Read : 1. Application dt.28.06.2010 by M/s. Mahyco Monsanto BioTech (India) Ltd., holder of TIN 27540365341V.

2. Writ Petition No. 9175 of 2015 (along with Writ Petition No.497 of 2015) decided on dt.11.08.2016 by the Hon. Bombay High Court in the case of Mahyco Monsanto BioTech (India) Pvt. Ltd. [formerly known as Mahyco Monsanto BioTech (India) Ltd.] versus The Union of India, The State of Maharashtra, the Principal Commissioner of Service Tax, the Commissioner of Sales Tax.

Heard : Sh. Gurudas Pai (Chartered Accountant) and Sh. D. K. Pawar (Tax Manager, Monsanto)

PROCEEDINGS

(under section 56 of the Maharashtra Value Added Tax Act, 2002)

No.DDQ 11/2010/Adm-3/30/B- 1 **Mumbai, dt.** 13/7/2018

The applicant, situated at Ahura Centre, B Wing, 5th Floor, 96, Mahakali Caves Road, Andheri (East), Mumbai - 400 093, has posed the following question for determination –

Whether the transaction of sub-licensing Monsanto Technology (Technical Know How) as described herein to various seed companies is not a sale as a transfer of right to use goods and therefore, not liable to VAT?

02. CASE HISTORY

On the very facts as in the present application, the applicant, M/s. Mahyco Monsanto BioTech (India) Ltd., had filed a Writ Petition (No. 9175 of 2015) in the Hon. Bombay High Court. The same came to be decided on dt.11.08.2016. The issue as captured in the words of the Hon. Court is thus –

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*"(a) If we may be permitted a small latitude, the kernel (or 'seed', as it were) of Mr. Venkatraman's case is this: Mahyco Monsanto Biotech (India) Pvt. Ltd. ("**Monsanto India**") supplies to third parties a certain type of hybrid cotton seed. This seed is impregnated with a proprietary technology that protects it against the boll-weevil, a known menace to cotton crops. From those hybrid seeds, these third parties then generate large quantities of sowable seeds, which they then sell to cotton farmers. Monsanto India itself sells nothing to the end-user. These end-product seeds have the benefit of the boll-weevil protection technology; and the third party purchasers from Monsanto India are thus able to commercialize the technology to produce hybrid seeds for sale to cotton growers. From a small seed do mighty cotton plantations grow. Monsanto India says that what it provides when it gives the third party purchasers the parent, impregnated seed is a service, and this is liable to be taxed under the relevant provisions of the Finance Act as amended, read with the Rules that pertain to service tax. This is a central levy. The transaction between Monsanto India and the third party with whom it deals is not, and cannot be, a sale assessable under the Maharashtra Value Added Tax Act, 2002 ("**the MVAT Act**"). Mr. Venkatraman insists that the transaction in question involves no transfer of a chattel qua chattel; no transfer of the right to use; and therefore, by necessary elimination, it must be a service and must be construed as such. He says that what is being offered is the technology; the container, receptacle or form in which it is transmitted is entirely irrelevant. What the third party pays for is the technology, not the container; and since this has none of the qualities that define a sale or a deemed sale (viz., a transfer of the right to use), it must be held to be a service. Central to this argument is the aspect of non-exclusivity: Monsanto India passes no 'property' or 'estate' in the technology itself to the third party developer. It merely licenses it. Monsanto India may issue innumerable such technology licenses to various third party developers. Those developers in turn cannot further sub-license the technology. They can only use it to produce a hybrid, sowable seed. Therefore, the third party developers obtain only a right to use the technology; and there is no transfer of that right. The argument against this seems to us to be straightforward: that the only way for Monsanto India to effect this so-called technology transfer is by selling to the developer a seed duly imbued or impregnated with the protective technology. In other words, it is simply not possible for Monsanto India to divorce the container from the technology; without the seed container, the technology is in itself useless. Once this is seen, it becomes apparent that all the qualities that Monsanto India describes as applicable to a sale apply exactly to the third party developers' acquisition of that impregnated seed. That third party developer may further sell it as is or do what he wishes with it. There*

is clearly not only a transfer of a right to use (as there would be in a deemed sale), but there is in fact a direct sale of the impregnated seed; this is in no way a service.

5. Having closely considered the submissions, we are of the view that the Monsanto Petition must fail......Our reasons follow.

....

