

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment reserved on :24.05.2010

Judgment delivered on:19.07.2010

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W.P.(C) Nos. 5483/2008,

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5484/2008, 5485/2008, 5486/2008, 5487/2008, 5488/2008, 5489/2008, 6993/2009, 6994/2009, 6995/2009, 6996/2009, 6997/2009, 6998/2009, 6999/2009, 10972/2009, 10973/2009, 10974/2009, 10975/2009, 10976/2009, 10977/2009, 10978/2009, 10979/2009, 10980/2009, 10981/2009, 10982/2009 and 10983/2009.

**INDIAN RAILWAYS CATERING &
TOURISM CORPORATION LTD**

..... Petitioner

versus

GOVT OF NCT OF DELHI & ORS

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr RandhirChawla with MsRenukaSehgal

For the Respondents : Mr Rajesh Mahna with MrRamnand Roy
and MsNavneetDhillon for the Respondents 1 & 2.
Mr MukeshAnand with MrShaileshTiwari,
Mr R.C.S.Bhadoria and MrSumitBatra for the ` Respondents 3 & 4.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE V.K. JAIN

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| 1. Whether Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in Digest? | Yes |

V.K. JAIN, J.

1. By this common order, we will dispose of all the writ petitions referred above, which involve a common question of

law.

2. The petitioner is a Government company, providing services, including catering on board the trains run by Indian Railways, under identical contracts between the petitioner-company and Indian Railways. The petitioner has also sub-leased the contract in respect of some trains to various contractors. The consideration for these services is included in the fare charged by Indian Railways from the passengers and the petitioner-company is paid, by Indian Railways, for what it terms as the services, including catering provided by it to the passengers. The petitioner had in the past been paying VAT, in respect of the services on board the trains, including providing of food and beverages and the tax was paid up to 30th April, 2007.

3. Section 84 of Delhi Value Added Tax Act, 2004, to the extent it is relevant, provides that if any determinable question arises, otherwise than in proceedings before a court, a person may apply in the prescribed manner to the Commissioner for the determination of that question. The determinable question includes as to whether a transaction is or would be a sale.

4. The petitioner sought a determination from the Commissioner of Value Added Tax, under Section 84 of Delhi

Value Added Tax Act, 2004 (hereinafter referred to as “the Act”) on the taxability to VAT in respect of the food and beverages served to the passengers, on board the trains. The determination was sought on the following questions:

“(1) Whether in the facts and circumstances and the ‘Agreements’ signed between Indian Railways Catering & Tourism Corporation Limited and the Licensees, the food and beverages provided by the Licensee(s) to the passengers on moving trains for consumption is in the nature of ‘sale/purchase’ of food and beverages and whether it is liable to tax under the DVAT Act or that under the CST Act in Delhi?

(2) Whether in the facts and circumstances and the ‘Agreements’ reached between Northern Railways and the Indian Railways Catering & Tourism Corpn. Ltd., providing of food and beverages by the Indian Railways Catering & Tourism Corpn. Ltd. to the passengers during journey on board the running trains for consumption is ‘sale’ and whether the same is taxable under the DVAT Act; or that under the CST Act in Delhi?

(3) Whether on the request of the Indian Railways Catering & Tourism Corpn. Ltd., the Licensees are required to issue to the Corporation, the “Tax Invoices” in terms of Section 50 of the DVAT Act and the Indian Railways Catering & Tourism Corpn. Ltd. is entitled to claim credit of input tax at the time of working out the output tax payable by it in respect of the

sales made by it to the Railways?”

5. Vide Determination Order dated 23.03.2006, the Commissioner of Value Added Tax held that VAT was payable on the services provided on board the trains, since it amounted to sale within the meaning of Section 2(zc)(vii) of the Act. He also took the view that there were three transactions of sale, one from the licensee contractor to the petitioner, the second from the petitioner to the Railways and the third from the Railways to the passengers.

6. In the Determination Order, the Commissioner, inter alia, observed as under:

“Therefore, it comes out to be a clear case of sale/supply of food and beverages first by the Licensee(s)/Caterer(s) to the applicant Corporation, then by the applicant Corporation to the Indian Railways and thereafter, ultimately by the Indian Railways to the passengers on board. To put it in clear words, three sale transactions of food and beverages, first by the Licensee(s)/Caterer(s) to the applicant Corporation, second by the applicant Corporation to the Indian Railways and then the third by the Indian Railways to the passengers on board the running trains are involved in the whole process attracting tax at all stages under the Act. Further, in case, the suppliers i.e. the Licensee(s)/Caterer(s), the applicant Corporation and then the Indian Railways are all located in Delhi, they all are personally liable to collect

and pay the value added tax on their sales transactions individually at 12.5% u/s 4(1)(e) of the DVAT Act, 2004 in Delhi. Likewise, if the goods i.e. food and beverages are boarded by the Licensee(s)/Caterer(s) in the trains in Delhi, despite the fact that the Licensee(s) or the Caterer(s) are stationed/located outside Delhi and also the supplies are made by them to the passengers on running trains outside Delhi, the sales shall be treated to be the Local ones attracting tax under the provisions of DVAT Act, 2004.”

7. An appeal was filed by the petitioner before the Appellate Tribunal against the determination made by the Commissioner. It was submitted by the petitioner before the Appellate Tribunal that it did not have any grievance against the answers given by the Commissioner to the questions raised by them in their application seeking determination. They, however, objected to the following observations made by the Commissioner:

“However, in case, the first sellers i.e. the Licensee(s) and the Caterer(s) appointed by the applicant Corporation in such a case are located outside Delhi and also board the goods i.e. the raw materials etc. for preparing food and the beverages etc. for supplying them to the passengers on running trains outside the State, then their sales to the applicant Corporation shall be inter-State or say, outside the State while those of the applicant to the Indian Railways local and then again by

the Indian Railways to the passengers inter-State attracting tax under the provisions of the DVAT Act, 2004 and the CST Act, 1956 respectively. In this eventuality, the tax liability of the Licensee(s)/Caterer(s) shall arise under the CST Act, 1956 in the State in which they board the supplies on the trains. In such a case, the Indian Railways alone and not the applicant Corporation shall be entitled to demand from the applicant Corporation the "Tax Invoice" in term of Section 50 of the Act and then claim the credit of input tax on its basis from the Department. It is held and determined accordingly."

