

A SODEXO SVC INDIA PRIVATE LIMITED

v.

STATE OF MAHARASHTRA & ORS.

(Civil Appeal Nos. 4385-4386 of 2015)

B

DECEMBER 09, 2015

**[A. K. SIKRI AND R. F. NARIMAN, JJ.]**

C *Maharashtra Municipal Corporation Act, 1949: ss.2(25),*  
2(31A), 2(42) – *Octroi or Local Body Tax – Imposition of, on*  
*Meal Vouchers – In the instant case, paper based vouchers*  
D *printed by appellant and sold to its customers, who in turn*  
*provide these vouchers to their employees for utilizing in the*  
*restaurants or different places or outlets to get ready-to-eat*  
E *items and beverages of the face value printed on these*  
*vouchers – Whether these vouchers can be treated as goods*  
*for the purpose of levy of Octroi or Local Body Tax or the*  
*said activity only amounts to rendering service by the*  
*appellant – Held: In this case, the arrangement is made by*  
F *the appellant with the affiliates for supply of goods against*  
*the vouchers – This arrangement is made to help the*  
*customers by simply facilitating the provision for making*  
*available food items etc of particular amount represented by*  
*vouchers to the employees of these customers – Thus,*  
G *appellant is only a facilitator and a medium between the*  
*affiliates and customers and is providing these services –*  
*These Meal Vouchers cannot be treated as ‘goods’ for the*  
*purpose of levy of Octroi or LBT – Payment and Settlement*  
*Systems Act, 2007 – Tax/Taxation – Local Body Tax.*

**Allowing the appeals, the Court**

**HELD : 1. These vouchers are not the commodity**  
**which are sold. If the face value of the said vouchers is**  
H **₹50, by giving these vouchers to its customers, the**

appellant only takes specified service charges from its customers, which is normally ₹ 2 for ₹ 50 voucher. Likewise, when these vouchers are given by the customers to its employees and the employees present the same to various affiliates with whom the appellant had made the arrangements and those affiliates supply the goods against those vouchers, while reimbursing the cost of these vouchers to the said affiliates, the appellant again takes service charges from these affiliates, which is again a sum of ₹ 2. Thus, insofar as the appellant is concerned, it has made the arrangements with the affiliates for supply of goods against those vouchers. This arrangement is made to help the customers by simply facilitating the provision for making available food items, etc. of a particular amount, represented by vouchers, to the employees of these customers. No doubt, vouchers bear a particular value and for such value, goods are provided to the employees. However, these goods are not provided by the appellant, but by the affiliates. The appellant is only a facilitator and a medium between the affiliates and customers and is providing these services. The intrinsic and essential character of the entire transaction is to provide services by the appellant and this is achieved through the means of said vouchers. Goods belong to the affiliates which are sold by them to the customers' employees on the basis of vouchers given by the customers to its employees. It is these affiliates who are getting the money for those goods and not the appellant, who only gets service charges for the services rendered, both to the customers as well as the affiliates. [Para 16] [1244-H; 1245-A-F]

2. The vouchers are not 'sold' by the appellant to its customers, as wrongly perceived by the High Court,

A and this fundamental mistake in understanding the whole  
scheme of arrangement has led to wrong conclusion by  
the High Court. The High Court has also wrongly  
observed that vouchers are capable of being sold by the  
appellant after they are brought into the limits of the city.  
B These vouchers are printed for a particular customer,  
which are used by the said customer for distribution to  
its employees and these vouchers are not transferrable  
at all. [Para 17] [1245-G-H; 1246-A]

C 3. Without the sanction/ authorisation of the RBI to  
operate such a payment system under the Payment and  
Settlement Systems Act, 2007, nobody can operate such  
a system, as the purpose of the said Act is to regulate  
the payment and settlement thereof by means of '*Paper*  
D *Based Vouchers*'. An insight into the Policy Guidelines  
dated March 28, 2014 issued by the RBI to regulate such  
transactions would also clinchingly bear out that the real  
nature of the transaction is to provide service and by no  
stretch of imagination these vouchers can be termed as  
E '*goods*'. The appropriate test would be as to whether  
such vouchers can be traded and sold separately. The  
answer is in the negative. Therefore, this test of  
ascertaining the same to be '*goods*' is not satisfied.  
F [Paras 18, 24] [1246-C-D; 1251-E-F]