*12. The Petitioner in Writ Petition No. 9175 of 2015, Monsanto India, is a joint venture company of Monsanto Investment India Private Limited ("**MIIPL**") and the Maharashtra Hybrid Seeds Co. Monsanto India develops and commercializes insect-resistant hybrid cottonseeds using a proprietary "Bollgard technology", one that is licensed to Monsanto India by Monsanto USA through its wholly-owned subsidiary, Monsanto Holdings Private Limited ("**MHPL**"). This technology is further sub-licensed by Monsanto India to various seed companies on a non-exclusive and non-transferable basis to use, test, produce and sell genetically modified hybrid cotton planting seeds. In return for this technology, Monsanto India receives trait fees based on the number of packets of seeds sold by the sub-licensees. These sub-licensing agreements, with almost 40 seed companies, are the transactions in question. Respondent Nos. 1 and 2 in the Monsanto Writ Petition are the Union of India and the State of Maharashtra respectively. Respondent No. 3 is the Principal Commissioner of Service Tax. Respondent No. 4 is the Commissioner of Sales Tax.*

*13. The Monsanto Petition, filed under Article 226 of the Constitution of India, brings a challenge to Entry 39 of Schedule C to the Maharashtra Value Added Tax Act, 2002 ("**the MVAT Act**"); the definitions under Sections 65(105)(zzr), 65(55a) and 65(55b) of the Finance Act, 1994; and sub-clause (c) of Section 66E of the Finance Act, 1994. The challenge is on two grounds. First, that these are ultra vires Articles 14, 19(1)(g) and 265 of the Constitution of India. Second, that the exercise of power of the Respondent No. 1 under Entry 54 in List II of the Constitution is ultra vires; it encroaches on the power vested exclusively in the Union under Entry 97 in List I.*

*14. The principal question of this dispute is whether these agreements whereby the 'Monsanto technology' is granted by the Petitioner to the seed companies amounts to mere permissive use and, therefore, a service under Section 65(B)(44) of the Finance Act, 1994 ("**Finance Act**") read with Entry 97 List I of the Constitution, or whether it is a "deemed sale" in the nature of "transfer of right to use goods" under clause (b)(iv) of the Explanation to Section 2(24) of the MVAT Act read with Article 366(29A)(d) and Entry 54 List II of the Constitution.*

*15. A brief background of the Monsanto technology and business structure is necessary. Bacillus Thuringlensis ("**BT**") is a naturally occurring bacterium that produces proteins that kill specific insects. Using biotechnology, Monsanto USA introduces a specific BT gene into the cotton genome. This produces a toxin protein in the cottonseed sufficient to kill specific insects, viz., boll weevils or bollworms. These 'Bollgard' cottonseeds, called the 'donor seeds', containing the BT gene were initially imported by MHPL in India from Monsanto USA. MHPL also uses these seeds to produce more donor seeds in its facilities, and licenses the technology to Monsanto India in return for a 16.5% royalty on the latter's turnover. The process thereafter is as follows. Monsanto India enters into sub-licensing agreements with other seed companies through which it claims to grant permissive use of the technology via donor seeds. A sample of such sub-licensing agreement is annexed.[1] Monsanto India delivers fifty sample BT 'donor seeds' to the seed companies for BT cotton hybrid production, along with the standard operating procedure (SOP) manual prepared by Monsanto USA. The seed companies produce or generate additional donor seeds from these given seeds. Monsanto India provides initial training to the seed companies to assist them in using the donor seeds and developing foundation seeds, which will enable them to eventually produce BT cotton hybrids. Monsanto India thereafter provides training to the seed companies to carry out the zygosity test, which tests the execution of the breeding plan. The sub-licensees, at the end of this process, are required to undertake regulatory trials to obtain the relevant approvals from the various institutes such as the Institutional Biosafety Committee of the Department of Biotechnology, Ministry of Science and Technology, Ministry of Environment, Genetic Engineering Advisory Committee (GEAC) and others responsible. These approvals need certificates of validation and test reports, which are provided by Monsanto India. Once such approval is obtained from the GEAC, each sub-licensee can produce BT cotton hybrid seeds. These BT cotton hybrid seeds are then sold to farmers.*

*16. At present, the technologies licensed are Bollgard I ("**BG I**") and Bollgard II ("**BG II**"). The agreement provides for a few restrictions on the seed companies: the technology is non-transferable, non-exclusive, and cannot be assigned except in the manner provided in the agreement. The seed companies cannot grant further sub-licenses, and the sub-licensee is not permitted to reverse engineer, modify or use the BT gene without the prior consent of Monsanto India. Under the agreement, Monsanto India has also to provide training to produce hybrids at various stages, apart from assisting the seed companies in obtaining the required approvals and conducting zygosity tests. This training includes classroom training and sharing of protocols. Under the sub-licensing agreement, Monsanto India receives consideration from the seed companies in the form of a one-time fixed fee and a recurring variable based on the sale of the genetically modified seeds; in essence, a trait fee."*

The applicant has stated in the hearing that the facts in the present proceedings are no different than those placed for consideration before the Hon. High Court. Although the same is true, the facts as stated in the application before me, reproduced verbatim, could also be seen thus-

"1.1 Mahyco Monsanto BioTech (India) Ltd. ('MMBIL' or applicant) is a Company registered under the Companies Act, 1956. The applicant holds certificate of registration under the Maharashtra Value Added Tax Act, 2002 (TIN 27540365341V).
MMBIL is a joint venture between Monsanto Holdings Pvt. Ltd. and Maharashtra Hybrid Seeds Co. Ltd. The joint venture endeavors to develop and commercialize insect resistant hybrid planting seeds of cotton and other crops and carry on related activities in India.