8. The contention before the Tribunal was that when the matter under reference was only with regard to taxability of food and beverages loaded on trains from Delhi, there was no occasion for him to observe regarding the taxability on the sale or purchase of goods taking place outside the State. It was submitted that the observations, regarding taxability of goods on running trains outside the State, was outside the ambit of Determination Order passed by the Commissioner. The Tribunal accepted the contention and quashed the above-referred portion of the Determination Order passed by the Commissioner.

9. The Assessment Order for the year 2007-08 was passed by Value Added Tax Officer (VATO), following the

Determination Order passed by the Commissioner of Value Added Tax. A Revision Petition filed by the petitioner against the order was dismissed vide order dated 10.12.2008.

10. Service tax under Section 65(105)(zzt) of the Finance Act, 1994 is being paid by the petitioner in respect of the transactions in question. The petitioner has been advised that there cannot be levy of both, service tax as well as VAT, on the same transaction. It has also been stated in the petition that catering services provided by an outdoor caterer on a train was fully exempt from service tax vide notification dated 10.09.2004, but that notification was rescinded vide subsequent notification dated 01.03.2006, which provides for 50% abatement, to the outdoor caterer. The case of the petitioner is that if the transaction entered into by it is subject to service tax, it cannot be subjected to levy of VAT and vice versa, since one transaction cannot be subjected to levy of both VAT as well as service tax. The submission is that service tax and VAT/sales tax operate in different fields and are mutually exclusive. The petitioner claims 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 has also been alleged in the petition that the respondents are seeking VAT even in respect of the food and beverages which are not loaded on the trains in Delhi.

11. The petitioner has accordingly sought a declaration that the services, rendered by it on board the trains, are not liable to Value Added Tax and are liable to service tax alone. It has been further prayed that in case it is held that the services provided by the petitioner alongwith food and beverages, amount to sale of goods, the provisions of Section 65(105) (zzt) of Finance Act, 1994 be declared ultra vires. The petitioner has also sought quashing of the Assessment Order in respect of the year 2007-08 as well as the Determination Order dated 20.03.2006, besides seeking orders restraining the respondents from levying sales tax/VAT on the services provided by the petitioner.

12. The petition has been contested only by respondent No.1-Government of NCT of Delhi and respondent No.2-Commissioner of Value Added Tax. No reply has been filed by respondents 3 to 5. The contesting respondents have taken a preliminary objection that the petitioner can file objections under Section 74 of the DVAT Act in case it is aggrieved from

the order passed by the VATO and a further remedy of appeal before the Appellate Tribunal is also available to it against the order of the Objection Hearing Authority.

13. It has been stated in the counter-affidavit that 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 29.08.2006 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, has become final. On merits, it has been alleged that the petitioner was receiving consideration from Indian Railways in respect of supply of food and beverages served to the passengers and, therefore, the transaction amounts to sale in terms of Section 2(1)(zc) of the Act. It has also been stated that services provided by the petitioner by employing staff to serve the food and beverages loaded from Delhi was incidental to the business of supply of food, etc. and the invoices, issued by the petitioner, clearly indicate that consideration was being received by it from Indian Railways for sale of food and

beverages. It has been further stated that the petitioner itself has admitted raising bills in respect of supply of cooked food, water and newspapers. It has been clarified that no VAT has been demanded in respect of supply of newspapers.

14. Since the order passed by the Tribunal has not been challenged by either party, the dispute before us is confined to payment of VAT in respect of the food and beverages which are loaded on board the trains in Delhi.

15. The procedure adopted for supply of food and beverages to the passengers is that the licensee(s)/caterer(s), who supply the food and beverages to the passengers in the running trains, raise sales bills and invoices in respect of those supplies, in favour of the petitioner-corporation which, in turn, issues a consolidated sale invoice of such supplies in the name of Indian Railways and receives the sale consideration from it.

16. It is an admitted position that the invoices are raised by the petitioner in favour of Indian Railways in respect of three items (a) food; (b) beverages; and (c) newspaper. Admittedly, no VAT is being claimed by the respondents in respect of newspapers. Admittedly, the payment is being taken by the caterers/licensee from the petitioner-company, which raises bills in favour of Indian Railways and takes payment

from it. The food is loaded in the trains as per the reservation chart finalized by Indian Railways and communicated to the petitioner. On completion of journey, the Train Superintendent of Indian Railways issues certificate as to actual occupancy of seats from one station to another. For example, in the case of August KrantiRajdhani, originating from Delhi and terminating at Mumbai, the certificate will be issued by the Train Superintendent once the train reaches Mumbai. The petitioner raises invoice upon Indian Railways towards food and water bottles on the basis of occupancy of seats, certified by the Train Superintendent. The food on board the train is served by the petitioner's men to the passengers. It is also the case of the petitioner that usually water bottles are served in Delhi, whereas the food items are served when the train is passing through another State.

17. As per the agreement between the petitioner-company and Indian Railways, the menu of the food items as well as their cost is fixed by the Railway Board. The revenue is shared between Indian Railways, the petitioner-company and the licensee/caterer engaged by the petitioner. For example, on a gross billed amount of Rs 1 lakh, for catering, water and newspaper, 15% of the billed amount, i.e., Rs 15,000/- is

shared between Indian Railways and the petitioner-company. Indian Railways retaining Rs 2250/- and the petitioner-company retaining Rs 12750/-. The balance amount of Rs 85,000/- is paid to the contractor.

18. It is also an admitted position that the meals cooked in the base kitchen and loaded on the trains, are kept in the train compartments which are equipped with equipments required for catering, such as boilers, freezers, hot boxes, etc. and these equipments are being provided and maintained by Indian Railways.