4. Section 17 of the Income Tax Act, 1961, defines  
'*salary*' in the hands of the employees which becomes  
taxable under the Income Tax Act. Various components  
of salary are enumerated therein. Clause (viii) of sub-  
G section (1) of Section 17 includes '*the value of any other*  
*fringe benefit or amenity as may be prescribed*' as part of  
salary. Rule 3 of the Income Tax Rules prescribes the  
method of '*valuation of perquisites*'. Rule 3(7)(iii) deals

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with the value of free food, etc. The value of such free food and non-alcoholic beverage provided by an employer to an employee is treated as expenditure incurred by the employer and amenity in the hands of the employee. It is this perquisite given by the customer to its employees by adopting the methodology of vouchers and for its proper implementation, services of the appellant are utilised. [Paras 25, 26] [1251-G; 1252-A-B; 1252-F-G]

*Tata Consultancy Services v. State of Andhra Pradesh* 2004 (5) Suppl. SCR 1040 : (2005) 1 SCC 308; *Bharat Sanchar Nigam Ltd. & Anr. v. Union of India & Ors.* 2006 (2) SCR 823 : (2006) 3 SCC 1; *Idea Mobile Communication Limited. v. Commissioner of Central Excise and Customs, Cochin* 2011 (9) SCR 789 : (2011) 12 SCC 608; *Sunrise Associates v. Govt. of NCT of Delhi & Ors.* 2006 (1) Suppl. SCR 421 : (2006) 5 SCC 603; *H. Anraj v. Government of Tamil Nadu* 1985 (3) Suppl. SCR 342 : (1986) 1 SCC 414; *Yasha Overseas v. Commissioner of Sales Tax & Ors.* (2008) 8 SCC 681 – referred to.

Case Law Reference

2004 (5) Suppl. SCR 1040	referred to	Para 13	F
2006 (2) SCR 823	referred to	Para 21	
2011 (9) SCR 789	referred to	Para 22	
2006 (1) Suppl. SCR 421	referred to	Para 23	G
1985 (3) Suppl. SCR 342	referred to	Para 23	
(2008) 8 SCC 681	referred to	Para 23	

A            CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4385-4386 of 2015.

              From the Judgment and Order dated 20.03.2015 of the High Court of Bombay in Writ Petition No. 5653 of 2010 and Writ Petition No. 7503 of 2013.

B            N. Venkataraman, Sr. Adv., Jay Savla, Prasad P., Ms. Renuka Sahu, Ms. Amoha Sharma, Advs., for the Appellant.

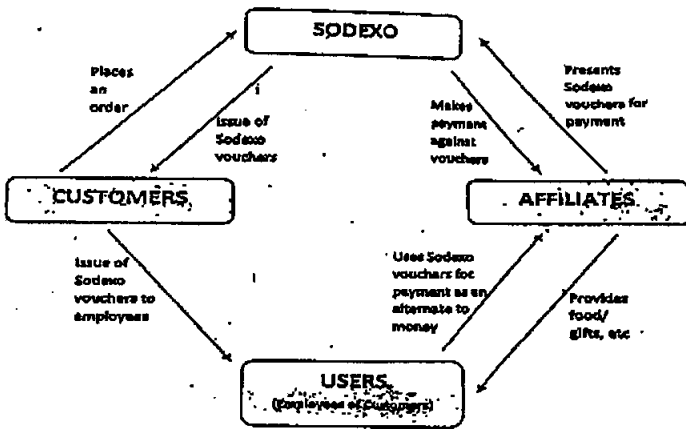
C            R. P. Bhatt, Sr. Adv., Chinmoy Khaladkar, Nishant Ramakantrao Katneshwarkar, Ashish Wad, Ms. Jayashree Wad, Ms. Kanika Baweja, Sangram Singh Bhonsle, Ms. Paromita Majumdar, M/s. J. S. Wad & Co., , Advs., for the Respondents.