1.2 The applicant has been provided a license for certain technology by Monsanto Company, USA to test, produce and sell insect tolerant and herbicide tolerant cotton planting seeds in India using certain technology ("Monsanto Technology").

1.3 The applicant has been granted the license to use Monsanto Technology by Monsanto, USA through Monsanto Holdings Pvt. Ltd. The said technology is further sub-licensed by MMBIL to various seed companies ("Sub-licencees") on non-exclusive and non-transferable basis to use the Monsanto Technology to test, produce and sells genetically modified hybrid cotton planting seeds. An illustrative copy of the sub-license agreement with one such seed company, JK Agri genetics Limited ("Sub License Agreement") is enclosed herewith for your reference (Annexure I). The applicant has entered into similar arrangement with 27 other seed companies.

1.4 The Monsanto Technology is sublicensed by the applicant to numerous seed companies in form of donor seeds which are then introgressed into the seed companies' germplasm for development of genetically modified hybrid cotton planting seeds with Bt. gene for commercial use. Such seeds are then multiplied and sold by Sub-licensees to farmers for sowing.

1.5 The Monsanto Technology is only sublicensed. The sub-licensees (seed companies) are ony allowed to use the technical know-how on a non-exclusive basis for a limited period. The proprietary rights to the technical know-how always remain with Monsanto group companies.

1.6. For sublicensing the said technology, the applicant receives a fixed fee plus a running royalty based on number of Bt. Cotton hybrid seed packets sold by the Sub-licensee.

It is the understanding of the applicant that they are not liable to pay tax under the provisions of the Maharashtra Value Added Tax Act, 2002 on the sub-license of the Monsanto Technology pursuant to documents such as the Sub-license Agreement as the transaction is not in the nature of lease but, mere licensing and, hence not sale."

03. HEARING

The applicant had earlier applied for determination under the provisions of the erstwhile Lease Act, the very issue as is before me in the present proceedings. This had come to be decided by the determination order No.DDQ 11/2005/Adm-3/103/B-02 dt.28.04.2008 wherein it was held that the transaction, same as in the present proceedings, is liable to tax under the Lease Tax Act.

In appeal before the Hon. Maharashtra Sales Tax Tribunal (Hon. MSTT), it was the case of the applicant that if the prayer for prospective effect is allowed thereby protecting the past tax liability, then the applicant doesn't wish to seek any decision on the impugned determination order. Accordingly, the Hon. MSTT in its decision in Appeal No.41 of 2008 dt.31.12.2008 held that the appellant's prayer to set aside the Determination u/s. 8 of the Lease Tax Act read with Section 52(1)(e) of the Bombay Act is rejected having not been pressed.

Despite the situation being so, the applicant has preferred the present application for determination under the provisions of the MVAT Act, 2002. Hence, the case was taken up for hearing on various dates since the year 2010. During a hearing on dt.09.12.2015, Sh. C. B. Thakar [Advocate], Sh. Kirti Oswal [Sr. Manager-KPMG] and Sh. Santosh Dalvi [STP] attended and reiterated the facts in the application. A request for prospective effect was made while submitting that a written submission, on all aspects, would be tendered within 2 weeks. By letter dt.24.12.2015, it was informed by the applicant thus –

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- *that assessments for the periods 2007-08 to 2010-11 were completed and the applicant had filed appeals against the said orders as VAT has been levied on the transactions.*
- *that the applicant was paying Service Tax on the transaction and as per the Service Tax authorities also, the transaction is liable to Service Tax.*
- *that both taxes cannot be applicable on same transaction.*
- *that Company has filed a Writ Petition in the Hon. Bombay High Court which was admitted on dt.15.12.2015 and the matter was posted for hearing on dt.12.01.2016 and hence, it is requested to hold the DDQ proceedings until the matter is decided by the Hon. Bombay High Court.*

With regard to the request to hold the DDQ proceedings, by an elaborate communication No.DDQ-11/2010/Adm-3/30/B-41 dt.16.02.2016, amongst other points, the applicant's attention was invited to the following :

