# PROCEEDING OF ADVANCE RULING AUTHORITY UNDER SECTION 55 OF MVAT ACT, 2002 AND UNDER RULE 63 OF MVAT RULES, 2005.

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<th>SR.NO</th>
<th>PARTICULARS</th>
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<td>Name of applicant</td>
<td>M/s. Omega Meyer LTD, (OML). UK based company.</td>
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<td>Address</td>
<td>1. Sir Walter Raleigh House, 48/50 Esplanade, St. Helier, Jersey JEI 4HH.</td>
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<td>Jurisdictional Assessing Authority</td>
<td>AC (D-006), Investigation – A, Mumbai.</td>
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<td>Heard</td>
<td>Mr. C. B. Thakar (Advocate) and Miss. Prachi Thakar, Manager (Taxation).</td>
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<td>E-mail</td>
<td><a href="mailto:pthacker@meyer.co.in">pthacker@meyer.co.in</a></td>
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<td>Advance Ruling Authority</td>
<td>Shri.C.M. Kamble (Chairman),</td>
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<td>Shri.V.V.Kulkarni (Member),</td>
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<td>Shri.A.A.Chahure (Member).</td>
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(Order under section 55 (5) and (9) of MVAT ACT, 2002)

The Applicant, M/s. Omega Meyer Ltd, (for brevity referred as OML), an UK based company has submitted application under Section 55 of the Maharashtra Value Added Tax Act, 2002 for determination of the various questions and issues. The applicant has stated that in 2005, the enforcement authority has raised the issue as to why tax should not be levied on the royalty received by Britain based company Omega Meyer. The OML has entered into agreement with Indian Company, M/s. Meyer Organics Pvt. Ltd. (for brevity referred as MOPL). The issues and questions raised for advance ruling are framed in logical manner as under.
I] whether, the actual transaction effected is covered by the scope of entry, Technical Know How or services.

II] whether the transaction effected is sale in the course of export.

III] whether on the basis of circumstances of case, the prospective effect is to be given?

2. The Facts of Case: -

2.1 Mr. C.B. Thakar, Advocate attended and submitted that the applicant, M/s Omega Meyer is UK based company engaged in Bulk Drugs Research and Production and provides retainer ship. The applicant is not maintaining any establishment in India nor is having any registered office in India and are operating from UK. M/s. Meyer Organics is sister concern having its registered office in Maharashtra. They help Meyer Organics (Indian Company) in developing products (drugs), advising issues, procuring raw material, and quality control. Meyer Organics (Indian Company) has the license to manufacture drugs. The OML provides 'thoughts' / 'ideas' about the new products needed to be developed by MOPL's Research and Development Center. The basic formula is developed by MOPL after considering formulae of the competitive available products in the local markets and Local FDA rules and regulation for the use of ingredients. Further, he submitted the copies of FDA licenses to show that the formula for the product is registered in the name of MOPL. The OML provides consultancy only for upgrading / improvements in the products developed by MOPL considering its efficacy, quality and world-wide acceptance. The applicant is providing services on retainer ship basis to their group concerns which, in India, includes M/s. Meyer Organics Pvt. Ltd. (MOPL) and received money towards services from M/s. MOPL. It is also informed that on these services provided by the applicant, MOPL is paying service tax in India as per Service Tax Act and this supports the applicant's submission that they are providing services and not selling any goods, which can be covered under Sales Tax Laws of Maharashtra or India.

2.2 Mr. C.B. Thakar, Advocate further submitted that the applicant has entered into formal agreement (agreement dt. 15.09.1998 along with supplementary agreement dt. 18.2.2002) with MOPL. In this agreement, the scope of the services is mainly covered in clause 1 on page 1 of the agreement wherein they are providing know how for production of licensed products. It also includes quality control process and providing of services for procurement of raw materials used in the formulation of the products which are not available in India, that is, to be imported by MOPL from foreign country. It is also highlighted that they are in the continuous dialogue with MOPL and not only give know how for manufacturing the products at one time but they constantly go on improving the same as well as they regularly interact with MOPL to solve their queries as well as to give them further directions. In Para 2 on page 1, there is a reference of allowing trade marks
by the applicant to MOPL. However, it is clarified that there are no trademarks as on today which applicant belongs, which are allowed to MOPL to be used by them. All the trade marks which MOPL is using today are registered in its own name in India and hence in actual, the applicant is not charging any fees towards allowing the use of trademarks or brand name etc. but the fees received from MOPL are towards providing consultation on retainer ship basis. Since it is continuous process of providing services, it is difficult to identify the volume of services at every time and hence it is decided to charge fees based on the turnover.

2.3 MOPL has also obtained permission dt.15.2.2002 for remittance of this royalty to the applicant from Reserve Bank of India. It is seen that the permission is granted for remittance on account of Technical Know How fees. In short, it is a kind of a regular consultation, which is normally referred to as retainership. The fees are referred to as royalty. It is submitted that, there is no actual lease or sale of trade marks by the applicant to MOPL. The fees are only Technical Know How fees. Though in permission letter it is referred to as Technical Know How fees, as stated above, these are in nature of retainer ship fees for providing continuous information and other services. The applicant has provided services to MOPL are not 'goods'. Thus, there is no taxable sale covered by MVAT ACT, 2002. He has placed reliance on the judgment in the case of Venkateshwara Hatcheries Pvt. Ltd. (S.A. No.1752 of 2004 dt.5.8.2006). The reference application in above case is rejected by Ref. Appl. No.148 of 2006 dated 9.2.2007. The applicant is carrying on same activity as involved in above case and they are also providing continuous services to MOPL. Further, he stated that the applicant has not provided any readymade formulae, trade mark for the production of goods to MOPL, it cannot be said to be 'goods'. Similarly, since they are not 'goods' there cannot be a question of leasing.

2.4 Mr. C.B. Thakar, Advocate has argued that if at all from above respective services are considered to be sale of Technical Know How or lease, then it is submitted that it is in course of import.

2.5 Mr. C.B. Thakar, Advocate, further submitted that, certain issues are raised by Sales Tax Authorities and they are of the opinion that they will be liable for levy of tax on above transactions, since the wording used in the agreement is royalty. It is submitted that the issue is raised only because of wrong use of words. It is a settled position of law that no tax can be levied only because of wrong use of words. In any case, on the above facts and legal position, it is submitted that there is no sales tax liability on the fees received by them from MOPL. However, for the sake of clarity for past period as well as for future period, it is requested to determine the question whether any tax liability is attracted on providing services to MOPL from Britain under Sales Tax Laws of Maharashtra.
2.6 The prospective effect: - It is also requested that if it is determined that they are liable to pay tax then they request to protect their liability till the date of determination order as on above facts, the legal position was certainly fluid. They have not collected any tax on these transactions and service tax is paid as per legal position. Therefore, if at all the determination is against the applicant then they request to give the prospective effect.

