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BEFORE DELHI VALUE ADDED TAX, APPELLATE TRIBUNAL DELHI
Sh. Narinder Kumar, Member (Judicial) & Sh. Rakesh Bali, Member (Administrative)

Appeal No. 951-952/ATVAT/2013
Date of Judgment: October 8th ,2021

M/s. Graviss Hospitality Ltd.,
1, Qutab Minar Restaurant Complex,
Mehrauli,
New Delhi - 110 030. ..... Appellant

V

Commissioner of Trade & Taxes, Delhi ..... Respondent

Representing the Appellant : Sh. A.K.Batra, CA.
Counsel representing the Revenue : Sh. P. Tara.

JUDGMENT

1. Appellant has challenged order dated 21/10/2013 passed by learned Special Objection Hearing Authority (SOHA) – Special Commissioner –I, whereby the notices of default assessment issued by the Assessing Authority u/s 32 & 33 (both dated 8/8/2012), have been upheld while recording findings that the assessments framed as regards tax are just and fair, and further that whenever tax liability is generated, the penalty and interest is an automatic outcome of the assessment proceedings.

Narinder Kumar 8/10/2021

2. The appellant is dealer registered with Department of Trade & Taxes vide Tin No. 07280371925. As per case of the appellant, it is engaged in providing catering and hospitality services.

3. Vide letter of intent dated 20/8/2010, Organizing Committee of Common Wealth Games (CWG) 2010 awarded a contract to the dealer – appellant. As per case of appellant, it was a contract for catering services at various lounges of cluster 1.

4. The dealer is said to have provided catering services, as per the terms and conditions of the contract, and then raised two invoices, on 15/10/2010, for a sum of Rs. 10,16,43,920/-. This amount included charges towards VAT and service tax. The Organizing committee cleared the invoices only for a sum of Rs. 7,08,07,575/-.

5. Case of the dealer – appellant is that it filed return pertaining to DVAT Act for the 3rd quarter of financial year 2010-11, declaring 50% value of the invoices as pertaining to food supplied, and the balance amount towards services provided by this company, and then deposited the due tax on the value of food supplied.

6. The Assessing Authority, vide notice of default assessment of tax and interest u/s 32 of DVAT Act, for the 3rd quarter of the year 2010-11, directed the dealer to pay tax to the tune of Rs. 48,69,392/- i.e. Rs. 39,33,754/- towards tax and Rs. 9,35,638/- towards interest.

7. Notice of default assessment of tax and interest is reproduced hereunder for ready reference –

> "Whereas I am satisfied that the dealer has furnished incomplete return or incorrect return or furnished a return that does not comply with the requirements of Delhi Value Added Tax Act, 2004 for the following reasons:
>
> 3rd quarter 2010-11; During the scrutiny of documents submitted by the dealer, it has been noticed that the dealer has issued two invoices i.e 107 dt. 15.10.10 and 108 dt. 15.10.10 for Rs. 9,21,42,845/- and for Rs. 95,01,075/- respectively aggregating total amount of Rs. 10,16,43,920/-. As per invoice No. 107, the dealer has charged VAT on Rs. 4,09,52,376/- i.e the food portion of the bill and against Bill No. 108, the dealer has charged VAT on Rs. 42,22,700/- i.e food portion of the bill.
>
> On the other amount of bill No. 107 and 108 which represents the value of catering services (i.e Rs. 4,60,76,119/-), the dealer has

charged service tax as per provisions of Central Service Tax Act.

The Organizing Committee of CWG 2010 while approving the bill of the dealer submitted to the O.C. for Rs. 10,16,43,920/-, the O.C after thoroughly examining the bills submitted by the dealer, the O.C. approved a total amount of Rs. 7,08,07,575/- against the above said bills. The dealer in his statement/ affidavit has stated that the deduction of the amount by the O.C. is for rejection/ deficiency of sale goods and since the material supplied of perishable nature, O.C has not made any goods return note and have destroyed the materials. In view of the explanation given by the dealer, the said contention is accepted.

As regards, the payment of Rs. 7,08,07,575/- received by the dealer from O.C, the dealer apportioned the above amount of Rs. 7,08,07,575/- equally between food charges and catering service charges and thus paid VAT only on Rs. 3,14,70,033/- (excluding of VAT amount). The dealer had taken the plea that he had paid VAT on 50% of the total food and catering services as per the provisions of the Services Act. But these provisions of Service Act are not applicable in the case of charging of VAT on 50% of the food and catering service.

The Learned Commissioner in the case of M/s Seasons Catering Services Pvt. Ltd. Who is engaged in outdoor catering business and has sought clarification on tax liability and rate thereof on the outdoor catering service determined vide order No.

241/CDVAT/2009/4 dt. 29.05.09 that the transactions being undertaken by the applicant are covered under the definition of word 'sale' as defined in section 2(zc) (vii) and that the entire proceeds of said transactions are eligible to VAT.

Therefore, the remaining amount of Rs. 3,14,70,033/- is liable for tax @12.5% being unspecified items.

Resultant tax deficiency of Rs. 39,33,754 attracts interest @15% p.a u/s 42(2) of DVAT Act, 2004. Also, penalty u/s 33 read with 86(12) of DVAT Act, 2004 is imposed.

Further, the due tax which was to be deposited by 25.01.2011 (since the dealer was filing quarterly returns) for the business conducted during 01.10.10 to 31.12.10, the dealer deposited partly tax of Rs. 20,00,000/- on 24.11.10 (which was within time) and the balance tax of Rs. 14,63,509/- (after availing ITC of Rs. 4,70,246/- on 03.03.11 which was late by 37 days. Hence the dealer is liable to pay interest @15% p.a for the delayed payment u/s 42(2) of DVAT Act, 2004.

The dealer is hereby directed to pay tax of an amount of Rupees 48,69,392/- and furnish details of such payment in Form DVAT-27A along with proof of payment to the undersigned on or before 10-10-2012 for the following tax period:-

Tax Period	Amount (Rs)		
	Tax	Interest	Total
Third Quarter, 2010-11	39,33,754/-	9,35,638/-	48,69,392/-

8. Vide separate notice of default assessment of penalty u/s 33 of DVAT Act, Assessing Authority levied penalty of Rs. 4,500/- u/s 86(9) of DVAT Act and that of Rs. 31,47,003/- u/s 86(12) of DVAT Act.