"This is with reference to your letter dt.24.12.2015 requesting to keep on hold the determination proceeding till the disposal of the Writ Petition filed by you before the Hon.Bombay High Court. In this regard, I am directed by the Hon. Commissioner of Sales Tax to inform as under:

- *Earlier, through the application dt.21.11.2005, you had sought determination inter alia, as to the rate of tax applicable on sub-licensing of Monsanto Technology under the Maharashtra Lease Tax Act, 1985 (Lease Tax Act, 1985). You had referred therein three questions as follows:*
  - *(a) Whether the sub-licence of Mansanto Technology vide agreement dated 26th April 2002 amounts to 'sale' under section 2(10) of the Maharashtra Lease Tax Act, 1985?*
  - *(b) If the transaction vide agreement dated 26th April 2002 amounts to a 'sale' under the Maharashtra Lease Tax Act, 1985, whether the same is covered under any of the entries in Schedule to the Maharashtra Lease Tax Act, 1985?*
  - *(c) Whether the applicant is liable for registration under the Maharashtra Lease Tax Act, 1985?*
- *It is noticed from the determination order dt.28.04.2008 that during the course of the hearing in the said determination proceeding, Mahyco Monsanto explicitly stated that they do not wish to press the issues of as to whether such sub-licensing amounts to 'sale' and whether they were liable for registration under the Lease Tax Act, 1985. It was wished to pursue only the question about rate of tax.*
- *An inference from the above reveals that you were not averse to the aforesaid transaction being a 'sale' for the purposes of the Sales Tax statute.*
- *The Lease Tax Act, 1985 under the provisions of which you had sought a determination earlier and, you were also acceptable to the transaction being taxable as a 'sale', and has been repealed w.e.f. 01.04.2005 and the MVAT Act, 2002 has come into existence w.e.f. 01.04.2005. The definition of 'sale' as appearing in the Repealed Lease Tax Act has been incorporated in the definition of 'sale' as appearing under the MVAT Act, 2002.*
- *However, now through the application dt.28.06.2010, you have preferred an application for determination under section-56 of the Maharashtra Value Added Tax Act, 2002 (MVAT Act, 2002) seeking determination as to whether the transaction of sub-licensing of Monsanto Technology (Technical Know How) to various seed companies amounted to the transfer of right to use goods and therefore, a 'sale' under section-2(24) of the MVAT Act, 2002.*
- *As can be seen, the transaction in the aforestated determination order dt.28.04.2008 is the same as the one you have presented in the present proceedings. As observed herein earlier, you have accepted the said transaction as one being in the nature as a 'sale' under the Lease Act. And since the definition of 'sale' under the Lease Act is found in MVAT Act, 2002, it can safely be presumed that you should not be disputing the same transaction under the MVAT Act, 2002.*
- *As regards, issue of rate of tax under the MVAT Act, 2002 then the same is answered by schedule entry C-39 of the MVAT Act, 2002. The notification thereunder covers 'technical know-how'. In view thereof, tax on 'technical know how' would be 4% upto 31.03.2010 and 5% from 01.04.2010 to date.*

In this view of the matter, there should be no difficulty in arranging your affairs accordingly. However, it is seen that you have preferred a fresh determination application under the provisions of the MVAT Act, 2002 and which, as observed above, has identical provisions to the earlier Lease Act under which you were agreeable to the impugned transaction being a 'sale' for the purchase of the Sales Tax statute. In the event, you are herewith called upon to explain the circumstances and on which fresh grounds or arguments, you wish to dispute the issue which was agreeable to Mahyco Monsanto earlier as being a 'sale'. The submission be made within a reasonable period of 15 days from the date of receipt of this communication."

In reply, the applicant by letter dt.11.03.2016, amongst other points, submitted thus -

- *that the Company never believed that the transaction of sub-licensing of Monsanto Technology is in the nature of sale.*
- *that the hearing for the DDQ was in the month of January 2008 when Lease Tax Act was repealed and MVAT Act was in existence. Thus, determination of such question would have become futile. Therefore, as an alternate plea, MMB has stated that if the prospective effect is granted then MMB will withdraw its determination question with regard to whether the transaction amounts to a sale under lease act and whether the appellant is liable for registration under the lease tax Act. The same view was stated by the Company during its hearing before the Hon'ble Tribunal. However, MMB continued to hold that the transaction was not in the nature of sales under the lease tax Act. The Company believed that they had a strong case on merits in first DDQ application.*
- *that the question with regard to whether the transaction amounts to sale under lease tax Act and whether the appellant is liable for registration under the lease tax Act was withdrawn merely for the purpose of protecting its revenue under the lease tax Act.*
- *that withdrawal of determination question was merely for limited purpose of safeguarding the past liability of the Company. It is under no circumstances should be held as their acceptance of the transaction as sale under section 2(10) of the Maharashtra Lease Tax Act, 1958.*

The applicant made requests to keep the proceedings pending in view of the Writ being filed with the Hon. Bombay High Court. And after disposal of the Writ, a request was again made to keep the proceedings pending due to a SLP bearing No.34331 of 2016 being filed with the Hon. Supreme Court against the decision of the Hon. Bombay High Court. However, the issue being settled, the case was kept for hearing on several occasions.

