

Read : Application dt.25.03.2010 by M/s. Pritam Constructions, holder of TIN 27580657095V.
Heard : Sh. Nitin Shah, Advocate attended the hearing.

PROCEEDINGS

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

No.DDQ/11-2010/Adm.3/18/B-2

Mumbai, dt. 22/03/2016

The applicant, M/s. Pritam Constructions, having address as Amar House, 1st floor, Near Goodluck Chowk, 892 Bhandarkar Road, Deccan Gymkhana, Pune-4, have posed the following question for determination -

"Is the applicant liable to pay tax under the provisions of MVAT Act, 2002 on the amount received towards license fees for Facilities and FF&E vide bills No.25 dated 25.02.2009, Bill No.10 dated 25.01.2009, Bill No.17 dt.25.01.2009. If the answer is in affirmative, then at what value and at what rate?"

02. FACTS OF THE CASE

The application is reproduced verbatim thus -

- (i) "M/s. PRITAM CONSTRUCTIONS is a sole proprietary concern engaged into the business of construction of immovable properties and also granting of license with respect to self acquired property; having its MVAT registration No.27580657095V CST Registration No. 27580657095C dated 20/8/08.
- (ii) The applicant has entered into a leave and license agreement with M/s. SYMPHONY SERVICES PUNE PRIVATE LIMITED (hereinafter referred to as SYMPHONY for the sake of brevity) for grant of license with respect to the Commercial Premises on the Sixth Floor admeasuring 22756 sq. ft. together with Lobby admeasuring 200 sq. ft., 160 sq. ft. of the open balcony/ies/terrace with AC Gantry area admeasuring 340 sq. ft. together with 25 car parking spaces in the basement, as per which amounts to $22756 + 160$ divided by $2 + 340$ divided by $2 + 200 = 23,206$ sq. ft. along with Furniture, Fixture and Equipments (FF&E).
- (iii) Clause 1.2 of the agreement defines "FF&E" which is as follows -
"FF&E shall mean the furniture, fixtures and equipments affixed in the licensed premises in terms of Annexure A".
Annexure-A contains the list of all facilities viz., work stations, closed cabin with modular table and back unit, lobby F.H. modular partitions, lobby area 5-seater meeting room with modular tables, lift lobby area, conference room with modular table, lobby area 8-seater meeting room with modular table, 4-seater faculty room with modular counter, Ductable package AC's in the work area, All the UPS units, PAC, all sofas and chairs, all equipments in lab area, genset, fire extinguisher, internal sinage, CCTV units, Access control, while list of FF&E is about pantry cum breakout room with LHS & QHS, Electrical room, UPS room & lab room, toilet blocks fixtures & fittings, AHU Room, all carpentry door & storages with security table, lab room, pantry, UPS room, all civil works, flooring tiles, vitrified, carpets, blinds, electrical cabling, electrical panels, UPS cabling upto the floor, networking cabling, glass partitions, reception areas, toilet blocks, handicap toilets, network racks in hub room / patch room on each floor, jack panels, electrical fittings, false flooring, false ceiling, access control cabling for two points on each floor, CCTV cabling, BMS room (Common), fire alarm system, fire panels, smoke detectors, MSEB main panels - common for all floors, AHU panels, transformer (common), parking blocks, lights in the parking (common), security tables, fire exit door on each floor, security cabin at the entrance (common).
- The properties mentioned in the annexure(s) are not categorized into movable and immovable properties but are provided as a consolidated list of Facilities and FF&E.
- (iv) The licensor charges the License fee to the licensee for both, immovable property (viz., land and building) and FF&E. Para 4.1 of Clause 'License Fees' as appearing in the agreement is reproduced below:
"The Licensee shall pay to the Licensor a monthly License Fee calculated at the rate of Rs.53/- per sq. ft. per month for the Chargeable Area of the First Floor viz. Rs.12,29,918/-. The parties further agree that the License Fee reserved herein shall be inclusive of the structural maintenance of the said building".
- (v) Further para 4.1.1 states as follows:

"The monthly License Fee mentioned hereinabove shall be apportioned in the following manner and two separate demand notes / invoices shall be issued accordingly.

- i. Rs.27.80 per sq. ft. for the Chargeable Area per month; and*
- ii. Rs. 25.20 per sq. ft. for the Chargeable Area towards the FF&E, provided in Annexure-A"*

In short, a consolidated price of Rs.25.20 is charged for,

- i) the list of all facilities and*
- ii) The list of FF& E as enclosed.*

The applicant has raised an invoices vide Bill No.25 dated 25.02.2009, Bill No.10 dated 25.01.2009, Bill No.17 dated 25.01.2009 for the months January 2009 and February 2009.

The licensor charges service tax on floor space and is charging sales tax @ 12.5% on facilities as well as FF&E (as the Applicant is not assured whether the said transaction attracts sales tax under the provisions of MVAT Act, 2002).

In view of this, Applicant hereby requests your good office to kindly determine the following questions on the basis of above mentioned facts:

- *Is the applicant liable to pay tax under the provisions of MVAT Act, 2002 on the amount received towards license fees for Facilities and FF&E vide bills No.25 dated 25.02.2009, Bill No.10 dated 25.01.2009, Bill No.17 dt.25.01.2009. If the answer is in affirmative, then at what value and at what rate?"*

03. HEARING

The case was taken up for hearing on dt.18.11.2015 when Sh. Nitin Shah, Advocate attended the hearing. The submission made during hearing is thus -

- A submission was tendered in respect of the issues raised for determination.
- It was submitted that while communicating by letter dt.05.07.2012, it was stated that the entire FF&E appearing in Annexure A of the Agreement belongs to the applicant which is not correct. In fact, in the said Annexure, the property belonging to Symphony i.e. lessee is specifically stated and is the correct factual position.
- The applicant was asked to give the bifurcation of FF&E.
 - a) in terms of movable and immovable items.
 - b) rent charged in terms of movable and immovable items.

The applicant provided the bifurcation of movable and immovable as per his understanding. However, as regards the bifurcation of rent towards movable and immovable, it was stated that the lessee is charged Rs.53/- per sq. ft. and for administrative purposes, the apportionment is made towards chargeable area at Rs.27.80/- and FF&E at Rs.25.20/-. No further bifurcation in terms of movable and immovable is available.

- The applicant was asked about
 - a) Whether the registration is obtained voluntarily?
 - b) Whether service tax is charged on Rs.53/-?
- To this, it was submitted thus-
- a) As the applicant was not aware whether the transaction attracts Sales Tax or Service Tax, the applicant obtained registration under Sales tax voluntarily as an abundant caution.
 - b) The applicant has paid Sales Tax on the amount of Rs.25.20/-.
 - c) The applicant has charged Service Tax only on Rs.27.80 as they were under the impression that Sales Tax might be applicable on Rs.25.20/- only.

