Read: Application dt.15.7.2011 and Amendment dt.18.09.2012 by M/s. L G Electronics India Pvt. Ltd., holder of TIN 27730296997V/C.

Heard: Shri Tapare, Advocate.

PROCEEDINGS
(under section 56 (1)(e) of the MVAT Act, 2002)

No.DDQ-11/2011/Adm.3/16/9-7

Mumbai, dt. 30/11/2013

M/s. L G Electronics India Pvt. Ltd., situated at A-5, MIDC Ranjangao, Tal. Shirur, Pune-412220 had filed an application u/s. 56 of the MVAT Act for determination of the applicability of VAT on the transaction entered into by the applicant. Initially the applicant has posed the following question for determination:

"Whether the movement of goods from Singapore to India, and the delivery of the goods made through the Free Trade and Warehousing Zone, based upon the order placed by LG India on LG Singapore will tantamount to a local sale in Maharashtra or same will qualify as a local sale in the course of import?"

The question was reframed thus:

"Whether sale of goods by M/s. L.G. International Singapore vide invoice No. LGIS10-091A dated 17/09/2010 to M/s. L.G. Electronics Indus Pvt. Ltd. Pune for USD 70 by effecting delivery of the goods through Arshiya Supply Chain Management Pvt. Ltd., duly authorized warehousing agent from Free Trade and Warehousing Zone, Dist. Raigad, Maharashtra is a sale effected in the course of import covered by section 5(2) of the CST Act or a sale effected within the State of Maharashtra liable for payment of VAT under the MVAT Act?"

02. FACTS & CONTENTION

Since the transaction was not fructified at the time of the original application, by communication dt.18.09.2012, with regard to the amended question as reproduced above, the applicant has contended thus:

1. The Ministry of Commerce and Industry (Department of Commerce) New Delhi vide notification no. S.O.1158(E) dt.04/05/2009 has notified the area at village Sai, Taluka Panvel, Dist. Raigad, Maharashtra State as a Special Economic Zone which is setup by M/s. Arshiya International Ltd. as a sector specific Special Economic Zone for Free Trade and Warehousing Zone. The Government of India, Office of the Development Commissioner, SEEPZ, Special Economic Zone, Ministry of Commerce and Industry, Mumbai by letter no. SEEPZ/NEWSEZ/Arshiya-Raigad/01/2009-10/3151 dt.23.3.2010 has approved M/s. Arshiya Supply Chain Management Pvt. Ltd. (ASCML) as a unit in a Special Economic Zone for Free Trade Warehousing Zone for the authorized operations of warehousing services and distribution service. M/s. L.G. International Singapore (LGIS) has executed an agreement and appointed ASCML as an agent for warehousing, warehousing and distribution of the goods from a warehouse in the Free Trade Warehousing Zone in Special Economic Zone at Panvel for and on behalf of LGIS.

2. LGIS under stock transfer invoice no. LGIS10-091 dt.25.8.2010 has consigned the goods in the name of ASCML vide bill of lading No. MGL-SHA201008224A dt.30.8.2010. On the basis of the bill of lading ASCML filed bill of entry for home consumption as Special Economic Zone Cargo and stored the goods in its unit at 181/3 in a Sector Special Economic Zone for Free Trade Warehousing Zone at Sai village, Taluka Panvel, Dist Raigad. M/s. L.G. International Singapore issued delivery order No.00001/ASCML/2010-11 dt.11.10.2010 in favour of M/s. ASCML for delivery of the goods to M/s. L.G. Electronics India Pvt. Ltd. Pune, (LGEIPL) which are sold by LGIS to LGEIPL, vide invoice no. LGIS10-091A dt.17.9.2010. Accordingly ASCML
delivered the goods to LGEIPL from the unit in the FTWZ in SEZ at Panvel. LGEIPL filed bill of entry for home consumption on 13.10.2010 and cleared the goods on payment of relevant customs duty.

3. The Government of India had announced a Special Economic Zone Scheme in April 2000 with a view to provide an internationally competitive environment for exports. The objective of SEZ include making available goods and services free of taxes and duties supported by integrated infrastructure for export production, expeditious and single window approval mechanism and a package of incentives to attract foreign and domestic investment for promoting export led growth. For the said purpose the Parliament enacted the Special Economic Zone Act, 2005. Section 50 of the SEZ Act provides exemption from State taxes to the developer or entrepreneur. The notification under section 50 can be issued where a taxable event is in respect of various taxes other than taxes under the CST Act. No notification is required under section 50 of the SEZ Act in respect of sale in the course of import from SEZ to DTA. The taxable event in this case is deemed import of goods within the customs barrier. As per section 2(n) of the SEZ Act Free Trade and Warehousing Zone means a Special Economic Zone wherein namely trading and warehousing and other activities related thereto are carried on. As per section 53 of the SEZ Act a Special Economic Zone shall, on and from the appointed day, be deemed to be a territory outside the customs territory of India for the purposes of Undertaking the authorized operations and a Special Economic Zone, with effect from such date as Central Government may notify, be deemed to be a port, in land container depot, land station and land customs stations, as the case may be, under section 7 of the Customs Act, 1962. Section 51 of the SEZ Act provides that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instruments having effect by virtue of any law other than this Act. Section 30 of the SEZ Act also provides that any goods removed from SEZ to DTA shall be chargeable to the duties of customs including anti dumping, countervailing and safeguard duties under the Customs Tariff Act, 1975, where applicable, as leviable on such goods when imported.

Section 2(11) of the Customs Act, 1962 defines “Customs Area” as the area of a customs station and includes any area in which imported goods or exported goods are ordinarily kept before clearance by the customs authorities. As per section 2(ab) of the CST Act “crossing the customs frontiers of India” means crossing the limits of the area of a customs station in which imported goods or exported goods are ordinarily kept before clearance by customs authorities. Thus the provision of section 2(11) of the Customs Act and section 2(ab) of the CST Act is on par. In the instant case LGIS has consigned the goods in favour of ASCMPL from outside territory of India. The said goods are stored in the unit in FTWZ in SEZ at Panvel and sold therefrom by LGIS to LGEIPL. The goods are sold before crossing the area where the goods were stored before clearance by the Customs authorities. Thereby the goods are sold before crossing the customs frontiers of India.