19. Section 2(i)(zc) of DVAT Act, to the extent it is relevant, reads as under:

“(z)(c) “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 state 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;

20. Section 2(m) of the Act defines goods and to the extent it is relevant, the provision reads as under:

“(m) “goods” means every kind of moveable property (other than newspapers, actionable claims, stocks, shares and securities) and includes-
(i) livestock, all materials, commodities, grass or things attached to or forming part of the earth which are agreed to be severed before sale or under a contract of sale”

Section 2(7) of Sale of Goods Act defines, goods as under:-

“(7) “goods” means every kind of moveable property (other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be served before sale or under the contract of sale;”

21. Section 4(1) of Sale of Goods Act, which defines sale, to the extent it is relevant, reads as under:-

“4. Sale and agreement to sell- (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price.”

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some

condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.”

22. Section 23 of Sale of Goods Act, which deals with unascertained goods and appropriation, to the extent it is relevant, reads as under:-

“23. Sale of unascertained goods and appropriation.- (1) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.”

23. Section 26 of Sale of Goods Act, which deals with risk in the goods, to the extent it is relevant, reads as under:

“26. Risk Prima facie passes with property.- Unless otherwise agreed, the goods remain at the seller’s risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer’s risk whether delivery has been made or not.

Provided also that nothing in this section shall affect the duties or liabilities of

either seller or buyer as bailee of the goods of the other party.

24. Section 33 of Sale of Goods Act, which deals with delivery of goods, to the extent it is relevant, reads as under:

“33. Delivery.- Delivery of goods sold may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorised to hold them on his behalf.”

25. An analysis of the definition of sale as given in Section 2(zc) of the Act and Section 4 of the Sale of Goods Act would show that the following are the essential ingredients of sale as defined in the Act:

- (i) There should be transfer of property in the goods between one person to another, which means that the ownership or title of the goods must necessarily get transferred from one person to another;
- (ii) The transfer should be for cash or for deferred payment or for some other valuable consideration.

It cannot be disputed and has not been disputed that the food articles and water, provided to the passengers in the trains, are goods within the meaning of Section 2(7) of Sale of Goods Act and Section 2(m) of the Act.

26. Since no tax is sought to be levied on Indian Railways, in the petitions before us, we are not concerned with the transaction between Indian Railways and the passengers and, therefore need not go into the question as to whether providing food by Indian Railways to the passenger, who travels in its trains as part of the ticket price, can be said to be a service provided by the Railways to the passenger or not. What we have to decide is as to whether the transaction between the petitioner-company and Indian Railways is a contract of providing service or a composite contract of providing service and selling goods or a contract only for sale/supply of goods.

27. In **State of Madras Vs. Gannon Dunkerley & Co.(Madras) Limited** : (1958) 9 STC 353 (SC), it was held by the Supreme Court that the expression 'sale of goods' in Entry 48 in List II of Schedule 7 of Government of India Act, 1935 cannot be construed in its popular sense but must be interpreted in its legal sense and should be given the same meaning which it has in the Sale of Goods Act, 1930, its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement. Thus, passing of property in the movable goods was held to be an essential ingredients of sale. It was held that a contract

under which a contractor agreed to set up a building would not be a contract for sale since it was one contract, entire and indivisible and there was no separate agreement for sale and goods justifying the levy of sales tax by the Provincial Legislatures. It was observed that the parties could have provided for two independent agreements, one relating to the labour and work involved in the execution of the work and erection of the building and the second relating to the sale of the material used in the building in which case the latter would be an agreement to sell and the supply of materials thereunder, a sale. Where there was no such separation, the contract was a composite one. It was not classifiable as a sale.

28. In **State of H.P. vs. Associated Hotels of India:**⁽²⁹⁾ *STC 474 (SC)*, the respondent-company, which carried on business as hoteliers as part of its business, received guests in its several hotels to whom, besides furnishing and lodging, it provided several amenities such as public and private rooms, bath with hot and cold running water, linen, meals during stated hours, etc. The bill tendered to the guest was an all-inclusive one, namely, a fixed amount for the stay in the hotel for each day and did not contain different items in respect of each of these amenities. The question before the Supreme

Court was whether the respondent-company was liable to pay the sales tax under the Punjab General Tax Act, 1948 in respect of meals served in the hotel, to guests coming there for stay. The Supreme Court observed that the transaction being essentially one and indivisible, namely, one of receiving a customer in the hotel to stay, it was essentially one service by the hotelier, in the performance of which and as part of the amenities incidental to the service, the hotelier serves meals in stated hours. It was held that the Revenue was not entitled to split up the transaction into two parts; one of service and the other of sale of food stuff and to split up also the bills charged by the hotelier as consisting of charges for lodging and charges for food stuffs served to him, with a view to bring the latter under the Sales Tax Act. During the course of the judgment, it was observed that even in the contract purely of work or service, it is possible that articles may have to be used by the person executing the work and property in such article or materials may pass to the other party, but, that would not necessarily convert the contract into one of sale of these materials. It was held that in every case the Court would have to find out what was the primary object of the transaction and the intention of the parties while entering into it.

29. In **Northern India Caterers vs. Lieutenant Governor of Delhi**: (1978) 48 STC 386 (SC), the appellant was running a hotel in which lodging and meals were provided on inclusive terms to the residents. Meals were also served to non-residents in the restaurant located in the hotel. The appellant before the Court maintained that having regard to the nature of the services rendered, there was no real difference between the two kinds of transactions and in both the cases it remained a supply and service of food not amounting to sale. It was held by the Supreme Court that the service of meals to the visitors in the restaurant of the appellant was not taxable under the Bengal Finance (Sales Tax) Act, 1941 as extended to the Union Territory of Delhi.

Review petitions were filed against the above-referred judgment dated September 7, 1978, which came to be decided vide judgment dated December 21, 1979. The respondents before the Court were apprehensive that the benefit of the judgment would be invoked by restaurant-owners in those cases also where there is a sale of food and title passes to the customers. After noticing that the facts alleged by the appellant were never disputed at any stage and no attempt was made by taxing authorities to enquire into the truth of the facts so

stated, the Supreme Court observed that it was in that factual context that it had examined the question whether any liability to sales tax was attracted. As regards sale in restaurants, the Supreme Court, inter alia, held as under:

“Indeed, we have no hesitation in saying that where food is supplied in an eating house or restaurant, and it is established upon the facts that the substance of the transaction, evidenced by its dominant object, is a sale of food and the rendering of services is merely incidental, the transaction would undoubtedly be exigible to sales-tax. In every case it will be for the taxing authority to ascertain the facts when making an assessment under the relevant sales tax law and to determine upon those facts whether a sale of the food supplied is intended.”