D            The Judgment of the Court was delivered by

E            **A. K. SIKRI, J.** 1. The appellant company is conducting the business of providing pre-printed meal vouchers which are given the nomenclature of '*Sodexo Meal Vouchers*'. As per the appellant, it enters into contracts with its customers for issuing the said vouchers. These customers are establishments/companies having number of employees on their rolls. They provide food/ meals and other items to their employees up to a certain amount. It is for this purpose that the agreement is entered into by such establishments/ companies with the appellant for issuing the said vouchers. After receiving these vouchers for a particular denomination, some are distributed by the companies to its employees. For utilisation of these vouchers by such employees, the appellant has made arrangements with various restaurants, departmental stores, shops, etc. (hereinafter referred to as '*affiliates*'). From these affiliates, the employees who are issued the vouchers can procure the food and other items on presentation of the said vouchers. The affiliates, after receiving the said vouchers, present the same to the appellant and get reimbursement of

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the face value of those vouchers after deduction of service charge payable by the affiliates to the appellant as per their mutual arrangement. In this manner, the appellant, by issuing these vouchers to its customers, gets its service charge from the said companies. Likewise, the appellant also takes specified service charges from its affiliates. A diagrammatic representation of the business model of the appellant is as under:



2. On the basis of the aforesaid arrangement made by the appellant with its customers as well as its affiliates, the question that has arisen for consideration is as to whether these vouchers can be treated as 'goods' for the purpose of levy of Octroi or Local Body Tax (LBT) or the aforesaid activity only amounts to rendering service by the appellant. The issue has to be examined as per the relevant provisions of the Maharashtra Municipal Corporation Act [Act No. LIX of 1949] under which the Municipal Corporation is entitled to levy and collect Octroi or LBT.

3. Before we advert to the relevant provisions of the Act, it would be worthwhile to mention that in order to carry on the aforesaid business, the appellant is compulsorily required to obtain necessary approval/ authorisation from the Reserve

- A Bank of India (RBI), which requirement is spelt out from Section 7 of the Payment and Settlement Systems Act, 2007. The appellant has been granted a Certificate of Authorisation by the RBI to operate a payment system for the issuance of *Sodexo Meal Vouchers* in the form of '*Paper Based Vouchers*'
- B under the aforesaid provision.

4. The Payment and Settlement Systems Act, 2007 provides for the regulation and supervision of payment systems in India and designates RBI as the authority for that purpose and all related matters. Under Section 2(1)(i) of the Payment and Settlement Systems Act, 2007, a '*payment system*' is defined as a system that enables payment to be effected between a payer and a beneficiary, involving clearing, payment or settlement service or all of them but does not include a stock exchange. The appellant is also required to adhere to the Pre-paid Issuance and Operation of the Payments Instruments in India (Reserve Bank) Directions, 2009 issued under the Payment and Settlement Systems Act, 2007 and Revised Consolidated Guidelines, 2014. Thereunder, '*pre-paid payment instruments*' are defined as payment instruments that facilitate purchase of goods and services against the value stored on such installments. The value stored on such instruments represents the value paid for by the holders by ash, by debit to a bank account, or by credit card. The amount so paid by the customers is always kept in escrow account and is used strictly only for settlement of vouchers and never accounted for or used as income in the hands of the appellant. Accordingly, the Certificate issued to the appellant contains the following terms and conditions:
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"The Payment System Provider shall adhere to the provisions of the Payment and Settlement Systems Act, 2007, regulations issued thereunder and the directions/guidelines issued by the Reserve Bank of India.