- In view of the applicant being voluntarily registered, the attention of the applicant was invited to provision of section 16(5) of the MVAT Act, 2002 as per which a registered dealer shall be liable to pay tax during the period in which his registration certificate is effective notwithstanding the fact that subsequently it is found that no registration certificate was necessary in his case.

To this, it was submitted that the above sub-section is applicable for the transactions which are liable to tax. In any case, it has to be decided whether the applicant is liable to pay tax on the transaction.

The submission of NIL dt. tendered during hearing states thus :

1. M/s. Pritam Constructions (hereinafter referred as "Applicant" for the sake of brevity) is a proprietary concern having its principal place of business at Amar House, 892, Bhandarkar Road, Pune - 411 004. The Applicant is engaged into the business of construction of immovable properties and it is also letting out self-acquired properties on rent for commercial purpose.
2. The Applicant is a registered dealer under the provisions of the Maharashtra Value Added Tax Act,

2002 (hereinafter referred as "MVAT Act" for brevity) bearing TIN No:27580657095V. It has regularly complied with payments under Works Contract on the activity of construction and sale of immovable property and there is no dispute regarding these payments/compliance.

3. During the course of its business, the Applicant constructed/developed building namely 'Amar Apex' situated at Baner Road, Pune. The said Baner area was becoming popular I.T. hub of the city during the relevant time. Therefore, the Applicant strategically decided to construct a 7 storied building having offices ranging to 1,79,000 sq. ft. with all such facilities, infrastructure and various other requirements which will cater to the needs of IT Companies. Further, the Applicant decided to let out the said building 'Amar Apex' on rent for commercial purpose, instead of outright sale of the said premises.
4. After the completion of the construction of the building, as rightly estimated by the Applicant, various IT. companies like Persistent Systems, Aztec Software, Infosys, NetApp etc. approached the Applicant for obtaining the said premises on rent. In furtherance of the said proposal the Applicant had given the 6th floor of the said property on Lease to Symphony Services Pune Private Limited.
5. For this purpose of the Applicant executed 'Leave and License Agreement' with the said company (hereinafter referred to as 'Licensee' for the sake of brevity) on 4 December 2008 (hereinafter referred as 'Agreement') which was duly registered with Sub-Registrar, Haveli 11 on payment of appropriate stamp duty of Rs.16,000/-
6. By the said agreement the Licensee obtained premises admeasuring 22756 Sq. Ft. on the sixth floor along with Furniture, Fixtures and Equipments (FF&E) together with lobby admeasuring 200 sq. ft. and open balcony/ies/terrace admeasuring 160 Sq. ft. together with A.C. gantry area admeasuring 340 Sq. ft. together with 25 car parking spaces in the basement as per Marked Parking Plan of Amar Apex (hereinafter referred to as 'Licensed Premises'). The said licensed premises were given on lease for the period of 47 months starting from 1st January, 2009 to 26 November 2012 along with all the facilities/infrastructure therein. The facilities and infrastructure provided in the said licensed premises included both, movable as well as immovable.
7. The said Agreement is descriptive in nature, having references to various definitions and clauses, which were defined therein. The Applicant would like to reproduce some of the relevant definitions and important clauses which are as under:

1. Definitions: [Page 8 Definition 1]

- 1.1 "Total Chargeable Area" shall be the area consisting of 22756 sq.ft. of the Sixth floor, 160 sq. ft. of the terrace on the Sixth floor and 340 sq. ft. of A.C. Gantry Area and 200 Sq. ft. of lobby on the ground floor which amounts to 22756 + 160 divided by 2 + 340 divided by 2 + 200 = 23206 sq.ft.
- 1.2 "FF&E" shall mean the Furnitures, Fixtures and Equipments affixed in the Licensed Premises in terms of Annexure A.
- 1.3 "Facilities" shall mean the amenities, furniture and fixtures more particularly described in Annexure A hereto to be fit out in the Premises in accordance with the design approved by the architect of the Licensee and attached hereto as Annexure B, having the technical specifications mentioned therein and as shown on the plans attached hereto and marked as Annexure B.

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4. License Fee : [Page 10 Clause 4]

- 4.1 The Licensee shall pay to the Licensor a monthly License Fee calculated at the rate of Rs. 53/- (Rupees Fifty Three Only) per square feet per month for the chargeable area of the sixth floor viz. Rs.12,29,918/- (Rupees Twelve Lacs Twenty Nine Thousand nine hundred & Eighteen Only). The parties further agree that the license fee reserved herein shall be inclusive of structural maintenance of the said building.
- 4.1.1. The monthly License Fee mentioned hereinabove shall be apportioned in the following manner and two separate Demand Notes/Invoices shall be issued accordingly:
 - i. Rs.27.80 (Rupees Twenty Seven and Eighty Paise only) per square feet for the chargeable Area per month; and
 - ii. Rs. 25.20 (Rupees Twenty Five and twenty Paise only) per square feet for the chargeable Area towards the FF&E, provided in Annexure A.
- 4.2. The floor area of 22756 sq. ft. is calculated @ Rs. 53/- (Rupees Fifty Three only) and totals to Rs. 12,06,068 (Rupees Twelve Lakhs Six thousand and Sixty Eight only)
The License Fee payable for the total Terrace (160 sq. ft.) area in the sixth floor is calculated @ 50% of Rs. 53/- (Rupees Fifty Three only), viz. Rs.26.50 (Rupees Twenty Six and Fifty Paise only) per sq. feet and the same totals to Rs. 4,240/- (Rupees Four Thousand Two Hundred and Twenty only).
- 4.2.1. The total license fee payable for 200 sq. ft. of the proportionate lobby area on the ground floor is calculated @ Rs. 53/- (Rupees Fifty Three only) per sq. ft. and the same totals to Rs. 10,600/- (Rupees Ten Thousand and Six Hundred Only).

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8. The Applicant has charged in a consolidated manner towards provision of lease of the premises along with FF&E and facilities as detailed in Annexure 'A' to the said agreement. It is to be noted that, such FF&E's and facilities are again of both types i.e. movable as well as immovable. For the ease of reference, the list of FF&E and facilities which is contained in 'Annexure A' is reproduced as herein under:

1. Pantry cum Breakout room with L.H.S. and O.H.S.-1 No.
2. Electrical Room, UPS Room and Lab Room 1 No.
3. Toilet Blocks Fixtures and Fittings
4. AHU Rooms - 2 Nos.
5. All carpentry door and storages with 1 No. Security Table.