5. Reliance has been placed on the Supreme Court decision dt.03.02.2012 in Civil Appeal No.2560 of 2010 in M/s. Hotel Ashoka while stating that the goods had not been brought into the customs frontiers of India before the transaction of sale had taken place and therefore, the transaction had taken place before or outside the customs frontiers of India.

6. LGIS has issued delivery order to ASCMPL authorizing to deliver the goods by endorsing the delivery order in favour of LGEIPL. On their behalf, ASCMPL accordingly endorsed the delivery order in favour of the buyer on the basis of which LGEIPL filed bill of entry for home consumption, paid customs duty and cleared the goods from the customs authorities. Thus, LGIS has effected sale to LGEIPL by transfer of delivery order which is a document of title to the goods before the goods have crossed the customs frontiers of India. The transaction of sale in question is covered by the second limb of section 5(2) of the CST Act and it is immune from levy of tax either
under CST Act or the MVAT Act. While effecting sale before the goods have crossed the customs frontiers of India, transfer of document of title to the goods is immaterial as observed by the Supreme Court in the judgment in M/s. Hotel Ashoka.

03. HEARING

The applicant was called for hearing in the matter on dt.04.10.2011 when Sh. Manish Gaur (Advocate) and Sh. Sushil Ahuja and Sh. R.K. Jain (Deputy General Manager-Taxation) attended on behalf of the applicant. An account of the hearing may be seen thus:

1. LG Electronics is a subsidiary of LG(Kerala). LGIS is a company in Singapore from where order is placed for LCD panels. But LG (Singapore) does not sell directly to LGEIPL. There is an agent of LG(Electronics) in the Arshiya Free Trade Zone (Panvel). This agent is not registered. The goods come from LGIS to this agent who stores it in a bonded warehouse.

2. The question is whether the supply by Arshiya is in the course of import or not.

3. The issue is not raised by Arshiya but by the applicant as Arshiya is not registered. To this, it was brought to the notice of the applicant that the question should be raised by Arshiya as he is the person who supplies tax and liable to pay tax. Therefore, a prima facie view was expressed that the question should be raised by the seller. The applicant was informed that the maintainability of the application would be seen after which a hearing would be given based on the maintainability of the application.

The case was taken up for hearing on dt.31.07.2012 when Sh. Tapare (Advocate) attended and he was informed that the application was in the nature of a request for clarification on a hypothetical question as there was no evidence of a transaction which has taken place. Hence, he was directed to submit the following:

a. Bill showing that the transaction has been effected.

b. Steps in the process of receipt of goods from Singapore to India.

c. Say in the matter of the transaction, the nature of sale, etc.

The hearing in the matter was again conducted on dt.01.01.2013. Shri N.V. Tapare, Advocate and Shri R.G. Variya, C.A. attended the hearing. The issue is whether the transaction is a local sale or a sale in the course of import or a sale outside the State of Maharashtra. The course of events is -

i. It is claimed that the products move as a result of order placed by LGEIPL on LGIS. When asked about the details of the order with regard to the transaction in question, it was informed that as per oral or telephonic orders the goods move from Singapore. It was also queried as to whether all movement of goods from Singapore to India are based on orders from India. To this it was replied that there are certain transactions wherein the orders are orally placed or sometimes the goods are sent without orders too.

ii. LGIS has raised a stock transfer invoice dt.25.8.2010. It is in the name of ASCMPL on behalf of LGIS. LGIS has appointed Arshiya as an agent for storage, warehousing and distribution of goods from the Free Trade Warehousing Zone (FTWZ) in the SEZ at Panvel. Hence they were asked to furnish a copy of the agreement between LGIS & ASCMPL.

iii. After receipt of goods in Customs Station, ASCMPL files Bill of Entry for Home Consumption which is for transshipment of goods from Customs port to ASCMPL. There is no payment of duty at this stage. Bond is required to be submitted to the
iv. At this stage, the goods are outside the territory of State of Maharashtra.

v. LGIS raises a commercial invoice dt.17.9.2010 on LGEIPL.

vi. Delivery term mentioned on the Invoice is “Ex Warehouse - Arshiya FTWZ”.

vii. LGIS issues a Delivery Order dt.11.10.2010 in favor of ASCMPL directing delivery of goods to LGEIPL.

viii. LGEIPL files Bill of Entry dt.14.10.2010 for Home Consumption on the basis of Bill of Lading [by which goods were imported into SEZ].

ix. The goods are cleared by LGEIPL after final payment of duty.

x. Benefits from appointing Arshiya:-
   a) LGEIPL – Release the goods as and when they require after payment of duty
   b) LGIS – Trade facilitate
   c) Arshiya – Warehousing and storage changes from LGS

xi. In this transaction, no activity on the goods is done by Arshiya. The goods are only stored in their warehouse which is inside the customs Station.

With regard to the above facts, the arguments made are:

A) Sale in the course of Import into India.

   [I] (i) LGIS mentions in Bill of Lading purchase about order placed by LGEIPL.
   (ii) Goods have moved in pursuance on account of Section 5(2) - sale/purchase occasions such import.

   OR

   [II] (i) LGEIPL files Bill of Entry on the basis of Bill of Lading delivered by Arshiya.
   (ii) Bill of Lading mentions consignee as Arshiya on behalf of LGIS.
   (iii) Goods have moved. There is transfer of document of title by way of Delivery Order issued by LGIS.

B) Sale within the state of Maharashtra

   (i) It is not a sale within the State of Maharashtra between Arshiya and LGEIPL as Arshiya is acting as an agent as per direction of LGIS and particular area where goods are warehoused is declared as a Customs Port and hence outside the territory of Maharashtra.

In response to queries raised during hearing, it was informed thus:

1. ASCMPL is a service unit located in Arshiya FTWZ Port and is acting as Logistics Service Provider – and independent agent to LGIS for the purpose of storage and warehousing of their goods in the deemed foreign territory of Arshiya FTWZ-Port. ASCMPL has no relation or connection with LGEIPL.

2. LGIS exports goods on stock transfer basis to FTWZ under a Bill of Lading wherein port of final destination is mentioned as Arshiya FTWZ.