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The authorization is only for issue of meal vouchers and gift vouchers in the form of 'Paper based vouchers' and 'Smartcard' or 'Smart Meal Card' and subject to adherence of the 'Policy Guidelines for issuance and operation of Pre-paid Payment Instruments in India' (unless specific relaxation has been permitted by the RBI)

Sodexo shall adhere to the provisions of the prevention of Money Laundering Act and ruled framed thereunder. Further, the guidelines on Know Your Customer/Anti-Money Laundering/ Combating Financing of Terrorism issued by the RBI to Banks, from time to time shall apply mutatis mutandis to the entity."

5. Thus, as per the aforesaid authorisation by the RBI, the business operation that is carried out by the appellant, has the following essential features:

(i) the payment system operated by the appellant involves issuance of vouchers having a face value (meal and gift vouchers) to the customers;

(ii) customers grant said vouchers to their employees (beneficiaries);

(iii) the employees use the vouchers to obtain/pay for food, meal or goods;

(iv) vouchers can only be used in an affiliated network of restaurants and shops (affiliates/redeemers);

(v) the affiliated restaurant/shop having delivered the food/meal/ good, receives the voucher and turns it to the appellant who issued it for reimbursement of the face value (redemption); and



A (vi) when the vouchers are redeemed, the appellant reimburses to the affiliate/redeemer the face value of the voucher and retains a service fee in order to compensate for the attractiveness of the system which has benefited to the affiliate's business. The appellant  
 B pays service tax on such service fee charged.

6. Having taken note of the nature of business operation of the appellant herein and the manner the same is statutorily regulated by the Payments and Settlement Systems Act, 2007  
 C and the Rules framed thereunder, we revert to the issue that has to be answered in the present case, namely, whether these *Sodexo Meal Vouchers* are goods within the meaning of Section 2(25) of the Act. For this purpose, it would be imperative to take note of the definition of goods appearing in  
 D the aforesaid provision as well as some other relevant provisions of this Act.

7. Section 2(25) of the Act provides the definition of 'goods', Section 2(31A) defines 'Local Body Tax' (LBT), and  
 E Section 2(42) contains the definition of 'Octroi'. These two provisions read as under:

**"2. Definitions.**

F In this Act, unless there be something repugnant in the subject or context, –

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(25) "goods" includes animals;

G xx xx xx

(31A) "Local Body Tax" means a tax on the entry of goods into the limits of the City, for consumption, use or sale therein, levied in accordance with the provisions of Chapter XIB, but does not include cess as defined in  
 H clause (6A) and octroi as defined in clause (42);

xx xx xx A

(42) "octroi" means a cess on the entry of goods into the limits of a city for consumption, use or sale therein; but does not include a cess as defined in clause 6A or Local Body Tax, as defined in clause (31A)."

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8. As is clear from the reading of Section 2(31A), LBT is the tax on the entry of goods into the limits of the city, when these goods are for consumption, use or sale. The tax is to be levied in accordance with the provisions of Chapter XIB. It, however, specifically excludes Octroi, as defined in Section 2(42). It also becomes clear that Octroi is a cess on the entry of goods into the limits of a city for consumption, use or sale therein, but it does not include a cess as defined in clause (6A) or LBT. Both these levies are on the goods that enter into the limits of a city for consumption, use or sale therein.

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9. The charging section, for imposition of tax under the Act, is Section 127. This provision enumerates various types of taxes. Sub-section (1) thereof empowers the Corporation to impose two kinds of taxes, namely, property tax and a tax on vehicles, boats and animals. Sub-section (2) also authorises the Corporation to impose certain other kinds of taxes which, *inter alia*, include Octroi and a cess on entry of goods in lieu of Octroi. Clause (aaa) was inserted in sub-section (2) by way of amendment carried out vide Mah.27 of 2009, with effect from August 31, 2009, whereby LBT was also included as another form of tax which could be levied and this clause reads as under:

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"(aaa) Local Body Tax on the entry of the goods into the limits of the City for consumption, use or sale therein, in lieu of octroi or cess, if so directed by the State Government by Notification in the *Official Gazette*;"