6. Lab Room – No.1
7. Pantry – 1 no.
8. UPS Room.
9. All civil works
10. Flooring tiles, vitrified
11. Carpets
12. Blinds.
13. Electrical cabling
14. Electrical panels
15. UPS cabling upto the floor
16. Networking cabling
17. Glass Partitions
18. Reception Areas
19. Toilet blocks
20. Handicap Toilets
21. 2 Nos. Network racks in hub room / patch room on each floor
22. Jack Panels 24 Nos.
23. Electrical fittings
24. False Flooring
25. False Ceiling
26. Access control cabling for two points on each floor
27. CCTV cabling
28. BMS room (Common)
29. Fire alarms system
30. Fire panels
31. Smoke Detectors
32. MSEB main panels –common for all floors
33. AHU Panels
34. Transformer – common
35. Parking blocks
36. lights in the parking (common)
37. Security tables
38. Fire exit doors on each floor
39. Security cabin at the entrance

9. From reading of above it can be seen that, the Applicant has provided entire premises to Licensee along with FF&E and facilities. Further, the Applicant has charged single lump sum 'License Fee' as per Clause 4 of Rs. 53 per Sq. Ft. However, for the administrative convenience, the said 'License Fee' is appropriated towards licensed premises and FF&E and facilities.

10. Further, it is also to be noted that, the consolidate price of Rs. 25.20 is charged for the renting of facilities as well as for FF&E. The Annexure A of the above Agreement contains a list of all the facilities which includes Electrical Room, UPS Room and Lab Room, Reception Area etc. as well as the list of FF&E such as electric cabling, carpets blinds, false flooring, smoke detectors, MSEB main panels, UPS cabling, jack panels, etc.

11. Thereafter, the Applicant raised an invoice for the period January 2009 and February 2009 for recovery of the rent for the area. The said invoice was raised for the recovery of rent towards the Built up area, Attached Terrace Area, AC Gantry and Lobby Area.

12. As decided in the agreement, the Applicant raised separate invoices for recovery of the license fee on the Furniture, Fixtures and Equipments for the period of January 2009 and February 2009. It had issued the invoice no. 10 dated 25 January 2009 for recovery of the licensee fee for the period January 2009 and invoice no. 17 dated 25 January 2009 for recovery of the license fee for the period of February 2009.

13. The Applicant had not charged VAT on the said amounts at the time of issuance of the invoices bearing no. 10 and 17. However, later the Applicant had also issued an invoice bearing no: 25 dated 25 February 2009 for recovery of Sales Tax for the period January 2009 to February 2009 totally amounting to Rs. 1,46,198/- in totality at the rate of Rs.12.5%.

14. However, since the entire activity is in relation to provision of immovable property on rent, which amounts to provision of taxable service as per Finance Act, 1994, the Applicant was in dilemma whether the said transaction also attracts sales tax under the provisions of the MVAT Act. Hence the Applicant had charged Sales Tax on the license fees for FF&E and facilities given along with the leased premises and the amount of Sales Tax so charged and recovered towards FF&E and facilities is deposited the same into government treasury.

OUR SUBMISSION:

Based on above facts the Applicant wishes to submit as under which is without prejudice to each other:

- A. The MVAT Act does not have any provisions to levy sales tax on the transactions of right to use the goods as such transactions are not covered in the definition of sale as given in section 2(24) of the act.

- A.1 The Applicant states and submits that the MVAT Act does not have any provisions to levy sales tax on the transaction of right to use the goods as such transactions are not covered in the definition of sale as given in section 2(24) of the Act.
- A.2 It is submitted that the present transaction involves the transaction of right to use the goods which are deemed to be the transaction sale as contemplated in the Article 366(29A) of the constitution of India. However the MVAT Act does not have such a deeming provision and hence the sales tax is not leviable. In terms of the provisions of MVAT Act, the sales tax is leviable only on the transactions of outright sale of goods sale as defined in the main clause of the section 2(24) of the MVAT Act. The present transaction is not of the outright sale of the goods and hence VAT is not leviable on the present transaction.

A.3 The Applicant submits that the government of Maharashtra had passed the Maharashtra Value Added Tax Act, 2002. In the said Act the term sale was defined in section 2(24) which is read as under:
 "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 13[14[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.

The relevant portion of the gazette of Government of Maharashtra is enclosed as Annexure A.

A.4 It is submitted that later on the said definition of the term sale was amended vide Act No. XIV of 2005. By the said act the section 2(24) which was defining the term sale was amended and clause (vii) in the earlier definition of sale was deleted. Hence the new section 2(24) defining the term sale stands as under:

"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;

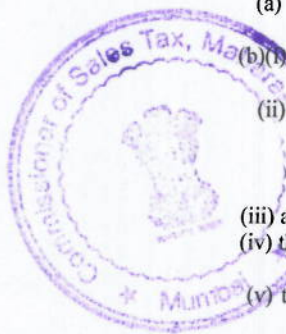
Explanation.— For the purposes of this clause,-

- (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 13[14[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;

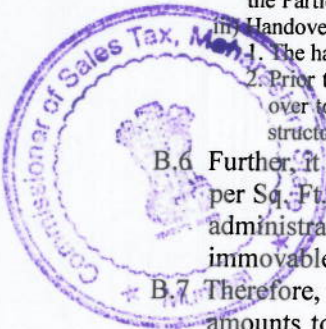
The relevant portion of the gazette of Government of Maharashtra is enclosed as Annexure B.

A.5. The applicant states and submits that because of the above deletion of the clause (vii), the deeming provision has been deleted and hence in absence of the same the transactions which are deemed to be of sale because of the deeming provision in the constitution of India are out of the purview of the levy of sales tax under MVAT act. Hence the Applicant is not liable to pay any VAT on its transaction of giving right to use property.

B. Predominant intention of whole transaction is to provide entire premises on rent along with all FF&E and facilities. The activity of leasing of immovable property is out of Sales Tax domain.



