

Read : Application dt.19.11.2007(received on dt.10.1.2008) by M/s. Novo Dental Products Pvt. Ltd.
Heard : Sh. Praveen Shah, Advocate and Sh. N. K. Doctor (Director).

PROCEEDINGS

(under Section 56(1) (d) and (e) of the Maharashtra Value Added Tax Act, 2002)

No. DDQ 11/2008/Adm-3/45/B- 2

Mumbai, dt. 7/5/2016

The applicant, M/s. Novo Dental Products Pvt. Ltd., situated at Gala No. 24, 1st Floor, Dewan & Shah Industrial Estate No. 2B, Navghar, Vasai(E), Dist. Thane - 401210, has posed the following questions for determination :

- I. Whether the transaction under invoice No. IN/V/488 dt.27.02.2014 for details as mentioned below can be said to be that of purchase and sale of goods? The details are thus :

SI No.	Description of Goods	Quantity	Rate	Disc. %	Amount
1	Bs Procedure Code - Loose Machine No. 4654B Procedure - 37 Nos	37 nos	8,000.00	22.78%	2,28,571.20
2	Bs 3000 Proucedure Kit & Gel Dely : dt.27.2.14 - 9 Kit Exp. Dt: 2015-1Code - Loose				
	M.S.T. VAT 5% Rounded Off.		5 %		11,428.56 0.24
	Total				2,40,000.00

- II. If yes, then, whether it should be treated as imports in the hands actual user or not? Since there is a direct nexus between the foreign principal and local end user and moreover, since all process generates only upon inquiry by the end user.
- III. If it is treated as sales in the hands of the applicant – the rate of tax on such sale?

02. FACTS AS PER APPLICANT AND CONTENTION

The application is reproduced verbatim thus :

1. "The applicant is a private limited company having its factory at Pondicherry with Sales & Administrative office at Mumbai. The applicant is holding VAT registration no.27540247971 V&C dt. 1-4-2006. Prior to that, the applicant was holding S. Tax Regn no. 400001/S/2837 under BST Act & 400001/C/2637 under CST Act both w.e.f.1-4-1996.
2. The main business of the applicant is that of manufacturing, supplying & reselling dental equipments. Among other business, the applicant also acts as an authorized agent for Britesmile One Hour Professional Teeth Whitening System of USA.
3. The applicant has a network of dental clinics under Britesmile franchise where the bleaching dental unit is provided by BRITESMILE- USA, free of cost. The unit is activated only for 5 patient treatments when an 11-digit authorization code number is enter on the keyboard. This 11 digit sequence authorization code are downloaded from the company website of Britesmile.
The order for the authorization codes is placed by the doctor on e-mail or by telephone. To get the 11 digit sequence authorization code, it is required to log in to the Britesmile website with the user name and password (refer page#1 as per attachment). After logging in, the machine inventory page appears (ref. Page #2 as per attachment) where details of the machines with their serial number appears. Whenever there is an order for new Sequence Authorization code, a click on the authorization button of the particular machine generates automatically a new sequence authorization code, which gets directly passed on the user's dental bleaching unit.
For example,
We are enclosing herewith the dentist contact form of Machine Number P04654B, Serial No. 2147540828 which is installed at the clinic of Dr. Saiesha Mistry (ref page #3 as per attachment). This sequence code generated from the Internet is sent to the user by e-mail or sms. We have issue a sales Bill No.IN/V/BS/69 dt.01.11.2007 for amount of Rs.69,160/- (copy enclosed).

There is no passing of property in physical form, nor there is delivery of goods in physical form. Only a digital code is generated upon receipt of indent and which the foreign manufacturer directly passes to the machines in the hand of the end user. In view of this procedure, we are passing on electronic digitally generated authorization code and not the commodities. We in our humble opinion feel that this is a transaction not coming within the purview of VAT and moreover, our job is restricted to that of an indenting agent only.

The points for reference and your kind consideration are,

- I. Whether the transaction can be said to be that of purchase and sale of goods?
- II. If yes, then, whether it should be treated as imports in the hands actual user or not? Since there is a direct nexus between the foreign principal and local end user and moreover, since all process generates only upon inquiry by the end user.

- III. If it is treated as sales in the hands of the applicant - the rate of tax on such sale?

Presently, the applicant treats such receipts as receipts falling under the category of information technology products and collects and deposits tax in the government treasury @ 4%.

If an adverse interference is to be drawn, then the same may be made effective from the date of judgment on the issue giving prospective effect.

Also it is prayed that an advance ruling may be given immediately, pending final hearing to meet ends of justice and enabling us to fulfill the legal obligations in proper manner as a law-abiding and sincere dealer registered under the Act.

Since the details alongwith the application were insufficient, the applicant was called upon by letter dt.04.01.2012 to give details such as :

- Details of the technology used.
- Details of software and users' manual used for dental treatment.
- Details of treatment possible through the technology.
- Literature of machines used in the technology and operation of such machines.
- Whether operating machines are supplied by the company or by foreign entity or is required to be purchased by the user dentist?

By letter dt.03.02.2012, the applicant replied thus :

“BRITESMILE -USA are the manufacturer of various Dental Equipments with innovative ideas developed by them. Periodically, they advertise their products in medical Papers and Dental Research Journals as well as International Medical (Dental) Conferences. Dental Bleaching Unit is one of such product, which they supply 'Free of Cost' to prospective Dental Surgeon Clients with names of the Area Authorized Agents; from whom such Treatment Operative Codes are made available.

The system is similar to Weighing Machines installed at Railway Station or Cinema Halls, where by insertion of a Coin; you get your weight as well as small note of Astrological Forecast. Also one can come across "Massage Sofa Set" placed at Shopping Malls or Star Hotels; where either by putting a coin or taking help of attendant; you get gentle body massage. The only difference in case of Bleaching Dental Unit is that - it is for treatment to one of the important organs of Human Body (namely Teeth). It is necessarily done under a strict supervision of a Dental Surgeon

Our Customer are Dental Clinics under BriteSmile Franchise; where the Bleaching Dental Unit is provided by BriteSmile -USA, Free of Cost. The unit is activated only for 5-Patients Treatments - when an 11 digit Authorization Code Number is entered on the Key Board. This 11 digit sequence Authorization Code are downloaded from the Company website of BriteSmile. The Machine Operates on 11 Digit Code which is transmitted by BriteSmile to their Distributor (i.e. Novo Dental Products Pvt. Ltd.). Against requirement by Dentist of such 11 Digit Codes are released (Sold) by Novo Dental Products Pvt. Ltd., to the customer i.e. Dentists. 4% VAT is charged to the Dentist for supply of this 11 Digit Software to activate his Machine. The Code No. supplied by us is similar to Code No. which are supplied by Mobile Companies to Pre-Paid Mobile Users; by way of 'Talk time'.

The process involves Teeth Bleaching, wherein a Patient is asked to sit before the Machine and the Light Rays activate the Process of Bleaching the patient's teeth. The Gel applied on the teeth before the Light Activation is supplied 'free of cost' by the US Manufacturers. The resultant effect of the treatment is - The teeth become sparkling White and Free of Germs and Food Residue.

We have treated the Sale of 11 (Eleven) Digit Operative Code as part of Innovative IT Products and have collected tax @ 4% (5% w.e.f. April 2010) and request your goodself that, if any adverse inference is drawn in our case, that the same be made effective with prospective effect.”

03. HEARING

The case was taken up for hearing on various dates. However, the hearing finally took place on dt.16.12.2015 when Sh. Praveen Shah (Advocate) and Sh. N. K. Doctor (Director) attended. The contention as made in the application was reiterated. They were asked to furnish a written submission describing the entire procedure and the documents related thereto. Accordingly, the written submission dt.04.01.2016, as furnished, is reproduced verbatim thus :

“We are enjoying the Franchise Agency of M/s BRITESMILE (USA) (PRESENTLY PHILLIPS) for their product THE BRITESMILE PROFESSIONAL (DENTAL) WHITENING SYSTEM.