30. Pursuant to the Report of the Law Commission, Article 366 of the Constitution was amended by inserting, vide Clause 29A, a definition of “tax on the sale or purchase of goods” used in Entry 54 in the II list of the Schedule 7 of the Constitution, and to provide that such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods, by the person making transfer delivery or supply and to the person to whom such transfer delivery or supply is made.”

31. Clause 29A of Article 366, to the extent it is relevant, reads as under:-

“(29A) "tax on the sale or purchase of goods" includes-

(f) a tax on the 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,

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;']

32. All the sub-clauses of Article 366(29A) serve to bring transactions, where one or more of the essential ingredients of a sale as defined in the Sale of Goods Act, 1930 are absent, within the ambit of purchases and sales for the purpose of levy of Sales Tax. To this extent, the principle enunciated by Supreme Court in the case of **Gannon Dunkerley & Co.(Madras) Limited** (supra) now stands diluted. The catering contract has thus been brought within the fiction of a ‘deemed sale’ and splitting of service and supply in respect of such a contract has been constitutionally permitted. The decision of Supreme Court in the case of **Associated Hotels** (supra) has thus been legislatively invalidated by the 46th Constitutional

Amendment.

33. In **K. Damodarasamy Naidu & Bros. Vs. State of Tamil Nadu & Anr.:(2000) 117 STC 1 (SC)**, the issue relating to the right of the States to levy tax on the sale of food and drink vide Entry 54 of List II of the 7th Schedule to the Constitution came up for consideration before Supreme Court. Referring to its earlier decision in the case of **Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi: (1978) 4 SCC 36**, it was noted that by reason of the Constitution (46th Amendment) Act, 1982, as a result of the amendment in Clause 29A to Article 366 of the Constitution, the State had become entitled to levy a tax on the supply of food and drink. It was contended before the Supreme Court that in the eye of the law, the tax on food served in restaurants could not be levied on the sum total of the price charged to the customer, since restaurants provided services in addition to food, and these had to be accounted for. It was pointed out that the restaurants provided an elegant decor, uniformed waiters, good linen, crockery and cutlery and could even provide music and dance floors. It was contended that the bill that the customer paid, had therefore, to be split up between what was charged for such service and what was charged for the food. Repelling the contention, Supreme Court,

inter alia, held as under:

“The tax, therefore, is on the supply of food or drink and it is not of relevance that the supply is by way of a service or as part of a service. In our view, therefore, the price that the customer pays for the supply of food in a restaurant cannot be split up as suggested by learned Counsel. The supply of food by the restaurant owner to the customer, though it may be a part of the service that he renders by providing good furniture, furnishing and fixtures, linen, crockery and cutlery, music, a dance floor and a floor show, is what is the subject of the levy. The patron of a fancy restaurant who orders a plate of cheese sandwiches whose price is shown to be Rs 50 on the bill of fare knows very well that the innate cost of the bread, butter, mustard and cheese in the plate is very much less, but he orders it all the same. He pays Rs 50 for its supply and it is on Rs 50 that the restaurant owner must be taxed.”

34. In **The East India Hotels vs. Union of India**: (121) STC 46 (SC), it was contended before the Supreme Court that on a correct interpretation of Delhi Sales Act, 1975, the sales made in the restaurant could not be taxed even after 46th Amendment to the Constitution. Rejecting the reliance placed by the petitioners on **Northern India Caterer's** (supra), Supreme Court, inter alia, held as under:

“9. According to Section 2(g), all movable properties, materials, articles or

commodities are goods. Therefore, food in a restaurant has necessarily to be regarded as goods. According to Section 2(l), transfer of property in goods by one person to another would amount to sale. With cooked food or food which is supplied in a restaurant falling within the definition of the word “goods” in Section 2(g), transfer of property in the same would amount to sale as provided by Section 2(l).

12. In the present case, when a customer goes to a restaurant and orders food and in respect of which he pays the price indicated therein and the said food items are supplied to him, it would clearly be a case of transfer of property in goods to the customer. Whether the customer eats the entire or part of the dish or chooses not to eat at all would make no difference if he pays for the dishes supplied. The moment the dish is supplied and sale price paid, it would amount to a sale.”

35. In **Commissioner of Sales Tax vs. Departmental Catering (Northern Railways)**: (2006) 146 STC 287 (Delhi), the respondent was operating at New Delhi Railway Station and Parliament House, besides providing catering in running trains. While holding that selling of food stuffs by the respondent amounted to sale, this Court relied upon the following observations made by the Supreme Court in the case of **Northern India Caterers** (supra):-

“Further, that where food is supplied in

an eating-house or restaurant, and it is established upon the facts and the substance of the transaction, evidenced by its dominant object, is a sale of food and the rendering of services is merely incidental, the transaction would undoubtedly be exigible to sales tax. In every case, it will be for the taxing authority to ascertain the facts when making an assessment under the relevant sales tax law and to determine upon those facts whether a sale of the food supplied is intended.”