- B.1 Without prejudice to the above, the Applicant respectfully submits that, the entire building namely 'Amar Apex' was constructed and developed by the Applicant with a sole purpose of letting it out on rent to IT companies. The said building is situated at Baner road, which was an upcoming IT destination in Pune city during the relevant time. Therefore, to have an advantage of its location, the Applicant from the inception has decided to let out the said property on rent to IT companies, hence the said building was specifically developed to cater to the needs of IT Companies and to provide them ready to move in infrastructure required to carry their business.
- B.2 Further, from reading of the various terms and conditions of the agreement it can be seen that, the 'consensus-ad-idedium' of the subject agreement is to give the entire premises on rent along with all furniture, fixtures, equipment's and facilities which will enable to operate a IT company from that location.
- B.3 The Applicant likes to reproduce few of the clauses from the impugned agreement which will establish the above mentioned intention of the parties to said agreement.
(clause M on page 7 of the agreement)
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"The Licensee was desirous of taking a suitable premises for its use and occupation which is fully operational infrastructure with all the facilities for the purposes of running its office, conducting software development, data processing, running call center, training and other information technology related services and other purposes incidental thereto and the said building was suitable to meet the requirements of the Licensee, the Building known as Amar Apex".
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On perusal of the above clause it is clear that the Licensee was desirous of obtaining entire premises along with fully operational infrastructure and all facilities which will enable them to conduct their business of software development, data processing, running call center, etc.
- B.4 Therefore, it is submitted that Applicant has always intended to provide only one single service which is of renting of immovable property. However, to attract the IT companies to obtain the said premises on rent, the Applicant provide all requisite FF&E and facilities along with said immovable property, however, the predominant intention of the entire activity is to let out on rent the entire premises which included bare property as well as facilities, furniture, fixtures and equipments.
- B.5 The below mentioned clauses from agreement will prove beyond any doubt that the Applicant was willing to provide entire premises as a whole on rent.
- Licensed Premises (clause 2 at page 9 of the agreement)
The Licenser hereby grants a License unto the Licensee to use and occupy the Licensed Premises along will all the facilities therein, and the FF&E, without any interference/obstruction from the Licenser on the terms and conditions contained in the Agreement.
 - Duration (clause 3 at page 10 of the agreement)
The Licenser hereby grants unto the Licensee the right to use and occupy the Licensed Premises and FF&E, on leave & license for a period of 47 months from 1st January 2009 and ending 26th November 2012, on the terms and conditions specified herein ("Term"). However, in case the Licenser is unable to put the Licensee in use and occupation of the licensed premises from the License Commencement date, then in that event the aforesaid date shall vary accordingly and the Parties shall execute supplemental writing to record the change in date.
 - Handover of Licensed Premises (clause 3.2 at page 10 of the agreement)
 - The hand over date by the licenser to the Licensee of the licensed premises is January 01, 2009.
 - Prior to the handing over of the Licensed Premises to the Licensee in the manner aforesaid, the Licenser shall hand over to the Licensee a certificate of stability issued by the structural engineer certifying that the Licensed Premises is structurally safe.
- B.6 Further, it is also pertinent to note that the Applicant has charged one lump-sum license fee at Rs.53/- per Sq. Ft. for the licensed premises from the Licensee. The mere bifurcation of the consideration for administrative purpose does not alter the characteristics of the consideration which was for renting of immovable property.
- B.7 Therefore, considering the nature of transaction in totality it is clear beyond any doubt that the activity amounts to 'Renting of Immovable Property' which is subject matter of Service Tax leviable under Finance Act, 1994 as provided in List II of Constitution of India.
- B.8 For the sake of clarity relevant section 65(90a) and 65(105)(zzzz) of Finance Act, 1994 are reproduced herein under:
Section 65(105)(zzzz): to any person, by any other person, by renting of immovable property or any other service in relation to such renting for use in the course of or for furtherance of business or commerce.
For the purposes of this sub-clause, "immovable property" includes-
(i) building and part of a building, and the land appurtenant thereto;
(ii) land incidental to the use of such building or part of a building;
(iii) the common or shared areas and facilities relating thereto; and
(iv) in case of a building located in a complex or an industrial estate, all common areas and facilities relating thereto, within such complex or estate, but does not include-
(a) vacant land solely used for agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes;
(b) vacant land, whether or not having facilities clearly incidental to the use of such vacant land;
(c) land used for educational, sports, circus, entertainment and parking purposes; and



(d) building used solely for residential purposes and buildings used for the purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities.

Explanation. - For the purposes of this sub-clause, an immovable property partly for use in the course or furtherance of business or commerce and partly for residential or any other purposes shall be deemed to be immovable property for use in the course or furtherance of business or commerce.

Section 65(90a): 'renting of immovable property' includes renting, letting, leasing, licensing or other similar arrangements of immovable property for use in the course or furtherance of business or commerce but does not include -

(i) Renting of immovable property by a religious body or to a religious body; or

(ii) Renting of immovable property to an educational body, imparting skill or knowledge or lessons on any subject or field, other than a commercial training or coaching center;

Explanation: For the purposes of this clause, "for use in the course of furtherance of a business or commerce" includes use of immovable property as factories, office buildings, warehouses, theaters, exhibition halls and multiple-use buildings"

{Emphasis and underlining supplied}

On perusal of these sections it can be said without any reservation that the activity of the Applicant is squarely covered by the above mentioned sections of the Finance Act, 1994 and hence the entire activity is a subject matter of Service Tax. Therefore, subject matter being in nature of provision of service which is under the domain of Central Government for the purpose of levy of taxes, the sales tax which is levied and administered by the State Government is not payable on the entire or part of the transaction.

B.9 Further, it is to be noted that by the very nature the activity of renting of immovable property and renting of FF&E is inseparable from each other. Both the activities are composite in nature and cannot be provided in isolation.

B.10 It is submitted that, in any case the premises can be rented in a vacate condition however, in no case mere FF&E and facilities can be rented without possession of immovable property. Therefore, for the time being even if we consider the activity of renting of FF&E and facilities does not amount to provision of service, then also it is to be noted that the said FF&E and facilities cannot be provided in isolation and it is mere ancillary to provision of main service i.e. renting of immovable property. Hence by no means these two activities can be segregated from each other for the purpose of taxation.

B.11 It is further submitted that while computing income for the purpose of Income-tax Act, 1961 for the Assessment Year 2009-10 (Financial Year 2008-09), has considered the whole amount received from licensee as Income from House Property in terms of Section 22 of the Income-tax Act and also claimed standard deduction of 30% in terms of Section 24 from the lease income, which has been duly accepted by Income Tax authorities. This fact also substantiates that the entire lease amount is towards the activity of renting of premises and hence out of purview of the Sales Tax.

B.12 Therefore, the Applicant humbly submits that the entire activity should be treated as one single composite activity of renting of premises and part of the activity should not be considered as separate activity for the purpose of levy of Sales Tax/MVAT.

Mere bifurcation of consideration does not amount two separate transactions involving transaction of service and transaction of deemed sale:

B.13 The Applicant further wishes to submit that, the Applicant merely for the sake of administrative purpose has bifurcated the consideration of Rs. 53/- towards renting of licensed premises and FF&E and facilities. However, such hypothetical bifurcation does not mean that there are two different transactions (one of sale and one of service) in respect of which the consideration is charged. As clarified above the activity of the Applicant is single composite activity of renting of entire property along with all FF&E and facilities, therefore even if the said lump-sum consideration is bifurcated by the Applicant it does not mean two separate transactions are present namely leasing of the premises and the leasing of goods on which sales tax can be charged. Further, it is to be noted that, by its very nature, the said activity of renting of licensed premises and provision of FF&E and facilities is integrally connected with each and it cannot be separated by adopting any means.