3. Since goods have to transship from JNPT to Arshiya FTWZ and both are ports, this movement of imported goods happens as per SEZ Rules,2006 under transshipment procedure without payment of customs duty. Transshipment is a movement of imported goods prior to customs clearance e.g., movement of imported goods from one port to another port for instance JNPT to any ICD/Port. The actual customs clearance happens at final port upon filing of Bill of Entry for Home Consumption and payment of Customs Duty.

4. The sale happens subsequently on the basis of Commercial invoice, Packing List, BL duly endorsed, Delivery Order raised by LGIS from Singapore on LGEIPL and goods are delivered to the buyer from FTWZ. After the sale transaction, the buyer of the goods inside FTWZ, namely LGEIPL files a Bill of Entry for Home Consumption with the Customs posted at Arshiya FTWZ Port (Port Code IN PNv6) and clears the goods on assessment and payment of customs duty along with any license, if any required for importations.
5. Transshipment of goods is permitted under section 54 of the Customs Act, 1962.

6. Transshipment of SEZ Cargo/Goods is governed by Rule 29 of SEZ Rules, 2006. For the purpose of transshipment of FTWZ Cargo - a Bill of Entry for Home Consumption with specially stamped endorsement as “SEZ Cargo” is filed with the Customs Officer posted at Arshiya FTWZ, who assess the Bill of Entry but no Customs duty is collected. This Bill of Entry is filed by ASCMPL with its own IEC on behalf of LGIS as per procedure followed in FTWZ and the duty amount is debited in the Bond-cum-Letter of Undertaking executed by the service Unit namely ASCMPL. The transshipment is allowed by the Port Customs at JNPT on the fifth copy of the Bill of Entry and the cargo moves to Arshiya FTWZ without payment of any customs duty but is covered under the Bond-cum-LUT of ASCMPL. The goods covered under the Bill of Entry is warehoused by ASCMPL in the FTWZ on behalf of LGIS as per agreement. Subsequent to the sale of the goods by LGIS to LGEIPL, a Bill of Entry for Home Consumption is filed by LGEIPL which is assessed by the Customs officer posted at Arshiya FTWZ Port and LGEIPL plays pays customs duty so assessed. After this the goods are cleared to Domestic Tariff Area by LGEIPL. At this time, any license required for import is to be produced by LGEIPL. The delivery of goods to LGEIPL happens under the following set of documents:

   a. Invoice of LGIS
   b. Packing List of LGIS
   c. Delivery Order issued by LGIS
   d. Bill of Entry for Home Consumption filed by LGEIPL
   e. Customs duty paid challan of LGEIPL

The Bill of Entry for Home Consumption filed for transshipment of goods from port to FTWZ-Port is a transshipment document and not a Bill of Entry for customs clearance as prescribed under Customs Rules and Regulations. The Bill of Entry for Home Consumption filed by LGEIPL for import clearance from FTWZ is the actual Bill of Entry for Home Consumption for duty assessment and payment and customs clearance as a result of which the goods cross customs territory to get mingled with land mass of India. The Bill of Entry for Home Consumption is the Bill of Entry as prescribed under section 46 of the Customs Act and Bill of Entry (Forms) Regulations, 1976 under the Customs Regulations.

A re-hearing in the matter was again held on dt.16.07.2013 when Shri N.V. Tapare, Advocate attended the hearing and reiterated the arguments made earlier. It was submitted that through submission dt.18.09.2012, exhaustive arguments supported by case laws have been made. Certain queries were raised during hearing which have been complied in the written submission dt.29.07.2013 thus:

Q. Why ‘Bill of entry for Home Consumption’ is prepared for transshipment of goods from port to FTWZ-SEZ? Since there are two Bills of entry for Home Consumption, it was queried as to why Bill of Entry for Warehousing is not prepared as Arshiya acts as a Warehousing agent only.

R. The applicant replied that the unit is under FTWZ-SEZ unit where in the goods are imported through Land or Ocean and they are bound by the SEZ Rule, 2006. According to rule 29(2)(a) the bill of entry for the purpose of taking the goods from shipment to FTWZ-SEZ, is always for home consumption and is mandatory and in compliance of rule, on the basis for which provisional assessment of Custom Duty is made by the Custom authority. The goods will remain in the said area before final clearance by the Custom authority.

Q. Whether transaction of the applicant is accounted in the books of accounts of Arshiya?
R. With regard to the query about the treatment by Arshiya of the transaction in the present determination proceedings, it was stated that the transaction cannot be accounted in the books
of Arshiya due to the following reasons:

a. A FTWZ does not do trading on its own rather provides its services to its foreign and DTA clients in terms of Rule 18(5) of SEZ Rules, 2006 read with instruction nos.49 & 60 issued by the Ministry of Commerce & Industry which permits to hold goods on behalf of foreign & DTA clients for the purpose of warehousing and sale.

b. Arshiya as a service provider/agent as a Port/FTWZ only provides Port services to its clients who in turn raises its bills in foreign currency for the services extended.

c. Such service charges earned exclusively in foreign currency is accounted towards achieving positive net foreign earnings.

d. Rule 53 of the SEZ Rules, 2006 outlines the calculation formula for achieving net foreign exchange which in majority covers supplies/imports/export values meant for manufacturing/trading units and it does not cover services rendered by a service unit to its clients.

e. Hence FTWZ can only include their service charges for the purpose of achieving positive net foreign exchange.

f. Arshiya has charged LG Singapore in foreign currency towards Port charges.

Therefore it cannot be accounted in the books of Arshiya.

Q. What is the difference between transshipment/movement of goods on the strength of a Bill of entry and on the strength of transshipment of bond?

R. Rule 28(7) provides an option to move the goods either on the strength of a bill of entry or under the transshipment bond which needs to be executed with the port customs. In terms of customs notification No.61/95-Cus.(N.T.) dt.28.9.95 amended by Notification No.31/98-Cus.(N.T.) dt.2.6.98 Notification No.59/2000-Cus.(N.T.) dt.10.10.2000 under the “Goods Imported (Conditions) of Transshipment Regulations, 1995” the importer/exporter or his authorized agent can make an application to the Commissioner of Customs at the Gateway Port to permit the transshipments under the transshipment bond executed and approved for such movement of goods/port. Accordingly to avoid port congestion and movement and movement delays on the strength of bill of entry, Arshiya obtained the transshipment permission with due execution of transshipment bond. This facility is to only expedite the containers movement from port to FTWZ. However, a bill of entry as defined in the Rule 28 & 29 above has to be filed for the following reasons:

- To regularize the movement into SEZ online system for accounting purpose of the Unit data.
- To comply with the rule 29 procedure as above to obtain the prior Gate-in permission.
- To provide the bill of entry copy to the importer for banking transactions purposes and records.