9. Feeling dissatisfied with the notices of default assessment, dealer filed objections. Learned OHA – Special Commissioner – I, vide order dated 21/10/2013, upheld the default assessments on the point of tax, interest and penalty, while observing in the operative part in the manner as –

> "The assessment orders fare therefore, found to be just and fair.
>
> On the issue of penalty, it may be stated that levy of penalties in the DVAT Act is automatic without discretion of the Assessing Authority. Whenever tax liability is generated the penalty and interest is an automatic outcome of the assessment proceeding, it cannot be condoned even by the mitigating conditions cited by the objector. The Kerala High Court in its decision in the case of Burmah Shell Co. Ltd. vs. STO (1973, 32 STC 429) had held that if there is no discretion left in the assessing Authority by the statute itself, there is no question of the exercise of discretion being quasi-judicial function and no question of giving notice to the assessee

before the exercise of discretion. In the instant case the penalty and interest have to be levied as per the established formula under the DVAT Act and Rules. Hence any relief is not found due on this account. Assessment orders are upheld and objections are rejected."

10. Feeling aggrieved by the impugned order, vide which its objections came to be rejected, dealer – appellant has filed these two appeals.

11. Arguments heard. File perused.

Contentions on behalf of appellant-dealer.

12. Case of the appellant-dealer is that it provided catering services in the commonwealth games; that the scope of work of the appellant included preparation of meal and drinks and serving the same to the players, athletes, team officials, support staff and various other guests; that it was its responsibility to supply crockery and utensils as well its furniture to serve the food to the guests, and that service tax was paid by the appellant @ 10.3% of the remaining 50% of the consideration, in terms of the charging Section of the Finance Act, 1994.

Admittedly, the appellant paid DVAT @ 12% on the 50% of the

total consideration received.

The dispute pertains to the payment of tax on the remaining 50% of the total consideration.

The contention of learned counsel for appellant is that in case of composite transactions, like the present one, wherein elements of sale and service co-exist, payment of service tax and VAT are mutually exclusive and therefore both service tax and VAT shall be paid having regard to the parameters of the both levies as envisaged in a composite contract, but in respect of service component, the parliament has the power to levy service tax, and that the transaction cannot be subject matter of either whole service tax or subject matter of whole sales tax/VAT.

Grievance of the dealer-appellant is that the Ld. Special Commissioner has failed to follow judicial discipline by not considering the judgments delivered by various High Courts on the issue and has on the contrary created demand against the appellant on the basis of a determination in Seasons Catering's case, which is distinguishable from the facts of this case, and as such the demand created against the appellant is completely illegal and unsustainable in law.

Learned counsel for the dealer has contended that the determination of question in the above referred to case, relied upon by the department, is not the law of the land or above the judicial decisions passed by various High Courts, on the issue in dispute.

In support of his submission, learned counsel for the dealer-appellant has placed reliance on the following decisions:

i) **Sky Gourmet Catering Private Limited vs Assistant Commissioner of Commercial taxes** 2011 46 VST 35 (Kar).

ii) **Imagic Creative Pvt Ltd.** (2008)2 SCC 614;

iii) **Commissioner of Services Tax, Bangalore Vs LSG SKY Chef India Pvt. Ltd.** 2012 (27) S.T.R. 5 (Kar).

iv) **SAJ Flight Services Pvt. Ltd. v Superintendent of Central Excise** 2006 (4) S.T.R. 429 (Ker.)

v) **Cap N Chops Caterers Vs State of Haryana** (2011) 37 VST 226.

vi) **Builder Association of India v. Union of India** (73 STC 370).

vii) **Cap 'N' Chops Caterers vs. State of Haryana** (37 VST 226) (P & H).

viii) **Valley Hotel & Resorts, Commercial Tax Revision** No.

02 of 2014.

ix) **LSG Sky Chef India Pvt. Ltd.,** 2011 (46) VST 57 (Kar.).

x) **Tamil Nadu Kalyana Mandpam Assn. v. Union of India,** (135 STC 480)(SC).

xi) **Bharat Sanchar Nigam Ltd (BSNL) v. Union of India,** (145 STC 91) (SC).

Contentions on behalf of Revenue

13. On the other hand, learned counsel for the Revenue has contended that determination of question u/s 84 of DVAT Act in **Season Catering Services** case (supra) was on the facts similar to the facts of the present case and as such the Revenue is justified in levying VAT on the entire proceeds of the transactions of sale.

Learned counsel for the Revenue has also referred to decision in **K. Damodarsamy Naidu & Bros. v. State of Tamil Nadu and Another,** (2000) 117 STC 1 (SC), particularly paras 9 & 10 and submitted that in suchlike transaction, tax is on supply of goods and it is not of relevance that the supply is by way of service or as a part of service, and further that the price which the customer pays for the supply of good in a restaurant, cannot be split up.

Learned counsel of the Revenue has also referred to decision in

Indian Railways Catering and Tourism Corp. v. GNCT of Delhi, (2010) 32 VST 162 (Del), wherein our own Hon'ble High Court observed that the transaction between petitioner company and the Indian Railways was purely one of sale of goods under the provisions of the Sale of Goods Act, as well as DVAT Act and the element of service by way of heating the food, heating/freezing the beverages and then serving them to the passengers was purely incidental and minimal required for sale of food and beverage in a transaction of said nature. The Revenue was therefore, held entitled to levy and demand VAT, on the entire amount of consideration paid by Indian Railways to the petitioner-company for food and beverages.

14. In reply, learned counsel for the appellant has contended that in **IRCTC's** case, cited by learned counsel for the Revenue, only the point of situs was in question, and the said decision is not applicable to the facts of the present case.

As regards, decision in **K. Damodarasamy Naidu's** case (supra), cited by learned counsel for the Revenue, learned counsel for the appellant has submitted that service tax was not in picture therein.