03. The contention and legal submission of applicant: -

Mr. C.B. Thakar, Advocate stated that on the above factual background, the applicant has provided services to MOPL are not 'goods' and there is no taxable sale covered by MVAT ACT, 2002. Further, he stated that the applicant has not provided any readymade formulae, trade mark for the production of goods to MOPL, it cannot be said to be 'goods'. Similarly, since they are not 'goods' there cannot be a question of leasing. In the present case, the help is a continuous process. The 'help' granted by Omega Meyer is not 'goods' as it is not even technical knowhow as technical knowhow means a one-time formula supplied. Further, to substantiate the claim, he has submitted the details of services related to each sector and products.

The details of services rendered by OML and submissions thereon are mentioned as under.

3.1] Why Royalty doesn't cover "TECHNICAL KNOW HOW"? :-

Mr. C.B. Thakar, Advocate has stated that OML are not providing any readymade formulae. The basic formula for every product is developed by MOPL in its own R and D Centre. Only 'thoughts' or 'ideas' are given by us, considering our exposure to worldwide medical fraternity. He has stated some factual aspects as under.

a) All Trademarks are registered in the name of MOPL in India and belongs to MOPL. OML is not charging any fees towards allowing the use of trademarks or brand name etc. The details of Trademark registration and renewal status are submitted to validate the claim.

b) Moreover, these products have been sold by MOPL prior to agreement with us. This can be evident by referring the Trademark Registration status, which shows that the products are registered prior to date of the agreement.

c) MOPL has not been making any kind of remittance to OML prior to entering into agreement, though it was selling these products.

d) All the products licenses are registered in name of MOPL in Indian Drug and Food Administration Department, which evidences the fact that Formula was created and developed by MOPL.
3.2] Why MOPL obtains Consulting Service from OML:

Mr. C.B. Thakar, Advocate has stated that basically the cost of resources involved in introducing/bringing a new product / molecule in the market is substantial. This is due to various challenges faced in research and development, clinical trials, stability, efficacy, market acceptance, quality and product safety etc. It's very difficult to face and bear such cost and challenges for small/medium size pharmaceutical companies like MOPL. Hence, most of the companies either employs highly-paid skilled and intellectual personnel who move around the world to study the technical as well as marketing aspects of pharmaceutical industry or depend on outside expertise who provides such services on continuous and regular basis.

In order to seek more expertise MOPL has entered into contractual agreement with us due to our worldwide exposure to Pharmaceutical Industry, especially to NEUTRACEUTICAL SEGMENT with the availability of skilled and intellectual personnel resources at applicant's end. However, as OML, a known party (as a shareholder in MOPL), MOPL has sought our advice, ideas and thoughts at various times. Moreover, MOPL had considered the option of paying our retainership fees based on impact of our ideas, thoughts and services on their sales (i.e. income) instead of paying high fixed fees / salary which other companies normally pay to their in-house intellectual and skilled staff and personnel. By this, MOPL wants to limit its liability for cost concern. Since it is process of providing services continuously as per requirement, it is difficult to identify the quantum of services and hence it is decided to charge a fee based on the turnover.

3.3] What type of Services are provided by us to MOPL, against Royalty

As stated in above paragraph, the applicant has tried to explain the services provided in different aspect. The applicant has produced the documents pertaining to the claims and argued that transaction involved is to be analyzed on the basis of factual matrix. The applicant has submitted the scope of services as under;

I] Providing various ideas for product introduction and Product up-gradation.
II] The sharing of clinical trial.
III] Information about various Manufacturing Processes and Techniques to improve quality and efficacy of products.
IV] Improvement in Quality Control process.
V] Assistance in procurement and specification of raw and packing materials.
VI] Use of Medical information.
The details of above services are as follows;
Providing various ideas for product introduction and Product up-gradation:

Due to our world-wide expertise in Pharmaceutical Industry, the applicant has provided new ‘thoughts’ / ‘ideas’ on new emerging market, segment, therapy and products to MOPL. These services have direct impact on MOPL sales. As on today, MOPL majorly covers five medical fraternity in local market, over i.e. Gynecology, Pediatric, Physician, Orthopedic and General Practitioner, whereas prior to our relationship with MOPL, they were concentrating only on GYNAECOLOGY with the major sale in products like Menopace, Calcimax and Premiance etc. Today, MOPL is having three marketing division concentrating on each medical fraternity i.e. PHARMA division – visiting Gynecology, CELLAGE Division – visiting Pediatric and Physician and EXCEL Division – Orthopedic and General Practitioner. These ‘ideas’ were given by us, by studying World-wide Pharmaceutical Market, especially “NEUTRACITICAL”. Some of the products (whose thoughts/ideas or up-gradation done by us) are brand leader in their market segment like CALCIMAX, KIDICARE, OLIGOCARE, OVACARE etc.

It is stated that OML give the ‘thoughts’/ ‘ideas’ about the new products needed to be developed by MOPL’s R and D Center. The basic formula is developed by them after considering formulae of the competitive available products in the local markets and Local FDA rules and regulation for the use of ingredients. The copy of FDA licenses in which the formula for the product is registered in the name of MOPL is also submitted. The applicant has provided only consultancy for upgrading / improvements in the same considering efficacy, quality and world-wide acceptance.

As an illustration, the applicant has submitted the details of services rendered by him for different products. Some of them are as follows;

a) MENOPACE: In India Hormonal replacement therapy (HRT) was the traditional type of treatment available for Menopausal symptoms but the same was full of risks of breast cancer, heart diseases and stroke. The applicant advised MOPL to develop non-hormonal preparation designed specifically for woman above 35 years having menopausal problems. As per our advice, they designed MENOPACE which not only combats menopausal symptoms but also improves immunity of woman.

b) PREGNACARE: The applicant advised MOPL to develop complete comprehensive nutritional formula containing moderate iron so that the same can be taken right before conception to lactation unlike other products available in market which have high iron content resulting in high incidences of gastrointestinal side effects like vomiting, nausea, gastric pain etc.

c) CALCIMAX: MOPL was largely concentrating on CALCIMAX FORTE which uses only essential vitamins. On the basis of our market analysis the applicant came to know that
in India no supplement was available containing calcium-magnesium. Magnesium is natural protector from excess calcium in the body. Magnesium deficiency can lead to calcium overload which may result in deposition/accumulation of calcium into soft tissues like heart and kidney resulting soft tissue calcification. Thus, magnesium supplement is vital for individuals who are on calcium treatment. The applicant advised MOPL to combine Calcium, Magnesium, vitamin D3 and other pro-bone minerals that have additional benefit in improving the bone strength and rigidity unlike other products which have only calcium in them. Thereby they developed CALCIMAX 500 TAB and other line extensions like Calcimax Suspension, Calcimax Forte etc with the brand turnover of Rs 56.5 Cr.

Similar details are also submitted in respect of other products. They are DIABETONE, COLICAID, PREMENCE, KIDICARE, IMMUNACE, NEUROZAN, ASAMVIT, OLIGOCARE, OVACARE, UGESIC.