The product is State of the Art Whitening unit (a composite machine) which performs by insertion of 11 Digit Code. A licensed and trained dental professional performs the entire procedure. A whitening gel (Hydrogen Peroxide or like wise) is applied to the teeth of the patient undergoing the treatment. The BRITESMILE BLUE LIGHT shines on the gel and activates its whitening compound. The process lasts for about an hour-with 3 (three) cycles of 20 minutes each. The degree of intensity can vary say between 1 to 10 depending upon condition of the teeth or requirement of the patient or recommendation of the performing dentist. A therapy may last for one session of 20 minutes or more depending upon circumstances.

The machine is the ownership of the Principal. Each Machine is freely supplied by the principal and installed at the Dental Surgeons premises through us after going through the selection criteria.

OUR ROLE AS AN AGENT is to do detailed field works and survey and to verify the expertise and Credentials of the Professional Dentists as well as their clinical location their repute and the response that they receive by way of clientele.

As stated earlier the machine function upon insertion of 11 Digit Code which is supplied by the Principal as per requirement of the end users. A code once inserted is good for single patient. The principal may not be interested in catering to individual orders as it turns out to be difficult to operate and is non-viable. We in turn collect the requirements of different users and place a collective order for the code nos. with the principal and remit the funds accordingly. The principal thereupon electronically pass the code through net to our computer site. Which we transfer to individual end user as per their requirement. Since each of the end users are registered with us as well as with the principals, both of us have electronically controlled data of the use made by the end users.

The principals bill us for the code nos. supplied to us and in turn we issue invoices to respective end users as per the code nos. supplied to each of them.

As a matter of fact there is a Direct nexus between the end users and the principals for the code nos. supplied and our role is that of a mediator who facilitates the process.

We feel that we are a service provider and the passing of operational code no. is not a sale of goods in our hands.

Without prejudice to whatever state above we further pray that this being the age of E. usage and information technology we have alternately opted to pay tax @ the rate 4% or 5% as the case may be. In the circumstances we request your goodself to treat the same at par with the supply and sale of Software Packages and authenticate and approve our system of taxing the said sales @ of 5% (or 4%) VAT or CST as the case may be.

If any adverse view is prescribed than the same be made prospective.”

04. OBSERVATIONS

I have gone through the facts of the case. The applicant has presented a transaction and queried whether the same is a ‘purchase’ and ‘sale’ of goods which is liable to tax for the purposes of the Maharashtra Value Added Tax Act, 2002 (MVAT Act, 2002). The applicant has tried to explain the transaction and has also given copies of the agreements in this regard. Relevant clauses of the agreement from one such set pertaining to agreement of the applicant with the foreign principle and with the end user (Dentist) could be seen thus :

AGREEMENT OF THE APPLICANT WITH THE FOREIGN PRINCIPLE

BriteSmile International Limited, Ireland has by letter dt.19.12.2005 informed the applicant that in pursuance of the agreement dt.01.01.2003 with the applicant, it will not supply BriteSmile Materials to any other person in India (the "Territory"), except to Spas developed jointly, by BIL or by you, with cross rights of participation. It is also mentioned therein that for valuable consideration, receipt of which is acknowledged, the applicant also waives any kind of rights to develop any such Spas or to participate in any such Spas, and further that the applicant agrees to have the right to supply BriteSmile Materials to any Spa in the Territory developed or operated by BIL or its assigns.

Clauses from the Agreement

1. **Background.** BriteSmile is in the business of providing teeth whitening services and products including a light activated teeth whitening system (the "BriteSmile System"). The BriteSmile System is activated electronically with an authorization code (the "Authorization Code") supplied by BriteSmile and is operated in conjunction with a proprietary gel (the "BS Gel"), barrier material and other materials customarily supplied by BriteSmile (the BS Gel, barrier material and other such materials being collectively referred to as the "BriteSmile Materials"). The BriteSmile System and BriteSmile Materials are used together to perform teeth whitening procedures (the "BriteSmile Procedures").
Distribution Co. is in the business of distributing dental products in the Territory to dentists and other licensed dental professionals. The intent of this Agreement is that Distribution Co. establish a business of providing teeth whitening services in India (the "Territory") using BriteSmile Systems and BriteSmile Materials (the "Distribution Business") and that BriteSmile supply to Distribution Co. BriteSmile System, Authorization Codes and BriteSmile Materials for use in the Distribution Business. Distribution Co. will use its best efforts to install at least 30 BriteSmile Systems pursuant to this Agreement by the end of the 24th month after the date hereof.
2. **Right to Use BriteSmile System.** BriteSmile hereby licenses to Distribution Co. and Distribution Co. hereby licenses from BriteSmile, the right to use such number of BriteSmile Systems for the purpose of providing teeth whitening services in the Distribution Business. Distribution Co. will locate and use, or permit to be used, the BriteSmile Systems licensed hereunder only at locations in the Territory (each such location an "Installation Site") and shall not locate and use or permit to be used any BriteSmile System at any place outside of the Territory.
3. **Provision and Use of Authorization Codes and BriteSmile Materials.** BriteSmile shall sell Distribution Co. Authorization Codes and BriteSmile Materials. Distribution Co. shall buy Authorization Codes and BriteSmile Materials from BriteSmile. Distribution Co. shall use, or permit the use of, the Authorization Codes, BS Gel and other BriteSmile Materials only in connection with BriteSmile Procedures. Distribution Co. shall not in connection with any BriteSmile Procedure substitute, or permit the substitution of, any similar devices, gels or materials for the Authorization Codes, BS Gel or other BriteSmile Materials supplied directly or indirectly by BriteSmile. Distribution Co. will not operate or permit a BriteSmile System to be operated other than through use of the Authorization Code.
4. **Authorization Code Payment.** Each Authorization Code sold to Distribution Co. by BriteSmile shall enable five BriteSmile Procedures to be performed. BriteSmile reserve the right to change the prices of the Authorization Codes and accordingly shall give Distribution Co. not less than one month's notice in writing of any alternation in prices. Notwithstanding the foregoing, Distribution Co. shall make Authorization Code Payments (the "Code Payment") within 60 days after the date of BriteSmile invoice. All Code Payments shall be made without any further notice by wire transfer to an account designated by BriteSmile (or by such other method of payment to which the parties may mutually agree in writing).
5. **Free Authorization Codes and Procedure kits.** BriteSmile shall supply Distribution Co. with a reasonable number of Authorization Codes and procedure kits without charge for use solely for BriteSmile Procedures performed at Installation Sites without treatment fees being charged for training, promotional and other reasonable business purposes.
6. **Delivery of BriteSmile Materials and Authorization Codes.** BriteSmile shall deliver all Authorization Codes and BriteSmile Materials to a carrier for transportation to Distribution Co. and BriteSmile shall arrange for transportation thereof to a single location in the Territory mutually agreed by BriteSmile and Distribution Co. BriteSmile shall pay all transportation charges therefor.
7. **Delivery and Removal of BriteSmile Systems.** BriteSmile shall arrange for the transportation of all BriteSmile Systems to a single location in the Territory mutually agreed upon by BriteSmile and Distribution Co. and BriteSmile shall pay all transportation charges therefor. Distribution Co., at its expense, shall arrange for all approvals to import the BriteSmile Systems, Authorization Codes and BriteSmile Materials into the Territory and shall be responsible for all associated import and similar duties and for all VAT and similar charges associated with the use of such items. Upon termination or expiration of this Agreement, Distribution Co. shall promptly deliver all BriteSmile Systems to BriteSmile at a single location in the Territory mutually agreed upon by BriteSmile and Distribution Co.
8. **Records and Reports.** On a monthly basis, Distribution Co. will provide BriteSmile a report in the format and containing such information as Distribution Co. and BriteSmile may mutually agree upon from time to time. BriteSmile shall have the right throughout the term of this Agreement, at BriteSmile's expense and during business hours, to audit Distribution Co.'s records and facilities once per calendar year for the purposes of confirming Distribution Co.'s compliance with the terms of this Agreement, including confirming the number of BriteSmile Procedures performed, the locations at which such BriteSmile Procedures were performed and the location of each BriteSmile System. Such right to audit shall be exercised by BriteSmile as to any particular year by at least 10 days prior written notice given by BriteSmile to Distribution Co.
9. **Alterations, Maintenance and Replacements.**