Discussion

15. As noticed above, case of the appellant is that it provided

catering services in the commonwealth games; that the scope of work of the appellant included preparation of meal and drinks and serving the same to the players, athletes, team officials, support staff and various other guests; that appellant paid DVAT as well as service tax on the amount received. VAT was paid @ 12% on the 50% of the total consideration received.

As per case of appellant, service tax has been paid by the appellant @ 10.3% on the remaining 50% of the consideration, in terms charging Section of the Finance Act, 1994, as it case of the appellant is that it was its responsibility to supply its crockery and utensils as well its furniture to serve the food to the guests.

Dispute

The dispute pertains to remaining 50% of the total consideration received, on which the dealer is stated to have paid service tax, as according to the dealer, the transaction cannot be subject matter of either whole service tax or subject matter of whole sales tax/VAT.

Observations by the Assessing Authority.

Provisions of Service Act are not applicable in the case of charging of VAT on 50% of the food and catering service. Therefore, the remaining amount of Rs. 3,14,70,033/- is liable for tax @12.5% being unspecified items.

Reasoning given by OHA

16. In the impugned order, learned OHA has observed as under:

> "in judging while interpreting the nature of a contract the substance (and not the form) thereof is material and intention of the parties should be considered. Therefore, in judging whether the contract is for a "sale" or for "food and labour", the essence of the contract or the reality of the transaction as a whole has to be taken into consideration. The pre-dominant object of the contract, the circumstances of the case and the custom of the trade provide a guide in deciding whether transaction is a "sale" or not.
>
> Ultimately, the terms of a given contract would be determinative of the nature of the transaction, whether it is a "sale" or a composite contract. .....
>
> The fact that supply of food is the predominant objective of the disputed transactions is borne out from consideration of rates assigned to various good packages....
>
> Applying this test it can be clearly concluded that the nature of transaction in this case is similar to the one in case of M/s Seasons

Catering.

Other case law cited is not relevant to the context especially when determination in clear terms is available on identical case."

Significant & relevant definitions.

Clause (zzt) of sub-section (105) of Section 65 of the Finance Act, 1994 defines "taxable service" as below:

"(105) "taxable service" means any service provided or to be provided, to any person, by an outdoor caterer;"

Definitions of "caterer" and "outdoor caterer" as available under Section 65(24) and 65(76a) of the Finance Act, 1994 are as follow:

"(24) "caterer" means any person who supplies, either directly or indirectly, any food, edible preparations, alcoholic or non-alcoholic beverages or crockery and similar articles or accoutrements for any purpose or occasion;

"(76a) "outdoor caterer" means a caterer engaged in providing services in connection with catering at a place other than his own but including a place provided by way of tenancy or otherwise by the person receiving such services;

Definitions of 'sale' and that of 'sale price' as available under section 2(zc) and 2(zd) of DVAT Act read as under:

"(zc) "sale" with its grammatical variations and cognate expression means any transfer of property in goods by one person to another for cash or for deferred payment or for other valuable consideration (not including a grant or subvention payment made by one government agency or department, whether of the central government or of any stage government, to another) and includes-

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

"(zd) "sale price" means the amount paid or payable as valuable consideration for any sale, including

(i) the amount of tax, if any, for which the dealer is liable under section 3 of this Act;

(ii) in relation to the delivery of goods on hire purchase or any system of payment by installments, the amount of valuable consideration payable to a person for such delivery including hire charges, interest and other charges incidental to such transaction;

(iii) in relation to transfer of the right to use any goods for any purpose (whether or not for a specified period) the valuable consideration or hiring charges received or receivable for such transfer;

(iv) any sum charged for anything done by the dealer in respect of goods at the time of, or before, the delivery thereof;

(v) amount of duties levied or leviable on the goods under the Central Excise Act, 1944 (1 of 1944) or the Customs act, 1962 (52 of 1962), or the Punjab Excise Act, 1914 (1 of 1914) as extended to the National Capital Territory of Delhi whether such duties are payable by the seller or any other person; and

(vi) amount received or receivable by the seller by way of deposit (whether refundable or not) which has been received or is receivable whether by way of separate agreement or not, in connection with, or incidental to or ancillary to the sale of goods;

(vii) in relation to works contract means the amount of valuable consideration paid or payable to a dealer for the execution of the works contract; less -

a. any sum allowed as discount which goes to reduce the sale price according to the practice, normally, prevailing in trade;
b. the cost of freight or delivery or the cost of installation in cases where such cost is separately charged;

and the words "purchase price" with all their grammatical variations and cognate expressions, shall be construed accordingly...."

17. In the course of arguments, while referring to the above definitions, Learned counsel for the appellant has contended that the combined effect of the said definitions is that sale is in relation to 'goods', and not of services. Similarly, the contention is that the sale price is in respect of sale of goods and not in respect of provision of services.

Learned counsel has contended that the current transaction has the element of goods as well as service and should be treated as the composite transaction, wherein VAT can only be levied on the goods portion.

As further argued, simply because in one bill both charges are shown, VAT Department cannot get jurisdiction to levy tax on the total amount under DVAT Act, particularly when service tax is levied on service portion.

Determination of question earlier raised under section 84 of DVAT Act, on the application of Season Catering Services Pvt. Ltd.

18. As regards, determination of question in the case of Seasons

Catering, the learned OHA, in the impugned order observed that the nature of the transaction in this case is similar to the one in case of Seasons Catering. As regards, decisions in Sky Gourmet's case, Saj Flight Services case, Cap n Chop's case and LSG Sky Chef's case (supra), learned OHA observed that the same were not relevant to the context specially when determination was available in clear terms on the identical case of Season Catering,

Learned OHA concluded the impugned order by observing that supply of food is the predominant objective of the disputed transactions is borne out from consideration of rates assigned to various food packages, and further that the conclusion, which can be drawn, is that it is the nature of food items, which determines the price payable to the objector; that this reinforces the unmistakable conclusion that the transaction is in nature of sale and service rendered is just incidental and covered by definition of sale as above.