Thus, it is contended that the applicant is not passing any readymade formula for production of goods to MOPL, but just product up-gradation and new thoughts / ideas to introduce products in the existing environment thereby making a favorable impact on MOPL sales. On the basis of market study, the applicant has guided MOPL to publish articles about the drugs in various medical journals after conducting of clinical trials. Though the articles are prepared by MOPL personnel, the applicant give them guidance as to in which journals they should be published. The applicant give them references of other peer reviewed articles and various clinical researches.

II] The sharing of clinical trial: -

a) The applicant has advised MOPL to evaluate efficacy and safety of Menopace in India pre and post menopause. The applicant has also advised them to get the results of this clinical trial published in International Journal of Gynecology and Obstetrics.

b) The applicant has advised MOPL to conduct clinical trials for comparison between Pregnacare and other High iron containing preparation. The Results of the same were published as per our advice in ObsandGynaec Today and J ObstetGynecol Ind.

c) The applicant has advised MOPL to conduct clinical trials of Kidicare in Indian school children, by dividing them into two groups. One group would be Kidicare group and other would be No treatment group. The applicant has advised them to get the results published in Journal of Pharmaceutical Research and Clinical Practice.

d) The applicant advised MOPL to conduct clinical trials of Ugesic in patients suffering from Migrane. As per our advice results were published in J Assoc Physicians India. Also
as per our advice another trial was conducted on patients who had got their third molar tooth removed surgically. Accordingly, the results were published in Indian Journal of Dental Research.

III] Information about various Manufacturing Processes and Techniques to improve quality and efficacy of products:

It is stated that the MOPL is having their in-house technical staff to look after day to day production, stores, quality control, quality assurance and engineering department. However, due to limitation of world-wide exposure and technical knowledge, MOPL’s staff heavily depend on OML for their expertise, not only in the field of formulae up-gradation and thoughts /ideas, but also for other technical support like up-gradation in manufacturing process through automation and technical process. The best practices in the industry and common lean principles are shared. The applicant has guided and provided services to improve the Quality Checks and get well acquainted with the ultramodern testing techniques, ideas like purchase of Second hand Good Quality sophisticated Instruments / Machineries from the developed market, sharing of information with respect to the requirement of US FDA and UK MHRA guidelines, guiding over the ICH requirement over stability monitoring of Products, few of the details are as follows.

It is stated that due to European Market accessibility, the applicant has suggested various up-graded new machinery which MOPL source locally or through our contacts at very concessional rates. Due to recession in Europe market, many big Pharma Company wind up their businesses and put their plant on auction sale, where the applicant has facilitated MOPL to procure good and upgraded machinery and laboratory equipment at very competent pricing. This can be evidenced by verifying invoice copy as well as photos of imported machinery and laboratory equipment purchased by MOPL from our local contacts in United Kingdom. Similarly, the applicant has suggested to launch SUBLINGUAL concepts (instead DISPERASABLE) in Piroxicam Tablets, which is FIRST TIME in India. MOPL has introduced such concept with Brand Name “UGESIC”, which accepted by medical fraternity successfully and the resulted in brand value of Rs 7.4 Cr as on 31.3.2013. This is new concept where the tablet to be kept under tongue till it get completely dissolves, which will give SAFE and RAPID Pain relief action.

IV] Improvement in Quality Control process:

It is informed that the applicant has delivered various solutions to ensure optimal quality assurance and quality control throughout the whole production process. The applicant has guided for raising the quality standards and thus ensured the highest levels of quality and thus reducing rejection and to avoid the spoilage. These services have improved
Quality Standards of MOPL Products i.e. techniques used for testing, which can be elaborated by following example.

As on today, MOPL majorly covers Five medical fraternity in local market, over and above the export i.e. Gynecology, Pediatric, Physician, Orthopedic and General Practitioner.

For Gynecology segment, the Candifem Tablets are tested for disintegration as per the specific designed disintegration apparatus for vaginal tablets only. For Pediatric segment the test experts have been trained and have got expertise and developed test buds to understand if any variation is observed from batch to batch manufacturing for the products like Kidicare syrup.

For General Practitioner and Physicians, the Omega Meyer has suggested to launch SUBLINQUAL concepts (instead DISPERASABLE) in Ugesic / Paingesic (Piroxicam Tablets) which is FIRST TIME in India. (Repeat) In this specific product a new technique was introduced to control quality at design by introducing dissolution test for raw material, i.e. Intrinsic dissolution has been developed to verify the quality of Raw material itself before approving to be used in the finished product. This is new concept where the tablet to be kept under tongue till it get completely dissolves, which will give SAFE and RAPID Pain relief action. For Orthopedic segment, the products like Osteocare and its range, HPLC analytical methods have been developed by the analytical Development team under the guidance of Omega Meyer for Qualitative and Quantitative analysis.

The applicant has made various other suggestions like use of PET bottle instead of GLASS bottle to improve quality of the syrup. The applicant has suggested using PET bottle instead of GLASS bottle to improve stability as well to reduce cost of breakage in the handling of the stock in various products like COFAID Liquid and LIVERIL SUSPENSION. The applicant has suggested to use BLISTER packaging for PREMANCE and MENOPACE instead of Strip Packaging to improve product quality and patient acceptance.

The applicant has submitted the product wise details of advice given in respect to quality control process, as follows;

i) In case of MENOPACE capsules, the applicant has suggested to blend Vitamins and Minerals separately prior to final blending to achieve uniformity.

ii) In case of CALCIMAX500 tablets and Calcimax forte tablets, the applicant has suggested them to use combination of Binder like Starch and Polyvinyl- pyrrolidone to achieve hardness and strength to the tablets. In case of Calcimax 250 tablet the applicant has suggested Trituration and serial dilution of minerals like Zinc Sulphate with recipients to obtain uniformity.
iii) In case of OSTEOCARE tablets the applicant has suggested use of super disintegrate like sodium starch Glycolate to achieve faster disintegration time, use of Calcium carbonate of heavy density in tablet formulation.

Similar information is also submitted in respect of products DIABETONE A Capsules, Colicaid Drops, Premence, GASTRACID, MIM, KIDICARE syrup, IMMUNACE, GOLDCARE Tablets, LIVERIL Tablets, ASTHAVIT Tablets, NEUROZAN Tablets, ASMAVIT suspension, CANDIFEM Tablets, ANDIMALE cream, CONGESTYL Syrup, Dr Meyer’s Iron Drops, FEVRIL Tablets, LIPIFOL, LIPITAB, MECOFOL A, MECOSOL SL, Oligocare Tablets, OVACARE Tablets, PERFECTIL capsules, PREGNACREAM, UGESIC Tablets, VISIONACE tablets, WELLMAN and ZEDCAL tablet.