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A           10. Procedure for levying such a tax is contained in  
Section 149 and we would like to reproduce sub-section (1)  
thereof, which is as under:

**“149. Procedure to be followed in levying other  
B           taxes.**

(1) In the event of the Corporation deciding to levy any  
of the taxes specified in sub-section (2) of section 127,  
it shall make detailed provision in so far as such  
C           provision is not made by this Act, in the form of rules,  
modifying, amplifying or adding to the rules at the time  
in force for the following matters, namely:

(a) the nature of the tax, the rates thereof, the class of  
D           classes of persons, articles or properties liable thereto  
and the exemptions therefrom, if any, to be granted;

(b) the system of assessment and method of recovery  
and the powers exercisable by the Commissioner or  
E           other officers in the collection of the tax;

(c) the information required to be given of liability to the  
F           tax;

(d) the penalties to which persons evading liability or  
G           furnishing incorrect or misleading information or failing  
to furnish information may be subjected;

(e) such other matters, not inconsistent with the  
provisions of this Act, as may be deemed expedient by  
the Corporation:

Provided that no rules shall be made by the Corporation  
in respect of any tax coming under clause (f) of sub-  
H           section (2) of section 127 unless the State Government  
shall have first given provisional approval to the selection  
of the tax by the Corporation.”

11. In order to have the stock of all the relevant provisions  
of this Act, another provision which needs to be noticed is

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Section 152P, which relates to the provisions relating to LBT. A  
It is to the following effect:

**“152P. Levy of Local Body Tax.**

Subject to the provisions of this Chapter and the rules, B  
the Corporation, to which the provisions of clause (aaa) of sub-section (2) of section 127 apply, may, for the purposes of this Act, levy and collect Local Body Tax on the entry of goods specified by the State Government by notification in the *Official Gazette*, into the limits of the City, for consumption, use or sale therein, at the rates C  
specified in such notification.”

12. What follows from the conjoint reading of the aforesaid provisions is that LBT or Octroi is a tax *‘on the entry of goods into the limits of the city’*, which goods are meant for *‘consumption, use or sale therein’*. In this backdrop, we have to find out the true nature of the *Sodexo Meal Vouchers* and to ascertain whether they are *‘goods’*. D

13. The appellant had resisted the imposition of LBT E  
primarily on the ground that it was providing services to the establishments with whom it had entered into contracts and, therefore, such agreements were for service and not for sale of any goods. The High Court has negated the contention primarily on the ground, which, in fact, is the sole ground, that F  
the scheme postulates printing of the paper vouchers by the appellant which are sold to its customers. The said customers, in turn, provide the vouchers to their employees who use these vouchers in the restaurants or different places or outlets to get ready-to-eat items and beverages of the face value printed on the said vouchers. Therefore, the vouchers are used to pay G  
the price for food items and beverages distributed to users. The High Court, in the passing, has also remarked that these vouchers are capable of being sold by the appellant after they H

A are brought into the limits of the city. Therefore, the said  
vouchers have its utility and the same are capable of being  
paid or sold and same are capable of being delivered, stored  
and possessed. Thus, according to the High Court, the test  
laid down by this Court in *Tata Consultancy Services v. State*  
B *of Andhra Pradesh*<sup>1</sup> has been satisfied.

14. We may mention at this stage itself that the learned  
counsel for the respondent hammered the aforesaid reasons  
given by the High Court by adopting these reasons as his  
C arguments. Learned counsel for the appellant, on the other  
hand, referred to the intrinsic nature of the transaction with the  
aid of RBI Policy on the subject and certain judgments of this  
Court, on the basis of which he was vociferous in his submission  
that in reality it was only a service which was provided by the  
D appellant with no element of 'goods' involved in the transaction.