19. A perusal of order dated 29.5.2009 passed by the Commissioner, VAT while determining question under section 84 of DVAT Act, would reveal that **M/s Seasons Catering Services Pvt. Ltd.** engaged in outdoor catering business and sought clarification on

taxability and rate thereof on the outdoor catering service.

Therein, Authorized Representative of the firm appeared and stated that the dealer was charging DVAT @12.5% on the sale value of the cooked food but w.e.f. September 2004, the catering business had been covered under service tax and he had to charge service tax upon 50% value of the invoice. So, the submission on behalf of the dealer was that VAT should be charged on remaining 50% amount of the invoice value.

While dealing with the submissions made, Learned OHA observed that the predominant element in the transactions being carried on by the applicant seems to be sale of food, and service, if any, is just incidental, and thus the entire proceeds of the sale of food are liable to be taxed u/s 3 of DVAT Act.

Therein, all the necessary concomitants of sale were found present in that transaction and sale was distinctly discernible.

In view of ruling of the Hon'ble Supreme Court in BSNL Vs. GOI.'s case, (1989) 3 SCC 634, it was held that the said transactions were liable to levy of VAT.

As to the binding nature of the order, determining a question under section 84 of the Act, in **C.L. Micromed v. CTT**, 1487 of 2012, decided on 18.2.2015, it was decided by this Tribunal that determination orders are binding not only on the applicant, but also on the other dealers and the subordinate officers. Reference may also be made to decisions in **Filter Co. v. CST,** (1996) 101 STC 523 (MP) and **ABC Constructions v. CTO**, (2011) 40 VST 81 (AP).

Appeal may be preferred by the person, affected by the order of the Commissioner under section 84 of DVAT Act, in the case of a third party. None of the parties has submitted before us if the determination of question in Season Catering's case was challenged by any dealer, having locus standi to challenge the same, before this Tribunal by way of appeal.

Therefore, we do not find any merit in the contention of learned counsel for the dealer- appellant that the order dated 29.5.2009 determining question on application of **Seasons Catering Pvt. Ltd.,** is not binding on third party.

Decision in **Smt. Godavaridevi Saraf's** case cited on behalf of the appellant is on the point that law declared by High Court,

though of another State, is final law of the land, and all authorities like an Income tax Tribunal are bound by it, until a contrary decision is given by any other High Court.

However, we may further observe that when there is a decision by Hon'ble Supreme Court or Hon'ble High Court, on the very point, which was raised by way of question for determination under section 84 of DVAT Act, thereby laying down law, then such a decision shall be binding on all concerned.

In this regard, reference may also be made to observations made by Hon'ble Apex Court in **T. N. Kalyana Mandapam Assn's** case (supra).

Levy of VAT and Service Tax.

20. For levy of VAT on the value of goods portion and service tax on the charges for services rendered, in case of divisible contact, learned counsel for the appellant has relied on decision in **Imagic Creative P. Ltd.** case (supra), and submitted that in that case, separate charges were shown for sale of goods and separate charges for services, and the sales tax authorities levied tax on the consolidated amount, and that Hon'ble Supreme Court disapproved the said levy and observed that the dealers were

entitled to separate the transactions and taxes can be levied on the price relating to sale of goods.

In the case of **Imagic Creative P. Ltd.**, it was contended on behalf of appellant that in the event the contract was held to be an indivisible one, the service element thereof being subject to service tax, no sales tax could have been levied on the incidental transfer of goods unless such transfer fell within the scope and ambit of one of the provisions contained in sub clauses (a) to (f) of clause (29A) of Article 366.

Peculiar facts of that case are that therein, the order of assessment was complete and the State had not preferred any appeal against said assessment. Hon'ble Court observed that the process of accounting or the methodology adopted by the assessee for the purpose of payment of both service tax and VAT had attained finality atleast for that year. It is not so, in the case in hand.

It is also significant to note that therein in the bills there was separate charge made as content development concept, design, photography scanning and other charges such as system charges including colour sketch pen or computer used design software

etc. The appropriate authority under section 60 of Karnataka Value Added Tax Act observed that it was a comprehensive contract or supply of printed material developed by the company; that the bills indicated entire activity though separated was a comprehensive work; that such creation of activity tanamount to making indivisible contract in a divisible contract. In this situation, it was ruled that entire sale value including the creation of concept etc. done by the company formed a part of the value of sale of such brochures and was liable to tax at 4% of the entire proceeds.

Keeping in view that the order of competent authority under section 60 of KVAT Act would be binding on the assessing authority, in future also, Hon'ble Court deemed it appropriate to examine the merit of the matter.

Therein, Hon'ble Apex Court observed as under-

> "28. 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 approach of the Assessing Authority, to us, thus, appears to be correct".

So, we find that, on facts, Imagic Creative's case is distinguishable.

21. As regards decision by Hon'ble Apex Court in T.N. Kalyanam's case, the government had decided to charge service tax only on 60% of the gross amount charged by the mandap keeper to the customer. Matter reached Hon'ble Apex Court by way of appeal directed against judgment of Hon'ble High Court vide which writ petition filed by the appellant-association was dismissed and provisions of sections 66,67(a) of Finance Act, 1994 and Rule 2(1)(d)(ix) of the Service Tax Rules, 12994 were held to be intra vires of the Constitution.

22. Hon'ble Court observed that the measure of taxation cannot affect the nature of taxation and therefore the fact that service tax is levied as a percentage of the gross charges for catering cannot alter or affect the legislative competent of Parliament in the matter.

Therein, Hon'ble Court noted the distinction between that services rendered by outdoor caterers and service rendered in a restaurant. Hon'ble Apex Court observed that clearly the service element is more weighty, visible and predominant in the case of

outdoor catering, it cannot be considered as a case of sale of food and drink as in restaurant.

That was a case of tax on services rendered by mandap-keeper and outdoor caterers. Hon'ble Court observed that a tax on services rendered by mandap-keeper and outdoor caterers is in pith and substance, a tax on services and not a tax on sale of goods or on hire purchase activities.

It was further observed that article 366(29A) only permits the State to impose a tax on the supply of food and drink but it does not conceptually or otherwise include the supply of services within the definition of "sale and purchase of goods". It was held that since the concept of catering includes the concept of rendering services, the fact that tax on sale of goods, involved in the said service can be levied, does not mean that the service tax cannot be levied on the service aspect of catering.