- (a) BriteSmile shall be entitled to install such alterations and improvements to the BriteSmile Systems as it deems advisable from time to time. In lieu of making such alterations, BriteSmile may elect to replace the BriteSmile Systems with a new BriteSmile System incorporating such alterations and improvements it deems advisable.
- (b) Distribution Co., at its expense, will maintain the BriteSmile Systems in good working order and repair in accordance with BriteSmile standard maintenance and service requirements; provided that BriteSmile shall, at its expense, provide all necessary spare parts.
10. Use. Distribution Co. shall use or permit the BriteSmile Systems to be used only in connection with BriteSmile Procedures performed at Installation Sites. The BriteSmile Systems shall be operated only by qualified professionals or by others expressly approved by Distribution Co. in accordance with all applicable operating instructions, including all operating manuals and instructions provided by BriteSmile, and in accordance with all applicable governmental laws and regulations. Distribution Co. shall not, and shall not permit any other person to, analyze or attempt to "reverse engineer" the BriteSmile Systems, Authorization Codes, BS Gel or other BriteSmile Materials. Distribution Co. shall not make and shall not permit any other person to make any alterations, additions or improvements to the BriteSmile Systems, Authorization Codes, BS Gel or other BriteSmile Materials or dilute or strengthen the BS Gel or other BriteSmile Materials. Nothing herein shall give Distribution Co. any right, title or interest in or to the BriteSmile Systems except the limited possession and use rights specified herein.
11. Term; Exclusivity; Centers.
- a) Term. Unless sooner terminated pursuant to Section 20, the term of this Agreement shall begin on the date hereof and end at the close of business on December 31, 2005, provided, however, that the term of this Agreement shall be automatically extended for an additional period commencing January 1, 2006 and ending on the fifth anniversary hereof unless not later than 120 days prior to January 1, 2006 either party has notified the other in writing that it does not wish to extend the term of this Agreement, in which case the term of this Agreement shall end on December 31, 2005. Notwithstanding the foregoing, Distribution Co. shall have the right to elect to extend this Agreement from January 1, 2006 to the fifth anniversary hereof in the event that the number of Authorization Codes it has purchased during the 12-month period ending September 30, 2005 equals or exceeds 90 (the "**Performance Target**"). Any such election shall be made by written notice to BriteSmile given on or before November 15, 2005. The termination of this Agreement shall not affect the right of either party to enforce any right or obligation then owned to it by the other, and the provisions of Sections 13(d) and (h) and 16 through 20 shall survive by any termination hereof.
- b) Exclusivity. Subject to Section 12(c), from the date of this Agreement until the end of the term of this Agreement, BriteSmile shall not supply Authorization Codes, BS Gel or BriteSmile Materials to any person in the Territory other than Distribution Co.
- c) Development of Centers. Notwithstanding Section 12(b), in the event that either Distribution Co. or BriteSmile wishes to develop and establish in the Territory one or more centers which are similar in their method and operation and services to the BriteSmile Centers now located in the United States, it shall notify the other of its plans whereupon both parties shall negotiate in good faith towards developing and establishing the center as a joint venture between them. If no agreement can be reached, or if the other party declines to participate, the party that proposed the venture shall be free to pursue it for its own account. If BriteSmile pursues such a center for its own account in accordance with this Section 12(c), it shall be permitted to supply such center with BriteSmile Systems, BS Gel, BriteSmile Materials and Authorization Codes.
12. Miscellaneous Agreements.
- (a) Teeth Whitening Competition. From the date of this Agreement until the end of the term of this Agreement, neither Distribution Co., nor any of its stockholders, officers, directors, employees or affiliates shall (other than with BriteSmile Systems, Authorization Codes and BriteSmile Materials during the term hereof as authorized in this Agreement) engage directly or indirectly (through the ownership of interests in other companies or otherwise) in the Territory in the business of providing teeth whitening procedures, teeth whitening equipment, teeth whitening gels or other ancillary products relating to teeth whitening or managing teeth whitening businesses, whether in the professional or take-home markets or in any other channel of distribution.
- (b) Marketing and Roll out Review. Beginning January 2003 and in January of each year thereafter during the term hereof, Distribution Co. shall submit for BriteSmile's review a written plan for the installation and use of BriteSmile Systems under this Agreement and the marketing programs and expenditures that Distribution Co. wish BriteSmile to make to support its plan which the parties shall discuss and mutually agree upon.
- (c) Use of Intellectual Property. BriteSmile grants to Distribution Co. during the term hereof the nonexclusive right to use BriteSmile's logo, trademark and tradename (collectively, "BriteSmile Intellectual Property") in the Territory solely in connection with the promotion and marketing of BriteSmile Procedures by Distribution Co. in connection with the Distribution Business. Distribution Co. shall use the BriteSmile Intellectual Property only in the form used by BriteSmile and not make any changes to the graphic representation thereof or the font or typeface in which it is portrayed.
- (d) Protection of BriteSmile Image. All advertising campaigns, advertisements and promotional activities created by Distribution Co. for the Distribution Business, including the use of particular publications, programs and other media, shall be in accordance with prevailing community mores and standards of good taste and shall conform in all material respects with the image of the BriteSmile brand portrayed by BriteSmile. Without limiting the foregoing, Distribution Co. shall promote and market BriteSmile Procedures in a high quality manner consistent with (i) the high reputation, image and prestige of BriteSmile and the "BriteSmile" brand (collectively, the "Image"), (ii) the manner in which comparable quality dental procedures of other leading, high-



end dental service providers are promoted or marketed and (iii) the marketing plan submitted by Distribution Co. and approved by BriteSmile in accordance with paragraph (b) above. Distribution Co. shall not take any action to damage BriteSmile's brand or the Image.

