Read: Application for determination of disputed question U/s.56 of the MVAT Act, 2002, by M/s. Jumbo King Foods Pvt. Ltd., holder of VAT Registration No.27700028469V and CST Registration No.27700028469C.

Heard: Shri B.C. Joshi, Advocate.

PROCEEDINGS

(Under Section 56 (1) (e) of the MVAT Act, 2002.)

No.DDQ/11-2006/Adm.5/54/B-2 **Mumbai, dt.24.12.2008**

M/s. Jumbo King Foods Pvt. Ltd., has filed an application u/s.56 (1)(e) of the MVAT Act, 2002 for determination tax on 'Jumbo King 'Vada Pav'' sold by the vending points/franchisees of 'Jumbo King Foods Pvt.Ltd.'

02. FACTS OF THE CASE

The Applicant runs a franchisee system under the name M/s. Jumbo King Foods Pvt. Ltd. It is stated that in this system, the franchisee manufactures and sells ''Vada Pav'' which is a notified farsan and liable to tax at 4% on sale thereof. The said 'Vada Pav' is sold under the trade name 'Jumbo King 'Vada Pav''.

The article is sold in a ready-to-eat form but is packed in paper wrappers. The ingredients of masala, chutney, chilly are in standard quality. Necessarily, the customers at times demand extra chutney for a stronger taste than the normal package for every consumer. In that case, the retail outlet/stall gives small amount of chutney packed in a pouch. In some stalls chutney is kept in bowl or dispenser so that the customer can take the amount of chutney he needs. The same applies to green chillies which if customer needs more for his taste, he can pick up from the bowl where they are kept for being picked up by any customer who needs it. The customer is at liberty to take away the packet wherever he wants. It is stated that the selling outlet is usually a stall, normally a small stall selling 'Vada Pav' as an article to be sold. Customers at times prefer to consume the same piece of 'Vada Pav' on the spot instead of taking away to any other place or a garden and eat there. To avoid creation of nuisance and unhygienic conditions, the applicant normally keeps a small water tank of drinking water, where customer can pick up the jug and drink water. Some customer who consumes 'Vada Pav' on the spot throw away the paper wrapper and leftovers any where in the stall or outside the stall in open. As this is objectionable to passers by the applicant instructs stalls to provide a trash bag or bin where the customer can deposit the packing material or leftovers, on consumption of 'Vada Pav' whether in the stall or anywhere else but near about.

It is stated that the 'Vada Pav' is kept as a ready to eat packed snack. The 'Vada Pav' therefore contains standard ingredients, which may be acceptable to all. However, some customers require more pungent topping up material such as chutney or a piece of chilly, in that case while packing itself it may be necessary to add this to the 'Vada Pav' Packet. Therefore, the customer is requested to pick up chutney or chillies from the bowl or dispenser as the case may be kept for this purpose, for his requirement which is provided at most vending points. It is informed that all these vending points are street corner joints for customers to pick up the 'Vada Pav' packet and eat it anywhere they like.

When a customer takes away a packet of 'Vada Pav' and consumes it in the vicinity of the shop or otherwise the natural demand is for drinking water which as stated hereinabove is kept ready in a water pot for being taken by the customer in the quantity he likes. However, at some of the vending points, customers do need either Pepsi or mineral water or lassi instead of pure water especially when the chutney or chillies are more pungent. In that case some of these joints are also selling to the respective customers Pepsi, a bottle of any mineral water or a packed plastic container containing lassi. These articles are optional and are separately billed and sold to any customer who needs it. The customer is also free to take away the mineral water or packed lassi packet or a bottle of Pepsi or similar soft drink. The due taxes are paid by such vending points separately for such supplies of soft drinks, mineral water or lassi.

The applicant states that the purchase of soft drinks, lassi or mineral water is optional and separately charged. There are, however, no charges for extra topping material of chutney or chillies and the customer is free to pick up a piece of chilly or chutney from the vending dispenser without any extra charges. It is argued that there is no element of service in all these sales and all the material go with the sale of 'Vada Pav', either in the form mixed in standard pack or added to the requirement of the customer by the customer himself. The customer takes these complimentary materials incidental to the purchase of 'Vada Pav' and picks up the same from the stand or counter, as a matter of helping himself or self service.