B.14 Hence, the Applicant humbly requests your goodself to kindly consider the present activity as one single activity which is in the nature of rendering of service and not to charge any sales tax on the said activity of renting of FF&E.

C. Dominant intention test is applicable as the activity being of 'Deemed sale', hence present transaction is transaction of service and no sales tax is leviable.

C.1 The Applicant states and submits that, generally the sales tax is payable on sale of any commodity. However, the present dispute is not in relation to any outright sale of the commodity but is in relation to leasing of various movable as well as immovable items together along with leasing of immovable property for commercial use.

C.2 As submitted earlier the entire transaction amounts to renting of immovable property which is in the nature of rendering of service and not of sale of any commodity. Hence the Applicant humbly submits that the sales tax is not payable on the said activity. However, presuming without accepting the fact

that part of the transaction can be subjected to levy of sales tax the same can be paid only under provisions relating to 'Deemed sale' since there is no outright sale of any commodity in the present case.

C.3 It is important to note here that, the activity of 'Deemed Sale' was incorporated as taxable activity in MVAT Act post 46th Constitutional amendment. Post such amendment of constitution the State Legislature amended Section 2(24) of MVAT Act to capture all such activities which are in nature of 'Deemed Sale' under the ambit of sales tax by way of addition of 'Explanation' to said Section 2(24) of MVAT Act which defines "sale". The said section 2(24) of MVAT Act reads as under:

"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,-

(c) 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 13[14[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;

[(vii) ***]

shall be deemed to be a sale."

{Emphasis supplied}

On perusal of the above section, it is clear that the activity of the Applicant even if considered to be taxable under Sales Tax fits into only one sub-clause viz. clause (iv) of Explanation appended to Section 2(24) of MVAT Act.

C.4 The 'Explanation' appended to Section 2(24) of MVAT Act, covers activities which are in nature of 'Deemed sale' and are covered within the sales tax ambit. On careful perusal of the nature of activities covered by such 'Deemed Sale', it can be seen that, all these activities are different than outright sale of goods, means in some case the activity is composite involving provision of service along with supply of material viz works contract and supply of food in another activity is supply of goods which have all attributes of sale except for transfer of ownership viz. hire purchase, supply of goods to members, transfer of right to use goods etc. Since the activity involved in 'Deemed Sale' is different than normal sale of goods transaction the said 'Deemed Sale' activity is taxed differently under Sales Tax/VAT legislations. Following activities are covered in the ambit of 'Deemed Sale':

i. Clause (b)(i): Transfer of property in goods otherwise in pursuance of a contract.

ii. Clause (b)(ii): Works Contract.

iii. Clause (b)(iii): Hire-Purchase or any similar transactions.

iv. Clause (b)(iv): Transfer of right to use any goods.

v. Clause (b)(v): Supply of goods to members by association of members.

vi. Clause (b)(vi): Supply of food for human consumption in restaurant, hotels or in catering contracts.

In the present case, the Applicant is neither transferring any property in goods nor engaged in doing works contract. Similarly, there is no hire-purchase transaction or supply of food. Further, Licensee is not member of Applicants association. Hence, after due consideration to all clauses of 'Deemed Sale', it can be concluded that the activity of Applicant if amounts to deemed sale, then will be covered in clause (b)(iv) of Explanation to Section 2(24) of the MVAT Act.

C.5 The Applicant submits that all such activities which are in nature of 'Deemed Sale' are always been bone of contention as far as taxation is concerned. As these transactions are not specifically and exclusively covered in any of the taxing statute there has always been confusion regarding correct tax liability on the said activities. For example in cases of composite activity which comprises of supply of material as well as service, there has always been issue regarding which tax to be charged Sales Tax/VAT or Service Tax, as both service as well as material component is involved in the said activity. Further, if the said composite activity is considered to be taxable under both statutes then valuation mechanism to determine the tax liability under each statute.

C.6 Therefore, levy of both service tax as well as sales tax was there on these kinds of composite activities which were not in true spirit of law and taxation policy adopted by India. Hence, disputes regarding

taxability of such composite transactions have travelled upto Hon'ble Apex Court, which from time to time has specified guidelines for taxability of such composite transactions.

C.7 While deciding one of such dispute in relation to taxability of "Works Contract" in the case of Bharat Sanchar Nigam Ltd. v. UOI 2006 (2) STR 161 (SC) the Hon'ble Supreme Court has clarified that, to apply any kind of taxes on such composite transactions not covered under Article 366(29A) of the Constitution of India, the dominant intention of the parties has to be taken into consideration. Further, the Hon'ble Supreme Court also clarified the law laid down in the case of Gannon Dunkerly & Co. (9 STC 353) will still be applicable and intention of the parties has to be taken into consideration before levying tax on the composite transactions which are in nature of 'Deemed Sale' and not covered by article 366(29A) of the constitution. If the dominant intention of the party is to avail services and supply of material is mere ancillary, then the Service Tax will be applicable and if the dominant intention is to avail material and supply of service is mere ancillary to such material then Sales tax/VAT will be applicable. The said theory is called as 'Dominant Intention Theory' and the same is de-facto applicable to all activities which are in relation to 'Deemed Sale' except for activity of 'Works Contract in relation to movable or immovable property' and 'Supply of Food in restaurant or catering contract'. This is so because, in both these kinds of transaction the supply of material as well as service is interlinked and interconnected determining the specific weight age towards material or service is not possible. Therefore, these kinds of transactions are taxed at abated rate under both statutes i.e. MVAT as well as Finance Act, 1994. However, for all other transactions which are in nature of 'Deemed Sale' the test of dominant intention has to apply and the transaction has to be taxed accordingly. The relevant extract of the decision of Hon'ble Apex Court is as under:

44. Gannon Dunkerley survived the 46th Constitutional Amendment in two respects. First with regard to the definition of 'sale' for the purposes of the Constitution in general and for the purposes of Entry 54 of List II in particular except to the extent that the clauses in Article 366(29A) operate. By introducing separate categories of 'deemed sales', the meaning of the word 'goods' was not altered. Thus, the definitions of the composite elements of a sale such as intention of the parties, goods, delivery etc. would continue to be defined according to known legal connotations. This does not mean that the content of the concepts remain static. Courts must move with the times. See Attorney General v. Edison telephone Company 1886 QBD 244. But the 46th Amendment does not give a licence for example to assume that a transaction is a sale and then to look around for what could be the goods. The word 'goods' has not been altered by the 46th Amendment. That ingredient of a sale continues to have the same definition. The second respect in which Gannon Dunkerley has survived is with reference to the dominant nature test to be applied to a composite transaction not covered by Article 366(29A): Transactions which are mutant sales are limited to the clauses of Article 366(29A). All other transactions would have to qualify as sales within the meaning of Sales of Goods Act, 1930 for the purpose of levy of sales tax.

