAT-1505/CR-105/Taxation -1, dt.1.6.2005, the applicant, subject to the conditions specified in the notification, is eligible for composition in respect of the sales in the 'Thali restaurant', as per the provisions of section 42 of the MVAT Act, 2002.

Rate of tax on food supplies in room services

The applicant is able to identify the charges on account of food sales in the hotel rooms. Under the Maharashtra Value Added Tax Rules, 2005, there is a provision under rule 59 for determining the taxable turnover of sales of goods, in respect of any period of the residential hotels, providing lodging and boarding and charging a composite sum, which is inclusive of breakfast or lunch or dinner or, as the case may be, a combination of all or any of the above. The rule comes useful when the sum charged is a composite sum. In the present case, it is informed that the applicant maintains a separate account of the supplies of food in the hotel rooms. Hence, the aforementioned rule would not be applicable to the facts of the present case. The applicant has informed that the food sale taking place in hotel rooms is added in "Restaurant sales" and tax is paid under composition scheme @ 8%. It needs now to be seen whether in respect of the food sale supplies in hotel rooms, the applicant would be eligible to the benefit of the notification of the notification dt.1.6.2005 which is for restaurants, eating house, refreshment room, boarding establishment, factory canteen clubs, hotels and caterers. I have reproduced herein

earlier the notification and the clauses specified in the said notification. To have a better understanding of the issue, I may reproduce it at the cost of repetition as follows :

Aggregate of sales of food and non-alcoholic drinks, not being food, alcoholic and non-alcoholic drinks served for consumption in any restaurant or hotel or any part thereof having gradation of "Four Star " and above or supplied by such restaurant, or hotel,

- (d) served for consumption at or in the immediate vicinity of any restaurant, hotel, eating house, refreshment room, boarding establishment, factory canteen or in any club or
- (e) supplied by way of counter-sale by such restaurant, hotel, eating house, refreshment room or boarding establishment or club, or
- (f) served for consumption at any place other than a restaurant, hotel, eating house, refreshment room boarding establishment factory canteen, or any club by a caterer.

Let me ascertain as to which of the above clauses would cover the applicant's case.

Clause (b) pertains to supplies by way of counter-sale by such restaurant, hotel. It is a known fact that in case of counter sales by the restaurants, there is no element of service involved. In the present case, the applicant provides room services and hence, the applicant's case cannot be said to be covered by clause (b) for counter-sales for restaurants.

Clause (c) is for caterers serving food and non-alcoholic drinks for consumption at any place other than a restaurant, hotel. In the transaction of food supplies in the hotel rooms, there is supply of food from the restaurant, hotel. Here, the sale of food and non-alcoholic drinks is in his capacity as a hotelier serving food from the restaurant, hotel. We have seen earlier that a sale by a caterer and a hotelier differs on the ground that in a sale by a hotelier, the prices of the food items including the services such as air conditioning, ambience etc., are fixed. A person willing to avail the food supplies in the hotel room does not enter into any kind of bargaining with regard to the rates or the manner in which the food will be served. The food is served to him in the hotel room as could have been served in the hotel. A person has to just order for the food he wants to eat in his room. He has no discretion with regard to the price. The manner of serving is as decided by the restaurant. Whereas in a catering contract, the caterer and the person who engages the services of a caterer have negotiations with regard to the items to be supplied by the caterer, the prices of the food items and the manner in which the food is to be served such as a buffet or the traditional Indian practice of serving to a person sitting at his place. Thus, in a hotel everything is pre-planned whereas all the details are planned out in a catering contract. The applicant supplies food and non-alcoholic drinks in the hotel room from his restaurant, hotel. The activity of the applicant in the present case is not of a

caterer but of a restaurant or a hotel. The applicant not being a caterer for his activity of food supplies in the hotel rooms, the question of coverage under this clause is out of question.

Clause (a) pertains to food and non-alcoholic drinks served for consumption at or in the immediate vicinity of any restaurant, hotel, eating house, refreshment room, boarding establishment, factory canteen or in any club. We have seen in the discussion on the earlier clause that the supply of food is from the restaurant. The facts in the impugned transaction are :

- 1) Applicant has a building consisting of ground plus seven floors.
- 2) The restaurant is on the 3rd floor where lunch and dinner are served by 'thali' system.
- 3) There are also residential rooms on the 5th, 6th and the 7th floors.
- 4) In these rooms, food services are provided.
- 5) The food is served for consumption in the hotel rooms from the restaurant.
- 6) The applicant maintains a separate account of the supplies of food in the hotel room.
- 7) A hotel room cannot be called a “restaurant” which is generally accessible to the public at large as the hotel room is accessible only to the occupant.

Now clause (a) pertains to food and non-alcoholic drinks served for consumption at or in the immediate vicinity of any restaurant, The words *“at or in the immediate vicinity of any restaurant..”* are very important here. I would break up the phrase as *“at the restaurant..”* or *“in the immediate vicinity of any restaurant..”*. The food is served in the rooms and hence, would not be covered by the words *“at the restaurant..”*. Now, let me ascertain the coverage by the words *“in the immediate vicinity of any restaurant..”*. Before that, I may reproduce herein a few decisions which have laid down the law in respect of “eating houses or restaurants”.