This movement of goods from Port to FTWZ is akin to movement of goods from Port to ICD/any other Port.

In view of the above facts, it is requested to treat the transaction as transaction of sale in the course of import covered by first limb of section 5(2) of CST Act as the same transaction was in pursuance of the purchase order placed by LGEIPL to LGIS.

Alternatively the transaction can be classified under second limb of sub- section 2 of section 5 of CST Act as the same is effected by transfer of documents of title to the goods i.e Bill of Lading in favour of LGEIPL. The said transfer of document is prior to the clearance of goods by LGEIPL who is paying the Duty i.e. Custom Duty and thereafter they are taking the delivery of goods in the FTWZ-SEZ area which is not a part of territorial area of the State of Maharashtra.

If the view as above is not acceptable, it is submitted that LGIS has delivered the goods to LGEIPL within a territory which is not a part of State of Maharashtra but the area is outside the State of Maharashtra and thus in view of the judgment of the Hon. Supreme Court in case of M/s. Hotel Asiska v. Assistant Commissioner of Commercial Taxes & ANR Civil Appeal No.2560 of 2010 dt.03.02.2012 the transaction of sale by LGIS (through Arshiya) to LG (India) is outside the State of Maharashtra.
OBSERVATION

I have reproduced the facts of the case and the contention of the applicant in detail.

The question for determination is

"Whether sale of goods by M/s. L.G. International Singapore vide invoice No. LGIS10-091A dated 17/09/2010 to M/s. L.G. Electronics India Pvt. Ltd. Pune for USD 70 by effecting delivery of the goods through Arshiya Supply Chain Management Pvt. Ltd., duly authorized warehousing agent from Free Trade and Warehousing Zone, Dist. Raigad, Maharashtra is a sale effected in the course of import covered by section 5(2) of the CST Act or a sale effected within the State of Maharashtra liable for payment of VAT under the MVAT Act?"

To ensure a proper understanding of the issue, I would enlist the course of events in the impugned transaction thus:

a. In the Bill of Lading is of dt.30.08.2010, LGIS is mentioned as the consignor. ASCMPL On behalf of LGIS is mentioned as consignee. There is mention of the name of ‘LGEIPL Ord. No.6010501050 alongwith other details’ in the column for Marks and Numbers Container & Seal No. The name of the vessel is ‘Hyundai Advance V.253W’

b. In the Stock Transfer Invoice dt.25.08.2010 raised by LGIS, it is mentioned - Consignee/SHipped To : ASCMPL On behalf of LGIS. The value is mentioned as USD 67. It is further mentioned thus - CIF NHAVA SHEVA FINAL DESTINATION ARSHIYA FTWZ CARGO, Vilage Sai, Panvel.

c. LGIS has addressed an ‘Authority letter of nil date to Dy. Commissioner of Custom, Arshiya FTWZ about appointing M/s. Swen Agencies Pvt. Ltd. to handle customs clearing forwarding & delivery including relevant documentation on their behalf.

d. There is a document titled ‘Final Delivery Order’ of dt.14.09.2010 by Hyundai Mérchant Marine India Pvt. Ltd. addressed to the Manager, Seabird CFS, Nhava Sheva to give delivery to Swen Agencies Pvt. Ltd. It is mentioned therein that the order is granted to consignee against Letter of Guarantee/Original Bill of Lading.

e. Bill of Entry for Home Consumption of dt.13.09.2010 mentions Importer’s name as ASCMPL on behalf of LGIS. There is mention of the name of ‘LGEIPL Ord. No.6010501050’ alongwith other details in the column for ‘Marks and Numbers’. The Declaration on the Bill of Entry which is to be signed by the Custom House Agent is signed by Swen Agencies Pvt. Ltd. This declaration bears a Note that - ‘Where a declaration is made by the Custom House-Agent, a declaration in the prescribed form shall be furnished by the importer of the goods. Accordingly on the reverse of the BOE, a declaration is signed by ASCMPL. Here Importer Code and BIN is mentioned as 0309063892. This IE Code belongs to LGIS.

f. A Commercial invoice dt.17.9.2010 is raised by LGIS on LGEIPL. Here consignee is mentioned as LGEIPL and the value is mentioned as USD 70. The Delivery term mentioned on the Commercial Invoice is “Ex Warehouse - Arshiya FTWZ”.

f. A Delivery Order dt.11.10.2010 is issued by LGIS in favor of ASCMPL directing delivery of goods to LGEIPL or in the event of endorsements as per directions mentioned in the endorsements.

g. In the Bill of Entry for Home Consumption of dt.14.10.2010, there is mention of the name of ‘LGEIPL Ord. No.6010501050’ alongwith other details in the column for ‘Marks and Numbers’. The importer is mentioned as LGEIPL unlike the Bill of Entry of dt.13.09.2012 where the importer was mentioned as ‘ASCMPL on behalf of LGIS’. In this BOE too, a note to the Declaration is signed by Swen Agencies Pvt. Ltd. However, the declaration on the reverse of the BOE to be signed by the importer is
left unfilled and unsigned. Here Importer Code and BIN is mentioned as 0596063211. This IE Code belongs to LGEIPL.

i. Challan dt.14.10.2010 showing amount of payment of duty by LGEIPL is furnished.

From a perusal of the above, it is seen that the transaction as presented to me by the applicant involves three parties namely the applicant i.e LGEIPL, LGIS and ASCMPL. It is informed that ASCMPL is appointed as an agent of LGIS. As I gather the facts, the first thing which comes to my notice and which has also been pointed to by the applicant is that LGIS has brought the goods into India first and thereafter the agent has been directed to give delivery of the goods to LGEIPL. In the Bill of Lading dt.30.08.2010, LGIS is mentioned as the consignor and the consignee is mentioned as ‘ASCMPL On behalf of LGIS’. Thus, LGIS on its own is causing the movement of goods into India. Since LGIS is mentioned as both the consignor as well as the consignee, there should not be any dispute about the party who brings the goods into India. I have to say that the intention of the applicant is reflected by his act of preferring to be both the consignor as well as the consignee of the goods. Therefore, mention or non-mention of the purchase order does not influence the course of events in any manner whatsoever. The fact is that LGIS has brought the goods into India.