In these circumstances, the applicant believes that this is a pure contract of sale of 'Vada Pav' which is taxable at 4%. It is stated that at some joints or vending points if bottle of mineral water or soft drinks like pepsi or packet of lassi is supplied on demand the same is merely incidental to the sale of 'Vada Pav', but charged separately.

It is informed that there are certain questions raised by some Sales Tax Officials visiting these vending stalls. According to these officials the vending points are either eating-houses or restaurants and the notification entry for 'Farsan' excludes ''Vada Pav' 'sold in an eating house, restaurant etc.. It is argued that the vending points are not eating houses / restaurants /hotels etc as, there is no element of service where any 'Vada Pav' is sold on the counter as counter sale. It is stated that the option to the customer for drinking water from the common tap or extra topping material or chilli is a matter of self service to the customer.

It is claimed that none of the joints are registered by the Municipal Corporation as a restaurant or an eating-house. The applicant therefore, seeks by this application, a determination of the rate of tax on sale of 'Vada Pav' sold as aforesaid by vending points.

03. HEARING

Shri B.C. Joshi, Advocate, attended on behalf of the applicant. He stated that "Vada Pav" is notified as a 'farsan' item under the notification issued for the purpose of schedule entry C-94. He then referred to letter dt.20.1.2006 in which he was informed that 'Vada Pav' sold would be a 'farsan' item covered by schedule entry C-94 and specification notified at Sr. No.28 in the notification. The view was therefore expressed to him that 'Vada Pav' sold through said outlets would be 'farsan' for the purpose of schedule entry C-94. Subsequently, a letter dt.10.4.2007 was sent to him by the Department of Legal Matters. He was requested to take note that whether any of the outlets can be classified as a restaurant, eating house, hotel, refreshment rooms, boarding establishment or a club would always be a question of fact that has to be examined at the time of assessment or during scrutiny of return/refund claim. Subsequently, letter dt.11.6.2007 was also issued to the applicant and copy of the DDQ passed in the case of M/s. Parampara Food Products (DDQ No.11-2005/Adm-5/76/B-3, dt.31.5.2007) was sent to him and he was requested through the letter to arrange his affairs accordingly. Shri B.C. Joshi, contended that the Jumbo King Outlets have always been classified as shop by the Health Department. He attached certificate given by the Health Department under the Shop & Establishment Act. He stated that the shops are 200 sq. feet in size and there are service counters but the food is consumed not inside the shop but outside.

03. OBSERVATIONS

1] The prime question here is whether 'Vada Pav' sold by the applicant is covered by notification issued for the purpose of schedule entry C-94 as an item of 'farsan'. There is an exclusion clause to the notification entry C-94 where 'farsan' items served for consumption in any restaurant including eating house, hotels, refreshment rooms or boarding establishment or in part thereof or in any club or by a caterer applies to the applicant as sale by virtue of which the applicant gets excluded from the benefit extended by this notification entry. In short, I have to decide whether the Jumbo King Outlet is covered by the scope of a 'restaurant including eating house, hotels, refreshment rooms etc.

The schedule entry under consideration is reproduced as below:

Schedule Entry	*Description*	*Rate of tax*	*Date of effect*
C-94(a)	……….		
(b)	Varieties of Farsan as may be notified from time to time by the State Government in the Official Gazette, except when served for consumption]	4%	1.5.2005 to date

Notification

Varieties of Farsan

[Under Schedule Entry C-94]

No.VAT-1505/CR-165/Taxation-1 dt.1st June, 2005

In exercise of the powers conferred by clause (b) of Entry 94 of Schedule C appended to the Maharashtra Value Added Tax Act, 2002 (Mah.IX of 2005), the Government of Maharashtra hereby specifies the Varieties of Farsan listed below whether raw or ready-to-serve, except when served for consumption in any Restaurant, including any Eating House, Hotel, Refreshment Room or Boarding Establishment or any part thereof or in any club or by a caterer, to be the varieties of farsan for the purpose of the said entry, namely;

Serial No. Varieties of Farsan

28. **Vada Pav**

The schedule entry C-94 covers those 'Varieties of Farsan' which are notified under a notification issued for the purpose--the notification carries a condition that the said varieties of farsan would not be covered when served for consumption in any Restaurant, including any Eating House, Hotel, Refreshment Room or Boarding Establishment or any part thereof or in any club or by a caterer.

