

**IN THE COURT OF COMMISSIONER  
DEPARTMENT OF TRADE AND TAXES  
GOVERNMENT OF N.C.T. OF DELHI  
VYAPAR BHAVAN, NEW DELHI**

No: 241/CDVAT/2009/4

Dated: 29.05.2009

**Season Catering Services Pvt. Ltd.  
B-6, Anupam Plaza, Opp, Azad Apartment,  
Hauj Khas, New Delhi - 110016**

**ORDER**

Present for the Applicant : Sanjiv Kumar Jha, A.R.  
Present for the Department : Shri T.C. Sharma, DR.

The above named applicant has filed this application u/s 84 of the Delhi Value Added Tax Act, 2004 (herein after referred to as the "said Act") and the question put up before this Court for determination under the aforesaid provision of law is as under:

**What will be the rate of tax on sales under catering business ?**

2. The application for determination has been made in the prescribed format DVAT-42 and the requisite fee of Rs. 500/- paid through Challan No. 842188 dated 28-02-2009.
3. The petitioner M/s Seasons Catering Services Pvt. Ltd. is engaged in outdoor catering business and has sought clarification on taxability and rate thereof on the outdoor catering service. Mr. Sanjiv Kumar Jha Authorized Representative of the firm appeared on 29-4-2009 and stated that the dealer is charging DVAT @ 12.5% on the sale value of the cooked food but w.e.f. September 2004, the catering business has been covered under service tax and he has to charge service tax upon 50% value of the invoice and that VAT should be charged on remaining 50% amount of the invoice value. He has also enquired as to whether or not Input Tax Credit is admissible to the petitioner on the purchase of L.P.G. used as fuel in his business.
4. Here it is relevant to refer to the definition of word 'sale' as it figures in section 2(zc)(vii) which reads 'sale' as follows:
  - (i) transfer of property in goods by one person to another;
  - (ii) transfer of property by auctioneer, banks and insurance companies;
  - (iii) transfer of goods on hire purchase or other system of installments;
  - (iv) supply of goods by society (including a co-operative society), club, firm, or any association to its members;
  - (v) transfer, otherwise than in pursuance of a contract, of property in any goods;
  - (vi) work contract transactions;
  - (vii) leasing-transfer of right to use goods;
  - (viii) supply, by way of or as part of any service or any other manner, of goods, being food or any other article for human consumption;
  - (ix) every disposal of goods as unclaimed or confiscated, or unserviceable or scrap, surplus, old, obsolete or as discarded material or waste products.
5. In the present case the applicant has submitted a copy of bill dated 18-07-08, the perusal of which shows the applicant is dealing in sale of cooked food. The said item is covered under the definition of term 'sale' in the section 2(zc)(vii).

6. 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. Thus the entire proceeds of the sale of food are liable to be taxed u/s 3 of DVAT Act.
  7. Here it is also pertinent to refer to para 88 of judgment of Hon'ble Supreme Court in case of Bharat Sanchar Nigam Vs. Union of India wherein the Apex Court has observed as follows:

“As has been succinctly stated in Federation of Hotel and Restaurant Association of India Vs. Union of India (1989) 3 SCC 634 - ‘subjects which in one aspect and for one purpose fall within the power of a particular legislature may in another aspect and for another purpose fall within another legislative power. They might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspect. But the fact that there is overlapping does not detract from the distinctiveness of the aspect’. No one denies the legislative competence of states to levy sales tax on sale provided that the necessary concomitants of a sale are present in the transaction and sale is distinctly discernible in the transaction.”
  8. The Hon'ble Supreme Court in the case titled The State of Madras Vs. Gannon Dunkerley & Co. (Madras) Ltd. had defined the ingredients of / concomitants of sale as follows:

“In order to constitute a sale it is necessary that there should be an agreement between the parties for the purpose of transferring title to goods, which presupposes capacity to contract, that it must be supported by money consideration, and that as a result of transaction property must actually pass in the goods.”

(b) The above said definition of sale has survived even 46th amendment to the Constitution of India.
  9. In the present case all the necessary concomitants of sale are present in transaction and sale is distinctly discernible. Thus the said transactions are liable to levy of VAT in view of ruling of the Hon'ble Supreme Court referred above viz. BSNL Vs. GOI.
  10. Further since the cooked food is an unspecified item the same shall be taxable @ 12.5%, in view of the provision of section 4(1)(e) of DVAT Act 2004. As regards, ITC on L.P.G. it is clarified that no Input Tax Credit is admissible u/s 9 (2) (b) read with clause 1(ii) of Seventh Schedule (List of non-creditable goods) appended to the Act.
  11. I have perused in detail the application filed u/s 84 of the Act and have heard the applicant as well as the DR. After going through the provisions of Law referred to above as well as judgment of Hon'ble Supreme Court in the Case of BSNL Vs. GOI, it is held 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 exigible to VAT. It is further held that the ‘cooked food’ is an unspecified item and hence taxable @ 12.5% u/s 4(1)(e). Further no ITC is admissible on LPG in view of provisions of Section 9(2)(b) read with Clause 1(ii) of the Seventh Schedule of DVAT ACT, 2004. Held accordingly.
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