On dt.01.02.2018 when Sh. Gurudas Pai (Chartered Accountant) and Sh. D. K. Pawar (Tax Manager, Monsanto) attended the hearing, it was submitted thus -

- *The submission and facts have been provided and there's nothing more to add on merits, at least.*
- *Assessments for the periods upto 2013-14 have been completed and necessary appeal proceedings have been taken recourse to.*
- *The Hon. Bombay High Court decision is appealed before the Hon. Apex Court. Hence, a request for abeyance of the present proceedings as this would add upto multiplicity of litigations.*

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04. OBSERVATIONS

If we look at the order of the Hon. High Court, we find that as soon as the facts (*"kernel" as has been preferred to be referred so by the Hon. Court*) of the case were reproduced by the Hon. Court, it had immediately given its verdict, for reasons to follow, thus –

*"……… the only way for Monsanto India to effect this so-called technology transfer is by selling to the developer a seed duly imbued or impregnated with the protective technology. In other words, it is simply not possible for Monsanto India to divorce the container from the technology; without the seed container, the technology is in itself useless. Once this is seen, it becomes apparent that **all the qualities that Monsanto India describes as applicable to a sale apply exactly to the third party developers' acquisition of that impregnated seed. That third party developer may further sell it as is or do what he wishes with it. There is clearly not only a transfer of a right to use (as there would be in a deemed sale), but there is in fact a direct sale of the impregnated seed; this is in no way a service.**"*

Since the Hon. Bombay High Court has decided the issue on merits, I would refrain from going into the submission of the applicant and deliberating thereupon. In fact, in view of the Hon. High Court settling the dispute, the decision of the Hon. Court, though in the applicant's own case, was brought to the notice of the applicant. Thus, the applicant has already been informed, as below, by a communication No.DDQ-11/2010/Adm-3/30/B-157 dt.29.12.2016 -

"This is with reference to your letter dt.11.03.2016 requesting to keep on hold the determination proceeding till the disposal of the Writ Petition filed by you before the Hon. Bombay High Court. It is seen that the said Writ Petition of yours has been decided by order in Writ Petition No. 9175 *of 2015 decided on dt.11.08.2016. It is further seen that the Hon. Bombay High Court has rejected your stand that the transaction is in the nature of a 'service' which is not amenable to tax under the Maharashtra Value Added Tax Act,2002 (MVAT Act, 2002).*

02. *It would be apposite herein to invite your attention to the very observations of the Hon. Bombay High Court thus :*

"3. .... ***Monsanto India says that what it provides when it gives the third party purchasers the parent, impregnated seed is a service, and this is liable to be taxed under the relevant provisions of the Finance Act as amended, read with the Rules that pertain to service tax.*** *This is a central levy.* ***The transaction between Monsanto India and the third party with whom it deals is not, and cannot be, a sale assessable under the Maharashtra Value Added Tax Act, 2002*** *("the MVAT Act").* ***Mr. Venkatraman insists that the transaction in question involves no transfer of a chattel qua chattel; no transfer of the right to use; and therefore, by necessary elimination, it must be a service and must be construed as such.*** *He says that what is being offered is the technology; the container, receptacle or form in which it is transmitted is entirely irrelevant. What the third party pays for is the technology, not the container; and since this has none of the qualities that define a sale or a deemed sale (viz., a transfer of the right to use), it must be held to be a service. Central to this argument is the aspect of nonexclusivity: Monsanto India passes no 'property' or 'estate' in the technology itself to the third party developer. It merely licenses it. Monsanto India may issue innumerable such technology licenses to various third party developers. Those developers in turn cannot further sub-license the technology. They can only use it to produce a hybrid, sowable seed. Therefore, the third party developers obtain only a right to use the technology; and there is no transfer of that right*

4. ***Having closely considered the submissions, we are of the view that the Monsanto Petition must fail,*** *............*

9. .... Briefly, Mr. Venkatraman's argument is that for a transaction to qualify as a transfer of the right to use goods — a deemed sale — the following requirements must be met : (a) there must be a transfer goods; (b) 'transfer' requires divesting in one and vesting in another of the same rights or goods; (c) the effective control over the goods must pass to the transferee; (d) the original owner must be temporarily excluded from using the right himself and, besides the conveyance of title, every other right should accrue absolutely in the hands of the transferee — the right cannot exist simultaneously in the hands of both the transferor and the transferee; (e) the original owner must not be able to effect a further transfer of the same rights to others, during the period they are vested in the transferee; and (f) the concept of transfer is the same for both tangible and intangible goods.