36. In **Bharat Sanchar Nigam Ltd. and Anr. vs. Union of India and Ors.**¹⁴⁵ *STC 91 (SC)*, the principal question involved in the case was the nature of the transaction, by which mobile phone connections are enjoyed, whether it was a sale or a service or both. The case of the service providers before the Court was that there was no sale transaction involved and the attempt of some States to levy tax on the provision of mobile phone facilities by them, to the subscribers, was constitutionally incompetent, the transaction in question being merely a service. The States, on the other hand, contended that the transaction was a deemed sale under Article 366(29A)(d) of the Constitution, read with the charging sections in the various sales tax enactments and, therefore, they were competent to levy sales tax on the transactions. It was held by the Supreme Court that the goods do not include

electromagnetic waves or radio frequencies for the purpose of Article 366(29A)(d) and the goods in telecommunication are limited to the handsets, provided by the service provider. As far as SIM cards were concerned, the issue was left for determination by the Assessing Authority. It was further held that nature of the transaction, involved in providing the telephone connection may be a composite contract of service and sale and 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. It was also held that the aspect theory, i.e., different aspects of a given transaction can fall within the legislative competence of two Legislatures and both would have the power to tax that aspect would not apply to enable the value of services to be included in the sale of goods or the parts of goods in the value of the services. During the course of the judgment, it was observed that there was no denial of the legislative competence of the States to levy tax on sales provided that the concomitants of a sale are present in the transaction and the sale is distinctly discernible in the transaction, but that does not allow the State to entrench upon the Union List and tax services by including the cost of such service in the value of the goods. It was held that even in those

composite contracts, which are by legal fiction, deemed to be visible under Article 366(29A) the value of the goods involved in the execution of the whole transaction cannot be assessed to sales tax. The Supreme Court, in the course of the judgment, inter alia, observed as under:-

“For reasons ultimately attributable to the principle enunciated in **Gannon Dunkerley & Co.(Madras) Limited** case (supra), namely, if there is an instrument of contract which may be composite in form in any case other than the exceptions in Article 366(29A), unless the transaction in truth represents two distinct and separate contracts and is discernible as such, then the State would not have the power to separate the agreement to sell from the agreement to render service, and impose tax on the sale. The test therefore, for composite contracts other than those mentioned in Article 366 (29A), continues to be - did the parties have in mind or intend separate rights arising out of the sale of goods. If there was no such intention there is no sale even if the contract could be disintegrated. The test for deciding whether a contract falls into one category or the other is to as what is 'the substance of the contract'. We will for want of a better phrase, call this the dominant nature test.”

37. The legal propositions, which emerge from a careful analysis of the above-referred decisions, can be summarized as under:-

(a) It is open to the States to levy sales tax/Value Added Tax, on the whole of the consideration, in transactions of sale of goods, such as sale to a customer in a restaurant, irrespective of the incidental element of service which is necessarily involved in sale of goods of this nature;

(b) If the transaction between the parties is covered under Article 366 (29A) of the Constitution, it is permissible for the States to levy and collect sales tax/Value Added Tax on the value of the goods involved in the execution of the transaction. It is not permissible to levy sales tax/ Value Added Tax in respect of service component of such composite transactions and;

(c) In respect of composite transactions, other than those covered by Article 366(29A) of the Constitution, if it is found that the intention of the parties was to segregate the element involving sale of goods from the element involving providing of service and actually the transaction represents distinct contracts which are clearly discernible, the State would have the power to separate the agreement involving sale of goods, from the agreement to provide services, and impose tax on the sale component of the transaction. If no such intention is found or the transaction does not involve two distinct

contracts, one for sale of goods and the other for providing of services, it is not permissible to disintegrate such a composite contract so as to levy sales tax/ Value Added Tax on that component which involves sale of goods, during the course of the transaction. The test for deciding whether the composite contract falls in the first category or in the second category would be to ascertain what is the dominant nature of the transaction between the parties.

38. As regards outdoor catering services, Supreme Court in the case of **Tamil Nadu Kalyana Mandapam Assn. vs. Union of India (UOI) and Ors.:(2004) 135 STC 480** noted as under:

“Similarly the services rendered by outdoor caterers are clearly distinguishable from the service rendered in a restaurant or hotel inasmuch as, in the case of outdoor catering service the food/eatables/drinks are the choice of the person who partakes the services. He is free to choose the kind, quantum and manner in which the food is to be served. But in the case of restaurant, the customer's choice of foods is limited to the menu card. Again in the case of outdoor catering, the customer is at liberty to choose the time and place where the food is to be served. In the case of an outdoor caterer, the customer negotiates each element of the catering service, including the price to be paid to the caterer. Outdoor catering has an

element of personalized service provided to the customer. 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.”

39. It was contended by the learned counsel for the petitioner that the transaction between the petitioner-company and Indian Railways amounted to catering services which attract levy of service tax and, therefore, cannot be subjected to levy of Value Added Tax. We are unable to accept the contention. As far as providing of food, snacks and water to the passengers on board the trains are concerned, the transaction, in our view, is altogether different from an outdoor catering service. Admittedly, the passengers travelling in the trains are served food and beverages as per a fixed menu approved by Railway Board. Neither the petitioner nor the passenger has any choice in respect of articles to be served in the trains or with respect to the quantity each passenger gets. It is not open to a passenger to ask for a food article of his choice, since neither such a food article is available in the train nor is the preparation or supply of food article as per the choice of the passenger, envisaged under the contract between the petitioner-company and Indian Railways. If the fixed menu

provides, for say, supply of one *samosa* and one cake to a passenger, he cannot ask for more than one *samosa* or more than one cake even on payment basis. He cannot even ask for a *samosa* in lieu of cakes or vice versa. He has absolutely no choice in the matter. The passenger has no role to play even with respect to the time and/or place at which the meals/snacks will be served to him. In fact, the passenger has absolutely no say in the matters relating to food/snacks, etc. provided to him in the train. He gets no refund from the Railways if he does not like or does not take the meals offered to him in the compartment. The requisite charges in this regard are taken from him by Indian Railways at the time of purchase of ticket by him and he pays the same charges in the ticket, irrespective of whether he wants meals in the trains or not. If the passenger does not take the meals at the time it is offered to him, he does not get it at all. Thus, there is no element of service at all, except heating the cooked food and serving the food and beverages. In fact, the service component in respect of sale of food in a restaurant is much more than supply of food to a passenger in a compartment of a train. If sales tax or VAT is leviable on the whole of the amount of bill paid in a restaurant, as held by the Supreme Court in the case

of **K. Damodarasamy Naidu & Bros.** and **The East India Hotels** (supra), it is difficult to say that it is not leviable in respect of food, provided to a passenger in a train. The service element, involved in providing meals to a passenger travelling in a train, is incidental and bare minimal required in selling of a food article/beverage to a customer. In fact, even in a shop-cum-restaurant, the meals are heated and beverages refrigerated and then served to the customer on his table in the crockery and cutlery provided by the shop-cum-restaurant. Even while selling a meal/snack/beverage off the counter, the seller heats the meal/snack and delivers cold/hot beverage to the customer. No one will buy meals/snacks if they are not hot, a soft drink, if it is not cold or a tea/coffee if it is not hot. The element of service, involved in serving a passenger travelling in a train, therefore, cannot be said to be higher than that involved in selling cooked food in a shop or in a restaurant.