- (e) Samples. If requested, Distribution Co. shall provide BriteSmile with samples of all advertising and promotional materials created by or for Distribution Co. bearing any BriteSmile Intellectual Property ("Distribution Co. Created Materials"). Distribution Co. shall not use or continue to use any Distribution Co. Created Materials of which BriteSmile shall disapprove.
- (f) General Provisions. Distribution Co. shall not use any of BriteSmile's Intellectual Property after the end of the term of this Agreement. BriteSmile shall own all right, title and interest (including copyrights) in all BriteSmile Intellectual Property, including all goodwill with respect thereto, all uses thereof shall inure to the benefit of BriteSmile, and Distribution Co. shall not acquire any right or interest therein by reason of the use authorized by this Agreement. Distribution Co. shall not: (i) acquire or asset any right in the BriteSmile Intellectual Property or any deprivation, adaptation or variation thereof; (ii) permit or authorize any act or use any mark which might adversely affect BriteSmile's rights in, or ownership of, the BriteSmile Intellectual Property (or registrations thereof), or which might dilute the value of or proprietary rights in the BriteSmile Intellectual Property, or which might disparage, tarnish or adversely affect the Image; (iii) register (or seek to register) the BriteSmile Intellectual Property or any derivation, adaptation or variation thereof or (iv) assign or sublicense its rights to BriteSmile Intellectual Property. Without limiting any remedy available at law or in equity, BriteSmile may enjoy any use of the BriteSmile Intellectual Property or exploitation of BriteSmile Procedures outside of the scope of the rights granted to Distribution Co. under this Agreement; and in such event, Distribution Co. hereby waives any obligation on BriteSmile to post a bond or to prove actual damages. BriteSmile hereby reserve all rights in the BriteSmile Intellectual Property not granted to Distribution Co.
- (g) Quality Control. It is acknowledged that the BriteSmile Trademarks indicate to the public that BriteSmile Systems and BriteSmile Procedures are of a high consistent quality and standard. Distribution Co. shall conduct the Distribution Business in a manner consistent with such quality and standard and shall institute adequate quality control and safety procedures. BriteSmile shall, upon reasonable notice have the right to inspect any facilities where the Distribution Business is being conducted (including the facilities of third parties to whom Distribution Co. has granted rights to use BriteSmile Systems) to confirm compliance with such quality control and safety procedures and the other provisions of this Agreement.
- (h) Infringements. Distribution Co. shall promptly notify BriteSmile of any infringements or illegal uses of the BriteSmile Intellectual Property that come to its attention. BriteSmile shall take action it deems appropriate and advisable in its sole discretion to protect the BriteSmile Intellectual Property. Distribution Co. shall cooperate fully with BriteSmile in connection with BriteSmile's efforts to protect the BriteSmile Intellectual Property. Distribution Co. shall not institute or authorize any action with respect to the BriteSmile Intellectual Property without the prior written consent of BriteSmile, which may be withheld or granted in BriteSmile's sole discretion.
- (i) Installation Sites. During the term of this Agreement, Distribution Co. will only perform or permit to be performed teeth whitening procedures on any person at any Installation Site with the BriteSmile Systems.
- (j) Training. BriteSmile shall provide to a qualified professional designated by Distribution Co. (the ("Distribution Co. Designee") training in the use and operation of the BriteSmile System and BriteSmile Materials, and the performance of BriteSmile Procedures, so that the Distribution Co. Designee may train dental professionals, dental hygienists, dental assistants and other professional personnel practicing in each Installation Site. Such training shall be conducted at a location mutually agreed upon by Distribution Co. and BriteSmile. Distribution Co. shall be responsible for all transportation, compensation and similar costs of such Distribution Co. Designee.
- (k) Use by Others. Distribution Co. agrees that the terms on which it will permit any BriteSmile Systems, Authorization Codes or BriteSmile Materials to be used by any third party shall include provisions (1) that require such third party's use of BriteSmile Systems licensed hereunder to cease on any termination of this Agreement and (2) that will permit Distribution Co. to terminate such third party's use of BriteSmile Systems licensed hereunder and to remove BriteSmile Systems, Authorization codes and BriteSmile Materials from the applicable Installation Site in the event such third party takes any action (and fails to cure such action within 30 days after receiving notice thereof) which if taken by Distribution Co. would violate in any materials respects the provisions of this Agreement. For clarification, Distribution Co.'s termination and removal rights will arise, for example, if a non- BriteSmile teeth whitening device is installed by an third party at an Installation Site or if a third party "reverse engineers" a BriteSmile System. Distribution Co. agrees to exercise such termination and removal rights in the event of any such violations.
13. Representations, Warranties and Covenants. Each of BriteSmile and Distribution Co. represents and warrants to the other that (i) it is duly organized, and possesses all power and authority to enter into and carry out the provisions of this Agreement, (ii) this Agreement has been duly executed and delivered by it and constitutes its valid binding and enforceable obligation and (iii) performance of this Agreement will not violate any law, rule or regulation or agreement of any nature to which it is subject. Distribution Co. will use its best efforts to obtain all regulatory approvals and consents required for the conduct of the Distribution Business as soon as possible after the date hereof.
14. Independent Contractors. Distribution Co. and BriteSmile intend to act and perform as independent contractors. The provisions hereof are not intended to create any partnership, joint venture, agency or employment relationship between the parties. Except as provided in this Agreement, Distribution Co. shall be responsible for and retain the exclusive authority to control and direct all aspects of the Distribution Business.



15. Title. Nothing herein shall give Distribution Co. or any other person any right, title or interest in or to the BriteSmile Systems, except the limited possession and use rights specifically set forth herein. Title to these Systems shall not pass to Distribution Co. Distribution Co. acknowledges and agrees that BriteSmile shall be entitled to file such financing statements, or comparable documents under applicable law, as it deems appropriate to protect its interest in the BriteSmile Systems and agrees to execute and deliver all financing statements and comparable documents reasonably requested by BriteSmile for such purpose.
16. Confidentiality. During the term of this Agreement, BriteSmile may disclose to Distribution Co. confidential and proprietary information regarding the BriteSmile know-how, BriteSmile Systems and BriteSmile Materials and the use thereof, including without limitation technical data, marketing data, efficacy studies, design features, business projections or plans and other information marked "confidential" (collectively "**Confidential Information**"). Distribution Co. agrees not to disclose or use or to permit to be disclosed or used any Confidential Information to any third party except in furtherance of the Distribution Business and to persons who have a need to know such information and who have entered into written agreements prohibiting further use or disclosure.
17. Limitation of Liability. BRITESMILE WILL NOT BE LIABLE FOR INCIDENTAL, CONSEQUENTIAL, INDIRECT OR SPECIAL DAMAGES OF ANY KIND INCLUDING, BUT NOT LIMITED TO, DAMAGES FOR LOSS OF REVENUE, LOSS OF BUSINESS OR BUSINESS OPPORTUNITY OR OTHER SIMILAR FINANCIAL LOSS ARISING OUT OF OR IN CONNECTION WITH THE INSTALLATION, PERFORMANCE, FAILURE, USE OR INTERRUPTED USE OF THE BRITESMILE SYSTEMS OR ANY BRITESMILE MATERIALS, OR THE UNAUTHORIZED USE OF THE BRITESMILE SYSTEMS OR ANY BRITESMILE MATERIALS.

AGREEMENT OF THE APPLICANT WITH THE END USER (DENTIST)

Memorandum of Understanding between Associated Partnering Dental Centre & Novo Dental Products Pvt. Ltd. (BriteSmile India Agency)

- BriteSmile unit i.e. Bleaching Lamp will be provided to the Associated Partnering Dental Centre (APDC) on completion of the Memorandum of Understanding; signed by both parties.
- APDC choosing to install the BriteSmile Bleaching System will be required to pay a Refundable Deposit of Rs.35,000/- prior to installation; which can be refunded whenever the System is returned to the Company.
- APDC will also purchase 10-Procedures @ Rs.7,000/- each plus 5% VAT and issue separate Remittance of Rs.73,500/- in addition to Rs.35,000/- as a Deposit.
- It is expected by the BriteSmile - represented by Novo Dental Products Pvt. Ltd. (NDPPL), that the APDC has regulated electrical supply. If not, UPS (0.5 KVA Online UPS with 80 minute backup time) and/or Voltage Stabilizer is necessary.
- At the time of installation, NDPPL's technical Expert will Demonstrate (if necessary) 1st Procedure on the Patient selected by the APDC on 'chargeable basis for travel/stay cost', as applicable.
- To enable us serve effectively, it is recommended to place orders of Procedures well in advance, allowing at least 4-full working days (excluding weekend) to process the order and reach the kits/code/procedures well on time - to the APDC.
- It is also recommended to maintain at least 2-procedures with kits - always readily available with APDC.
- Every order of Procedures should be preferable in multiples of 5-Procedures.
- NDPPL representing BriteSmile expect APDC to Purchase Minimum (30 procedures) within 1-year; from the date of installation of the Bleaching System.
- APDC agrees at all times; - to maintain an 'Insurance Policy' that insures the Machine from risk of damage, loss & theft amount not less than Rs.2 Lacs only in favour of M/s. Novo Dental Products Pvt. Ltd. and copy of the same to be submitted within 15 days of delivery to NDPPL.
- NDPPL representing BriteSmile may terminate this agreement at any time upon 30 days, prior written Notice in anyone of the following event.
 - a. Failure to make Payment within stipulated due date.
 - b. Non-compliance of Annual Minimum Commitments of 30 Procedures.
- In the event of Agreement Termination, 50% i.e. Rs.17,500/- Deposit will be forfeited as Service Charges, inclusive of Return Transportation to NDPPL representing BriteSmile.
- APDC is required to retain the Original Packing in good condition.
- Handling of the Equipment will be thoroughly explained at the time of installation by a Technical Expert, at the time of delivery of the machine - to the APDC. Till such time, please don't open the original packing.
- APDC may not 'Assign or Transfer this Agreement' or 'Assign or delegate any of its rights or obligations', 'voluntarily or involuntarily' without the prior written consent of NDPPL representing BriteSmile. Any such Assignment, Transfer or Delegation without the prior written consent of NDPPL representing BriteSmile will not be binding upon NDPPL or BriteSmile.
- Upon installation, the APDC will be the responsible "Care Taker" for the Machine.
- Although Servicing of BriteSmile Machine will be responsibility of 'Novo Dental Products Pvt. Ltd.' (NDPPL), the repair assurance does not cover damage resulting from misuse, loss, theft, neglect, adjustments or alternations to the BriteSmile Machine.
 - i. 'NO Reimbursement of Lost Procedures' due to power failure, fluctuation or improper electrical connections can be permitted.
- Upon Termination of this agreement, APDC shall return the BriteSmile Machine in good working condition to NDPPL (BriteSmile India Agency).