10. ***We have not found this summation of the law to be entirely accurate. We do not think that points (c), (d) and (e) must always be satisfied. The judgments cited in support were in a certain factual background and, in our opinion, were given not as a general proposition of law, but within the confines of their respective factual matrices. In any case, even on Mr. Venkatraman's formulation of the law we have found against him.***

....

13. ***The principal question of this dispute is whether these agreements whereby the 'Monsanto technology' is granted by the Petitioner to the seed companies amounts to mere permissive use and, therefore, a service under Section 65(B)(44) of the Finance Act, 1994 ("Finance Act") read with Entry 97 List I of the Constitution, or whether it is a "deemed sale" in the nature of "transfer of right to use goods" under clause (b)(iv) of the Explanation to Section 2(24) of the MVAT Act read with Article 366(29A)(d) and Entry 54 List II of the Constitution.***

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....

20. ***The crux of Mr. Venkatraman's case is that Monsanto India's agreements fall within the ambit of a permissive use rather than a transfer of a right to use. It is, therefore, a service and not a deemed sale within the meaning of Article 366(29A)(d) of the Constitution of India. The transaction, he says, is a single composite transaction and cannot be taxed as both a sale and a service. Sales tax and service tax are mutually exclusive and this, he says, is well-settled:***

....

37. We have considered most carefully this submission. It is indeed sophisticated in its construction, and, at first blush, appears most appealing. ***On reflection and a closer examination, we find ourselves unable to subscribe to the interpretation Mr. Venkatraman so eloquently commends, viz., that his transaction is one of a merely permissive use. We find this interpretation not to be supported by law, and we have the most serious reservations about the universal applicability of his propositions, which seem to us to be overbroad and to cast the net too widely. The first question is whether there is a 'transfer' within the meaning of Article 366(29A)(d). We believe there is.*** *It is true that the essence of a 'transfer' is the divesting of a right or goods from transferor and the investing of the same in the transferee, and this is what Salmond on Jurisprudence and Corpus Juris Secundum both say.* ***In our opinion, the seeds embedded with the technology are, in fact, transferred. Monsanto India is divested of that portion of the technology embedded in these fifty seeds and these are fully vested in the sub-licensee. Mr. Venkatraman is not correct when he says that the effective control of the 'goods' is with Monsanto India.*** *In RINL, the Supreme Court concluded that the contractor (transferee) did not have effective control over the machinery, despite the fact that he was using it, since he could not make such use of it as he liked. He could not use the machinery for any project other than that of the transferor's, nor could he move it out during*

the period of the project. We do not see how we can draw a parallel from that case to the one at hand. ***The effective control over the seeds, and, therefore that portion of the technology that is embedded in the seeds, is entirely with the sub-licensee. That sublicensee is not bound to use the seeds (and the embedded technology) in accordance with Monsanto India's wishes. Monsanto India cannot further dictate to the sub-licensee what he or it may do with these technology-infused seeds. The sub-licensee can do as it wishes with them. It may not use them at all. It may even destroy the seeds. Once the transaction is complete, i.e., once possession of the technology-imbued seeds is effected, and those seeds are delivered, Monsanto India has nothing at all to do with the technology embedded in those fifty seeds given to the sub-licensee. At no point does Monsanto India have access to this portion of the technology. In other words, the transfer is to the exclusion of Monsanto India. This clearly satisfies the so-called BSNL "twin test" that Mr. Venkatraman is at pains to propound. Mr. Venkatraman's argument that the seeds are "merely the media" and therefore irrelevant is, in our opinion, erroneous.*** *They are relevant for the simple reason that the technology could not have been given to the sub-licensee without them; and there is no other method demonstrated anywhere of effecting any such transfer.*

38. ***We must note that Mr. Venkatraman's submission that the BSNL test must always be present in each and every case for a transaction to be considered a transfer of the right to use goods is overbroad. We do not think that in BSNL the Supreme Court intended to prescribe a test of global or universal application without regard to individual circumstances. The judgment of the Supreme Court (in paragraph 90) notes the factual aspects.*** *There, the entire infrastructure, instruments, appliances and exchange remained in the physical control and possession of the petitioner at all times and there was neither any physical transfer of such goods nor any transfer of the right to use such equipment or apparatuses. One of the issues that arose for consideration was whether there was any transfer of the right to use goods by providing access or a telephone connection by the telephone service provider to a subscriber. This BSNL test, was, therefore, set out in these circumstances. The Court had no occasion to consider its applicability to intangible property like intellectual property. This is how BSNL has been interpreted by us in Tata Sons. We think that this interpretation is correct. In any case, it binds us. The Kerala High Court in Malabar Gold, in paragraph 35, took a contrary view. It took the BSNL twin test to be applicable as a general proposition, i.e., one that admits of no variance. As discussed above, we do not think this can ever be the a correct reading of BSNL.*