40. The learned counsel for the petitioner has sought support from the decision of Supreme Court in the case of **Tamil Nadu Kalyana Mandapam Assn.** (supra). In that case, the members of the appellant-association, who were the owners of owners of Kalyana Mandapam /Mandapam-keepers,

used to let out Mandapam /premises to the clients. In addition to letting out the Kalyana Mandapam, they were also providing other facilities such as catering, electricity, water etc. to their clients. After introduction of service tax in India, vide Finance Act, 1994, the services provided to a client of a Mandapam-keeper in relation to a use of Mandapam in any manner, including the facilities provided to the client in relation to such use and also the services, if any, rendered as a caterer were brought within the purview of service tax. The value of a taxable service in relation to the service provided by a Mandapam-keeper was prescribed as the gross amount charged by such keeper from the client for the use of Mandapam, including the facilities provided to him in relation to such use and also the charges for catering, if any. The Central Government issued a notification exempting an amount of service tax leviable on a Mandapam-keeper in excess of amount of service tax, calculated on 60% of the gross amount charged from the client by the Mandapam-keeper. The notification also provided that the exemption shall apply only in such cases where the Mandapam-keepers also provide catering services and the bills indicated that it was inclusive of charges for catering services. It was contended before Supreme Court that service tax on

Mandapam-keeper was unconstitutional, as it was a tax on goods and/or land and not a tax on the services and, therefore, was not in the domain of the Union. It was observed by the Supreme Court that for the tax to amount to a 'tax on sale of goods', it must amount to a sale, according to the established concept of a sale and the Legislature cannot enlarge the definition of sale, so as to bring within ambit of taxation, transaction, which could not be a sale in law. 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. It was held that making available the premises for being utilized as a Mandapam, whether with or without services, would itself be a service and cannot be classified as any other kind of legal concept and does not involve transfer of movable property. It was noted that Mandapam-keepers provide a wide variety of services apart from the service of allowing temporary

occupation of Mandapam. A Mandapam-keeper, apart from maintenance of Mandapam, also provides the necessary paraphernalia for holding such functions, as well as the conditions and ambience which are required by the customer, such as providing the lighting arrangements, furniture and fixtures, floor coverings etc. It was further observed that the services provided by him cover method and manner of decorating and organising the Mandapam and the keeper provides the customer with advice as to what should be the quantum and quality of the services required, keeping in view the requirement of the customer and the nature of the event to be solemnized etc. It was noted that the logistics of setting up, selection and maintenance is the responsibility of the Mandapam keeper and that the services provided by him were professional services, which he alone, by virtue of experience, has the wherewithal to provide. It was further noted that a customer goes to a Mandapam-keeper not merely for the food that they will provide, but for the entire variety of services provided therein, which results in providing the function to be solemnized with the required effect and ambience.

41. In our view, serving cooked food to a passenger in the compartment of a train is not at all comparable with the

extensive and varied services, provided by a Mandapam-keeper. No arrangement of any kind is involved in serving cooked food to the passenger and no professional advice or expertise is given to him. No logistics, for the customers, are involved in serving the food and there is no question of organizing something for the passenger. Therefore, reliance on this judgment, in our view, is wholly misplaced.

42. The judgment in the case of **Bharat Sanchar Nigam Ltd.** (supra) also is of no help to the petitioner since the transaction of providing meals and snacks to the passengers, to our minds, is not a composite contract of service and sale, but is a transaction of outright sale by the petitioner-company to the Indian Railways. The service component, involved in the transaction, is purely incidental and minimal necessary for the purpose of sale of those goods.

43. The learned counsel for the petitioner has also referred to **Associated Hotels of India Ltd. vs. Excise and Taxation Officer and Anr.:** (1966) 17 STC 555 and **State of Punjab vs. Associated Hotels of India:** (1967) 20 STC (1), where it was held that the hoteliers, who make consolidated charge for providing their clients with residential accommodation, services, linen, food, etc. and who do not

allow any rebate if food is not taken or served transfer the food to the customers for consideration though the restaurants sales of non-residents and sales of packed food by the petitioner-company to its customers are taxable under the Punjab Act. These judgments are not attracted to the transactions before us which cannot be treated at par with a transaction of providing consolidated services of accommodation, linen, food, etc. to the resident customers in a hotel and which are like that of sale to non-residents or restaurant sale to a non-resident customer.

44. Reliance has also been placed upon the decision of the Supreme Court in **Imagic Creative vs. Commissioner of Commercial Taxes**:(12) VST 371 (SC). In this case, the appellant, an advertising agency, provided advertisement services by creating original concept and design advertising material and design brochures, annual report etc. The appellant was assessed under Karnataka Sales Tax Act, after deducting, from its gross turnover, the items such as taxes, discount and service charges, design and art work charges in which no transfer of property was involved, advertisement charges and sales outside the State. However, the Appropriate Authority ruled that the entire sale value, including the

creation concept done by the appellant, formed part of the value of the sale and tax had to be imposed on the entire sale value. Reversing the decision of the Appropriate Authority and affirming the order of the Assessing Authority, Supreme Court held that it was a case of composite contract of a service provider and in such a case sales tax would not be payable on the value of the entire contract, irrespective of the element of services provided. It was held that a composite contract of this nature was not a works contract. This judgment is not attracted to the facts of the case before us since element of service, involved in serving meals and snacks to the passengers, travelling in a train, cannot be treated at par with the services provided by an advertising agency in the form of consultancy, design and art work where no transfer of property is involved. The transaction between the petitioner-company and Indian Railways cannot be said to be a composite transaction, involving sale of goods as well as providing of services.