V) Assistance in procurement and specification of raw and packing materials

It is submitted that Formula for every drug is developed by MOPL. However, the same has to be upgraded in terms of its raw material components from time to time in order to improve the quality and patient acceptance. In that process, the applicant has suggested MOPL to use some specific ingredients to have patient acceptability. For Example, Garlic extracts with Sri Lankan origin are best in terms of stability as compared to those of Indian origin which keep on changing their Colour as a result of which the Colour of final product also changes. Similarly, Chondroitin raw material is available in Bovin or Marine (Shark) source to improve product quality, which they have started to use. The applicant has guided in upgrading packaging of its products in order to—

a) Increase the shelf life of the product

b) Make the product more attractive

c) Patient Safety: Remove chemicals and plasticizers that are harmful for human health

d) Cost saving.

e) in compliance with various laws and regulations.

The applicant has given product wise details of advice in respect of Raw material and packing material specifications.

i) MENOPACE capsules: The applicant has advised them to use Vitamin D3 stabilized in place of Vitamin D3-crystalline to improve the stability of the same.

ii) PREGNACARE Capsules: The applicant has advised them to use Vitamin C- Cellulose coated in place of Vitamin C to improve the stability.

iii) CALCI.MAX Suspension: The applicant has advised them to use Tribasic Calcium Phosphate-Micronized as source of both Calcium and phosphorus.
Similar information is submitted in respect of products CALCIMAX SUSPENSION, OSTEOCARE Tablets, DIABETONE, COLICAILD, PREMENCE, GASTRADIC, MIM, KIDICARE, IMMUNACE, GOLDCARE, LIVERIL, ASTHAVIT, NEUROZAN, ASMAVIT, CANDIFEM, CANDIMALE, CONGESTYL, Dr Meyer’s Iron Drops, FEVRIL, LIPIFOL, MECOFOL A, OLGOCARE, PERFECTIL, PREGNACREAM, UGESIC, VISIONACE, WELLMAN and ZEDCAL.

It is also informed that the applicant has suggested MOPL to make various changes in its packaging and Product forms.

i) The Transition from glass bottles to Pet bottles has helped in reducing loss due to breakage. Also it is more economical as well as convenient. OML has guided MOPL to apply this change in case of Kidicare Syrup and Calcimax Suspension.

ii) The Change from capsule to tablet form: As the source of Gelatin capsules is fish(Non-Veg) which patients prefer to avoid, the applicant has suggested the same to MOPL in order to make the final product complete vegetarian. The suggestion was accepted by MOPL in case of WELLMAN.

V1] Use of Medical information.

It is stated that the Transfer of information to medical fraternity through marketing field personnel is a crucial element of pharmaceutical innovation. The doctors have to be updated about the availability, safety, efficacy, hazards, and techniques of using medicines. However, utmost care has to be taken that this marketing is not detrimental to the interests of the end consumers. So, the applicant has suggested to MOPL to do Continuous Medical Education to physicians, free samples plan and medical literature information available world-wide. The applicant has to keep MOPL updated about various regulations in pharma marketing which is necessary in order to strike a fair balance between risks and benefits of a promoted drug. The applicant has done extensive market survey in International market keeping MOPL abreast of all international developments in the Pharma Market. Market research helps in bringing a commercially relevant product to the market. The applicant work with MOPL to elicit what they already know to be true versus where there are genuine relevant gaps in knowledge.

In case of MENOPACE, the applicant has given reference of various articles to MOPL like article published in GynecolObstet Invest 2007 on the effect of Vitamin E on hot flashes in menopausal woman.

In case of PREGNACARE, the applicant has given reference of various articles on Vitamin B12, maternal zinc supplementation, iodine supplementation etc published in various journals.
In case of CALCIMAX, the applicant has given reference of various articles on how magnesium supplementation reduces insulin resistance.

In case of DIABETONE, the applicant has given reference of various articles like select vitamins and minerals in management of diabetes.

In case of PREMENCE, the applicant has given reference of various articles like pyridoxine and PMS, micronutrients and PMS.

In case of KIDICARE, the applicant has given reference of various articles published in international journals covering topics like effects of iron and learning potential, increased food intake of children taking zinc supplement and many others.

In case of IMMUNACE, the applicant has given reference of various articles published in international and Indian journals covering various facets of nutrition and immune system.

In case of ASMAVIT, the applicant has given reference of various articles covering topics from Oxidative stress in Asthma, Antioxidant vitamins, Adult asthmatics and Child asthma management, seasonal influenza to mild and acute asthma.

In case of OLIGOCARE and OVACARE, the applicant has given reference of various articles published in journals of various countries thereby providing complete insight of infertility aspects like effects of various elements on ovarian function, in vitro fertilization, bio-synthesis of both male and female gonads. In case of UGESIC, the applicant has given reference of various articles on clinical efficacy of Piroxicam in different situations.

3.4 In view of above submission, Mr. C. B. Thakar, Advocate has stated and argued that the applicant has provided up to date information on medical technology and medical practices carried worldwide. These literatures cover various aspects of medicine and update about the newest breakthroughs in medical technology. The applicant has parted guidance to staff of MOPL at the time of designing Product Leave behinds (LBs literature), since creative and informative leave behinds continue to speak about the product for a long time. Similarly, the applicant has guided them about various medical references whose mention is made in these LBs. The guidance is sought by MOPL because a professional touch is needed to make these leave behinds informative but at the same time not fill the same with too much details. The applicant makes sure that the LB is effective in touching all the points. A thoughtfully made Leave behind keeps the products name at forefront of consumer's mind.

Thus it is apparent from the nature of above services provided by the applicant to MOPL that the service is in nature of regular consultation, which is normally referred as retainer ship. The same has also been stated in DDQ application. Product-wise details of the above services along with their Trademark Registration copy in name of MOPL as well
as registration of the Formula by MOPL with FDA authority and Sales Invoice prior to agreement date.

The applicant would like to state that though the wording used in agreement entered into with MOPL is Royalty, there is no Royalty nor any rights are transferred. The applicant is providing consultancy services to MOPL for which the applicant charge fees on the basis of Turnover. However, the applicant being a known party (OML is a shareholder in MOPL), MOPL did not take utmost care in the use of words in the agreement entered with us and hence generic terms like Royalty are used.

Mr. C. B. Thakar, Advocate has invited our attention towards the rejection of reference application No. 148 of 2006 in the case of M/s. Venkateshwara Hatcheries Opponents Pvt. Limited and argued that the applicant has rendered the services and it could not be considered as goods for the purpose to levy the tax under MVAT ACT, 2002 and emphasized on following observations.

“12 - "We have considered at length that predominant nature of the contract in question is of rendering services and there was no intention to part with technical knowhow as alleged. As such after giving anxious thought to all pros and cons, the applicant have no hesitation to hold that the predominant nature is to render services rather than to part with technical know-how."