It should be clearly understood that the BriteSmile Unit is give to the APDC on FRANCHISEE basis. The APDC is not



the Legal Owner of the BriteSmile Unit; the Legal Ownership of the BriteSmile Franchise Associates is with Novo Dental Products Pvt. Ltd. (BriteSmile India Agency) and Discus Dental (USA); who alone has the right to withdraw the Machine from the Dental Clinic - if not satisfied with their (Franchisee Partner's) APDC performance.

The applicant has given copies of the invoices raised by -

- Discus Dental, LLC (No.5506167-1 dt.25.10.2013) on the applicant showing description as “**BSDN Procedure Authorization Code**”.
- Novo Dental Products Pvt. Ltd. on their customer, Dr. Mistry's Orthodontic & Dental Care Centre (2 invoices), showing description thus :

No.IN/V/BS/69 dt.01.11.2007

SI No.	Description of Goods	Quantity	Rate	Disc. %	Amount
1	Bs Procedure Code - Loose CODE NO: 22 SEQ 22: 31752423551	10 nos	7,000.00	5%	66,500.00
2	Bs Procedure Code - Loose CODE NO: 23 SEQ 23: 08563901933 FOC FOR ABOVE	2 nos			
	M.S.T. 4% VAT		4	%	2,660.00
	Total				69,160.00

No.IN/V/488 dt.27.02.2014

SI No.	Description of Goods	Quantity	Rate	Disc. %	Amount
1	Bs Procedure Code - Loose Machine No. 4654B Procedure - 37 Nos	37 nos	8,000.00	22.78%	2,28,571.20
2	Bs 3000 Proucedure Kit & Gel Dely : dt.27.2.14 - 9 Kit Exp. Dt: 2015-1Code - Loose	37 kit			
	M.S.T. VAT 5% Rounded Off.		5	%	11,428.56 0.24
	Total				2,40,000.00

The applicant was queried about the description in the above bills and the billing pattern.

It was replied thus -

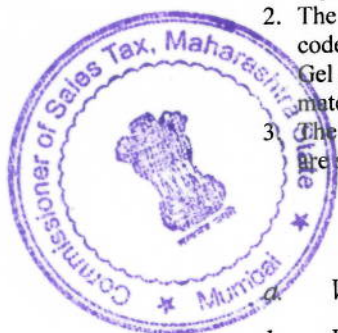
1. “The import purchase price is fixed by the Foreign Supplier varied from time to time also depending upon the rate of US Dollar. We in turn are allowed to keep a margin of approx. 25-30%, Inclusive all expenses. However this does not alter the fact that there is direct nexus between end user & the Principal Supplier since they (the supplier) also supervise & control the distribution & use of the code nos.
2. The invoice No.IN/V/BS/69 Dated 01.11.2007 denotes the details of the code nos. supplied as well as additional code nos. supplied free of cost as per the system of sale & distribution prevailing at that time. The procedure Kit & Gel are always supplied free of cost though some of the users do not insist for the same and prefer to use their own material (Gel), while exercising (Using) the machine for treatment.
3. The Invoice of October 2013 denotes the supply of code nos. & free supply of Gel. No Complementary code nos. are supplied as there was no such offer by the Principal.”

An overview of all above, I find that the applicant desires that I decide on the lines thus -

- a. *Whether the transaction can be said to be that of purchase and sale of goods?*
- b. *Whether it should be treated as imports in the hands of actual user or not? Since there is a direct nexus between the foreign principal and local end user and moreover, since all process generates only upon inquiry by the end user.*
- c. *Whether the receipts under the transaction fall under the category of information technology products.*

The agreements and the submissions, made at different times, could be summarized thus :

1. BriteSmile International Limited, Ireland is in the business of providing teeth whitening



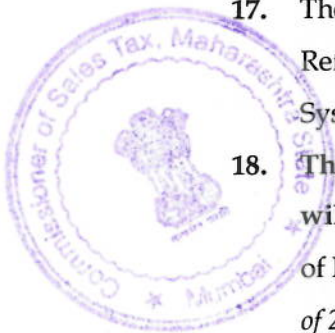
services and products including a light activated teeth whitening system ("BriteSmile System").

2. The BriteSmile System is activated electronically with an authorization code supplied by BriteSmile and is operated in conjunction with a proprietary gel (the "BS Gel"), barrier material and other materials customarily supplied by BriteSmile ("BriteSmile Materials").
3. The BriteSmile System and BriteSmile Materials are used together to perform teeth whitening procedures ("BriteSmile Procedures").
4. Each Authorization Code enables five BriteSmile Procedures to be performed.
5. **BriteSmile has appointed the applicant to supply BriteSmile Materials and has given the applicant the right to use such number of BriteSmile Systems in India in a defined Territory.** It is also agreed upon that BriteSmile shall not supply Authorization Codes, BS Gel or BriteSmile Materials to any person in the Territory other than the applicant.
6. The applicant would, thereafter, locate or select the Dental Centers or Doctors who are eligible to operate the BriteSmile System. The BriteSmile Systems are to be operated only by qualified professionals or by others expressly approved by the applicant in accordance with all applicable operating manuals and operating instructions provided by BriteSmile, and in accordance with all applicable governmental laws and regulations.
7. **The applicant and BriteSmile intend to act and perform as independent contractors.** The provisions of the Agreement between the two are not intended to create any partnership, joint venture, agency or employment relationship between the parties. Except as provided in the Agreement, the applicant shall be responsible for and retain the exclusive authority to control and direct all aspects of the Distribution Business.
8. Nothing in the Agreement with BriteSmile shall give the applicant, any right, title or interest in or to the BriteSmile Systems except the limited possession and use rights specified in the Agreement.
9. BriteSmile grants to the applicant, during the term of the Agreement, nonexclusive right to use BriteSmile's logo, trademark and tradename ("BriteSmile Intellectual Property") in the Territory solely in connection with the promotion and marketing of BriteSmile Procedures by the applicant in connection with the Distribution Business.
10. BriteSmile shall supply the applicant with a reasonable number of Authorization Codes and procedure kits without charge for use solely for BriteSmile Procedures performed at Installation Sites without treatment fees being charged for training, promotional and other reasonable business purposes.
11. BriteSmile shall arrange for the transportation, and pay all transportation charges therefor, of all BriteSmile Systems to a single location in the Territory mutually agreed upon by BriteSmile and the applicant. The applicant, at its expense, shall arrange for all approvals to import the BriteSmile Systems, Authorization Codes and BriteSmile Materials into the



Territory and shall be responsible for all associated import and similar duties and for all VAT and similar charges associated with the use of such items. Upon termination or expiration of the Agreement, the applicant shall promptly deliver all BriteSmile Systems to BriteSmile at a single location in the Territory mutually agreed upon by BriteSmile and the applicant.