45.....

46. The reason why these services do not involve a sale for the purpose of Entry 54 of List II is, as we see it, for reasons ultimately attributable to the principles enunciated in Gannon Dunkerley's case, namely, if there is an instrument of contract which may be composite in form in any case other than the exceptions in Article 366(29A), unless the transaction in truth represents two distinct and separate contracts and is discernible as such, then the State would not have the power to separate the agreement to sell from the agreement to render service, and impose tax on the sale. The test therefore for composite contracts other than those mentioned in Article 366(29A) continues to be – did the parties have in mind or intend separate rights arising out of the sale of goods. If there was no such intention there is no sale even if the contract could be disintegrated. The test for deciding whether a contract falls into one category or the other is to as what is 'the substance of the contract. We will, for the want of a better phrase, call this the dominant nature test.

Underlining and emphasis supplied

The copy of the above decision of Apex Court is enclosed as Annexure C.

- C.8 As submitted earlier the dominant intention in the present case of both parties i.e. Applicant as well as Licensee is to give or obtain entire premises with all FF&E and facilities on rent and the intention was never to give or obtain only movable FF&E on rent. Therefore, in the present case without any doubt the pre-dominant intention was to obtain ready to move in immovable property on rent. This activity is covered in the domain of Renting of Immovable Property Service' as per the provisions of Finance Act, 1994 and as submitted in detailed in earlier paragraphs. Therefore, for the time being even if we presume the activity of Applicant is taxable under sales tax the said levy fails on the dominant intention test, accordingly no sales tax is payable on the present transaction.
- D. The Applicant has charged one single lump-sum amount towards movable as well as immovable FF&E and facilities. Hence there is no mechanism available to determine the value on which sales tax is payable. Hence Sales Tax cannot be levied.
- D.1 The Applicant state and submit that, as submitted earlier the applicant is charging lump-sum amount of Rs.53/- per sq. ft. as License fee for providing the said premises to Licensee.

D.2 Further, the Applicant has allocated said amount of Rs.53/- as under:

- i) Rs.27.80/- towards licensed premises; and
- ii) Rs.25.20/- towards the FF&E and facilities.

D.3 For the time being if we consider that, the said amount of Rs.25.20/- is towards renting of goods, then also it is to be noted that the said amount of Rs.25.20 is charged towards 3 different aspects viz.

- a. Provision of Facilities.
- b. Provision of Immovable FF&E
- c. Provision of Movable FF&E

Further, it is to be noted that, there is no further bifurcation available of this Rs.25.20/- charged by the Applicant and it is consolidated towards facilities and immovable as well as movable FF&E.

D.4 It is also to be noted that, as per clause (b)(iv) of Section 2(24) of MVAT Act, only leasing of goods is covered. Further, there is no dispute that the facilities and immovable cannot be treated as 'Goods' which is defined in Section 2(12) of MVAT Act and which reads as under:

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

D.5 Therefore, even if sales tax is required to be paid the same will be applicable only on renting of movable FF&E. However, the amount charged by Applicant towards said renting of FF&E is not ascertainable. Therefore, the applicant is not in a position to charge the MVAT on the said activity and deposit it with government exchequer.

D.6 The Applicant further submits that there is no mechanism provided in MVAT Act, 2005 or rules made there under to ascertain the value in such transaction on which tax can be paid. Therefore, in the event of failure to provide means of determining the tax liability the sales tax cannot be levied.

D.7 The applicant further relies upon the decision in case of Hon'ble Andhra Pradesh High Court in case of the State Bank of India [1988] 70 STC 215 (AP). In the said case while deciding the issue of levability of the Sales tax on the transaction of giving right to use the bank lockers, the Hon. High Court held that the right to use the bank locker also includes various other facilities on which the sales tax cannot be levied and because of the inseparable character of the consideration the sales tax cannot be levied. The relevant extract of the decision is read as under:

13. We see considerable force in the submissions of the learned counsel for the petitioners. Let us ask the question as to why people go to banks for depositing their valuables in lockers. It is because they do not have the facility of a locker at their residence? It is common knowledge that every steel almirah is fitted with a safe deposit locker of high thickness and gauge. The class of customers who go to banks for depositing their valuables in lockers do certainly have steel almirahs in their houses or even otherwise can afford to purchase one such almirah with safe deposit locker. But then why do these persons prefer to go to a bank and deposit their valuables in the lockers located there without keeping the articles in their houses under constant watch by them? The answer is obvious. It is because the safe deposit lockers hired by banks are located in impregnable strong rooms and prowlers cannot gain access into these strong rooms of the banks. The wide feeling is that valuables deposited in bank lockers are safer than at home because of the high security arrangements at the bank and the provision of strong rooms. It cannot, therefore, be gainsaid that persons pay the hire charges for the lockers not only for the right to use the lockers but also for a host of other services referred to above closely associated with the maintenance of lockers by the banks. In that sense the hire charges collected by the bank from the constituents represent a consolidated charge levied by the bank for a variety of services and facilities provided, of which the use of the locker forms a small part. The hire charge is inseparable into various services and because of the impossibility of relating to any particular amount as hire charge solely for the use of the locker, the proposal to levy tax on such hire should fail. Any endeavor to levy tax on the aggregate hire charges levied by the bank would amount to levying tax not only on the right to use locker but also on the charges collected by the bank for the provision of strong rooms, providing round the clock watch and ward and employing necessary staff to have a close supervision in the operation of strong rooms. The inseparable character of the hire charged by the banks frustrates any attempt to separate the small sum which is the charge for the right to use the locker, which only can be subject to tax under the Act. We have, therefore, no hesitation in holding that, in the facts and circumstances above stated, the banks cannot be called upon to pay sales tax on the hire received for the use by the constituents of the lockers which forms a fractional and inseparable part of the composite charge for a variety of services.

The copy of the above decision is enclosed as Annexure D.

D.8 The Applicant further relies upon the decision in case of Karthik Engineering Works V. State of Karnataka [2000] 119 STC 88 (Kar), wherein while deciding the issue of levability of VAT on the transaction of lease of machinery along with the factory premises wherein the consideration was one composite amount, it was clarified by Hon'ble Karnataka High Court that in case of composite contract the tax cannot be levied on the entire consideration. The copy of the above decision of Hon'ble High Court is enclosed as Annexure E.