45. The learned counsel for the petitioner has also referred to the decision of this Court in *S.T. Appeal No.10/2009*, **Commissioner, VAT Trade and Taxes Department vs. International Travel House Ltd.** In that

case, the respondent had entered into an agreement with NDPL for hire of Omni vans. As per the contract, the respondent was to provide Omni vans on 24 hours/2500 Km per month per vehicle on a monthly cumulative basis @ Rs. 23,000/- per vehicle per month and 16 (sixteen) non-AC Omni vans on 12 hour/3000 Km basis @ Rs. 16,000/- car/per month. Extra Km above the cumulative 48000 Km per month was to be paid @ Rs. 4/Km and extra hours of duty in excess of 12 hours/day of duty @ Rs. 15/hr. The respondent was also obliged to ensure a number of other things, including uniform of chauffeurs and mobiles to them. The issues before this Court were (a) whether the transaction in question was sale within the meaning of Article 366(29A)(d); and (b) whether the contracts in question were contracts for service? It was contended before this Court that the contract satisfied the requirement of sale since there was a transfer of right to use the goods for valuable consideration and effective control and possession of cabs had been given to NDPL. The contention of the respondent, however, was that the transaction in question was not a transaction of sale because the effective control and possession of the goods remained with the respondent, since the vehicles were driven by its drivers and all the licences and permission

were in the name of the respondent. It was also contended on behalf of the respondent that since it was already paying service tax to the Central Government, the transaction in question, being services under the Central Act, the State Act cannot come in the conflict of Central Act. If this conflict arises, the State Act must necessarily give way to the Central Act. It was held by this Court that since the permission and licences with respect to the cabs were not available to the transferee and remained in control of possession of the respondents, it cannot be said that there was sale of goods by transfer of right to use goods inasmuch as a necessary ingredient of the sale, being the transfer of right to use the goods was absent.

The nature of the contract between Indian Railways and the petitioner-company is altogether different from the nature of the contract between NDPL and International Travel House Ltd., which was a subject matter of S.T. Appeal No.10/2009 and, therefore, this judgment does not advance the case of the petitioner in any manner.

46. Since these is transfer of goods, by the petitioner company to Indian Railways, for consideration and the property in the goods also passes to Indian Railways, the

transaction between them is no doubt a case purely of sale of goods under the provisions of Sale of Goods Act as well as Delhi Value Added Tax Act and the element of service by way of heating the food, heating/freezing the beverages and then serving them to the passengers is purely incidental and minimal required for sale of food and beverage in a transaction of this nature. There is no privity of contract between petitioner-company and the passengers travelling in trains. No package of services is being provided to Indian Railways, by the petitioner-company. It is neither a contract for providing service nor a composite contract for sale/supply of goods and providing of service by the petition-company to Indian Railways. The contesting respondents are, therefore, entitled to levy and demand VAT, on the entire amount of consideration paid by Indian Railways to the petitioner-company for food and beverages.

47. In the case of **Northern Caterers** (supra) one of the reasons for holding that the transaction was not a sale, was that the customer had no right to take away the unconsumed food. There is no such prohibition on the passengers travelling in trains. Since the transaction in a restaurant has, in subsequent decisions, been held to be a sale, despite the Court

taking the view that the customer had no right to take away the unconsumed food, there is no good reason to take a different view in a transaction involving a train passenger, to whom even such a disability is not attached.

48. It was contended by the learned counsel for the petitioner that merely on loading of the cooked food in the trains, the property or title in the goods does not get transferred to Indian Railways and since the meals and snacks are served after the train leaves Delhi, it cannot be said that the sale, if any, to the Indian Railways is made in the territory of Delhi. We are unable to accept the contention. Admittedly, the meals and snacks are kept in the hot boxes and refrigerators, belonging to the Indian Railways and provided in the train compartments. The moment the goods are loaded in train and are kept in those equipments, belonging to Indian Railways, the property in the goods gets transferred to Indian Railways. It would then be immaterial that these goods are served to the passengers after the train has left the territory of Delhi. Once the property in those goods is transferred to Indian Railways, on account of their being loaded on the trains and kept in the gadgets belonging to Indian Railways, those goods become the property of Railways and at the time of

service of those goods to the passengers, title in the goods vests in the Railways and not in the petitioner-company. If we accept the contention that the property in the goods is transferred to Indian Railways only when they are served to the passengers that would result in a situation where it will not be possible even to ascertain the place where the property in the goods passes to Indian Railways. Let us illustrate it by giving an example. If say biscuits are to be served to the passengers, the train may be in territory of one State when they are served to some of the passengers, whereas it may be in the territory of another State when they are served to the other passengers. We need to appreciate that the train keeps on running when these goods are served to the passengers and not all of them can be served at the same time. If the argument is accepted, the sale in respect of the goods served to some of the passengers may take place in one State, whereas sale in respect of the goods, served to the remaining passengers may take place in another State. If the food articles/beverages to be served are more than one, which normally is the case, one snack/meal may be served in the territory of one State, the second snack/meal may be served in the territory of the second State and the third snack/meal may be served in the

territory of third State. If the contention, advanced by the learned counsel for the petitioner is accepted, it will be difficult to find out which goods attract levy of sales tax/VAT in one State and which goods attract levy of similar tax in another State. As noted earlier, even the sale of one particular meal may take place in more than one States, since some passengers may get it in one State, whereas another passenger may get it in another State. The Court needs to avoid taking an interpretation which will result in a statutory provision becoming unworkable and incapable of implementation.