The case of T. N. Kalyanam related to the constitutionality of the above-mentioned provisions and Hon'ble Apex Court dismissed the appeal filed by the Association upholding the decision that the provisions were intra-vires of the Constitution.

23. Herein, learned counsel for appellant has submitted that the charges towards sale and services are stated to be identifiable, as VAT is charged on appropriate amount and Service Tax is

charged on its relevant value.

Learned counsel for the appellant has contended that when deemed sale category of supply of food by way of catering has been considered to be divisible by the Hon'ble Supreme Court, in case of catering, charges are divisible, and VAT can be levied under Sales Tax Laws, only on the portion relating to food supply.

The contention of learned counsel for appellant further is that when the values are identified separately, levying VAT on consolidated amount is against the decision by the Hon. Supreme Court in BSNL's case (supra), and that it can safely be said that on same amount sale tax and service tax both cannot be levied.

In BSNL's case, Hon'ble Apex Court observed in the manner as –

> "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 (f) of Clause 29A of Art. 366, there is no other service which has been permitted to

be so split."

Therein, while answering the questions raised therein Hon'ble Apex Court observed that the nature of the transaction involved in providing the telephone connection may be a composite contract of service and sale; and that 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.

In **Builders Association of India** and others case (supra) Hon'ble Apex Court while dealing with the provisions of clause (29A) of Article 366 of the Constitution observed that tax leviable by virtue of sub-clause (b) of clause 29A of Art.366 becomes subject to the same discipline to which any levy under entry 54 of the State List is made subject to under the Constitution.

In the case of Cap 'N' Chops Caterers vs. State of Haryana, (37 VST 226) (P & H), Hon'ble High Court held that the authority under entry 366(29A)(f) is to levy tax only on the value reflecting sale of goods and not on full value including services.

Same view was taken by the Hon'ble High Court of Uttarakhand, in the case of **Valley Hotel & Resorts's** case

(supra).

Decision in M/s Maneklal Chunnilal & Sons Ltd.'s case pertains to provisions under Income Tax Act.

In the case of LSG Sky Chef India Pvt. Ltd's case (supra), Hon'ble Karnataka High Court held that by virtue of sub-clause (f) of clause (29A) of article 366 of the Constitution of India, the outdoor catering contract has to be treated as a composite contract.

In Sky Gourmet Pvt Ltd's case (supra), wherein Hon'ble Karnataka High Court held that the catering contracts are divisible into sales of food and supply of services; that when tax is paid on food portion service tax cannot be charged on the same.

In the case of **SAJ Flight Services P. Ltd's** case (supra), Hon'ble High court held that the Petitioner, an outdoor caterer, was liable to pay service tax on the supply made by them to the air flight passengers.

In Shree Sanyeeji Ispat Pvt. Ltd's case, cited on behalf of the

appellant, a notification was set aside to the extent the same was repugnant to the Industrial Policy of 1991, and respondents were directed not to force the petitioner to pay sales tax in terms of said notification, it was otherwise not liable to pay.

Smt. Rajlaxmi's case and Inaroo Limited's case cited in the list on behalf of the appellant were under Income tax Act. In the course of arguments, no reference to said decisions has been made on any point.

Similarly, in the course of arguments, no reference has been made to decision in N.C.Budharaja & Com.'s case cited on behalf of the appellant, on any point whatsoever.

In IRCTC's case, cited by counsel for the Revenue, the petitioner, Government company, has been providing services, including catering on board trains run by Indian Railways, under identical contracts between the petitioner-company and Indian Railways. The petitioner also sub-leased the contract in respect of some trains to various contractors. The consideration for these services was included in the fare charged by Indian Railways from passengers and the petitioner-company was paid, by Indian Railways, for what it terms the services, including catering provided by it to passengers. The petitioner had in the past been

paying VAT, in respect of services on board trains, including providing of food and beverages and the tax was paid up to April 30, 2007.

Service tax under section 65(105) (zzt) of the finance Act, 1994 was being paid by the petitioner in respect of the transactions in question.

The petitioner was advised that there could not be levy of both, service tax as well as VAT, on the same transaction. Case of the petitioner was that catering services provided by an outdoor caterer on a train were fully exempt from service tax vide subsequent notification dated September 10,2004, but that notification was rescinded vide subsequent notification dated March 1, 2006, which provides for 50 per cent abatement, to the outdoor caterer. The case of the petitioner is that if the transaction entered into by it was subject to service tax, it could not be subjected to levy of both VAT and vice versa, since one transaction cannot be subjected to levy of both VAT as well as service tax. The submission was that service tax and VAT/sales tax operate in different fields and are mutually exclusive. The petitioner claimed that on account of the determination order/assessment order passed under the DVAT Act, the provisions of section 2(zc)(vii) of the DVAT Act, 2004 had

come into direct conflict with the provisions of section 65(105)(zzt) of the Finance Act, 1994.

It was also alleged in the petition that the respondents were seeking VAT even in respect of the food and beverages which were not loaded on the trains in Delhi.

The petitioner accordingly sought a declaration that the services rendered by it on board trains, were not liable to value added tax and are liable to service tax alone.

It was further prayed that in case it was held that the services provided by the petitioner along with food and beverages, amounted to sale of goods, the provisions of section 65(105)(zzt) of the Finance Act, 1994 be declared ultra virus.

The petitioner also sought quashing of the assessment order in respect of the year 2007-08 as well as the determination order dated March 20,2006, besides seeking orders restraining the respondents from levying sales tax/VAT on the services provided by the petitioner.

In the appeal filed by the petitioner against the determination order passed by the Commissioner of Value Added Tax, the appellate authority vide order dated August 29, 2006 had held that only the food and beverages loaded in trains from Delhi were liable to VAT and the sale and purchase of goods taking

place outside Delhi, on the running trains, were outside the ambit of determination order passed by the Commissioner of VAT.

The order passed by the Tribunal was not challenged by either party and, therefore, had attained finality.