15. We have already taken note of the nature of the  
transaction. After going through the relevant provisions and  
the principle laid down in various judgments explaining the  
E features of 'services' and 'goods', we are of the opinion that  
the *Sodexo Meal Vouchers* cannot be treated as 'goods' for  
the purpose of levy of Octroi or LBT. There are at least three  
fundamental and principal reasons for coming to this  
conclusion, which we would like to discuss in detail hereinafter.

F (I) **Exact Nature of Meal Vouchers:**

16. The basic mistake which has been committed by  
the High Court is to proceed on the basis that after printing of  
the paper vouchers, these are sold by the appellant to its  
G customers. A diagramatic representation of the business  
model of the appellant, already depicted above, would make  
it manifest that the vouchers are not the commodity which are  
sold. If the face value of the said vouchers is rps ₹ 50, by

H <sup>1</sup> (2005) 1 SCC 308

giving these vouchers to its customers, the appellant only takes specified service charges from its customers, which is normally ₹2 for ₹50 voucher. Likewise, when these vouchers are given by the customers to its employees and the employees present the same to various affiliates with whom the appellant had made the arrangements and those affiliates supply the goods against those vouchers, while reimbursing the cost of these vouchers to the said affiliates, the appellant again takes service charges from these affiliates, which is again a sum of ₹ 2. Thus, insofar as the appellant is concerned, it has made the arrangements with the affiliates for supply of goods against those vouchers. This arrangement is made to help the customers by simply facilitating the provision for making available food items, etc. of a particular amount, represented by vouchers, to the employees of these customers. No doubt, vouchers bear a particular value and for such value, goods are provided to the employees. However, these goods are not provided by the appellant, but by the affiliates. The appellant is only a facilitator and a medium between the affiliates and customers and is providing these services. The intrinsic and essential character of the entire transaction is to provide services by the appellant and this is achieved through the means of said vouchers. Goods belong to the affiliates which are sold by them to the customers' employees on the basis of vouchers given by the customers to its employees. It is these affiliates who are getting the money for those goods and not the appellant, who only gets service charges for the services rendered, both to the customers as well as the affiliates.

17. It is to be borne in mind that the vouchers are not 'sold' by the appellant to its customers, as wrongly perceived by the High Court, and this fundamental mistake in understanding the whole scheme of arrangement has led to wrong conclusion by the High Court. The High Court has also wrongly observed that vouchers are capable of being sold by

A the appellant after they are brought into the limits of the city. These vouchers are printed for a particular customer, which are used by the said customer for distribution to its employees and these vouchers are not transferrable at all.

B (II) **Transaction Regulated By RBI Guidelines:**

C 18. As already pointed out above, without the sanction/ authorisation of the RBI to operate such a payment system under the Payment and Settlement Systems Act, 2007, nobody can operate such a system, as the purpose of the said Act is to regulate the payment and settlement thereof by means of *'Paper Based Vouchers'*. An insight into the Policy Guidelines dated March 28, 2014 issued by the RBI to regulate such transactions would also clinchingly bears out that the real nature of the transaction is to provide service and by no stretch of imagination these vouchers can be termed as *'goods'*. The very first para, viz. Para A, stipulates the purpose of these Guidelines and Rules as follows:

E **"A. Purpose**

F To provide a framework for the regulation and supervision of persons operating payment systems involved in the issuance of Pre-paid Payment Instruments (PPIs) in the country and to ensure development of this segment of the payment and settlement systems in a prudent and customer friendly manner. For the purpose of these guidelines, the term 'persons' refers to 'entities' authorized to issue prepaid payment instruments and 'entities' proposing to issue pre-paid payment instruments."