D.9 The Applicant further relies upon the following decisions in the context of levy of excise duty, wherein it was held that in absence of the proper mechanism to determine the value for levy of the tax, the same cannot be levied:

- Bangalore Pharma & Research Laboratory P. Ltd. Vs. CCE, Bangalore 2010 (252) ELT (135) (Tri. – Bang.): In this case the Hon'ble Tribunal held that, in the absence of a proper mechanism to attribute the value of the technical know-how to the goods cleared, duty cannot be demanded. In other words, there is no computation mechanism at all.

Similar view is also taken in following cases:

- CCE, Bangalore III Vs. Wintac Ltd. 2011 (263) ELT 273 (Tri. Bang.)
- Group Pharmaceuticals Ltd. Vs. CCE, Bangalore-I 2011 (272) ELT 108 (Tri. – Bang.)

The copies of the above decisions are enclosed as Annexure F, G and H respectively.

D.10 The Applicant submits that when in terms of the composite contract, the moveable property and immovable property was given on lease and there is composite consideration then the tax cannot be levied on the entire amount and hence the Applicant is not liable to pay Sales Tax.

E. Service Tax and Sales Tax are mutually exclusive taxes. As submitted earlier the present transaction is subject matter of 'Service Tax' hence sales tax is not payable.

E.1 The Applicant once again wishes to submit that, Service Tax and Sales Tax/VAT are both separate taxes levied and administered through separate statutes viz. Finance Act, 1994 and Sales Tax Act, 1956 or Maharashtra Value Added Tax, 2005.

E.2 Further, subject matter of both the taxes is entirely different, service tax is payable in the event of provision of service and sales tax/VAT is payable in the event of sale or deemed sale of goods. Therefore, both the taxes are mutually exclusive and cannot be charged in chorus one same activity and on same consideration. This contention finds support from decision of Hon'ble Supreme Court in case of Imagic Creative Pvt Ltd vs. CCE 2008 (9) STR 337 (SC). The copy of the above decision is enclosed as Annexure I.

E.3 As clarified in foregoing paras, the present activity is subject matter of service tax as per provisions of Finance Act, 1994. Hence sales tax is not payable on the said activity.

PRAYER

In view of the above facts and submissions the Applicant prays as under:

1. It is prayed that no sales tax be levied in the present case.
2. If your goodself proceeds to confirm the levy of sales tax then the value on which the same is payable may please be determined.
3. Further if your goodself confirms the levy of sales tax then it is kindly requested to give the prospective effect to the decision."

04. OBSERVATIONS

I have gone through the facts of the case. There is some property along with certain facilities, furniture and fixture, etc. which is given by the applicant as per a Leave and License Agreement. That there are movable and immovable items which have been given on lease is not disputed. What is argued is that the consideration received is for both movables and immovable and no split thereof with regard to apportionment towards movables and immovable is available. Thus, lease of certain things is not disputed. However, the disputed issues, in short, thereto are :

1. *Whether it could be regarded as a 'deemed sale' for the purposes of the Maharashtra Value Added Tax Act, 2002 (MVAT Act, 2002)?*
2. *If it is regarded as a 'sale' under the Maharashtra Value Added Tax Act, 2002, then the 'sale price' of the same as the consideration for lease of movables?*
3. *Whether Service Tax and Sales Tax can be levied on the same transaction?*

I would begin to ascertain the above and other issues as also the arguments as put forth by the applicant.

The first and foremost argument which I need to deal with is that the MVAT Act, 2002 does not have a provision for 'deemed sale'. The applicant has referred to the Gazette dt.31.03.2005 whereby it is provided that in clause (24) of section 2 of the Act, paragraph (vii) of sub-clause (b) of the Explanation shall be deleted. Section 2 pertains to definitions under the MVAT Act, 2002 and clause (24) has the definition of 'sale'. Though the applicant has referred to this definition, I would reproduce this definition here to clear the issue :

"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 13[14[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."*

As can be seen there are paragraphs (i) to (vi) in sub-clause (b) of the Explanation. The Explanation begins with the lines that for the purposes of the clause [clause (24), the definition of 'sale'] and then enumerates two sub-clauses (a) and (b) and paragraphs (i) to (vii) under sub-clause (b) and ends with the words 'shall be deemed to be a sale'. It means by way of the Explanation, certain situations as enumerated thereunder would be deemed to be a 'sale'. The applicant is trying to put across the point that the paragraph (vii) after paragraph (vi) which was deleted by the Gazette dt.31.03.2005 contained the words 'shall be deemed to be a sale'. And since the said words have been deleted, it is contended that the definition of 'sale' in clause (24) does not have a provision for 'deemed sales' such as works contract, lease, etc. The argument lacks in merits as the words 'shall be deemed to be a sale' cannot be part of any of the enlisted situations as found in sub-clauses (a) and (b) and paragraphs (i) to (vii) under sub-clause (b). The said words were meant to conclude that the enlisted sub-clauses and paragraphs would be deemed to be a 'sale'. The Explanation began with the words that for the purposes of the clause (24) and then enlisted the situations which would be deemed to be a 'sale'. The words 'shall be deemed to be a sale' were never a part of the paragraphs (i) to (vi) or (vii) and therefore when the paragraph (vii) was deleted by the Gazette dt.31.03.2005, it cannot be said that with it the words 'shall be deemed to be a sale' were also deleted. Having dealt with this argument, I move on to the clauses of the impugned agreement.

Prior to that, since the definition of sale has been reproduced above, I invite attention to paragraph (iv) thereof which is about "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;". Thus, the definition of 'sale' treats lease transactions as 'deemed sale' and they are very well covered by the aforesaid wording found in paragraph (iv). In the present case if there is transfer of the right to use any movable goods for a valuable consideration then the same would be covered by the above words and thereby by the definition of 'sale'. The applicant agrees that movable and immovable property has been given on lease. However, it is his case that the consideration received is composite and cannot be apportioned between movable and immovable property. I would move on to ascertain the same thus :

The applicant has given 3 bills, the particulars of which are as follows :

Bill No.10 dt.25.01.2009

RENT INVOICE					
SR NO	DESCRIPTION	AREA Sq.ft	RATE	PER	AMOUNT
1	License fees for the 6 th Floor at Amar Apex for the month of January '09 Facilities & Furniture Fixture & Equipments as provided in Schedule 'A' of the agreement Vat/Service Tax will be charge later.				584,791
	Amt in words				584,791

Bill No.17 dt.25.01.2009

RENT INVOICE					
SR NO	DESCRIPTION	AREA Sq.ft	RATE	PER	AMOUNT
1	License fees for the 6 th Floor at Amar Apex for the month of February '09 Facilities & Furniture Fixture & Equipments as provided in Schedule 'A' of the agreement Vat/Service Tax will be charge later.				584,791
	Amt in words				584,791