On arrival of the goods in India, it is seen that the goods are taken to the FTWZ by the agent of LGIS. Thus even on arrival of the goods in the territory of India, there is no immediate delivery of goods directly to the applicant nor is there a delivery effected by endorsement of documents in favour of the applicant. This is evident when it is seen that two Bills of Entry for Home Consumption are filed in the instant case. The applicant has argued that the first Bill of Entry for Home Consumption dt.13.09.2010 is filed by the agent of LGIS i.e ASCMPL for the purpose of transshipment whereas the second Bill of Entry for Home Consumption dt.14.10.2010 is filed by the applicant only after a Commercial invoice dt.17.9.2010 and a subsequent Delivery Order dt.11.10.2010 is raised by LGIS directing ASCMPL to give delivery of goods to the applicant. Thus, the sale to the applicant is effected after the goods have reached India. The intention to sell the goods to the applicant is seen only when a Commercial invoice and a subsequent Delivery Order is prepared after the goods have landed in India. Till issue of such Commercial invoice, it is ASCMPL acting in the capacity of an agent of LGIS who is holding the goods in India. The goods may be at the port (Nhava Sheva in Maharashtra) or the FTWZ (Arshiya FTWZ in Maharashtra) but both these places form a part of the territory of India, more particularly the State of Maharashtra. The reference to the ‘territory of India’ in the immediately preceding observation is in keeping with the general understanding of what comprises the territory of India and not as per the Customs or Special Economic Zone Act.
The applicant has argued that the transaction is covered by the provisions of subsection (2) of section 5 of the Central Sales Tax Act, 1956 (CST Act). The present proceedings are under the provisions of section 56 of the MVAT Act, 2002 and to determine whether the impugned transaction is covered under the provisions of the MVAT Act, 2002, I have to examine the possibility of coverage of the impugned transaction under the aforesaid subsection of the CST Act. The sub-section reads thus:

"A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India."

Thus, what the above section says is that a sale or purchase shall deem to take place in the course of the import of the goods into the territory of India only if -

a. the sale or purchase either occasions such import

OR

b. the sale or purchase is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India.

The impugned transaction is a purchase of the applicant claimed to be in the course of import. With regard to the facts and discussion as held above, I find that both the above contingencies are not fulfilled in respect of the transaction in the present case as follows:

a. The first limb of the above sub-section says that the purchase should occasion the import. The same is not so in the present case when it is seen that the goods are brought into India by LGIS. LGIS is the consignor and by acting through an agent has consciously remained the consignee too. It was LGIS who had caused to bring the goods into India. Thus when the goods were brought in India, it cannot be said that the purchase by the applicant had occasioned the import.

b. The second limb says that the purchase is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India. The document of title to the goods in the present case is the Bill of Lading. There is no transfer of document of title to the goods in the present case. There is a sale of the goods to the applicant after the goods have reached India and the delivery order directing delivery is a normal course of events between a seller and a buyer. However, it has been contended that LGIS has effected sale to the applicant before the goods have crossed the customs frontiers of India by transfer of delivery order which is a document of title to the goods. With regard to this argument, I have to say that the Delivery Order is prepared at a later date (dt. 11.10.2010) than the
Commercial invoice (dt.17.9.2010) evidencing sale to the applicant. The Delivery Order in the present case is a mere direction to the agent directing delivery to the applicant and it comes after it has been decided to sell the goods to the applicant whereas the second limb of sub-section (2) of section 5 contemplates a sale or purchase which is effected by a transfer of document of title to the goods. Thus, the essential ingredient of the second limb of section 5(2) is that the sale should be by transfer of document of title to the goods. In the present case, the delivery order is not transferred or endorsed in the name of the applicant. Hence, there is no sale by a transfer of document of title to the goods. Here the sale has been effected first and what follows thereafter is an essential concomitant of sale i.e delivery of the goods. A 'Delivery Order' in the present case cannot be said to be indicating a sale to the applicant and is in fact for an event which comes 'after' the sale to the applicant has been finalized. The sale has already been effected and once a sale is effected, a delivery of goods is to follow. By virtue of the sale, the applicant has already become the owner of the goods and thereby has obtained the title to the goods. In this view of the matter, the 'Delivery Order', in the present case, cannot be said to be the documents of title to the goods. The document of title to the goods, in the present case, is the Bill of lading. In the present case when ASCMPL takes the goods to the FTWZ, the Bill of lading is surrendered. Thus, there could be no endorsement thereon or transfer thereof to the applicant. Thus, it is seen that the course of import was already over when ASCMPL filed the Bill of Entry for Home Consumption and the imported goods were assessed to duty. The sale transaction thereafter would be a local sale transaction liable to tax under the respective State Act. The document of title to the goods being the Bill of Lading, in the present case, there is no endorsement or transfer of the same. Also, the sub-section contemplates a transfer of documents of title whereas the present delivery order has the effect of directly giving delivery of the goods to the applicant. There is no transfer of delivery or title to the goods from any other person to the applicant. The party holding the goods is ASCMPL which is an agent of LGIS and therefore, it cannot be said that there is delivery by transfer of documents from self to self i.e LGIS to LGIS and thereafter to the applicant. The word "transfer" implies transferring over of something already in existence which is not the case in the present facts. Thus, there is no transfer of document of title to the goods in the present case as understood by the second limb of sub-section (2) of section 5 of the CST Act. The argument of the applicant that directing the delivery order to the applicant amounts to transfer of document of title to the goods is not well founded. The delivery order in the present case is simply a direction by the seller
to give delivery to the purchaser. Since ASCMPL is appointed as an agent, a direction to the agent to give delivery to LGEI is in effect a direction of the seller only. A possibility of diversion of the goods could not have been ruled out and it is in keeping with the same that LGIS has preferred to remain as the importer into India through its agent ASCMPL.