In the present case, the applicant sells "vada pav' and this fact is undisputable. What is contentious is whether the vending joints of 'Jumbo King' fall under the description 'Eating House, Hotel, Refreshment Room or Boarding Establishment or any part thereof 'in which case the 'Vada Pav' sold by the applicant would not be eligible for coverage under the notification. The issue being what it is, it is necessary to establish the factual position and then proceed to the legal aspect.

2] The finer facts of the case as given by the applicant are as follows:

- Jumbo ‘Vada Pav’ has franchisees who manufacture and sell ‘Vada Pav’ that is sold under the trade name 'Jumbo King ‘Vada Pav’'. The applicant had stated that, the articles are sold in a 'ready to eat' form and it is packed in paper wrappers.
- The customer, at times, demand extra chutney for a stronger taste then the normal package for free consumption. In that case, the retail outlets give small amount of chutney packed in a pouch. In some stalls the chutney is kept in a bowl so that the customer can take some chutney according to their requirement. Same is applied to the green chilies which can be picked up from the bowl.
- The customer is at liberty to take away the packets wherever he wants. But sometimes, the customer prefers to consume the same piece of ‘Vada Pav’ on the spot instead of taking away to any other place.
- The applicant also normally keeps a small water tank of drinking water where, customer can pick up the jug and drink water.
- The applicant also provides a trash pack or dust bin where the customer can throw the discarded paper wrappers.

In order to ascertain whether the facts stated are correct, a visit was paid by the Sales Tax Inspector, Legal Matters, at one of the joints of Jumbo King ‘Vada Pav’ situated at Ranade Road, Near Suvidha Show Room, Dadar (West), on 18th October 2008 at around 5.30 pm to 6.00 pm. The directions were to observe the proceedings and the lay-out of the joint. The observations are noted as below.

a. Different types of ‘Vada Pav’ namely, Regular, Cheese ‘Vada Pav’, Usal ‘Vada Pav’, Butter ‘Vada Pav’, etc. so also different types of 'Lassis' are served against the payment in cash at the counter.
b. A gala is seen partitioned by a service counter. The other side is used as kitchen where eatables (Vadas) are prepared / fried at one corner while at the other corner 'Pav' (Breads) are soaked in 'butter' for 'Butter ‘Vada Pav’' or 'Usal' – a type of vegetarian preparation made of pulses – is stuffed into the bread for 'Usal ‘Vada Pav’' etc. All types of '‘Vada Pav’' are handed over across the counter wrapped in a tissue paper.
c. In the outer side are two granite platforms of size approximately of 5' X 7” embedded in walls of either side. Three boxes each containing dry chutney, fried green chillies and wet chutney were seen kept on the said platforms.
d. One of the customers who had bought a ‘Vada Pav’ and a lassi used the platform to keep lassi while she was busy consuming ‘Vada Pav’.
e. While many of the customers preferred to take away the ‘Vada Pav’ for eating outside the premises on street, some preferred to stay within the premises and consume it. Also those wishing to take parcels home were given parcels in a carry bag.
f. The Lassi is served in disposable glasses across the counter.

The facts given by the applicant are corroborated by the visit report. It is found from the visit that there are no sitting arrangements in the outlet but granite platforms are provided for those who wish to consume the ‘vada pav’ at the outlet itself. The applicant has argued that , whatever the arrangements, there is no element of service and therefore the outlet is not a ‘hotel.’ I will have to examine whether such is really the case or not for that I shall refer to the certain judgements of the MSTT on the very aspect.

Fortunately, in recent times, a fair amount of MSTT judgments have dealt with the question of whether certain food stalls and joints can be called as ‘eating house or restaurant’.

While reading through all the judgments, I have observed that all the judgments have unanimously given an expanded meaning to the term 'eating house/restaurant'. While giving an extended meaning to the term 'restaurant', premises as diverse as railway platforms, hand carts, ice-cream depots have been held as 'eating houses'. While giving forth such opinions, none of the MSTT judgements has placed much emphasis on the element of service while defining an 'eating house'.

3]However, the decision that started it all was the Bombay High Court decision in the case of M/s Mangharam & Company (47 STC 595). The facts in this case were that the respondent sold ice-cream at their place of business in a cabin where people bought it for consumption. The department contended that the respondent were not eligible for the exemption under schedule entry A-14 (for eating houses, hotels etc) on the following grounds.