12. BriteSmile shall be entitled to install such alterations and improvements to the BriteSmile Systems as it deems advisable from time to time. The applicant, at its expense, will maintain the BriteSmile Systems in good working order and repair in accordance with BriteSmile standard maintenance and service requirements; provided that BriteSmile shall, at its expense, provide all necessary spare parts.
13. Upon installation, the Dental Centre will be the responsible "Care Taker" for the Machine.
14. Although servicing of BriteSmile Machine will be the responsibility of the applicant, the repair assurance does not cover damage resulting from misuse, loss, theft, neglect, adjustments or alternations to the BriteSmile Machine. No reimbursement of Lost Procedures due to power failure, fluctuation or improper electrical connections is permitted.
15. **The Agreement with BriteSmile spells out that BriteSmile shall sell the applicant, Authorization Codes and BriteSmile Materials AND the applicant shall buy Authorization Codes and BriteSmile Materials from BriteSmile.**
16. The applicant shall make Authorization Code Payments within 60 days after the date of BriteSmile invoice. All Code Payments shall be made without any further notice by wire transfer to an account designated by BriteSmile (or by such other method of payment to which the parties may mutually agree in writing).
17. The Dental Centre choosing to install the BriteSmile Bleaching System is required to pay a Refundable Deposit of Rs.35,000/- prior to installation which can be refunded whenever the System is returned to the Company.
18. **The Agreement of the applicant with the Dental Centre mentions that the Dental Centre will purchase 10-Procedures @ Rs.7,000/- each plus 5% VAT and issue separate Remittance of Rs.73,500/- in addition to Rs.35,000/- as a Deposit. (the rates have changed as the sample bills of 2007 and 2014 given show the same to be Rs.7,000/- and Rs.8,000/-, respectively)**
19. The Agreement of the applicant with the Dental Centre mentions that every order of Procedures as placed by the Dental Centre should be preferable in multiples of 5-Procedures and further that, **the applicant expects the Dental Centre to Purchase Minimum (30 procedures)** within 1-year from the date of installation of the Bleaching System.
20. The Dental Centre agrees at all times to maintain an 'Insurance Policy' that insures the Machine from risk of damage, loss & theft amount not less than Rs.2 Lacs only in favour of the applicant.
21. Upon Termination of the agreement with the Dental Centre, the BriteSmile Machine in good working condition is to be returned to the applicant.



22. BriteSmile will not be liable for incidental, consequential, indirect or special damages of any kind including, but not limited to, damages for loss of revenue, loss of business or business opportunity or other similar financial loss arising out of or in connection with the installation, performance, failure, use or interrupted use of the BriteSmile systems or any BriteSmile materials, or the unauthorized use of the BriteSmile systems or any BriteSmile materials.
23. BriteSmile shall have the right to audit the applicant's records and facilities once per calendar year for the purposes of confirming compliance with the terms of the Agreement, including confirming the number of BriteSmile Procedures performed, the locations at which such BriteSmile Procedures were performed and the location of each BriteSmile System.
24. The process as informed by the applicant is thus :
- The Bleaching Dental Unit is provided by BriteSmile -USA, Free of Cost. The Machine Operates on 11 Digit Authorization Code. The 11 digit sequence Authorization Codes are downloaded from the website of BriteSmile and are transmitted by BriteSmile to their Distributor (i.e. Novo Dental Products Pvt. Ltd.). Against requirement by Dentist, of such 11 Digit Codes, the same are released (sold) by Novo Dental Products Pvt. Ltd., to the customer i.e. Dentists. 4% VAT is charged to the Dentist for supply of this 11 Digit Software to activate his Machine.

On perusal of all above, the immediate inferences which strike me are thus :

- i. The relationship of the applicant with BriteSmile as well as with the Dental Clinics is not of principal and agent. *In fact, the agreement with BriteSmile clearly spells out that the applicant and BriteSmile intend to act and perform as independent contractors.* In view of the same, the argument of the applicant that the activity is carried on by the applicant as an agent of BriteSmile is incorrect. There are independent transactions between the applicant and BriteSmile and the other between the applicant and the Dental Centers.

There is a clear case of purchase and sale transactions being effected in pursuance of the recitals of the agreements. And the Agreements echo the intention thus :

- BriteSmile shall sell the applicant, Authorizaition Codes and BriteSmile Materials AND the applicant shall buy Authorizaition Codes and BriteSmile Materials from BriteSmile.
- Dental Centre will purchase 10-Procedures @ Rs.7,000/- each plus 5% VAT.

In view of the above, the argument of the applicant that the activity involves no sale or purchase is incorrect.

- iii. Further, even the agreement of the applicant that the transaction should be treated as imports in the hands of actual user is incorrect as we see that BriteSmile does not directly deal with the Dental Centers. The agreement of the applicant with BriteSmile clearly spells that *BriteSmile has appointed the applicant to supply BriteSmile Materials and has given the applicant the right to use such number of BriteSmile Systems in India in a defined Territory.* Thus, there is no question of a direct nexus between BriteSmile and the Dental Centers.



The above were the immediate inferences which come to notice. However, from a reproduction of all the details above, I find that the transaction presented before me is thus -

1. The BriteSmile system is such that there is a machine which is used for the whitening treatment on the teeth.
2. The advertisements about BriteSmile as available on the website could be seen to understand the functioning of the BriteSmile System thus :

BriteSmile Treatment [<http://deneckerdentistry.com/services/bright-smile-procedure/>]

We use a hydrogen peroxide gel which activates the whitening – this gel specifically developed for the whitening procedure, responds to the subtle blue wavelengths of the light system used during this treatment.

During the BriteSmile whitening procedure, your gums are **protected** with isolation materials. The BriteSmile gel is applied and then activated by the light source. After three – 20 minute applications, your whitening process is completed.

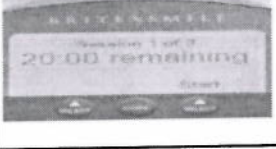
The BriteSmile procedure is very **safe and effective** whitening treatment for the following reasons:

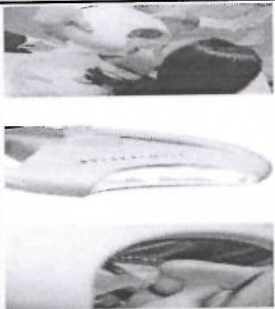
- Only an approved professional dentist may perform the BriteSmile teeth whitening procedure.
- The LED light used is very gentle and we do not use any potentially harmful laser or UV rays.
- The BriteSmile gel contains 15% peroxide compared to the 35%+ of other light activated procedures.
- No structural changes to your teeth take place during the treatment
- No harmful effect on any of your fillings

How does BriteSmile work? [http://www.britesmile.co.za/index.php?dirname=html_docs_005dentpros]

The BriteSmile Center dentist will first examine your teeth and gums for good oral health. Next as you relax in the chair, our proprietary whitening gel is applied to your teeth and the revolutionary, proprietary BriteSmile light will be positioned over your teeth to activate the gel. As you watch TV, listen to music or nap, your teeth will lighten to their optimum, natural whiteness in about an hour.

BS3000PB Operating Procedure

STEP ONE Set up the Unit 	Unfold the delivery arm, extend to horizontal and position as needed.
STEP TWO Loading Procedures 	(Start up & replenishment only) With the BS4000 on press the CODE button (center top row) on the control panel. This will enable the CODE ENTERING MODE. Write down the unit serial number that appears. Press CONTINUE and enter the 11 digit authorization code. The display will confirm receipt. Press EXIT. You can now begin a BriteSmile chairside whitening procedure.
STEP THREE Reading the Keypad  	The total number of procedures will appear on the display after the transaction is complete. Options for starting a NEW procedure or a TOUCH UP appear just below the listing of total procedures available. Once a new procedure is selected, the time remaining will appear on the display.
STEP FOUR Curing Light 	Prepare the patient, following the clinical guidelines treatment protocol using the curing light inside the compartment.
STEP FIVE Start the Treatment 	5.1 The display will show the current balance. 5.2 Select "New Procedure" to do a whitening procedure. (3 x 20 minute cycles). 5.3 Select "Continue" to proceed, "Abort" to cancel, and return to the main menu. 5.4 Once "Continue" is selected, the display will show the time remaining.