13. Thus, it can be seen that the Tribunal has dealt with the issues exhaustively, has considered each and every aspect of the matter and the various points raised on behalf of the revenue. The Tribunal has drawn the inference that is what is provided by the appellant to his transferee as services after the close scrutiny and critical analysis of the admitted facts. It is not the case that inference has been drawn besides the facts. After considering the composite nature of the agreement and after applying the tests laid down in the matter of Bharat Sanchar Nigam Limited (145 STC 91), the Tribunal has held that there is nothing to show that parties have in mind or intend separate rights arising out of the sale of goods, the Tribunal has categorically found that for want of such intention, there is no sale of technical know-how. Thus, the second question which is mixed question of fact and law is mainly depended on finding of particular fact; i.e., whether what is provided to transferee is services or technical knowhow within the meaning of section 2(28) of the Bombay Act. At the cost of repetition, it is to be reiterated that this finding of the Tribunal that what is provided by the appellant to the transferee are services is based on factual aspect and arrive at close scrutiny and critical analysis of the date furnished on record. In view of the matter, even after giving conscious consideration to all pros and cons we are of the firm opinion that no purpose would be served by referring the matter to the Hon. High Court of Judicature. No another view is possible"
Further, Mr. C. B. Thakar, Advocate has relied on judgment of Hon. MSTT in the case of Sungrace Engineering SA No.198 of 2015 and stated that the activity of appellant cannot be considered as Technical Know-how.

Alternately, Mr. C. B. Thakar, Advocate has stated that assuming the product is goods, the applicant claims that, it is sale in the course of export and purchase in the course of import for the applicant.

04. Observations:

We have considered the facts of the case, submission of the applicant, and legal position. The two parties involved are Omega Meyer Ltd. (the applicant) and Meyer Organics Pvt. Ltd. The applicant has informed that there are 3 agreements - one dt.15.09.1998, a supplementary agreement dt.18.02.2002 and third agreement 2nd May 2007

Agreement dt. 15.09.1998

The agreement introduces the 2 companies thus:

Omega represents a group of multi-national pharmaceutical companies, which produce and market a wide range of innovative medicinal formulations under specific Brand names which are registered not only in United Kingdom but also in several other countries around the world.

Meyer is a pharmaceutical company with a well-developed manufacturing plant and marketing network Meyer wishes to produce and market in India a number of products originally belonging to Omega.

The list of such products referred to as ‘Licensed Products’.


There are 9 clauses in the agreement dt. 15.09.1998, the relevant among them are reproduced below in which both the parties agree to the following:

*Omega shall provide Meyer the complete Know-how for the production of Licensed Products. This know how will include the detailed methods of manufacturing and the quality control procedures. The know-how will also include the procurement of those raw materials which are used in the formulations of the Licensed Products and not easily available in India.
Omega hereby allows to use the Brand Names and Trademarks of the Licensed Products in India and for selective exports. Omega also allows Meyer the use of the packaging style and get up used by Omega all over the world.

Even though Meyer will have unrestricted privileges to use the brand names, trademarks, packaging style and get-up used of the Licensed Products. Meyer shall neither have nor attain any proprietary rights over them since those will always belong to Omega.

Omega agrees to allow Meyer the use of the medical and OTC literatures designed by Omega for the medical profession and trade. Omega also agrees to provide all relevant data and information which is available to it to enable Meyer to market the Licensed Products ethically and scientifically.

The Licensed products manufactured by Meyer using Omega’s trademarks, brand names, know-how style and get-up etc. will be allowed to be exported out of India to certain specified countries for which purpose Omega & Meyer will mutually agree to from time to time and record such agreement in writing.

For the considerations as above Meyer will pay Omega lump sum in US Dollars equal to a sum of Indian Rs. 15 lacs. Meyer will remit the above said amount in US dollars as lump sum latest by 30th (Thirtieth) day of March 1998. Alternatively, Omega will accept the said amount in two equal instalments, one each before 30th March 1998 and 1999.

In addition to the lump sum to be paid by Meyer as detailed above in Point No. 6, Meyer will pay Omega royalty towards the technical know-how as well as the permission to use the brand names and trademarks. Such royalty to be paid by Meyer once in a year within three months of the close of its financial year, will be computed as follows:

On domestic sales – 5%

On exports – 5%

The royalty as stated above will be payable on the gross sales of the Licensed Products net of duties levies insurance and freight charges from the financial year beginning April 97. As per the terms stated above, first royalty remittance will become due on 1st April 1998 and payable latest by 30th June 1998”.

**Supplementary agreement dt. 18.02.2002** – The supplementary Agreement is entered into on 18th day of February 2002 pursuant to the “Technological Collaboration Agreement” entered into on 27th January 1997 by and between OMEGA-MEYER LTD. and Meyer Organics Pvt. Ltd. In compliance with the condition of the letter of approval issued by Reserve Bank of India for payment of lump sum know-how fees and Royalty as
per the provisions of the said Original Agreement towards “Foreign Technology Transfer with the addition of some products as per the Annexure B

Annexure – B - MIM Drops, MIM Orange Syrup, Kidicare Plus Syrup, Cellage Cream, Immunace Capsules, Gold Care Capsules, Candicare Tab/Cream, Liveril, Ashavit, Neurozan.

The Reserve Bank of India (RBI) approval letter dt. 10.02.1998 gives the following details:

"RBI gives its approval to Meyer to enter into technical collaboration. The terms of payment thereof:

Lump sum payment :- Subject to Taxes

Technical Know-how fees, Patents, Trademarks, etc.:– USD 38500

Royalty :- subject to taxes

On domestic sales at 5.00% for the period of 5.00 years

On exports at 5.00% for the period of 5.00 years.

Duration of the agreement will be ten years from the date of agreement or 7 years from the date of commercial production whichever is earlier.

The letter also states the following:

The applicant will have to comply with the present drug policy in force.

The letter of approval is valid for the period of two years.

The approval is only for payment towards Technology Transfer from FERA angle and should not be construed as approval under the provisions of any other law in force.

The third Agreement dt. 2nd May 2007

Royalty agreement registered on dt.15.09.1998 and Supplementary agreement dt. 18.02.2002 expired on 31st March 2002. These were further extended w.e.f. 1st April 2002 to 31st March 2007. The parties agreed to the following:

“Omega shall provide Meyer the complete know-how for the production as well as compete packaging development for different products. The List of such products is attached hereto in Annexure ‘A’, ‘B’, and ‘C’, and hereinafter referred to as ‘Licensed Products’). This know how will include the detailed method of manufacturing and the
quality control procedures. The know-how will also include the specifications of those raw materials which are used in the formulations of the licensed products.

Even the Meyer will have the unrestricted privilege to use the packaging style and get up of the Licensed Products, Meyer shall neither have nor attain any proprietary rights over them since those will always belong to Omega.

Omega agrees to allow Meyer, the use of medical and OTC literature designed by Omega for the medical profession and trade, Omega also agrees to provide all relevant data and information which is available to it to enable Meyer to market and Licensed Products ethically and scientifically.

The Licensed Products manufactured by Meyer using Omega’s know-how style and get-up etc, will be allowed to be exported out of India to certain specified countries for which purpose Omega & Meyer will mutually agree to from time to time and record such agreements in writings.