49. It was contended by the learned counsel for the petitioner that if unfortunately some accident is to take place before the food is served to the passengers, the petitioner will not get paid for the food loaded in the train which shows that the property in the goods does not pass to the Railways till they are served to the passengers. We, however, find that no such stipulation in the agreement of the petitioner with Indian Railways. In view of the provisions of Section 26 of the Sale of Goods Act, the risk in the goods would be of Indian Railways once they are loaded on the train and kept in the equipment, belonging to the railways since the statutory provision is subject to agreement between the parties, nothing prevents the

petitioner agreeing to bear the risk, despite property in the goods having already been transferred to the purchaser. It is important in such cases, to separate the risk factor, from passing of title in the goods. The seller may, if he so decides, agree to bear the risk even in those cases, where the property in the goods has passed to the buyer, and acceptance of risk by the seller does not necessarily exclude passing of property in the goods to the buyer. The ownership of the goods in such cases vests in the buyer, whereas the risk is incurred by the seller, by virtue of his agreement with the buyer. In fact, in a given case, the buyer may agree to bear the risk, even before the property in the goods passes to him. It is all a matter of agreement between the parties. It is an admitted position that the reservation chart of Indian Railways is supplied to the petitioner-company and the meals/snacks/beverages are loaded in the train, considering the number of passengers booked on the train. The petitioner-company knows, in advance, the number of passengers likely to board the train. Therefore, it cannot be said that the petitioner-company is loading excess or indefinite quantity of such goods on the train and consequently, the property in the goods does not pass to Indian Railways when they are loaded on the train. Section 33

of Sale of Goods Act provides for delivery of the goods by doing anything which the parties agree to treat as delivery or which has the effect of putting the goods in the possession of the buyer or any person authorized to hold them on his behalf. Since as per the agreement of the petitioner-Indian Railways, the goods are to be loaded on trains and kept in the equipment such as refrigerators and hot boxes owned by Indian Railways, this amounts to delivery of the goods to Railways and putting the goods into its possession, within the ambit of Section 33 of Sale of Goods Act. In fact, delivery of goods need not always be physical, and may, in appropriate cases, also be symbolic. This proposition finds statutory recognition in Section 33 of Sale of Goods Act.

50. It is true that at the time of execution of contract between the petitioner-company and Indian Railways, the goods, subject matter of the contract, are not ascertained and, in fact, the meals and snacks are not even in existence, since they have to be prepared at a later date. But, in view of the provision contained in Section 23 of Sale of Goods Act, as soon as the meals and snacks are cooked and, being in a deliverable state, are appropriated to the contract by loading them on the compartments of Indian Railways and keeping them in the

equipment belonging to the Railways, the property in the goods passes to the Indian Railways.

51. Admittedly, payment to the petitioner is required to be made by Indian Railways even if the food is not consumed by the passenger. This is yet another circumstance, indicating transfer of property in the goods to the Indian Railways on their being loaded on the train and are being kept in the gadgets of Indian Railways.

52. It was vehemently urged by the learned counsel for the petitioner that since the petitioner is already assessed to service tax in respect of the same transaction albeit with 50% abatement, it cannot be subjected to levy of Value Added Tax and in any case, the Value Added Tax can be levied only in respect of 50% of the transactional cost which is given as abatement to the petitioner-company. Since in our view, the transaction between the petitioner-company and Indian Railways, is a transaction purely of sale of goods and not a composite transaction for sale of goods and rendering of services, we cannot accept the contention advanced by the learned counsel. Section 2(zd) of the Act, to the extent it is relevant provides that sales price means the amount paid or payable as valuable consideration for any sale, including any

sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof. Therefore, the respondents, in our view, are entitled to levy and demand Value Added Tax on the whole of the consideration paid by the Indian Railways to the petitioner-company. It would be relevant to note here that the State is competent to levy sales tax/Value Added Tax on the entire sale consideration in respect of sale of goods and we cannot deny the constitutional right to State to levy such a tax merely because tax authorities have also collected service tax from the petitioner on the assumption that the contract between the parties was a contract of providing services or a composite agreement of providing services and goods. The petitioner has not prayed for refund of the service tax paid by it. It has only challenged constitutional validity of Section 65(105)(zzt) of Finance Act, 1994 since it permits levy of service tax on 'outdoor catering service.' Since respondents 3 to 5 have not come forward to file a reply and no arguments have been advanced before us on this question, we need not go further into this aspect of the matter. It is not our view that service tax cannot be levied on outdoor catering, as provided in Section 65(105)(zzt) of Finance Act, 1994. In our view, the transaction between the petitioner and Indian Railways does

not amount to a contract of providing outdoor catering, but, is a transaction of sale of food and beverages by the petitioner-company to Indian Railways.

53. It was pointed out by the learned counsel for the petitioner that the petitioner-company is paid for snacks only in respect of those number of passengers, who actually board the train which shows that the property in the goods does not pass to Indian Railways till the time they are served to the passengers. We cannot accept the contentions. The property in the goods in its transferred to Indian Railways, as soon as they are loaded on the compartments and kept in their equipment. If the petitioner-company has agreed, with Indian Railways, to charge only with respect to that quantity which is expected to be served to the passengers, who actually board the train, it is a matter of contract between the two parties and that by itself would not show that the property in the goods does not get transferred to Indian Railways on their loading on the compartments. As noted earlier, even out of those passengers, who actually board the train, some of them may not consume these meals/snacks, but the Indian Railways does pay to the petitioner for all the passengers boarding the train. It is, therefore, a business decision taken by the

petitioner-company, considering all pros and cons to charge from Indian Railways, only for that much quantity which is attributable to the number of persons actually boarding the train.

54. For the reasons given in the preceding paragraphs, we hold that the transaction between the petitioner-company and Indian Railways for providing food and beverages to the passengers, on board the trains, is a transaction of sale of goods by the petitioner-company to Indian Railways. It is neither a contract for providing services nor a composite contract for supply of goods and providing of services. We also hold that sale in respect of goods loaded on board the trains in Delhi, takes place, when the goods are loaded in the trains. Accordingly, we find no merit in the writ petitions and the same are hereby dismissed. It will, however, be open to the petitioner to claim refund of service tax already paid by it in respect of such transactions. If the refund is declined, the petitioner will be at liberty to initiate such proceedings, as may be open to it in law in this regard. If service tax is sought to be levied, upon the petitioner, in future, in respect of such transactions, it will be open to it, to challenge the same in appropriate proceedings.

The writ petitions stand disposed of.

(V.K. JAIN)
JUDGE

(BADAR DURREZ AHMED)
JUDGE

JULY 19, 2010
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