It was case of the petitioner, that it was receiving consideration from Indian Railways in respect of supply of food and beverages served to the passengers and, therefore, the transaction amounted to sale in terms of section2(1)(zc) of the Act; that services provided by the petitioner by employing staff to serve the food and beverages loaded from Delhi were incidental to the business of supply of food, etc., and the invoices, issued by the petitioner, clearly indicated that consideration was being received by it from Indian Railways for sale of food and beverages.

The petitioner itself had admitted raising bills in respect of supply of cooked food, water and newspapers. It was clarified that no VAT had been demanded in respect of supply of newspapers.

Since the order passed by the Tribunal has not been challenged by either party, the dispute before Hon'ble High Court was confined to payment of VAT in respect of the food and beverages which are loaded on board trains in Delhi.

The licensee(s)/caterer(s), who used to supply the food and beverages to the passengers in the running trains, for supply of food and beverages to the passengers, raised sales bills and invoices in respect of those supplies, in favour of the petitioner-corporation.

The petitioner, in turn, issued a consolidated sale invoice of such supplies in the name of Indian Railways and received the sale consideration from it.

Admittedly, the invoices were raised by the petitioner in favour of Indian Railways in respect of three items -

(a) food; (b) beverages; and (c) newspapers.

Admittedly, the payment was being taken by the caterers/licensees from the petitioner-company, which raised bills in favour of Indian Railways and took payment from it.

The petitioner raised invoice upon Indian Railways towards food and water bottles on the basis of occupancy of seats, certified by the train superintendent.

Therein, the petitioner only challenged constitutional validity of section 65(105)(zzt) of the services.

Hon'ble High Court was of the view that the transaction between the petitioner and Indian Railways did not amount to a contract

of providing outdoor catering, but, was a transaction of sale of food and beverages by the petitioner-company to Indian Railways. It was held that the transaction between the petitioner-company and Indian Railways for providing food and beverages to the passengers, on board the trains, was a transaction of sale of goods by the petitioner-company to Indian Railways.

Here, the petitioner is itself an outdoor caterer. The case of IRCTC is distinguishable on facts.

Finance Act, 1994

After carefully going through the provisions of Finance Act, 1994 as regards taxable service of outdoor caterer, we find that as per column (4) of the notification No.1/2006 ST dated 1.3.2006, prescribing conditions for exemption to the extent of 50%, it is for the outdoor caterer to prove that the invoice, bill or challan issued indicated that it was inclusive of charges for supply of food.

As per provisions of section2(zc)(vii) of DVAT Act, supply, by way of or as part of any service or in any other manner, of goods i.e. food or any other article for human consumption or any other drink, where such supply or service is for cash, deferred payment

or other valuable consideration, is included in the definition of sale.

As rightly pointed out by learned counsel for the appellant services by an outdoor caterer were made exigible to service tax vide finance (No. 2) Act, 2004.

As per notification No. 1/2006 ST dated 1/3/2006, issued in exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, exempted the taxable service of catering and specified in sub-clause (zzt) of clause (105) of section 65, from so much of the service tax leviable thereon u/s 66 of the said Finance Act as in excess of the service tax calculated on a value which is equivalent to a percentage specified in the corresponding entry in column (5) of the said Table, of the gross amount charged by such service provider for providing the said taxable service, subject to the relevant conditions specified in the corresponding entry in column (4) of the said Table.

The Central Government exempted the taxable service of catering and specified in sub-clause (zzt) of clause (105) of section 6.

The exemption is from so much of the service tax leviable thereon u/s 66 of the said Finance Act as in excess of the service tax calculated, on a value which is equivalent to a percentage specified in the notification, of the gross amount charged by such service provider for providing the said taxable service.

It is significant to note that the exemption would be available subject to the relevant conditions specified in the corresponding entry in column (4) of the said Table.

24. In view of the well settled law and the above notification, the catering being taxable service, as per Section 65(105)(zzt) of the Finance Act, 1994, and required to be separated for the purpose of exemption, to the extent of percentage as notified, but the exemption can be granted only on fulfillment of the requisite conditions as specified in the notification.

As per the aforesaid notification, the exemption of 50% applies in cases where -

(i) the outdoor caterer also provided food; and

(ii) the invoice, bill or challan issued indicated that it was inclusive of charges for supply of food.

Here, in the present case, from the estimated costs as described in the Letter of Intent made available by the dealer-appellant, it

can safely be said that this is a case mainly of supply of goods i.e. food items, and that the service of food was just incidental, particularly, when the same do not reveal that any particular sum was agreed to be paid or paid or was payable towards service of said goods i.e. food items.

25. It may be mentioned here that as rightly pointed out by learned counsel for the Revenue in the course of arguments, the appellant has not made the agreement or the contract, part of the record or say, part of the memorandum of appeal. On behalf of the dealer-appellant, not even a word has been put forth as to why the Long Form Agreement has not been made part of the record.

26. What the appellant has made available to us is only a copy of Letter of Intent dated 20.8.2010. It specifically provides that in furtherance to the receipt of this document both the parties were to execute Long Form Agreement within a week or any time period as extended by Delhi 2010. On behalf of the dealer-appellant, no even a word has been put forth as to why the Long Form Agreement has not been made part of the record. The reason, as to why the Long Form Agreement or the contract has been withheld by the dealer, is best known to the appellant.

27. As per the Letter of Intent dated 20.8.2010, the appellant was

selected as the Service Provider for catering services at various Lounges in Venues of Clusters I and 6 during XIX Commonwealth Games, Delhi 2010, to be held during the period from 23 September 2010 to 15th of October, 2010. Annexure

28. Documents annexed to the Letter of Intent as Annexure 4 are copies of 2 bills and as Annexure 5 is copy of the Tax Invoice. Annexure 6 is copy of Form DVAT 16 submitted online on 21.3.2011.

29. First mentioned bill dated 31.10.2010 is from Seasons Catering Services Pvt. Ltd. submitted to the appellant. Second mentioned bill dated 19.3.2011 is also from Seasons Catering Services Pvt. Ltd. submitted to the appellant.