G 19. Introduction to these Guidelines mentions that the same are passed after a comprehensive review of the extant Guidelines and Instructions for the purpose of laying down the basic eligibility criteria and the conditions for operations of

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such payment systems in the country. Some of the definitions given in para 2 are reproduced below for better understanding of the system: A

**“2. Definitions**

2.1 **Issuer:** Persons operating the payment systems issuing pre-paid payment instruments to individuals/organizations. The money so collected is used by these persons to make payment to the merchants who are part of the acceptance arrangement directly, or through a settlement arrangement. B C

2.2 **Holder:** Individuals/Organizations who acquire pre-paid payment instruments for purchase of goods and services, including financial services. D

2.3 **Pre-paid Payment Instruments:** Pre-paid payment instruments are payment instruments that facilitate purchase of goods and services, including funds transfer, against the value stored on such instruments. The value stored on such instruments represents the value paid for by the holders by cash, by debit to a bank account, or by credit card. The pre-paid instruments can be issued as smart cards, magnetic stripe cards, internet accounts, internet wallets, mobile accounts, mobile wallets, paper vouchers and any such instrument which can be used to access the pre-paid amount (collectively called Prepaid Payment Instruments hereafter). The pre-paid payment instruments that can be issued in the country are classified under three categories viz. (i) Closed system payment instruments (ii) Semi-closed system payment instruments and (iii) Open system payment instruments. E F G

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A           **2.4 Closed System Payment Instruments:** These are payment instruments issued by a person for facilitating the purchase of goods and services from him/it. These instruments do not permit cash withdrawal or redemption. As these instruments do not facilitate payments and settlement for third party services, issue and operation of such instruments are not classified as payment systems.

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C           **2.5 Semi-Closed System Payment Instruments:** These are payment instruments which can be used for purchase of goods and services, including financial services at a group of clearly identified merchant locations/establishments which have a specific contract with the issuer to accept the payment instruments. D           These instruments do not permit cash withdrawal or redemption by the holder.

E           **2.6 Open System Payment Instruments:** These are payment instruments which can be used for purchase of goods and services, including financial services like funds transfer at any card accepting merchant locations (point of sale terminals) and also permit cash withdrawal at ATMs/Bcs.

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**2.8 Merchants:** The establishments who accept the PPIs issued by PPI issuer against the sale of goods and services.”

G           20. In order to ensure that payment received from the customer is paid to the affiliates against those vouchers, Para 8 provides for the deployment of money collected. As per this, the amount thus collected has to be kept in the escrow account and the persons, like the appellant herein, are under obligation

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to use this amount only for making payments to the participating merchant establishments and other permitted payments. A

21. Read in the aforesaid context, insofar as the appellant is concerned, it is only a service provider on the touchstone of the test laid down in ***Bharat Sanchar Nigam Ltd. & Anr. v. Union of India & Ors.***<sup>2</sup> Paragrah 87 of this judgment, enumerating this test, is reproduced below: B

“87. It is not possible for this Court to opine finally on the issue. What a SIM card represents is ultimately a question of fact, as has been correctly submitted by the States. In determining the issue, however the assessing authorities will have to keep in mind the following principles: if the SIM card is not sold by the assessee to the subscribers but is merely part of the services rendered by the service providers, then a SIM card cannot be charged separately to sales tax. It would depend ultimately upon the intention of the parties. If the parties intended that the SIM card would be a separate object of sale, it would be open to the Sales Tax Authorities to levy sales tax thereon. There is insufficient material on the basis of which we can reach a decision. However we emphasise that if the sale of a SIM card is merely incidental to the service being provided and only facilitates the identification of the subscribers, their credit and other details, it would not be assessable to sales tax. In our opinion the High Court ought not to have finally determined the issue. In any event, the High Court erred in including the cost of the service in the value of the SIM card by relying on the “aspects” doctrine. That doctrine merely deals with legislative competence. As has been succinctly stated in *Federation of Hotel & Restaurant Assn. Of India v.* C D E F G

<sup>2</sup> (2006) 3 SCC 1

A *Union of India*, (2005) 4 SCC 214: (SCC pp.652-53, paras 30-31)

B “ ‘...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’:

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C There might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is overlapping does not detract from the distinctiveness of the aspects.”