39. ***Similarly, we do not think the test of 'effective control' in the sense laid down in RINL was intended to be one that demanded satisfaction in every case..***

40. ***We are, therefore, in complete agreement with Mr. Sonpal when he says that this is a case of a transfer of the right to use goods. He points out certain clauses in the Monsanto India's sub-license agreement which, in our opinion, further substantiate this.*** *Clause 1.1 defines "Cotton Proprietary Germplasm" to mean proprietary hybrid cotton parent lines developed or owned by the sub-licensee during the term of the agreement. The word 'owned' implies that a sale has taken place. The term of the agreement, as provided under clause 9.1, is for an initial period of ten years and is further renewable in increments of five years by mutual consent of both parties, unless it is otherwise terminated earlier. What happens after the expiry or termination of the agreement is most interesting. Under clause 9.4, the sub-licensee is not bound to return to Monsanto India any portion of the initial fifty seeds given under the agreement, nor any additional donor seeds the sub-licensee may have produced. The control (and ownership) of the Bollgard Technology contained in those initial fifty donor seeds, as also in the additional donor seeds produced by the sub-licensee is with the sublicensee. Monsanto India has nothing whatsoever to do with this portion of the technology. The only restriction appears to be on the sale of the GMO cotton planting seeds. The sub-licensee is given a two-year window to sell or otherwise dispose of any remaining GMO planting seeds. After this period, Monsanto India has the option of requiring the sub-licensee to sell these planting seeds to Monsanto India itself or to dispose them for non-planting purposes. This clause makes it evident that the ownership of even the planting seeds is with the sub-licensee. Clause 2.5(d) then provides that Monsanto India can further sublicense the Bollgard Technology to a maximum of three other companies in the same territory as that the of the original sub-licensee. For additional transfers, Monsanto India would have to first consult the sub-licensee. Mr. Sonpal rightly states that this suggests that a transfer of the right has, in fact, taken place; and, even on Mr. Venkatraman's own illustrations, this case would not fall within the third illustration, but within the second and perhaps even the first. The degree of territorial exclusion is surely irrelevant; the question is whether or not there is any exclusivity. If it were mere permissive use, there would be no question of the Monsato India having to first consult the sub-licensee before effecting further transfers. Further, under clause 7.1 the sub-licensee can assign the agreement and its rights and obligations under it to its wholly-owned subsidiaries without Monsanto India's permission. Mr. Sonpal rightly says that this can never happen in a case of a permissive use. In law, a wholly-owned subsidiary is a distinct legal entity. In a case of service or permissive use, a person can never assign the goods or rights to a third person.*

....

44. ***Mr. Sonpal's reliance on the decision of the Andhra Pradesh High Court in G.S. Lamba & Sons v State of Andhra Pradesh is, however, well-founded.*** ....

45. ***Requirement (iv) of the decision in Lamba is vital to Mr. Sonpal's argument on effective control. This is especially so because Mr. Venkataraman has extensively argued that effective control is essential to transfer of right to use. On testing Monsanto India's sub-licensing agreement against the requirements laid down in decision, we believe this decision sufficiently supports Mr. Sonpal in his argument that the sub-licensing actually amounts to passage of effective control as well of the Bollgard Technology embedded in the seeds.***

*46. **In fact, we believe that this sub-licensing of the Bollgard technology may possibly even be an outright sale.** For a transaction to qualify for a sale, there must be a transfer of the property in the goods. In legal usage, the word "property" is a generic term, of broad and extensive application; perhaps, the most comprehensive of all terms which can be used. Property embraces everything which is or which may be subject to ownership of any kind at all, and is legally understood to include every class of acquisitions that a man can own or in which he can have an interest. The rights that transfer of property cover are the right of acquisition, possession, use, enjoyment and disposition.*

*47. **We pause here momentarily to consider the nature of these intangible goods. We believe this is necessary, because this is perhaps a case where the law is yet evolving to keep abreast of technology.** If what **Mr. Venkatraman suggests is correct, then every sale of software as we currently know it is never a sale but only a service. In his formulation, the 'medium' (CD, pen drive, etc) is irrelevant. Surely this cannot be correct. Software may be downloaded too, without any 'physical medium' intervening — the medium is as intangible as the goods.** .... In a software sale, there is no question of termination or repossession. It is for the licensee to use forever. This is clearly a sale or a deemed sale and it is in respect of not the medium or the intellectual property (the marks, copyright, patents, etc), but is the transfer of the right to use that software subject to those marks, patents, copyright, etc. **Monsanto India's case is no different. Its sub-licensee do not acquire any proprietory intellectual property rights over the Bollard Technology; Monsanto India's and its parents' patents, copyright, marks and other intellectual property rights are preserved intact, unaffected by the sub-licensing. But the identified technology, the one infused in the fifty seeds given to the sub-licensee, is for the sub-licensee to use as he wishes.** Viewed from this perspective, Mr. Venkatraman's clients' underlying fears are, we believe, unfounded.*