Having seen that the transaction is not covered by both the first limb as well as the second limb, I have to conclude that the impugned transaction is not covered by sub-section (2) of section 5 of the CST Act.

In the circumstances, the situation before me now is as to where the transaction could be said to have taken place. The delivery of the goods is taken at Arshiya SEZ - FTWZ which is located in Maharashtra and the applicant too is located in Maharashtra. Does this mean that the transaction is a sale within the State of Maharashtra? I find that the Hon. Supreme Court in the case of M/s. Madras Marine And Co. v. State of Madras (1986 63 STC 169) had an opportunity to deliberate on a similar situation. The verdict of the Hon. Court in the aforementioned case is worth reproducing thus:

- "It was rightly urged that the appropriation of goods took place in the State of Tamil Nadu when the goods were segregated in the bonded warehouse to be delivered to the foreign going vessels. It was not a case of export as there was no destination for the goods to a foreign country. The sale was for the purpose of consumption on board the ship. It was not as if only on delivery on board the vessel that the sale took place. The mere fact that shipping bill was prepared for sending it for customs formalities which were designed to effectively control smuggling activities could not determine the nature of the transaction for the purpose of sales tax nor does the circumstances that delivery was to the captain on board the ship within the territorial waters make it a sale outside the State of Tamil Nadu.

The goods were within the State of Tamil Nadu in case of ascertained goods at the time when the contract of sale was made and in case of unascertained goods at the time of their appropriation to the contract by the seller, sale must be deemed to be within the State of Tamil Nadu. Such appropriation took place in the bonded warehouses which were within the territory of the State of Tamil Nadu. Therefore, under sub-section (2), sub-clause (a) and (b) of section 4 of the Central Sales Tax Act, 1956, the sale of goods in question shall be deemed to have taken place inside the State because the contract of sale of ascertained goods was made within the territory of Tamil Nadu and furthermore in case of unascertained goods appropriation had taken place in that State in terms of clause (b) of sub-section (2) of section 4 of the Central Sales Tax Act, 1956.

There is no question of sale taking place in the course of export or import under section 5 in this case. From that point of view the amendment introduced by Act 103 of 1976 by incorporating in clause (ab) of section 2 of the Central Sales Tax Act, 1956, does not affect the position. In this connection reference may be made from the observations of this Court in Birmah Shell Oil Storage Ltd. [1960] 11 STC 764 (SC) where it has been held that customs barrier does not set a territorial limit to the territory of the State for sales tax purposes. Sale, therefore, beyond the customs barrier is still a sale within the State. The amendment introduced in section 2 by the Act 103 of 1976 does not affect the position because the customs station is within the State of Tamil Nadu. That question might have been relevant if we were considering the case of sale by the transfer of documents of title to the goods as contemplated by section 5 of the Central Sales Tax Act."

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The court referred to the observations in an earlier case of the Supreme Court thus:

- "The High Court in Civil Appeal No. 642 of 1974 has based its decision on the decision of this Court in State of Madras v. Davar and Co. [1969] 24 STC 481 (SC). In that case the assessee, a dealer in timber, had imported two consignments of timber from Burma and sold it to buyer in India. The ship carrying the first consignment arrived at the Madras Harbour on 17th October, 1957. The assessee obtained money from the buyers on 24th October, 1957, retired the documents of title from the bank and handed over the documents on the same day to the buyer to enable them to clear the goods. All charges and expenses by way of import duty, clearance charges, etc., were paid by the buyer on behalf of the assessee. The second consignment reached Madras by ship on 17th December, 1957, and the assessee obtained on 23rd December, 1957, from the buyers the value of the consignment after handing over to the buyers the necessary shipping documents. The assessee claimed that these sales were in the course of import and these were not liable to tax under the Madras General Sales Tax Act, 1959, as these were covered by article 266(1)(b) of the Constitution. It was held that the expression "customs frontier" in section 5(2) of the Central Sales Tax Act, 1956, did not mean "customs barrier". "Customs frontier" meant the boundaries of the territory, including territorial waters, of India. The sales in this case were effected by transfer of documents of title long after the goods had crossed the customs frontier of India; the ships carrying the goods in question were all in the respective harbours within the State of Madras when the sales were effected by the assessee by transfer of documents of title to the buyer. The sales were therefore not effected in the course of import."

Thus it can be seen from the above extracts, that the Hon. Apex court has held sale from a bonded warehouse to be within the state in which the same was located. The Hon. Apex court observed that a sale beyond the customs barrier is still a sale within the State. It was further observed that the words 'customs frontier' as appearing in the second limb of sub-section 2 of section 5 might have been relevant if there was a case of sale by transfer of documents of title to the goods as contemplated by the said limb. In the present case, as observed earlier, there is no occasion to observe that there is a sale by way of transfer of documents of title to the goods.

The applicant has relied on a number of cases. However, the facts of the present case are different. Hence, I refrain from entering into any exercise of distinguishing these cases with regard to the facts of the present case. The applicant has also cited the case of M/s. Hotel Ashoka (cited supra) wherein it has been held that the State of Karnataka has no right to tax any such transaction which takes place at the duty free shops situated at the International Airport of Bengaluru which are not within the customs frontier of India. It was observed that when the goods are lying in the bonded warehouses, they are deemed to have been kept outside the customs frontier of the country and the appellant was selling the goods from the duty free shops before the said goods had crossed the customs frontier. Even though this case is decided by a Division Bench of the Hon. Supreme Court, I have to observe that the decision in the two judges Bench of the very Supreme Court in M/s. Madras Marine (cited supra) was not before the Hon. Court while delivering the verdict in M/s. Hotel Ashoka (cited supra). In the circumstances, the law laid down in M/s. Madras Marine (cited supra) is also good law. Further, the facts in the instant case
stand on firm grounds such that the transaction is not covered by any of the two limbs as found in sub-section (2) of section 5 of the CST Act. It therefore goes without saying that the transaction represents a sale effected within the State of Maharashtra liable for payment of VAT under the MVAT Act.

Without any further deliberations, I would now ascertain how the impugned transaction is placed with regard to the provisions as appearing under the MVAT Act, 2002.