30. A close perusal of both these bills would reveal that expenses described therein were incurred by Seasons Catering Services Pvt. Ltd., during the period from 3.10.2010 to 14.10.2010. This goes to show that it is the Seasons Catering Services Pvt. Ltd. which is stated to have assisted the appellant.

Estimated Cost as per Letter of Intent.

31. Let's see as to what was the Estimated Cost, as per Letter of Intent. The table available in the letter of Intent reads as under:

	Competition Venues		Training Venues
Cluster # 1-MAIN STADIUM & CEREMONIES	J.N. Stadium (Athletics, Weight Lifting, Lawn Bowls, Ceremonies)		J.N. Stadium (Athletics, Weight Lifting, Lawn Bowls)
CLUSTER#1	Numbers	Head Rate per	Total Amt.
Athletes Lounge	11918	550	65,54,900/-
Technical Official Lounge	2715	600	16,29,000/-
Media Lounge	11508	600	69,04,800/-
Games Family	14269	1360	1,94,33,040/-
VIP	12829	1360	1,74,47,440/-
Technical Delegates Tray Service	As per actual consumption		
Total			**5,19,69,180/-**

	Competition Venues		Training Venues
Cluster #6-DELHI UNIVERSITY CAMPUSES And COLLEGES	Delhi University (Rugby 7)		Delhi University Campus and 13 Colleges (Rugby, Athletics Wrestling, Boxing, Netball)
CLUSTER#6	Numbers	Rate per Head	Total Amt.
Athletes Venue Hot Meals(3 Meal per day)	480	4500	21,60,000/-
Technical Official Venue Hot Meals (3 meals per day)	90	4500	4,05,000/-

Media Lounge	315	800	2,52,000/-
Games Family	280	1490	4,17,200/-
VIP	105	1490	1,56,450/-
Technical Delegates Tray Service	As per actual consumption		
Hydration Charges at Training Venues	32445	125	40,55,625/-
Total			**74,46,275/-**

32. A perusal of the above tables would reveal that same do not contain any column regarding charges on supply of service. Rather, these tables depict the estimated cost and rate per head. At the cost of repetition, it is noteworthy that no copy of any contract between the dealer-appellant and the Organizing Committee of CWG has been filed. In absence thereof, it cannot be said if there was any specific agreement or contract between these parties or that the parties were ad idem on the point of charges for supply of service.

33. As per unsigned Invoice dated 15.10.2010 , Annexure 5, payments were made by the appellant towards VAT and Service Tax in terms of letter of Intent dated 20.8.2010.

When the unsigned Invoice is dated 15.10.2010 and the two bills are of subsequent dates i.e. dated 31.10.2010 and 19.3.2011,

these bills purported to have been issued by Seasons Catering Services to the dealer are of no help to the dealer-appellant. Consequently, it cannot be said that expenses were incurred by Seasons Catering Services in respect of the catering done by the appellant as an outdoor caterer, during the period the games were held. As a result, there is no material on record to suggest that the amount shown in the tables included charges on supply of service or to suggest as to what steps, if any, were taken by the dealer in connection with and expenses incurred on supply of goods i.e. food items.

Rather, from the material available on record, it can be said that the transaction as to supply of food items was in nature of sale, and further it can be inferred that service rendered was just incidental in connection with supply of food items.

Conclusion

34. In view of the above discussion, the principles available in the various decisions cited before us, we hold that in view of the peculiar facts and circumstances of this matter, where there is lack of evidence on the point of supply of service, the appellant was liable to pay VAT, as assessed by way of default assessment of tax and interest, and upheld by the Learned OHA vide impugned order.

Penalty

35. As noticed above, notice of default assessment of penalty under section 33 of DVAT Act read with section 86(9) and section 86(12) came to be issued by the Assessing Authority, and the penalty levied by the Assessing Authority was upheld by the Learned OHA vide impugned order.

On behalf of the appellant, penalty imposed under section 86(12) of the Act only has been challenged. In other words, no challenge has been made to the penalty imposed under the other head.

Submission on behalf of the appellant is that the imposition of penalty is completely unwarranted and uncalled for; without any legal basis, and as such liable to be set aside. To challenge the imposition of penalty, reference has been made to the following decisions:

i. **State of MP v. Bharat Heavy Electricals**, 1998 (99) E.L.T. 33 (SC).
ii. **M/S. Saphire Enterprises Versus The State Of Karnataka** [2021 (3) TMI 1032- Karnataka High Court].
iii. **Dilip N. Shroff vs Joint Commissioner of Income Tax-Supreme Court** in Case no: Appeal (civil) 2746 of 2007.

iv. **Brajalal Banik versus State of Tripura** [1990] 79 STC 217 (Gau.).

v. **Pratibha Processors Vs Union of India** – 1996 (88) ELT 12 (SC).

vi. **Anand Nishikawa Co. Ltd - Vs Commissioner of Central Excise,** Meerut, reported in (2005)7 SCC 749.

vii. **M/s Hindustan Steel Ltd. Vs. State of Orissa** dated 04.08.1969 cited as 1969-VIL-01-SC.

viii. **Orix Auto Infrastructure Services Ltd. Vs. Commissioner DVAT** dated 05.02.2015 cited as 2015-VIL - 76- DEL.

ix. **Tamil Nadu Housing Board Vs Collector of Central Excise,** Madras (reported in 1994 (74) E.L.T 9 (S.C.)

x. **CCE, Jalandhar v. Sarup Tanneries Limited**, 2005 (184) E.L.T. 217 (Tri. - Del.)

xi. **CCE, Ghaziabad v. Explicit Trading & Marketing (P) Ltd.,** 2004 (169) E.L.T. 205 (Tri. - Del.)

On the other hand, learned counsel for the Revenue has submitted that in view of the findings recorded by the Revenue as to tax deficiency, in the given facts and circumstances, when determination of same question had already taken place under section 84 of the Act, there is no merit in the contention on behalf of the appellant that it is a

case of a reasonable cause for evasion of tax under DVAT Act or that the appellant had no mala fide intent in not paying VAT on the balance amount.