The consideration for the above has already been paid in lump sum in US $ equal to sum of INR 15 lakhs paid during financing year 1998-1999 and an additional amount equivalent to INR 50 lakhs paid during financial year 2003-04. The parties hereto agree that the same consideration shall continue for the present agreement and no additional amount by way of consideration shall be restricted to paid.

Meyer will pay Omega royalty towards the technical know-how as well as the permission to use the medical and OTC literature designed by Omega. Such royalty is to be paid by Meyer once in a year within six months of finalization of accounts of the year*.

Royalty in respect of items listed in Annexure A:-

Domestic sales 5.00% (Five percent) subject to taxes

Exports 5.00% (Five percent) subject to taxes

Royalty in respect of items listed in Annexure B-

Domestic sales 5.00% (Five percent) subject to taxes

Exports 8.00% (Eight percent) subject to taxes

The company has provided additional list of products as per Annexure C

Domestic sales 5.00% (Five percent) subject to taxes

Exports 8.00% (Eight percent) subject to taxes
The royalty as stated above will be payable on the gross sales of the Licensed Products net of duties, levies, insurance and freight charges from the financial year beginning April 2007 in respect of following products:


**Annexure B** - MIM Drops, MIM Orange Syrup, Kidicare Plus Syrup, Cellage Cream, Immunace Capsules, Gold Care Capsules, Candicare Tab/Cream, Liveril, Ashavit, Neurozan.


The scope of the activity provided by applicant is already mentioned in above agreements. On analysis, in nutshell, we have observed that the applicant is providing various technical knowledge as per requirement. The said activity cannot be termed as one-time activity but is continuous, regular and constant activity. In present case, the research and development is carried out by OML as per requirement of MOPL. The parted technical knowledge/information includes---

1) The “ideas”/”thoughts” to introduce new products as well as product up gradation, in case needed.

2) Information about manufacturing process and techniques to improve quality and efficacy of products.

3) Quality control process.

4) Procurement and specification of raw and packing materials

5) Use of Medical information.
05. Analysis and discussion: -

We have perused the information and documents submitted by the applicant. The oral and written arguments advanced by Ld. Advocate are considered to decide the issue. The questions are considered as under.

I] Whether, the actual transaction effected is covered by the scope of entry, Technical Know How or services.

a) It is contended that ‘thoughts’ or ‘ideas’ are shared. The consultancy is offered for upgrading / improvements by considering efficacy, quality and world-wide acceptance. It is admitted fact that the OML have specialist, skilled and intellectual personnel engaged in scientific research development studying and expert in World-wide Pharmaceutical Market. It is stated that the applicant has provided various ideas for product introduction and Product up-gradation. It is advised to conduct clinical trials for comparison and publish the result in Indian/ international Journals. It is stated that the basic formula is developed by MOPL after considering formulae of the competitive available products in the local markets and developed their own product as per Local FDA rules and regulation.

b) Under these circumstances, it is necessary to see what is technical know?

i) The term 'technical know-how' has been incorporated by the entry No.7 of the notification issued for entry 39 of Schedule C of the MVAT ACT,2002, and treating it as goods of incorporeal or intangible character. The term 'technical know-how' has not been defined in the MVAT ACT, 2002. In order to ascertain the word "technical know-how' one has to take recourse to legal dictionary meaning as well as how it is understood in common parlance.

ii) The legal meaning of technical knowhow will enlighten us. The legal meaning is as under.

Technical Know-How means all published or unpublished research, development information, technical data, designs, formulas, prototypes, samples, plans, specifications, methods, processes, systems, trade secrets, empirical data, computer programs and any other information or documentation related to the Technology and to the Intellectual Property, whether patentable or unpatentable, and whether in written, machine readable, oral form or drawing, and which exists at the Effective Date.

Thus, the term "know-how' includes various technocratic information, research work and indicates the way in which a skilled man does his job and is an expression of his individual skills and experience". In common parlance, we understand it as the knowledge regarding the use of specific technology or way of doing something more efficiently and effectively.
iii) We have gone through the documents/literature submitted by applicant. It is admitted fact that for the technical knowledge, MOPL’s staff heavily depend on OML for their expertise, in the field of formulae up-gradation, thoughts/ideas, other technical support like up-gradation in manufacturing process through automation and technical process. We have observed that to seek more expertise, the MOPL has entered into contractual agreement with OML having worldwide exposure to pharmaceutical Industry, skilled and intellectual personnel resources.

The imparted knowledge provided against the royalty mainly consists of providing various ideas for product introduction, product up-gradation. The applicant has suggested to incorporate the certain minerals and vitamins to combat the deficiencies. The Information about various Manufacturing processes and Techniques have been advised to improve quality and efficacy of products. The applicant has shared the knowledge regarding the application of medicine as new technique, sublingual.

Similarly, the applicant has recommended certain ideas, specific technical knowledge, techniques to assure the improvement in Quality Control process, change in manufacturing process, use of specific coating material, ingredients, binders and use of certain products to obtain the uniformity, stability, efficacy, to combat the deficiencies in the product and to ease the applicability of the products for the better results. The applicant has also imparted the knowledge in respect of packing material and packaging. In fact, there is no much dispute that the work done by the applicant is in the nature of technical know-how.

iv) On analysis with legal meaning and application of test of common parlance, activities carried out by the applicant in majority are in the nature of technical support and knowledge regarding the use of specific technology or way of doing something more efficiently and effectively and covered by the scope of “technical know-how”.

iv) The term “goods” means every kind of movable property not being newspapers, actionable claims, money, stocks, shares, securities or lottery tickets and includes live stocks, growing crop, grass and trees and plants including the produce thereof including property in such goods attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;

Thus, the definition includes every kind of movable property. It also provides exclusion clause. The movable property, which are only described under the exclusion clause is out of purview of the definition and would not be considered as goods for the sales tax purpose. In order to determine applicability of tax, the meaning of “goods” is required to be taken into consideration.
The term "goods" as used in Article 366 (12) of the Constitution of India and as defined under the said Act are very wide and include all types of movable properties, whether those properties be tangible or intangible.

The Hon Apex court, in Tata Consultancy Service (137 STC 620) (SC) has observed as under:

"17. Thus this Court has held that the term 'goods', for the purposes of sales tax, cannot be given a narrow meaning. It has been held that properties which are capable of being abstracted, consumed and used and / or transmitted, transferred, delivered, stored or possessed etc. are 'goods' for the purposes of sale tax."