1. There was no arrangement for the customers to sit and consume the ice-cream purchased by them.
2. The place of business was conducted for the sale of sweet meats.
3. The schedule entry 'A-14' exempted cooked food and non alcoholic drinks served for consumption at or out side any eating house, restaurant, hotels, refreshment room or boarding establishment and not shops conducted primarily for the sale of sweet meats, cakes, biscuits or pastries.

The High Court observed that, ***though normally the hotel or the restaurant might have sitting arrangement for their customers for consumption of food, this is not necessary and already we have quite a few snack bars becoming fashionable where people stand and eat.*** It is also not necessary that the food purchased must be consumed inside any hotels, restaurant or eating house. Therefore, the High Court also making allowance for the changing scene, deigned to extend the meaning and the perspective of a hotel by including such a place as a cabin, and also holding forth the principle that food is not necessarily consumed by sitting inside the hotel and more so a hotel need not be one where there would be sitting arrangement. In short, way back in 1976, the High Court had chosen to get away from the conventional mode of defining things and opted instead for taking an expanded view by respecting the fact that concepts are bound to undergo a change.

Following the above judgement, the MSTT in the case Leo Ice-cream(Appeal No.111 of 1991) decided on 31.12.1992) held that sale of ice cream through a handcart is sale by an 'eating house.'The point that fell for the decision of the Tribunal was whether the sale of Ice-cream made through hand cart at a spot specified in the licence issued by the Municipal Corporation for consumption of the purchaser was covered by Entry 22 of Schedule-C part II. Entry 22 of Schedule-C Part II reproduced as follows.

Food and non alcoholic drink to which entry 99 in the schedule applies, served at one time for consumption inside any eating house, restaurant, hotels, refreshment rooms or boarding establishments.

In other words, the Tribunal had to decide whether such sale can be said to be made in an eating house or any part thereof. It was pleaded by the applicant that the words "served for consumption" in any eating house, restaurant, refreshment rooms or boarding establishment or in any part thereof should be given a liberal and wider meaning so as to include service for consumption of article of food at any specified premises or places.

There was notification under Section 41 of the Act, by which sale of food and non alcoholic drink covered by schedule entry C-II-22 provided exemption from tax the sales of food and non alcoholic drinks to sales less than Rs.3 lakhs. For the sales above Rs.3 lakhs and not exceeding Rs.10 lakhs a reduced rate of tax was provided. The department was of the view that entry C-II-22 is restricted and applied only to the sales by establishment like eating house, restaurant etc. The Tribunal referred to the decision of the High Court in the case of Mangaram & Company (47 STC 595) and held that if a restrictive meaning is given to the eating house then the small dealers would be out of the scope of the exemption. Accordingly, the decision was made in favour of the applicant. Further, in the case of Railway Refreshment Room v. the State of Maharashtra, S.A. No.425 of 1987 decided on 4.12.1987, the MSTT took its cue from the above referred MSTT decision and held that a wider meaning should be given to the word 'eating house' in order to extend the scope to small vendors of articles of food and it held that food served by the appellant to the passengers in the train is sale by an ‘eating house.’. The Tribunal concluded that, from 1.7.1983 to 31.3.1984, entry C-II-22 covered only service of food and non alcoholic drinks inside any eating house. After 1.4.1984 the entry amended the word 'inside' by the word 'in' and the 'service for consumption' was to be 'in any eating house' or any part thereof. Therefore, the amendment intended to apply to the sale not only inside the restaurant but to its other area of operation which can be outside the restaurant. **Then again the Tribunal here observed that giving a restrictive meaning to the word 'eating house' would result in defeating the object of the legislature. The object of the legislature seems to be to extend the area of the operation of the hotel. Thus the decision seems to be entirely based on the purpose behind the amendment of the entry**.

4] It seems from the twin MSTT judgements in the case of M/s Leo ice cream and M/s Railway Refreshment room that the MSTT had gone beyond the plain wordings of the entry and had examined the purpose of the Legislature in drafting the entry for ‘eating house’, ‘hotel’ etc and had found it fit to hold that ‘hand cart’ and the ‘cabin’ were ‘eating house’ as not holding so would have affected the small dealers adversely. At the same time it is equally true that the BHC judgement in the case of Mangharam (cited supra) was moved by no such consideration-the judgement is simply based on an extended meaning of the term ‘eating house’and this aspect is worthy of consideration.