Section 8 of the MVAT Act, 2002 pertains to ‘Certain sales and purchases not to be liable to tax’ and sub-section (3) of this section provides that – “The State Government may, by general or special order published in the Official Gazette, and subject to such conditions and restrictions as may be specified in the said order, exempt from payment of tax any class or classes of sales of goods made by any unit in the Special Economic Zone, a developer or co-developer of the Special Economic Zone, any export oriented unit, any unit in the Software Technology Park or any unit in the Electronic Hardware Technology Park.” A plain reading of the section reveals that an exemption had to be specifically provided for and which in other words would mean that in the absence of such a provision, no specific treatment could be accorded to units referred to in the said sub-section (3). I have also perused the notification issued for the purposes of the above section. The exemption under this section is available only to the units referred to in this sub-section i.e. the sale by one unit to another unit, export of goods manufactured in a unit, etc. Though ASCMPL is a unit in the FTWZ, LGIS is not a unit in the SEZ. Since LGIS is not a unit in the SEZ, I need not even consider the argument that delivery of goods has been taken in the FTWZ-SEZ area, not a part of territorial area of the State of Maharashtra. However, it has been stated that ASCMPL is acting as an agent of LGIS. Nevertheless the situation doesn’t get any better as there are pronouncements of the Hon. Courts to the effect that SEZ forms a part of the territory of India.

Before referring to these case laws, I would briefly acquaint myself with the provisions governing exemption from taxes under the SEZ Act. Section 7 of the Act is about exemption from taxes, duties or cess under all enactments specified in the First Schedule of the Act in respect of any goods or services exported out of, or imported into, or procured from the Domestic Tariff Area by a Unit in a Special Economic Zone or a Developer. Section 50 of the Act provides that the State Government may, for the purposes of giving effect to the provisions of the SEZ Act, notify policies for Developers and Units and take suitable steps for enactment of any law granting exemption from the State taxes, levies and duties to the Developer or the entrepreneur. Thus, under both the sections, what needs to be observed is that a provision for exemption from taxes had to be specifically built into the Act and is not impliedly available owing to location in a SEZ. Further section
50 also makes one see that even the SEZ Act recognizes the location of a SEZ in any State in the territory of India and, by virtue of the said ideology, has granted powers to the State to provide for exemption from State taxes which otherwise would have been applicable. Coming back to section 7 of the SEZ Act, I have perused the First Schedule as referred to therein and it is seen that the State Sales Tax Act does not find a mention therein. This could be understood in view of the fact that there is a special provision crafted out for State Acts. As regards exemption to be granted by the State, I would discuss the issue at a later stage in this order.

There is also a section 51 which states that the provisions of the SEZ Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act. The Hon. Courts while discussing the scope of this section have decisively held that SEZ forms a part of the territory of India. Hence, without any further deliberations, I would refer to these cases thus:

The Hon. Kolkata High Court (Appellate Side) in 6237/2011 decided on 24 August, 2012 had an occasion to deal with an application for recalling of its judgment and order dated 6th July, 2010 passed in W.P. 16800 (W) of 2009. The short question involved in the writ application was whether procurement from Domestic Tariff areas of chrome ore, chrome sand and chrome settling for the unit of the petitioner at Falta, within a Special Economic Zone under the Special Economic Zones Act, 2005, would attract Customs duty. The Hon. Court while visiting the provisions of both the Customs and the SEZ Act expressed agreement with the view taken by the Division Bench of the High Court of Gujarat in Essar Steel Limited (2010-249-ELT -0003) wherein it was held that a Special Economic Zone was not located outside India. The Court reiterated the view that under Section 53(1), a Special Economic Zone is to be deemed to be territory outside the customs territory of India for the purpose of undertaking authorized operations. As observed in its order dated 6th July, 2010, the Hon. Court reiterated that the expression 'customs territory of India' has not been defined either in the SEZ Act or the Customs Act. The expression, however, finds reference in the General Agreement of Trade and Tariffs, commonly referred to as "GATT". There is a difference between Customs territory of India and territory of India. A Special Economic Zone is very much within India. Even though Special Economic Zone may be deemed to be outside the customs territory of India for purposes, specified in Section 53(1) of the SEZ Act, it is not to be deemed outside the customs territory for the purpose of levy of customs duty. With regard to the object of the SEZ Act, it was observed that the object of setting up Special Economic Zones is to provide certain benefits and exemptions to entrepreneurs operating in those zones and not to levy export duty or import duty for supplies to and from a Special Economic Zone.
to any other part of the territory of India. There is no inconsistency between the provision of the SEZ Act and the Customs Act in relation to levy of duty. Section 51 does not enable the Customs Authorities to adopt the provisions of the SEZ Act for the purposes of levy of customs duty, ignoring the express provisions of the Customs Act, 1962. It was finally observed thus:

'This Court is of the firm view that customs duty cannot be charged when goods are moved from a domestic tariff area to a Special Economic Zone area within the territory of India. Such movement would not constitute export within the meaning of the Customs Act. Similarly movement of goods from a Special Economic Zone to domestic tariff area would not constitute import within the meaning of the said Act.'

The Hon. Court cited the case of Essar Steel Limited & Anr. Vs. Union of India & Ors., (249 ELT 0003) wherein a Division Bench of the High Court of Gujarat at Ahmedabad, inter alia, held as follows:

"The movement of goods from the Domestic Tariff Area to the Special Economic Zone has been treated as export by a legal fiction created under the SEZ Act, 2005. A legal fiction is to be restricted to the statute which creates it. ........... Moreover, such legal fiction should be confined to the purpose for which it has been created. .......... As stated above/such movement has been treated as export under the SEZ Act, 2005 for the purpose of making available benefits as in the case of actual exports like duty drawback, DEPB benefits, etc. to the Special Economic Zone Unit/Developer or the Domestic Tariff Area supplier at their option. Constraining this movement of goods as entailing a liability of payment of duty runs absolutely counter to the purpose of the legal fiction created under the SEZ Act, 2005.