The test is whether the concerned, item is capable of abstraction, consumed and used etc. plays important role. In the case, as discussed above, all of these properties are present and there is transfer of the technical knowhow, which is deemed sale.

v) In view of above, the agreements as detailed earlier are perused. It is seen that, in the first agreement there was involvement of Brand Names and Trademarks of the licensed products. The latter agreement is restricted to Omega's know-how, style and get-up etc. This is a clear case of sale of technical know-how which falls under the category of intangible goods. The agreements themselves spell out that they are being executed for the purposes of imparting of technical know-how by the applicant to Meyer Organics. It is seen that the goods are not in existence when the agreements are executed. The technical know-how is imparted as a continuous process and therefore, it is observed that the frequency of correspondence depends on need and the imparting of the same. Thus it is a transaction of 'sale'. There are 2 schedule entries under the MVAT Act, 2002 as follows:

<table>
<thead>
<tr>
<th>A-27</th>
<th>Goods of incorporeal or intangible character, other than those notified under entry 39 in Schedule C.</th>
<th>Nil % (1.4.2005 to date )</th>
</tr>
</thead>
<tbody>
<tr>
<td>C-39</td>
<td>Goods of intangible or incorporeal nature as may be notified from to time by the State Government in the Official Gazette.</td>
<td>4% (1.4.2005 to 31.3.2010)</td>
</tr>
</tbody>
</table>

In the notification VAT 1505/CR-114 Taxation-1 dt. 01.06.2005, "Technical Know-how" has been notified at Sr. no.7. Therefore, the receipts under the impugned agreements are subject to levy of tax under entry C-39 of Schedule C appended to the MVAT Act, 2002.

III) Whether the transaction effected is sale in the course of export?

Mr. C.B. Thakar, Advocate has argued that if at all from above respective services are considered to be sale of Technical Know How or lease, then it is submitted that it is in
course of import. The applicant is sending all this information via Email or Internet from their establishment in Britain. The movement of the information is to be considered because of the MOPL requirements and hence it is in course of export from Britain and in course of import in India by MOPL. The occasion of movement of goods have inextricable link and no tax is applicable on sales which are taking place in course of import. In this respect, reliance is placed upon the various judgments court authorities, wherein the state has restrictions to levy tax on sales transaction is effected is covered by Article 286 of Indian constitution and thus sale in the course of export. He relied upon Hon. Tribunal in case of NRB Bearings Ltd. (S.A. No.1643 of 2004 dt.23.2.2007) and Menon Piston Ltd. (S.A. No.1038 of 2003 dt.29.4.2006) wherein, it is held that sending the information via internet amounts to sale in course of import and it is not liable to tax. We have gone through the said judgment and the legal position discussed with in light of various rulings.

With this background, it is necessary to examine whether the transaction is covered by sale in the course of export or otherwise?

The section 5 of the CST ACT, 1956 provides - When is a sale or purchase of goods said to take place in the course of import or export. Sub-section (1) and (2) of section 5 is extracted below:

“(1) A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India.

(2) 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.”

The applicant’s goods are ‘technical know how’, an intangible goods, as discussed in earlier paras. Therefore, the situs of sale of intangible goods needs to be looked upon.

A similar issue in respect of right to use trade mark, an intangible good, was before the Maharashtra Sales Tax Tribunal (MSTT) in the case of M/s Merk KGa, Germany vide S.A. No. 304 to 308 of 2011, wherein the licensee, M/s.Merk Ltd in Mumbai, India, had sent two copies of signed agreement to the appellant, a parent company in Germany with request to sign and return one copy to transferee at Mumbai The appellant, the
parent company in Germany, signed the agreement at Germany, retained one copy of
agreement and sent second copy to M/s. Merk Ltd in Mumbai, India. Therefore, it was
contended that entire execution was completed at Germany and not in Mumbai and
relying on the judgment of 20th Century Finance Corporation Ltd, it was argued that, the
situs of sale took place out of the jurisdiction of Maharashtra, and hence, State of
Maharashtra has no jurisdiction to levy tax. The MSTT has discussed the situs of sale in
this case being, intangible goods, in para 23 and 24, as follows;

"23. On the basis of rival arguments, it would be just and necessary to decide where is
the situs of sale. It is pertinent to note that though both the appellant and respondent are
relying over the judgment of 20th Century, we feel that this judgment would not be
applicable to our case, basically for the reason that so far as 20th Century’s case is
concerned, it was with regard to deemed sale with regard to tangible goods, while our
case is with regard to intangible goods i.e. use of trademark. In deemed sale of tangible
goods, right to use goods can be transferred one at a time, but, so far as intangible goods
are concerned the owner can simultaneously transfer right in the goods to different
customers at the same time. Hence, the analogy given in the case of 20th Century
Finance Corporation Ltd. cannot be applied to our case.

24. This has lead us to find out what is the meaning of situs. We have taken down
Halsbury’s Laws, excerpts in this regard is as below – “In law, the situs (pronounced
"situs") (Latin for position or site) of property is where the property is treated as being
located for legal purposes. This may be important when determining which laws apply to
the property, since the situs of an object determines the lex situs, that is, the law
applicable in the jurisdiction where the object is located, which may differ from the lexforsi,
the law applicable in the jurisdiction where a legal action is brought. It can be essential to
determine the situs of an object, and the lex situs, because there are substantial
differences between the laws in different jurisdictions governing, for example: whether
property has been transferred effectively; what taxes apply (such as inheritance tax,
estate tax, wealth tax, income tax and capital gains tax); and whether rules of intestacy
or forced heirship apply. The rules for determining situs vary between jurisdictions and
can depend on the context. The English common law rules, which apply in most common
law jurisdictions, are in outline as follows: the situs of real estate (land) is where the land
is located the situs of bearer instruments and chattels (tangible moveable property) is
where the instrument or chattel is located from time to time. The situs of registered
instruments is where the register is held. The situs of shares is where the share register
is held (in the case of registered shares) or where the bearer share certificate is located
(in the case of bearer shares). The situs of debts is where the debtor resides (since that
is generally where legal action can be taken to enforce the debt). The situs of intangible
property, including intellectual property such as copyright, trademarks and patents but
also goodwill, is where the property is registered, or, if not registered, where the rights to
the property can be enforced within territorial waters, the situs of a ship is where it is actually located; on the high seas, a ship is treated as situated at its port of registry. Halsbury’s Laws, Conflict of Laws, para. pp. 385–391” From the above excerpts, it becomes clear that the situs depends upon the type of goods. Situs for tangible goods would be different and situs for intangible goods would be different. Applying the principle laid down as mentioned above, situs so far as intangible goods are concerned, can be drawn on the basis where property is registered or where rights to property can be enforced”.

We have perused the details submitted by the applicant and observed that there is sale of ‘Technical know-how’, an intangible goods. As decided in the MSTT judgement in case of M/s Merk KGa, Germany vide S.A. No. 304 to 308 of 2011, the situs of intangible property, including intellectual property such as copyright, trademarks and patents but also goodwill, is where the property is registered, or, if not registered, where the rights to the property can be enforced within territorial waters. The technical knowhow in the present case is not registered in India but the rights of the technical knowhow are enforced in Maharashtra. The OML has given technical know how for exclusive use to MOPL, as discussed in detail in earlier paras, in respect of following:

I] Providing various ideas for product introduction and Product up-gradation.

II] The sharing of clinical trial.