There is also a MSTT judgement in the case of Sterung Horticulture Research Pvt. Ltd which gives a similar decision , although on different grounds. In this case, the applicant was engaged in the sale of Tea, Coffee through vending machines. The machines are installed on Railway Station and the applicant gave commission to the Railway on such sale. The machines were also installed at hotels and restaurants. It was the contention of the applicant that the sales by such vending machines installed in hotel and restaurant and Railway Stations should be held as sales covered by schedule entry C-II-16 or are covered by schedule entry C-II-14. Schedule Entry C-II-16 & C-II-14 are reproduced below.

Schedule entry	*Description*
C-II-16	Food and non alcoholic drinks served for consumption at any place other than the public restaurant by a caterer

Schedule entry	*Description*
C-II-14	Food and non-alcoholic drinks,not being food or drinks to which entry 15 of this part applies, served for consumption at or in the immediate vicinity of any public restaurant or in any club, or supplied by such public restaurant or club.

The Tribunal observed that, in common parlance, a caterer is understood as a person who supplies food at functions such as marriage, thread ceremony etc. and therefore the applicant cannot be called as a 'caterer'. In reply to the second question as to whether such sales are covered by schedule entry C-II-14, the Tribunal referred to the definition of eating house given in the case of Pure Ice-cream and Mangaram & Company. The Tribunal observed the following...

> "In view of the above trend set by our High Court in the case of Commissioner of Sales Tax v. Mangaram & Company and adopted by the Tribunal in the case of Railway Refreshment Rooms, we have no hesitation in coming to the conclusion that for the said reasons sale of liquid tea and coffee will be covered by Entry C-II-14."

5] It can be argued that the decision in the case of Railway Refreshment Rooms, Pure Ice-cream and Mangaram & Company were influenced by the fact that the legislature had intended to extend the exemption to small dealers which would otherwise have been left out of the purview of the Notification Entry 191 if the depots, cabins and hand carts had not been categorised as eating house, refreshment rooms etc. It is true that to some extent the humanitarian aspects had come to the fore when the Tribunal gave its decision- the humanitarian aspects being that the exemption be given to the small dealers and the sale of food and non alcoholic drinks by such dealers be exempted from tax. At the same time, it is equally true that whatever the inspiration behind the decision or the reasoning behind it, the Tribunal gave an extended meaning to the term 'eating house', 'restaurant' etc and set a trend which I dare not avert. **However, I have also a point to make that no such humanitarian consideration were present in the case of Sterung Horticulture Research Pvt. Ltd**. The Company was not a small dealer by any criteria and the Tribunal made no such observation that they have been categorised as 'eating house' beacuse if not done so, they would be left out of the exemption. The decision is purely based on the definition of 'eating house' and 'restaurant' which has evolved right from the decision of the Tribunal following the decision of the High Court in this regard. In the instant case, I therefore have no other alternative but to follow the broad meaning given to the term 'eating house' and then decide whether the Jumbo King Vada-pav out lets would be covered by the term 'eating house'. I find no reason to deviate from the earlier decisions. When depots, cabins and kiosks having been held as 'eating house' and 'restaurant' in the pronounced and glaring absence of any sitting arrangements as also the absence of the aspect of 'service' which characterizes a 'hotel'- as the common man understands it, then I should also hold the outlets as 'hotels'.

6] In the MSTT decision in the case of M/s Jagat Enterprises (025)-MTJ -0808) 'Shamiyana' or 'Pandal' erected for the purpose of doing the business at Legislative Assembly Council Premises was held as an 'eating house'. It was argued by the appellant that serving of food in Shamiyana (Pandal) in the premises of 'Council Hall' during the Legislative Assembly Session, is nothing but running an eating house or 'Restaurant' or 'Canteen' and that the sales effected for consumption inside the said premises are covered under Entry C-II-22 of the Schedule appended to the Bombay Act, read with Notification Entry 191 issued under Section 41 of the Bombay Act.