STEP SIX Position the Delivery Head	
	6.1 Grasp the delivery head with one hand and bring it close to the patient's mouth.
	6.2 Use your other hand to raise or lower the arm to position the delivery head over the patient's teeth.
	6.3 Use both hands to carefully "plug" the slender metal post on the delivery head into the hollow end of the optical positioner.
	6.4 Have the patient bite down as the two parts join.
	6.5 You will feel a slight "bump" as the delivery head plugs into the positioner.
STEP SEVEN Activating the Light Source	
	7.1 Press the "Start" button to activate the light source. The "Pause" button can be pressed at any time to turn off the light. Press the "Continue" button to restart the light and resume treatment.
	7.2 The control panel will indicate the current session number and time remaining.
	7.3 Press the "Start" button to activate the light between gel applications.
STEP EIGHT Completing the Session	
(Fourth session option)	
8.1 At the end of the third session, the display will read "Treatment Complete". The operator can press "Done" to reset the device for the next patient or press "Extend" to go a fourth 20-minute session.	
8.2 Press the "blue on/off" button to turn the unit off.	

BriteSmile 2000 for BriteSmile [<https://www.ideo.com/work/britesmile-2000>]

Teeth-whitening system

Using a proprietary light-activated whitening gel, BriteSmile offers an effective new procedure that offers a simple, fast, and safe way to give people whiter teeth. After entering one of BriteSmile's highly professional centers and undergoing a screening, the customer is seated in a dental chair. The dentist then applies whitening gel to the patient's teeth along with isolation material to protect the mouth and gums. The dentist positions the BriteSmile 2000's light bar in front of the patient's mouth and illuminates the teeth for 20 minutes. This procedure repeats for three applications and the whitening effect is immediate.

The design challenge for IDEO involved bringing light from two large sources located in a cabinet to a movable arm that is placed the front of the customer's mouth, while conveying a feeling of comfort, safety, and high-tech competence. With their centers located in retail environments, BriteSmile wanted to avoid the threatening connotations of a dental office. The resulting device is comfortable for the customer and easy to use by both left- and right-handed operators. To ensure a high level of quality control, the positioning mechanism had to be accurate and repeatable. The team also designed the illumination pattern to encompass the front 16 teeth (8 upper and 8 lower) within a prescribed level of uniformity. All other whitening light sources on the market can only do one tooth at a time.

BriteSmile 3000 for BriteSmile

The team created a sleek, efficient unit with a floating arm mechanism that effectively transmits the light necessary to activate whitening chemicals applied to a customer's teeth. The machine aims the light source more accurately than previous technology, thereby improving the whitening process. The mobile arm gives the customer freedom of movement during the hour-long treatment, and the lines and features of the unit provide a sense of reassurance, comfort, and confidence. The end result is a more enjoyable client experience.

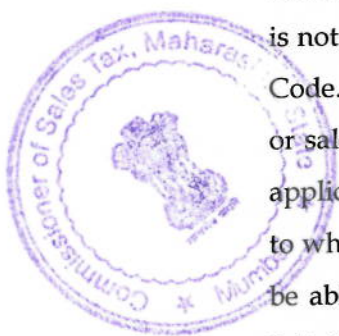
In all positions, the BriteSmile 3000PB Teeth-Whitening System is a complete, self-contained unit that protects both the delicate lighting technology and the safety of the patient and operators. When folded, the arm collapses into the main body of the machine, making it compact enough for storage under the counter or in a corner, and stable enough to roll from room to room. It is more adaptable and suited to deployment in remote, small, or crowded dental practices than previous devices, and has thereby opened up the overseas market for the company. The product has dramatically improved the BriteSmile's capital outlays and operating expenses as a proportion of its procedure revenues.

3. Thus, we see above that the machine lets out the light to activate the gel which is applied on the teeth for teeth whitening purposes.
4. Now, the applicant informs that -
 - a. The machine is given free of cost by BriteSmile.
 - b. The gel used during the treatment may or may not be used by the Dental Centres as they prefer to use their material. Hence, it is stated that the procedure Kit & Gel are always supplied free of cost.

5. Merely having the machine and the materials would not enable to perform the treatment. The machines will not perform unless a code is keyed in the machines. Thus, access to the machines is available ONLY when the authorization code consisting of an 11 digit number is keyed in to activate the machine which performs the teeth whitening procedures.
6. The intention of the transaction is that the BriteSmile machines which work on the BriteSmile light technology are used to perform teeth whitening procedures. Hence, BriteSmile has allowed the use of their machines.
7. The transaction, therefore, in its essence, is one for the transfer of the right to use the machines. The right to use the machines is transferred when the Codes are given by BriteSmile and fed in the machines.
8. Now, we find that the invoices as tendered herein show that the same are raised for the authorization codes (BSDN Procedure Authorization Code / Bs Procedure Code). However, I find that this would not change the nature of the transaction as one being for the transfer of the right to use the BriteSmile machines. The reason I say so can be explained thus -

The machines wherever they are belong to BriteSmile and would be known as the BriteSmile machines. BriteSmile intends that the BriteSmile light technology on which the machine works is promoted and used for teeth whitening procedures. Now, BriteSmile desires that the applicant gives these machines to the Dental Centres for use in teeth whitening procedures. As oft repeated, the possession of the machines does not enable the use of the machines. The use is possible only when the needful Code is keyed in. What then is the purpose of the Authorization Code? The answer would be that these Codes give the right to use the machines. Had there been only supply of the Authorization Codes without supplying the BriteSmile machine, there would have been no use of the Codes. The Codes have no value if they are not to be keyed into the machines. In fact, the Dental Centres would never have purchased the Codes if they were not in possession of the machines. Similarly only possession of the machines is not sufficient. The machines would not operate unless they are keyed in with the requisite Code. Without feeding the Codes, the machines cannot be used. There cannot be any purchase or sale of only the Authorization Codes. Even if the bills show the supply of the Codes, the applicant would not be in any position to sell it to a Dental Centre other than as selected and to whom the BriteSmile machine has been given. Further, the Dental Centres also would not be able to trade in these Codes as these Codes have no use other than being keyed in the BriteSmile machines so as to operate the machines. Ultimately, the intention is to use the machine. The use of the Authorization Codes is linked to the use of the machines. It is through the Codes that the user gets the right to use the machine. Therefore, the consideration for the Authorization Codes is the consideration for the right given to use the machines.

Once it is understood that the transaction is essentially one about the right to use the



machines which is transferred when the Authorization Codes are issued, I now come to the intricacies of the transaction. These could be seen thus -

- a. There are three parties in the transaction - BriteSmile, the applicant and the Dental Centre.
- b. **The agreement of the applicant with BriteSmile spells out that the applicant and BriteSmile intend to act and perform as independent contractors.**
- c. **The agreement says that BriteSmile has appointed the applicant to supply BriteSmile Materials and has given the applicant the right to use such number of BriteSmile Systems in India in a defined Territory.**
- d. With the intention that BriteSmile light technology is promoted, BriteSmile has given the machines to the applicant.
- e. **Since the applicant has been given the right to use such number of BriteSmile Systems, it is the applicant who selects the Dental Centres which shall operate the machines.**
- f. Agreement of the applicant with BriteSmile states that
 - *BriteSmile shall sell and the applicant shall buy, the Authorization Codes and BriteSmile Materials.*
 - *The BS Gel, barrier material and other such materials are collectively referred to as the "BriteSmile Materials".*
 - *BriteSmile System is a light activated teeth whitening system.*
 - *BriteSmile System is activated electronically with an authorization code supplied by BriteSmile and is operated in conjunction with BriteSmile Materials customarily supplied by BriteSmile.*
 - *The BriteSmile System and BriteSmile Materials are used together to perform teeth whitening procedures ("BriteSmile Procedures").*
- g. Agreement of the applicant with the Dental Centre states that the Dental Centre will purchase Procedures.
- h. The points (a) to (g) as at above show that there is no direct nexus between BriteSmile and the Dental Centres.
- i. Though it is stated that purchase and sale would be of the Authorization Code as well as the BriteSmile materials such as gel, etc., the applicant has informed us that these are given free of cost and so the charges collected in the invoice is the consideration for the Authorization Codes. In his submission, the applicant has stated that -
 - *The machine is freely supplied by the principal and installed at the Dental Surgeons premises through the applicant after going through the selection criteria.*
 - *The Gel applied on the teeth before the Light Activation is supplied 'free of cost' by the US Manufacturers.*
 - *The principal bills the applicant for the code nos. supplied to the applicant and the applicant in turn issues invoices to respective end users as per the code nos. supplied to each of them.*
- j. What is stated in the above point (i) is confirmed when we see the invoices raised by BriteSmile as well as the applicant. Discus Dental has raised a bill on the applicant showing description as **"BSDN Procedure Authorization Code"**. The applicant has raised invoices showing description as **"Bs Procedure Code"**.