In M/S. Saphire Enterprises's case, Hon'ble High Cout observed as under:

> "10. The levy of penalty is not automatic, but is discretionary in nature. Therefore, the aforesaid aspect of the matter which have a material bearing on the issue of levy of penalty have not been considered either by the Commercial Tax Officer or by the First Appellate Authority and the Tribunal. Therefore, in the facts of the case, we deem it appropriate to remit the matter for consideration afresh and to take a decision on the stand taken by the petitioner, supra, by a reasoned order."

On same point are decisions in Dilip N. Shroff and Brajalal Banik's case.

It is true that imposition of penalty under DVAT Act is not automatic. Penalty is to be imposed when all the essential ingredients of the relevant provision of law stand duly established.

36. On behalf of the appellant, reference has also been made to the following proviso, then available in Section 86(2) of the DVAT Act, 2004:

"Provided Further that the penalty imposed under this section can be remitted where a person is able to prove existence of a reasonable cause for the act or omission giving rise to penalty during objection proceedings under section 74 of this Act."

On behalf of appellant, it has also been submitted that since the issue involved in the present case involved legal interpretation of law, penalty should not have been imposed.

As noticed above, appellant paid VAT only on 50% of the turnover. It paid service tax on remaining 50% of the valuable consideration. Seasons Catering Pvt. Ltd., is in the business of an outdoor caterer. On its application, question raised on the same point was determined by the Commissioner, VAT, in May, 2009. The transaction between the petitioner and Organising Committee of Common Wealth Games was entered into subsequently. It is not case of the appellant that it was not aware of the answer to the question determined by the Commissioner, VAT in the case of Seasons Catering Pvt. Ltd..

On behalf of the appellant, it has been submitted that when appellant has already paid VAT on 50% of the gross consideration and Service Tax on 50% on the remaining consideration, and it is not liable to pay VAT on the balance amount, appellant is not liable to pay penalty, which is levied only in case of a *mala fide* intention of the party is proved.

Further it has been submitted that *mala fide* intention of the party is proved when any fact is suppressed or misstated from the Department willingly in order to evade the payment of tax.

In support of this submission, reference has been made to decision in Pratibha Processors Vs Union of India – 1996 (88) ELT 12 (SC), wherein Hon'ble Supreme Court observed that penalty is ordinarily levied on an assessee for some contumacious conduct or for a deliberate violation of the provisions of the particular statute, and that in the absence of deliberate violation of statutory provisions or contumacious act, penalty is not imposable upon the appellant.

In State of MP v. Bharat Heavy Electricals, 1998 (99) E.L.T. 33 (SC), it was observed that depending upon the facts of each case, the assessing authority has to decide as to what would be the reasonable amount of penalty to be imposed. That case pertained to the application of provisions of section 7(5) of the Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976.

Herein, the appellant paid service tax which is at a lesser rate i.e. 10.3%, on the remaining valuable consideration of the transaction. The two bills relied on by the appellant to claim exemption on the point of service tax are of subsequent date(s),

and can safely be said to have been collected from Season Catering Pvt. Ltd., to claim said exemption by covering the remaining 50% of the valuable consideration under taxable service. Long Form Agreement has not been produced before us, despite specific mention by counsel for the Revenue in this regard. In this situation, mala fide intention to evade payment of requisite percentage of tax can safely be attributed to the appellant. It cannot be said that the appellant had any reasonable cause, so as to set aside the penalty imposed.

In this situation, the decisions in –

i. **State of MP v. Bharat Heavy Electricals,** 1998 (99) E.L.T. 33 (SC).

ii. **Anand Nishikawa Co. Ltd - Vs Commissioner of Central Excise,** Meerut, reported in (2005)7 SCC 749.

iii. **M/s Hindustan Steel Ltd. Vs. State of Orissa** dated 04.08.1969 cited as 1969-VIL-01-SC.

iv. **Orix Auto Infrastructure Services Ltd. Vs. Commissioner DVAT** dated 05.02.2015 cited as 2015-VIL-76-DEL.

v. **Tamil Nadu Housing Board Vs Collector of Central Excise,** Madras (reported in 1994 (74) E.L.T 9 (S.C.).

vi. **CCE, Jalandhar v. Sarup Tanneries Limited**, 2005 (184) E.L.T. 217 (Tri. - Del.)

vii. **CCE, Ghaziabad v. Explicit Trading & Marketing (P) Ltd.**, 2004 (169) E.L.T. 205 (Tri. - Del.)

do not come to the aid of the appellant.

But, here the appellant deposited service tax at the rate of 10.3% on the balance consideration i.e. 50% of the total valuable consideration, and the appellant parted with this much money, even though towards tax under another Statute. As on today, we do not know, if the appellant is going to be refunded the said amount paid towards service tax. We find that here the penalty imposed on the appellant is very harsh.

Therefore, we deem it a fit case to reduce the amount of penalty ~~reduced~~ to Rs 50,000/-only. It is made clear that had the appellant not deposited said amount towards service tax, we would not have thought of modification on the point of penalty.

Accordingly, in the peculiar facts and circumstances of this case, we reduce the amount of penalty to Rs.50,000/-only.

Result

37. As a result of the above findings, appeal No. 951 is hereby dismissed, whereas appeal No.952 is disposed of with modification in the impugned order and assessment as to the amount of penalty, which is reduced from Rs. 31,47,003/- to Rs.50,000/- only.

38. Copy of the order be supplied to both the parties as per rules. One copy be sent to the concerned authority. Another copy be displayed on the concerned website.

Announced in open Court.

Date : 8/10/2021

(Rakesh Bali)
Member (A)

(Narinder Kumar)
Member (J)

Appeal No. 951-952/ATVAT/2013/1360-67 Dated: 13/10/21

Copy to:-

(1) VATO (Ward-)
(2) Second case file
(3) Govt. Counsel
(4) Secretary (Sales Tax Bar Association)
(5). PS to Member (J) for uploading the judgment on the portal of DVAT/GST, Delhi - through EDP branch.
(6) Dealer
(7) Guard File
(8) AC(L&J)
(9) Commissioner (T&T)

APPELLATE TRIBUNAL VAT DELHI

REGISTRAR