In order to appreciate the relevant submissions, it will be convenient to extract relevant entries, which read as under:

"Entry 22, Part-II Schedule C :
Food and non-alcoholic drinks .... served for consumption in any eating house, restaurant, hotel, refreshment room or boarding establishment or any part thereof."
Entry 191 of the notification issued under Section 41 of the Bombay Act.

"Aggregate sales of goods and non-alcoholic drink .... by a dealer who carries on the business of conducting an eating house, restaurant, hotel, refreshment room, canteen or boarding house, being the turnover of sales of goods as covered by Entry 22 in Part II of Schedule C."

The Tribunal initially discussed the meanings under various enactments given to the term 'eating house','restaurant'etc:

…''''A plain reading of the aforesaid entries makes it clear that the aggregate sales of food and non-alcoholic drinks by the dealer who carries on business of an eating house, Restaurant etc. can only be exempted. Obviously the condition precedent for allowing the exemption under the aforesaid entry is that the dealer must carry out eating house, Restaurant, Canteen etc. Now this Tribunal had occasion to deal with this issue and particularly to determine that it is meant by the word "eating house". Now admittedly the words 'eating house' or 'Restaurant' etc. are not defined in the Bombay Act. This Tribunal in the past has considered the dictionary meaning of the words "eating house" and "Restaurant" as well as definition of "eating house" given in the Bombay Police Act, 1951 and Bombay Shops and Establishments act, 1948. The term 'eating house' defined in the dictionary is as follows.

(1) Webster's New Twentieth Century Dictionary, page 517 :

"A house in which prepared food is sold and served, a 'restaurant'.

(2) Collin's World Publication (1978) page No. 1544 :

"An eating house, to restore, refresh, a place where meals can be bought and eaten."

(3) Chambers' Twentieth Century Dictionary, New Edition 1983, page 394 :

"eating house" - 'restaurant'.

Under the Bombay Shop and Establishments Act, 1948, the said term is defined as under,

"Restaurant" and 'eating house' means: Any premises in which is carried on wholly or principally the business of the supply of meal or refreshment to the public or a class of public for consumption on the premises."

Under the Bombay Police Act, 1951, Section 2(5A) provides definition of an 'eating house'as under :

'Eating house' means any place to which public are admitted and where any kind of food or drinks is supplied for consumption on the premises by any person owning or having an interest in or managing such place, and includes a refreshment room, boarding house, coffee house or a shop where any kind of food or drinks is supplied for consumption in or near such shop, but does not include 'a place of public entertainment'."

Under the said Act, any such place where public is generally admitted and articles of food or drink are sold for consumption is deemed to be "an eating house". In this Act, the word "place" has also been defined under Section 2(8) of the said Act as under:

"'place' includes a building, a tent, a booth or other erection whether permanent or temporary, or any area whether enclosed or open."

It then referred to the judgements in the case of M/s Railway Refreshments and M/s Leo Ice Creams and it observed that after considering all aspects of the matter, including the purpose behind incorporating entry, the definition given in Bombay Police Act, 1951 and earlier past decisions, it is held in the case of M/s. Leo Ice-creams (supra), that the sales of Ice-cream by the Appellant at a place within the prescribed area allotted under the licence under the Municipal Corporation for consumption are covered by Entry 22 of Schedule C, Part II appended to the Bombay Act. The MSTT particularly adverted to the observations in

Leo Ice cream that "if we do not interpret the entry as we are doing, small vendors like the Appellant whose turnover of sales for the period 29.4.1984 to 2.11.1986 was only at Rs. 1,95,705/- as per Assessment Order dated 28.12.1987 will not be able to get benefit of the Notification Entry No. 191 and will be subjected to tax at full rate even for sales under Rs. 3 lakhs, while the bigger Restaurant Owners will be entitled to tax-free sales to the extent of Rs. 3 lakhs and will pay taxes as per rates prescribed in clauses (b) and (c) of Notification Entry No. 191''. **But, then it has drawn attention to some cases which though being of small dealers, no such consideration for small vendors was shown when the facts/place were completely at variance with what which one expects with a 'eating house', restaurant 'etc.**