1. **Motilal Laxmidas & Co. vs. State of Bombay (1951) 2 STC 153** : Appellant was having railway stall and was selling tea and light refreshments on a railway platform. He was serving not only the passengers who were standing on the platform but also those who were sitting in the train which halts at a station. Claim of exemption was allowed by Tribunal by referring to agreement entered into with the Railways whereby area of operation of the appellant was earmarked which was treated as an “Eating House”.
2. **Leo Ice-cream Appeal No. 111 of 1991 decided on 31-12-1992** : Appellant was selling Ice-Cream through Hand Carts standing at certain fixed places notified and allowed as per Municipal Licences granted at Public Gardens. Hand Carts were held as Eating Houses. The Tribunal applied the definition of Eating House and Place as contained in Bombay Police Act which reads as under : As per section 2(5A) “Eating House” means any place to which public are admitted and where any kind of food or drink is

supplied for consumption on the premises by any person owning or having interest in the management of such place and includes a Refreshment Room or a Shop where any kind of food or drink is supplied to the public for consumption in or near such shop, but does not include a place of public entertainment." As per section 2(8) "Place includes a building, a tent or a booth or other erection whether permanent or temporary or any area whether enclosed or open."

In spite of the words - "inside", "in", it is seen that the entire platform and the stationary train was held as covered by "refreshment rooms". It has been established in various cases that an "Eating House" can be in open spaces near the kitchen from where service is effected. Garden Restaurants, Bageecha Restaurants and Village type Restaurants in open spaces are very popular. There need not be any sitting arrangement. Consumers can stand and eat. The concept of service has changed. An "Eating House" need not be situated in an immovable property. It can be a hand-cart stationed at a particular spot in a garden or any public place. The area of operation of an establishment and its limits are extended beyond the four corners of the hotel. The interpretation will depend on the wording used for the purposes of the entry. In the present case, the phrase used is "*at or in the immediate vicinity of any restaurant..*". I have already ruled out coverage by the words "*at any restaurant..*" It is seen that the words "*in the immediate vicinity*" will restrict the scope of consumption just outside the premises and not taken away for consumption at home. But then food taken away for consumption at home is covered by Clause (b) as seen above. The meaning of "*immediate*" is "*not separated in space; in direct contact; closest; nearest*". The meaning of "*vicinity*" as commonly understood is "*the region or area surrounding a particular place; neighborhood*". You use **immediate** to describe an area or position that is next to or very near a particular place or person. And therefore "*immediate vicinity*" would mean closest, nearest region or area surrounding a particular place. In the present case, the restaurant and the hotel rooms are located in the same structure/building. The restaurant is identified by a location on the third floor. The rooms are located on the 5th, 6th and the 7th floors. The food is served in the rooms which are located in the same building. Being located in the same building, the rooms are "in the immediate vicinity" i.e., region or area surrounding the restaurant. It can be said that the food is served for consumption in the hotel room which is not a restaurant but which is in the immediate vicinity of the restaurant.

Thus, it can be seen from the above that the case of the applicant could well be covered by the first clause. This being so, the applicant, subject to the conditions specified in the notification, is eligible for composition as per the provisions of section 42 of the MVAT Act, 2002 in respect of the supplies of food in the hotel rooms.

Having answered the third question, let me determine the second question raised by the applicant. The same is whether the payment of tax on sale of 'Sweets and Farsan' from the shopping area as per schedule entry C-94 is correct or not. It is stated therein that counter sales take place through the shops in the shopping area. A similar question has been decided by me in the case of M/s. Jumbo King Foods Pvt. Ltd. vide No DDQ /11-2006/ Adm-5/54/B-2, Mumbai, dt.24.12.2008. The determination was on the basis of the facts before me in that case. In the present case, the applicant has not stated the facts clearly. It is only stated that counter sale take place from the shopping area. Therefore, the applicant may refer to the determination order in the case of M/s. Jumbo King Foods Pvt. Ltd. (cited supra).

05. PROSPECTIVE EFFECT

The applicant has requested that if any of above issues are held to be against them or in other words the disputed sales are held to be subject to higher rate of tax or at higher amount then the determination be given prospective effect on facts of the case. The prayer of the applicant needs to be weighed in the light of the provisions under the Act as to, whether there truly existed a statutory misguidance. I have already dealt in detail on each of the claims of the applicant and their inappropriateness. Also, there were judicial pronouncements. The position of law being very clear, there is no scope for any statutory misguidance. I have elaborately dealt with the issue and it can be seen from the preceding paras that there did not exist any kind of statutory misguidance. In view of the above, I do not find any merit in the plea of the applicant. The applicant's prayer for prospective effect is therefore rejected.

06. In the backdrop of the discussion held hereinabove, it is ordered as below:

ORDER

(U/s. 56 (1)(e) and section 56(2) of the Maharashtra Value Added Tax Act, 2002.)

No.DDQ11/2007/ Adm-3/21/B- 1

Mumbai, Date : 25.5.2009

1. The first question that 'Whether in relation to food sales included in Composite

Banquet charges, the sales tax/ VAT tax payment on 40% portion (i.e. net of 60%

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Service Charges which are subject to Service Tax), is correct in relation to each bill dated 22/4/2004, 14/4/2005 and 1/4/2006' is answered as below:

The applicant has to pay tax on the entire charges charged by him in the bill and not only on the 40% irrespective of how the bill is prepared.

2. The second question -Whether the payment of tax on sale of Sweets/farsan from shopping area as per respective entries C-94(a)/(b) is correct? Is answered as below:

The question has already been decided in the case of M/s Jumbo King Foods (cited supra).

3. The third question ,''Whether discharging tax liability @ 8% under composition on restaurant/Banquet hall food charges and food supplies in room services is correct is answered as below:

In respect of the sales in the 'Thali restaurant', Banquet halls and the food supplies in the hotel rooms, the applicant would be eligible for the benefit of the composition scheme for the purposes of Section 42 of the MVAT Act,2002 and as notified in the notification No.VAT-1505/CR-105/Taxation-1, dt.1.6.2005, subject to the conditions specified in the notification.

4. The applicant's prayer for prospective effect is rejected.

SANJAY BHATIA
Commissioner of Sales Tax,
Maharashtra State, Mumbai