*48. **Mr. Venkatraman, in the alternative and without prejudice, argues that the seeds themselves are exempt from being taxed under Entry 41** of Schedule A of the MVAT Act, 2002, even if the transaction in question is held to be a sale...*

....

*52. Given our previous discussion, **we do not think it is necessary to go into this question at all, for what is being taxed is not the seed itself but the license that transfers a right to use the seed. Therefore, in our opinion, it makes no difference if the seeds are coker seeds or oil seeds.***

*53. **Mr. Venkatraman makes one more without prejudice argument, in case neither of his previous arguments succeed. He submits that even if the agreement in question is held to be a transfer of the right to use (deemed sale) and that it does not fall under the exemption for seeds in the MVAT Act, then the levy and collection of Service Tax by the Union of India would be without the authority of law since VAT can only be levied and collected by the States.** As argued earlier, the same transaction cannot be taxed as both a sale and a service. Monsanto India has already paid service tax for the entire period at a rate significantly higher than what is provided under the MVAT Act and therefore he says that it is not liable to pay further tax. For the period between May 2007 and February 2009, it has paid service tax at a rate of 12.36%, for March 2009 to March 2012 at a rate of 10.3%, for April 2012 to May 2015 at 12.36%, and for the period beginning June 2015 at a rate of 14%. Under Entry 39 of Schedule C of the MVAT Act, the applicable rate of sales tax is only 5% since April 2010, prior to which it was 4%. **He therefore seeks a Writ of Mandamus directing Union of India to transfer the amount paid as service tax from the Consolidated Fund of India to the Consolidated Fund of State of Maharashtra. He argues that such a transfer would not amount to unjust enrichment. We decline to enter into this debate. We leave it to Monsanto India to adopt suitable proceedings in this behalf, and leave their contentions open to the necessary extent."***

Commissioner of Sales Tax, Mumbai

03. *The issue as raised in the determination proceedings being the same as the one before the Hon. Bombay High Court, it was requested by your goodself to keep the determination proceedings on hold. In the circumstances of the issue having been decided by the Hon. Bombay High Court, I am directed by the Hon. Commissioner of Sales Tax, Maharashtra State to inform as under:*

The Hon. BHC has categorically held that the transaction is a 'transfer' within the meaning of Article 366(29A)(d) which reads as "(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;". Since the decision is in your very case, you are herewith asked to arrange your affairs accordingly. In view of the settled position that the transaction is amenable to tax under the MVAT Act,2002, it is proposed to close the determination proceedings. In the event, the aforesaid proposal is not acceptable, you are herewith called upon to explain your view, in writing, within a reasonable period of 15 days from the date of receipt of this communication."

The Hon. Bombay High Court having so elaborately elucidated the very matter as in the present proceedings and dealt with the arguments, as well, there would be nothing more to add. The applicant, too, in the hearing in the matter of the present proceedings, did not advance any arguments in respect of the decision of the Hon. Bombay High Court. In the circumstances, I have to hold that the transaction of sub-licensing Monsanto Technology (Technical Know How) to

various seed companies is a sale and therefore, liable to tax under the MVAT Act, 2002.

05. PROSPECTIVE EFFECT

The applicant has requested for prospective effect if the request of the applicant is not acceptable. I find that the provisions are clear and there has been no statutory misguidance. Even the Hon. Bombay High Court has explained, in detail, as to how the transaction as undertaken by the applicant falls within the scope of the provisions of the MVAT Act, 2002. In view thereof, I do not feel inclined to favourably consider the request for prospective effect.

06. In view of the above, it is determined thus –

ORDER

(under section 56 of the Maharashtra Value Added Tax Act, 2002)

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For reasons as discussed in the body of the order, it is herewith determined thus –

- The transaction of sub-licensing Monsanto Technology (Technical Know How) to various seed companies is a sale and therefore, liable to tax under the Maharashtra Value Added Tax Act, 2002.
- The request for prospective effect is rejected.

Commissioner of Sales Tax, Maharashtra State, Mumbai

(RAJIV JALOTA)

COMMISSIONER OF SALES TAX,
MAHARASHTRA STATE, MUMBAI