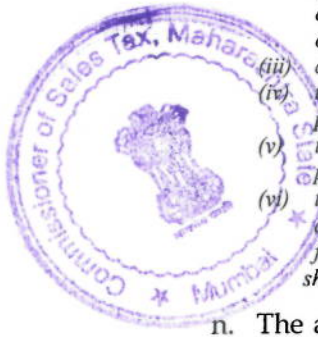


- k. The Authorization Codes are given to the applicant who then supplies them to the Dental Centers as per their requirement.
- l. I have observed above that the consideration for the Authorization Codes is the consideration for the transfer of the right to use the BriteSmile machines. This Authorization Code is given to the Dental Centres by the applicant. Now, the agreement with BriteSmile of the applicant, empowers the applicant with the right to use the BriteSmile Systems in the defined territory. It is in this capacity that the applicant has by way of charging for the Authorization Codes transferred the right to use the BriteSmile machines to the Dental Centres who were selected and supplied the BriteSmile machines by the applicant. Now the machines cannot be used unless the Authorization Code is keyed in. Therefore, merely having the machines would not enable the Dental Centres to use it. Once the Code is keyed in, the Dental Centres get to use the machines.
- m. Having seen thus, I find that the transaction between the applicant and the Dental Centres would very appropriately be covered by the following highlighted description as available in the definition of 'sale' as found in section 2(24) of the MVAT Act,2002. The same reads thus -

'sale' means a sale of goods made within the State for cash or deferred payment or other valuable consideration but does not include a mortgage, hypothecation, charge or pledge; and the words 'sell', 'buy' and 'purchase', with all their grammatical variations and cognate expressions, shall be construed accordingly;

Explanation.- For the purposes of this clause,-

- (a) a sale within the State includes a sale determined to be inside the State in accordance with the principles formulated in section 4 of the Central Sales Tax Act, 1956 (74 of 1956);
- (b)(i) the transfer of property in any goods, otherwise than in pursuance of a contract, for cash, deferred payment or other valuable consideration;
- (ii) the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract including, an agreement for carrying out for cash, deferred payment or other valuable consideration, the building, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property;
- (iii) a delivery of goods on hire-purchase or any system of payment by instalments;
- (iv) 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;
- (v) the supply of goods by any association or body of persons incorporated or not, to a member thereof for cash, deferred payment or other valuable consideration;
- (vi) the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service is made or given for cash, deferred payment or other valuable consideration; shall be deemed to be a sale.



- n. The above at clause (iv) of the *Explanation* provides that 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 shall be deemed to be a sale. In the present case, the recitals of the above clause are satisfied such that the transaction of transfer of the right by the applicant to the Dental Center to use the BriteSmile machine is a deemed sale for the purposes of the MVAT Act,2002 for reasons thus -

- i. There are goods, the BriteSmile machines.
- ii. The applicant has given the BriteSmile machines to the Dental Centres.
- iii. The agreement with BriteSmile of the applicant, empowers the applicant with the right to use the BriteSmile Systems in the defined territory.
- iv. The Dental Centres are transferred the right to use these machines when the

Authorization Codes are given to them by the applicant.

- v. The use of the machines is possible when the Codes are keyed in the machines.
 - vi. There is consideration for each use of the machine. This consideration is the charges for the Authorization Codes which enable the use of the machine. Each Authorization Code enables five BriteSmile Procedures to be performed.
 - vii. The Dental Centres are in possession of the machines. By giving the Authorization Code, the Dental Centres are transferred the right to use the machines. Once the machine is started by keying in the Authorization Code, the Dental Centres have control over the machines. Thus, the Dental Centres are endowed with both possession as well as control of the machines, to the exclusion of others.
- o. Now since it has been established that the charges for the Authorization Codes are the consideration for the transfer of the right to use of the BriteSmile machine, the tax in respect of the transaction would be on the goods i.e., the BriteSmile machine, the use of which has been transferred. I find that there is no specific entry for this machine under the MVAT Act,2002. Neither is the machine covered under any of the notifications issued for the purposes of any of the schedule entries under the MVAT Act,2002. In absence of a specific entry, the transaction of transfer of the right to use the BriteSmile machine would be covered by the residuary schedule entry E-1 of the MVAT Act,2002, thereby taxable @12.5%.

Having seen thus, I find that the applicant has treated the transaction as part of Innovative IT Products and has collected tax @ 4% (5% w.e.f. April 2010). The receipts under the transaction do not fall under the category of information technology products. I have elaborately dealt with above that the consideration for the Authorization Code is essentially the consideration for the use of the BriteSmile machine. When the Authorization Code is given to the Dental Centre for the same to be keyed in the machine, there is transfer of the right to use the machine. Therefore, the treatment given to the transaction by the applicant is not supported by the attending facts.

I now deal with the argument of the applicant that though the applicant has taxed the impugned transaction, the impugned Authorization Code is only a digital code and further that, it is only a service. With regard to this, I have to observe that it would be wrong to treat the impugned Authorization Codes as mere digital codes. The transaction is definitely not a 'service' as the possession of the machine would be of no use if they cannot be used. It is possible to use the machines only when the needful key or authorization to run the machine is given. We have seen that the machines are given free of cost. Therefore, the transaction could be said to start and end only when the Authorization Code is supplied. It is through the Authorization Code that the applicant transfers the right to use the BriteSmile machines. The consideration for the Authorization Codes is the consideration for the right to use the machines.

The applicant has also argued that the impugned transaction is an import of the end user.



We have seen above that the agreement clearly stipulates that BriteSmile shall sell the Authorization Code and the BriteSmile materials ONLY to the applicant for the purposes of the defined Territory and the applicant is to buy from BriteSmile. The agreement also stipulates that the necessary import formalities are to be completed by the applicant only - *"The applicant, at its expense, shall arrange for all approvals to import the BriteSmile Systems, Authorization Codes and BriteSmile Materials into the Territory and shall be responsible for all associated import and similar duties and for all VAT and similar charges associated with the use of such items."* It is the applicant who is to then pass on the goods to the Dental Centers as per their requirement. By virtue of such clear terms of contract and operational procedures, the argument of the applicant does not hold good.

05. PROSPECTIVE EFFECT

The applicant has prayed that if the contention is not acceptable then the determination order be given prospective effect. With regard to this request, I have to say that the a request for prospective effect is measured on certain parameters such as available provision and the possibility of it being misinterpreted, statutory mis-guidance, attending facts, etc. We have very elaborately seen above that the terms of the Agreement and facts were available for the applicant to understand the situation. The agreements clearly envisaged the sale and purchase transactions and the applicant being empowered with the right to use the BriteSmile Systems in the defined territory. Further, there should not have been difficulty to see that the Authorization Codes as such would mean nothing. The use of these Codes is to derive the right to use the machines. The circumstances being so, I am not inclined to favourably consider the request for prospective effect.

06. In view of the deliberations as at above, it is determined thus -

ORDER

(under section 56(1) (d), (e) and (2) of the Maharashtra Value Added Tax Act, 2002)

No. DDQ 11/2008/Adm-3/45/B- 2

Mumbai, dt. 7/5/2016

For reasons as elaborately discussed in the body of the order, the questions posed for determination are herewith determined thus :

- 1. The transaction under invoice No. IN/V/488 dt.27.02.2014 is a sale of goods, more particularly a deemed sale in the nature of transfer of the right to use goods.*
- 2. It is not an import in the hands of the actual user.*
- 3. The rate of tax on such sale is 12.5%, being covered by the residuary schedule entry E-1 of the Maharashtra Value Added Tax Act, 2002.*
- 4. The request for prospective effect is rejected.*

(RAJIV JALOTA)
COMMISSIONER OF SALES TAX
MAHARASHTRA STATE, MUMBAI