In the case of M/s. K.F.D. Caterers v. The State of Maharashtra (S.A. No. 1489 of 1992) decided on 12.6.1998 [(1998) 18 MTJ 222] it was held that where supply of food is by way of Tiffin Services to an individual and there is no service of food at a place of catering, held that such supply is not covered by Schedule Entry C-II-22. In the said case of M/s. K.F.D. Caterers (supra), the Appellant was doing catering business. It undertook Catering Contracts for functions such as wedding, thread ceremony etc. and sometimes it also undertook Tiffin Services and supplies food to individual officers as well. There was small place where cooking was done. On these set of facts, it is observed that the Appellant is neither serving food at the premises itself, nor serving food at the restricted premises, therefore, it cannot be said to have carried out the business, wholly or principally for providing meals for consumption on its premises. The said premises, therefore, would not come within the purview of "Boarding house' or 'eating house" or "Restaurant" as contemplated by Schedule Entry C-II-22. Similarly in the case of M/s. Captain Cook Enterprises v. The State of Maharashtra (Appeal No. 23 of 1995) decided on 27th July, 1999, [(1999) 20 MTJ 572] it is held that the Appellant supplies food and drinks on ceremonial occasion at the customer's place which is not an 'eating house' of its own, cannot be said to be running an 'eating house' and is not entitled for exemption.

The MSTT further observed that from the abovesaid discussion and deliberation following principles emerged :-

(i) In order to get benefit of concession under Entry 22 of Schedule C Part II read with Entry 191 of the notification issued under Section 41 of the Bombay Act, there must be premises in which business of supply of meal or refreshment to the public or class of public for consumption is carried out.

(ii) Such premises may be in building, site, tent etc. but supply of food must be regularly at some restricted premises.

(iii) If such premises are constructed, the construction may be permanent or temporary.

(iv) Even premises can be kept open and it is not necessary to have closed premises.

(v) It is not necessary that premises must be owned by the owner of the business, but he must have control over such premises during the period when he is carrying out such activity of running eating house.

(vi) Catering Contracts for serving and supplying food, snacks etc. on occasion of functions such as wedding, thread ceremony etc. cannot be termed as eating house.

(vi) Holding licence to run 'eating house' may undertake the nature of activity, but this itself indicates that it is not decisive test to treat the premises referred to in the licence as 'eating house'.

It further summarises the above in the following words:

..''From the aforesaid discussion, it is emerged that in order to get benefit of concession under Entry 22 of Schedule C, Part II, read with Entry 191 of notification issued under Section 41 of the Bombay Act, **there must be premises in which business of supply of meal or refreshment to the public in class for consumption is carried out. Such premises may be open or closed one, may be a building of permanent construction or may be a temporary erection like tent. Such business may be found carried out even on Hand Cart. It is not necessary that it must be owned by the owner of the business, but the owner or the conductor of such business must have control over such premises during the period when he is carrying out such activity of running an 'Eating House'**. Catering contracts for serving and supplying food, snacks etc. on occasion of functions such as wedding, thread ceremony etc. or in some other parties, cannot be termed as an 'Eating House'. Holding the licence to run an 'Eating House'indicates the nature of activity, but this itself cannot be decisive test to treat the premises referred to in the licence as an'Eating House', unless other conditions are found fulfilled. In nutshell, whatever may be nature of the premises, in order to get the benefit of impugned entry, it must be shown that such premises, wholly or partially, the business of supply of meal or refreshment to the public or class of public for consumption in the premises is being carried out. Turning to the facts of the impugned case, there is material on record to show that during the Winter Session of Legislative Assembly, certain premises were made available to the Appellant in the premises of Nagpur Council Hall to serve and supply foods. It appears that Shamiyana (Pandal) was erected for the said purpose, wherein Appellant was carrying out the activity of serving food to the customers i.e. particularly the persons who used to visit the Council Hall during the said Winter Session. It is certain that during the said period Appellant was carrying on business of supply of meal or refreshment to the public for consumption at said premises. The Appellant was having control over the said premises. It is true that there is no material on record whether the Appellant was holding licence for running 'Eating House'or not. It is urged by Shri Bagri, learned Chartered Accountant for the Appellant, that this activity was carried out by the Appellant in January 1986, and after lapse of about more than 17 years, it is not possible for him to produce any evidence in that behalf or he is not in position to make any statement either he was holding such licence or not. But according to him as the Government had given him permission to carry on such activities, he must be holding the requisite licence. **Of course it may not be safe to presume that he was holding licence only because such permission was given to him by the concerned Authority, and no any positive finding as to factual aspect of holding licence or not, can be recorded at this stage. However, want of evidence in that behalf would not be sufficient to discard the other evidence indicating that the activity was of running an 'Eating House'**The activity of the Appellant of supplying food and refreshment to the visitors during the Winter Session cannot be equated with the activity of Catering Contract to supply food occasionally on functions of wedding, thread ceremony etc. or on parties. It is needless to say that the Appellant was carrying on business of supply of food, refreshment etc. regularly on restricted place during the said Winter Session, and certainly it fulfilled all the necessary conditions and criteria laid down above to hold that said activity is nothing but running 'Eating House'as contemplated under Entry C-II-22 read with Entry 191 of notification issued under Section 41 of the Bombay Act. The Appellant, is therefore, entitled for concession in respect of sales in premises of the Council Hall when the Legislative Assembly Session was held in the month of January 1986. .'