III] Information about various Manufacturing Processes and Techniques to improve quality and efficacy of products.

IV] Improvement in Quality Control process.

V] Assistance in procurement and specification of raw and packing materials.

VI] Use of Medical information.

The MOPL has utilized the above technical know how, within the State of Maharashtra. All the agreements between the applicant and MOPL are nothing but the sale of technical know how for consideration by way of royalty. Applying same principle of sale of intangible goods, we hold the transaction between OML and MOPL is, a sale of technical know-how, within in the State of Maharashtra. The contention of applicant that the transaction between OML and MOPL is a sale in the course of export and the purchases by the MOPL are in the course of import is not accepted.

III] Whether on the basis of circumstances of case, the prospective effect is to be given?
Mr. C.B. Thakar, Advocate has requested that if it is determined that the applicant is liable to pay tax, then the prospective effect shall be given to protect liability till the date of determination order. He has relied on various MSTT decision and stated that the legal position was certainly fluid. Therefore, considering above facts and circumstances, the protection may be given by making the ruling prospective from the date of pronouncement. Further, he requested to grant benefit provided in section 55(9) of MVAT Act, 2002.

In view of above, it is necessary to analyse the provisions related to relevant Act. For clarity the provisions are reproduced as under.

Section 55 (9): -The Commissioner or, as the case may be, the Advance Ruling Authority, may direct that the Advance Ruling shall not affect the liability of the applicant or, if the circumstances so warrant of any other person similarly situated, as respects any sale or purchase effected prior to the Advance Ruling.

On careful analysis of the section, it reveals that the Advance Ruling Authority may protect the liability of dealer in two conditions.

a. in case of applicant or
b. if the circumstances so warrant of any other person similarly situated.

It is settled principle that the issue of prospective effect is to be considered on fact and circumstances of each case separately. There is no straight jacket formula to say that prospective effect is to be given in typical circumstances. However, the Hon. Bombay High Court in case of Lalbaugcha Raja Sarwajanik Ganeshotsav Mandal has laid certain principle for granting the prospective effect. We would like to refer the same.

The Hon. Bombay high Court in case of Lalbaugcha Raja Sarwajanik Ganeshotsav Mandal (MVAT Tax Appeal No.10 of 2015) while interpreting the section 56 of MVAT ACT,2002 laid dawn the principles regarding the granting of prospective effect and observed in relevant Para that--

"10. On plain reading of both the subsections (1) and (2) of Section 56, it is apparent that the Commissioner may direct that the determination shall not affect the liability under the MVAT Act of the applicant or if the circumstances so warrant, of any other person a similarly situated, as respects any sale or purchase effected prior to a determination. Therefore, this is not a mandate but a discretionary power vested in the Commissioner. This discretionary power has to be exercised and while exercising it, the Commissioner, has to be guided by certain inbuilt checks and safeguards. He cannot in the garb of giving relief of the nature contemplated by subsection (2) totally wipe out the liability of any and every dealer."
11. The Commissioner is expected to exercise this discretionary power so as not to defeat the law or render its provisions meaningless or redundant. The power must be exercised bearing in mind the facts and circumstances in each case. No general rule can be laid down. The exercise of this discretionary power must be bonafide and reasonable so also sub-serving the larger public interest. The highest officer in the hierarchy is chosen by the legislature as there is a presumption that this executive functionary will exercise the discretion in genuine and bonafide cases. He must be satisfied that there is a real need and the circumstances warrant exercise of the same. The power being wide, the satisfaction must be backed by cogent and strong reasons which can be tested in a Court of law.

12. The words are of wide amplitude and if the Commissioner exercises the discretion injudiciously or arbitrarily and contrary to the object and purpose sought to be achieved by the enactment itself, his exercise of the discretionary power is always capable of being questioned. Therefore, when the Commissioner finds that there was never a disputed question to be determined and the law is very clear and free of doubt, equally its applicability, then, refusal by the Commissioner to exercise the discretion is rightly Upheld by the Tribunal. Just as the Commissioner was obliged to assign reasons for not exercising his discretionary power equally the Tribunal was in upholding his order. The Tribunal in paragraph 22 of its order found that the entire process was utilized so as to delay compliance with the mandate of the Act. The Tribunal has also found that the Commissioner refused to grant relief holding that there is no ambiguity in the provisions and there is no scope, for any doubt arising out of the provisions and relevant for the purpose of the determination. The reasons that are assigned by the Commissioner for refusing to give prospective effect to his determination order, have not been found to be suffering from any error of law apparent on the face of the record or perversity warranting interference in the appellate jurisdiction of the Tribunal.”

The observations of the Hon. High Court as aforementioned are equally applicable to the Advance Ruling Authority and the powers delegated to the Advance Ruling Authority must be used in very logical and judicious manner in order to protect the liability of applicant and also sub-serve the larger public interest. These powers are coupled with duty to see whether the applicant has really strong reasons, which necessitate the use of discretionary powers. These powers cannot be used as per wish and whims of authority concerned.

(f) In the present case, the applicant cannot prove existence of circumstances which warrant us to use the discretionary power. In fact, use of such discretionary powers in the absence of compelling circumstances would be detrimental to legitimate government revenue and would wipe out the legitimate tax liability. In these circumstances, we do not allow the use of prospective effect as a tool to protect or to wipe of legitimate tax liability.
Hence, we feel that here is no strong and sufficient reason to hold that this advance ruling shall not affect the liability of the applicant or, if the circumstances so warrant of any other person similarly situated, as respects any sale effected prior to the Advance Ruling. Hence, the dealer’s request of granting prospective effect to this order is hereby rejected. Hence, we proceed to pass following order.

06. In view of the discussion held herein above, the issues are decided and are answered in tabular format as under. Hence, the order-

<table>
<thead>
<tr>
<th>Sr. No.</th>
<th>Questions/ particulars</th>
<th>Thus, held that</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Whether, the actual transaction effected is covered by the scope of entry, Technical Know How or services?</td>
<td>The actual transaction effected by applicant is covered by the scope of entry, Technical Know How and there is transfer of the technical knowhow, which is deemed sale Under MVAT ACT, 2002.</td>
</tr>
<tr>
<td>2</td>
<td>Whether the transaction under consideration is a sale in the course of export.</td>
<td>The situs of sale of technical know-how is within the State of Maharashtra and it is not a sale in the course of export.</td>
</tr>
<tr>
<td>3</td>
<td>Whether prospective effect is to be given.</td>
<td>Prospective effect is rejected.</td>
</tr>
</tbody>
</table>

Note: If the applicant is aggrieved by this order then Appeal may be filed before the MSTT, Mumbai within the prescribed time (Thirty days) as provided in the relevant Section of the Act.

NO. ARA. (Mumbai) /09 of 2016-17 /2019-20/B-No. 02- Dated 30/04/2019

Copy to:-

1. The Applicant, M/s. Omega Meyer Ltd.
2. The Commissioner of State GST, M.S. Mumbai.