Section 51 of the SEZ Act, 2005 providing that the Act would have overriding effect does not justify adoption of a different definition in the Act for the purposes of another statute. A non-obstante clause only enables the provisions of the Act containing it to prevail over the provisions of another enactment in case of any conflict in the operation of the Act containing the non-obstante clause. In other words, if the provision/s of both the enactments apply in a given case and there is a conflict, the provisions of the Act containing the non-obstante clause would ordinarily prevail. In the present case, the movement of goods from the Domestic Tariff Area into the Special Economic Zone is treated as an export under the SEZ Act, 2005, which does not contain any provision for levy of export duty on the same. On the other hand, export duty is levied under the Customs Act, 1962 on export of goods from India to a place outside India and the said Act does not contemplate levy of duty on movement of goods from the Domestic Tariff Area to the Special Economic Zone. Therefore, there is no conflict in applying the respective definitions of export in the two enactments for the purposes of both the Acts and therefore, the non-obstante clause cannot be applied or invoked at all.

Similarly, reliance on Section 53 of the SEZ Act, 2005 to contend that a Special Economic Zone is a territory outside India, is misconceived. Section 53 provides that the Zone would be deemed to be a territory outside the customs territory of India for the purposes of undertaking the authorized operations. The term "customs territory" cannot be equated to the territory of India and in fact, such term has been defined in the General Agreement of Tariffs & Trade, to which India is a signatory, to mean an area subject to common tariff and regulations of commerce and that there could be more than one customs territory in a country. Moreover such an interpretation would lead to a situation where a Special Economic Zone would not be subject to any laws whatsoever. The entire SEZ Act, 2005 would be rendered redundant since it is stated to extend the whole of India. In any case, various provisions of the SEZ Act would be rendered redundant and unworkable if the Special Economic Zone was to be considered an area outside India. This is apart from the fact that such a declaration would be constitutionally impermissible.
In view of the above, the Hon. Court in the case of Essar Steel Limited (cited supra) held that the levy of export duty on goods supplied from the Domestic Tariff Area to the Special Economic Zone is not justified.

The Hon'ble High Court of Gujarat in the case of UOI v. Essar Steel Ltd. reported in 2008 (232) E.L.T. 617 also considered a question as to whether export duty under the Customs Act could be levied on supplies made from the DTA to a unit in the SEZ, taking into account the provisions of Section 2(m)(ii) of the Special Economic Zone Act, 2005, read with Section 51 of the said SEZ Act which defines the words import-domestic tariff area. The Hon'ble High Court held that the provisions of Special Economic Zone Act, 2005 cannot be automatically be extended to other Acts such as Customs Act and prima facie in the absence of specific provision under Special Economic Zone Act to levy Customs duty, no liability to pay Customs duty on goods supplied from DTA to Special Economic Zone would arise. The said decision of the Hon'ble Gujarat High Court was upheld by the Hon'ble Apex Court reported in 2010 (255) E.L.T. A115.

Even the Hon. Karnataka High Court in Shyamaraju & Co. (India) Pvt. Ltd. v. Union of India (256 ELT 193) pronounced thus –

"In the absence of any amendment of the expressions - "export" and "India" under the Customs Act, 1962, or any amendment under the charging Section 12, contemplating the movement of goods from the DTA to a SEZ as a taxable event entailing a levy of export duty, as in the case of export, the levy of export duty cannot be justified under the provisions of the Customs Act, 1962. This is apparent from the circumstance that such a charging provision namely, Section 76F as was introduced by inserting Chapter - XA under the Customs Act, 1962, being a special provision relating to the SEZs, that Chapter having been omitted by the Finance Act, 2007 and in the absence of the newly added provision, contemplating the movement of goods as aforesaid, would amount to a taxable event, attracting levy of excise duty, it cannot be said that it is a taxable event under the Customs Act, 1962.

..................

The movement of goods from the DTA to the SEZ is treated as an export under the SEZ Act only by a legal fiction for the purposes of the Act, namely, for making available benefits as in the case of actual exports like, duty drawback and other export benefits to the SEZ unit or the developer or a DTA supplier at their option. To construe this movement of goods as entailing a liability of payment of duty would run counter to the purpose for which the legal fiction is created under the SEZ Act. The levy of export duty as is evident arises under the Customs Act and not under the SEZ Act."

The exercise engaged by me in reproducing the decisions under the Customs Act is to bring home the point that a similar analogy could be drawn for the purposes of the MVAT Act, 2002 too. The Act provides for levy of tax in respect of a transaction taking place within the State of Maharashtra. There is no provision under the MVAT Act, 2002 whereby Arshiya FTWZ which is located in Maharashtra could be said to be a place
outside the territory of India. Similarly there is no provision under the SEZ Act to levy tax on a sale taking place within the State of Maharashtra. Thus, there is no conflict in the provisions of the MVAT Act and the SEZ Act. The Hon. Courts have held that a SEZ is very much within India and which in the present case falls within the State of Maharashtra in the Union of India. In view of all above decisions, it can be summarized that the location of ASCMPL within a SEZ would not alter the taxability of the transaction which has taken place within the State of Maharashtra. Hence, I would not deal with any of the arguments advanced as regards the purchase of LGEIPL being from a SEZ. Further, it is seen that other than this provision of exemption from tax to a unit referred to in sub-section (3) of section 8, there is no other provision which has the effect of treating the impugned transaction occurred within the State to be exempt from tax. The liability to discharge tax on a transaction effected within the State of Maharashtra would depend upon the arrangement between LGIS and its agent, ASCMPL.

05. In view of the detailed deliberations as at above, I pass the following order -

ORDER
(under section 56 (1)(e) of the MVAT Act, 2002)
No.DDQ-11/2011/Adm.3/16/B- 7
Mumbai, dt. 30/11/2013

1. It is determined that the sale of goods by M/s. L.G. International Singapore vide invoice No. LGIS10-091A dated 17/09/2010 to M/s. L.G. Electronics India Pvt. Ltd. Pune for USD 70 by effecting delivery of the goods through Arshiya Supply Chain Management Pvt. Ltd., duly authorized warehousing agent from Free Trade and Warehousing Zone, Dist. Raigad, Maharashtra is not a sale effected in the course of import under section 5(2) of the CST Act, 1956.

2. It is a sale effected within the State of Maharashtra liable for payment of tax under the MVAT Act, 2002.

(FOREIGN HAND)

(DR. NITIN KAREER)
COMMISSIONER OF SALES TAX,
MAHARASHTRA STATE, MUMBAI