The present case fulfills the criteria as laid down in the aforesaid judgement.

- o In the present case, there are outlets where the'vada pav' is supplied. It is to be observed that the MSTT has merely said that the meals should be supplied – they have not use the word 'served'.
- o The supply takes place at restricted premises as the outlets are also restricted premises.
- o The owner, of course, has control over the premises.

7] The applicant has canvassed the proposition that there is no element of service involved and therefore the outlets are not 'eating houses'. However, the MSTT has held that 'hand carts', 'kiosks' , 'vending machines' are 'eating houses' despite of the fact that **the element of service was conspicuously absent in these cases.** In the case of M/s Sterung Horticulture (cited supra) **the tea, coffee was obtained through vending machines where there is absolutely no service involved. In fact, the situation is marginally better off in the present case where the 'vada pav' /lassi is handed over to the customer.** Also, in the present case, though there are no sitting arrangements there is a place provided to keep the food where the **customer is provided with an option to consume the food at the premises itself.**

After having a look at all the judgements which I have quoted at length above, it is seen that though some of the judgements have held cabins and hand carts as 'eating houses' not on the basis of the facts but they were partially driven by an examination of the purpose behind amendment of the entry- the MSTT did not want to deprive the small dealers from the benefit bestowed by the entry. But on the other hand there are also judgments in the case of M/s Jagat Enterprises(cited supra) & M/s Sterung Horticulture Research Pvt. Ltd(cited supra) in which 'shamiyana' and 'kiosks' at railway stations have been held as eating house and they were entirely based on the pure facts of the case. In the case of M/s Jagat Enterprises, the Tribunal has also brought to the notice that there are some contingencies which cannot be held as 'eating houses' though the parties involved were small vendors. In the instant case, therefore, by following these judgments and the Bombay High Court judgment in the case of Mangharam cited supra, I hold that the outlets where Jumbo Wada Pav sold are 'eating houses' and therefore, the sale of ''Vada Pav'' is not eligible for coverage under schedule entry C-94.

8]The Applicant had argued that he holds licence as a 'shop' under the Bombay Shops and Establishment Act and does not hold a licence as an eating house. I do not find those facts crucial to the decision or in any way influencing the outcome of this case, mainly for the following reasons:

1) The definition of an 'eating house', 'restaurant' under the Maharashtra Value Added Tax Act is not based upon or is not referential to the definition of an 'eating house' under the Bombay Shops and Establishment Acts. Therefore, the definition of a licence under the Bombay Shops and Establishment Act is not germane to the outcome of this case.

2) None of the decisions have found it necessary to refer to the licence under the Act as an evidence or as a determining factor.

3) When the decisions given under the erstwhile Bombay Sales Tax Act have been very clear in their import, resort to how circumstances stand under the Bombay Shops and Establishment Act is at the least ,redundant.

04. In view of the above deliberations I pass an order as follows :

<u>O R D E R</u>

No. DDQ-11-06/Adm-5/54/B-2 Mumbai, dt.24.12.2008

The sale of 'Wada Pav' by M/s Jumbo King Foods Pvt.Ltd through its vending joints is not covered by Schedule Entry C-94. It will be covered by the residuary entry carrying rate of tax @ 12.5%.

(Sanjay Bhatia)
Commissioner of Sales Tax,
Maharashtra State, Mumbai.