D 22. Further, para 20 of the judgment of this Court in *Idea Mobile Communication Limited. v. Commissioner of Central Excise and Customs, Cochin*<sup>3</sup>, shall be applicable here as well making it a case of service and not sale of goods. This para is as under:

E “20. The charges paid by the subscribers for procuring a SIM card are generally processing charges for activating the cellular phone and consequently the same would necessarily be included in the value of the SIM card. There cannot be any dispute to the aforesaid position as the appellant itself subsequently has been paying service tax for the entire collection as processing charges for activating cellular phones and paying the service tax on the activation. The appellant also accepts the position that activation is a taxable service. The position in law is therefore clear that the amount received by the cellular telephone company from its subscribers towards the SIM cards will form part of the taxable value

H <sup>3</sup> (2011) 12 SCC 608

for levy of service tax, for the SIM cards are never sold as goods independent from services provided. They are considered part and parcel of the services provided and the dominant position of the transaction is to provide services and not to sell the material i.e. SIM card which on its own but without the service would hardly have any value at all.”

23. We may also take note of the judgment of this Court in **Sunrise Associates v. Govt. of NCT of Delhi & Ors.**<sup>4</sup>, where this Court considered as to whether lottery tickets can be treated as goods and after discussing the earlier judgment in **H. Anraj v. Government of Tamil Nadu**<sup>5</sup>, pointed out that the primary test would be as to whether such lottery tickets would constitute a stock in trade of every dealer and, therefore, is a merchandise which can be bought and sold in the market. This was followed in another judgment in **Yasha Overseas v. Commissioner of Sales Tax & Ors.**<sup>6</sup>, wherein again the test of ‘flexibility in its utilisation and its transferability were discussed and applied in the context of REP licences’ to determine whether such licences were goods or not.

24. We may mention here that the appropriate test would be as to whether such vouchers can be traded and sold separately. The answer is in the negative. Therefore, this test of ascertaining the same to be ‘goods’ is not satisfied.

**(III) Real Character Of The Transaction Is The Facility By The Customers As Employers To Their Employees:**

25. Section 17 of the Income Tax Act, 1961, defines ‘salary’ in the hands of the employees which becomes taxable under the Income Tax Act. Various components of salary are

<sup>4</sup> (2006) 5 SCC 603

<sup>5</sup> (1986) 1 SCC 414

<sup>6</sup> (2008) 8 SCC 681

A enumerated therein. Clause (viii) of sub-section (1) of Section 17 includes *'the value of any other fringe benefit or amenity as may be prescribed'* as part of salary. Rule 3 of the Income Tax Rules prescribes the method of *'valuation of perquisites'*. We are concerned with Rule 3(7)(iii), which deals with the value  
B of free food, etc. and reads as under:

“(iii) The value of free food and non-alcoholic beverages provided by the employer to an employee shall be the amount of expenditure incurred by such employer. The  
C amount so determined shall be reduced by the amount, if any, paid or recovered from the employee for such benefit or amenity:

**Provided** that nothing contained in this clause shall  
D apply to free food and non-alcoholic beverages provided by such employer during working hours at office or business premises or through paid vouchers which are not transferable and usable only at eating joints, to the extent the value thereof in either case does not exceed  
E fifty rupees per meal or to tea or snacks provided during working hours or to free food and non-alcoholic beverages during working hours provided in a remote area or an off-shore installation.”

F 26. Thus, the value of such free food and non-alcoholic beverage provided by an employer to an employee is treated as expenditure incurred by the employer and amenity in the hands of the employee. It is this perquisite given by the customer to its employees by adopting the methodology of  
G vouchers and for its proper implementation, services of the appellant are utilised.

H 27. For all the aforesaid reasons, we are of the opinion that the judgment of the High Court has not discussed and decided the issue correctly and warrants interference. We,

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thus, allow these appeals and set aside the judgment of the High Court by holding that *Sodexo Meal Vouchers* are not 'goods' within the meaning of Section 2(25) of the Act and, therefore, not liable for either Octroi or LBT. A

There shall, however, be no order as to costs. B

Devika Gujral

Appeals allowed.