Bill No.25 dt.25.02.2009

RENT INVOICE					
SR NO	DESCRIPTION	AREA Sq.ft	RATE	PER	AMOUNT
1	License fees for the 6 th Floor at Amar Apex for the month of 01/01/09 to 28/02/09 Facilities & Furniture Fixture & Equipments as provided in Schedule 'A' of the agreement Add : VAT @ 12.50%				1,169,582
					146,198
	TOTAL :				1,315,780
	Less : Amount Received				1,169,582
	Amt in words				146,198

The invoices show that they have been raised for License fees for the 6th Floor at Amar Apex for the month of 01/01/09 to 28/02/09 and for the Facilities & Furniture Fixture & Equipments as provided in Schedule 'A' of the agreement. VAT has been charged in the bill. The

clause which provides for payment of 'fees' and other relevant clauses from the agreement can be seen thus -

Clauses from the Agreement

- M. The Licensee was desirous of taking a suitable premises for its use and occupation which is fully operational infrastructure with all the facilities for the purposes of running its office, conducting software development, data processing, running call center, training and other information technology related services and other purposes incidental thereto and the said Building was suitable to meet the requirements of the Licensee, the Building known as Amar Apex".
- N. Pursuant to the negotiations ensued between the Parties hereto, the Licensor had agreed to grant a license in favour of the Licensee with respect to the said Building and the parties had accordingly exchanged a Letter of Intent dated January 24th 2007 in that regard.
- O. In furtherance to the said Letter of Intent, pending completion of the balance construction of the balance building, the Licensee has requested the Licensor to grant a license with respect to the commercial premises on the Sixth Floor admeasuring 22756 sq.ft. along with the Furniture, Fixtures and Equipments (the "FF&E") together with Lobby admeasuring 200 sq.ft and the open balcony/ies/terrace ad measuring 160 sq ft together with A.C. Gantry area admeasuring 340 sq.ft together with 25 car parking spaces in the basement, as per the Marked Parking Plan enclosed herewith as Appendix - I. and Annexure II The list of FF&E provided in the Licensed Premises is set forth in Annexure A of this Agreement.

Definitions

- 1.4 "Total Chargeable Area" shall be the area consisting of 22756 sq ft of the Sixth floor, 160 sq ft of the terrace on the Sixth floor and 340 sq.ft of A.C. Gantry Area and 200 sq ft of lobby on the ground floor which amounts to $22756 + 160$ divided by 2 + 340 divided by 2 + 200 = 23206 sq ft.
- 1.5 "FF&E" shall mean the Furnitures, Fixtures and Equipments affixed in the Licensed Premises in terms of Annexure A.
- 1.6 "Facilities" shall mean the amenities, furniture and fixtures more particularly described in Annexure A hereto to be fit out in the Premises, in accordance with the design approved by the architect of the Licensee and attached hereto as Annexure B, having the technical specifications mentioned therein and as shown on the plans attached hereto and marked as Annexure B.
- 1.12 "Licensed Premises" shall mean the total chargeable area of 23206 sq ft which includes office space on the Sixth floor of the Building known as "Amar Apex" admeasuring 22756 sq ft i.e. together with Main Lobby admeasuring 200 sq.ft and together with Terrace area admeasuring 160 sq ft together with A.C. Gantry area admeasuring 340 sq.ft together with 25 Car Parking spaces in the Building.
2. **Licensed Premises**

The Licensor hereby grants a License unto the Licensee to use and occupy the Licensed Premises along with all the Facilities therein, and the FF&E, without any interference/obstruction from the Licensor on the terms and conditions contained in this Agreement.

Duration

The Licensor hereby grants unto the Licensee the right to use and occupy the Licensed Premises and FF&E, on leave & license for a period of 47 months from 1st January, 2009 and ending on 26th November 2012, on the terms and conditions specified herein ("Term"). However, in case the licensor is unable to put the Licensee in use and occupation of the Licensed Premises from the License Commence ment Date, then in that event the aforesaid date shall vary accordingly and the Parties shall execute supplemental writing to record the change in date.

3.2 Handover of Licensed premises

3.2.1 The handover Date by the Licensor to the Licensee of the Licensed Premises is January 01, 2009.

4. License Fee : [Page 10 Clause 4]

- 4.1 The Licensee shall pay to the Licensor a monthly License Fee calculated at the rate of Rs.53/- (Rupees Fifty Three Only) per square feet per month for the Chargeable Area of the sixth floor viz, Rs. 12,29,918/- (Rupees Twelve Lacs Twenty Nine Thousand Nine Hundred and Eighteen Only). The Parties further agree that the License Fee reserved herein shall be inclusive of the structural maintenance of the said Building.
- 4.1.1. The monthly License Fee mentioned hereinabove shall be apportioned in the following manner and two separate demand Notes/Invoices shall be issued:
- i. Rs. 27.80 (Rupees Twenty Seven and Eighty Paise only) per square feet for the Chargeable Area per month; and
 - ii. Rs. 25.20 (Rupees Twenty Five and Twenty Paise only) per square feet for the Chargeable Area towards the FF&E, provided in Annexure A.
- 4.2. The floor area of 22756 sq ft is calculated @ Rs. 53/- (Rupees Fifty Three only) and totals to Rs. 12,06,068/- (Rupees Twelve Lakhs Six Thousand and Sixty Eight only).
The License Fee payable for the total Terrace (160 sq ft) area in the Sixth floor is calculated @ of 50% of Rs. 53/- (Rupees Fifty Three only), viz, Rs.26.50 (Rupees Twenty Six and Fifty paise only) per sq feet and the same totals to Rs. 4,240/- (Rupees Four Thousand Two Hundred and Forty only).
The License Fee payable for the A.C. Gantry area (340 sq.ft) area on the Sixth floor is calculated at @ for 50% of

- Rs. 53/- (Rupees Fifty Three only), viz, Rs. 26.50 (Rupees Twenty Six and Fifty paise only) per sq feet and the same totals to Rs 9,010/- (Rupees Nine Thousand and Ten Only).
- 4.2.1. The total license fee payable for 200 sq. ft. of the proportionate lobby area on the ground floor is calculated @ Rs. 53/- (Rupees Fifty Three only) per sq ft and the same totals to Rs. 10,600/- (Rupees Ten Thousand and Six Hundred only).
- 4.3 The Licensor will erect a temporary, weather proof, water tight, roof structure for the cafeteria portion in eighth (8th) floor of the terrace and will ensure that the structure so provided remains intact during the term of this Agreement. The Licensor shall also provide bainemarie counter, chairs and tables as may be specified by the Licensee.
- 4.4 The License Fee shall be paid by the 10th of each calendar month subject to the deduction of tax at source, under the Income Tax Act, 1961. The License Fee will cover the property tax, as applicable. Any service tax levied on the License Fee shall be to the account of the Licensee.
5. **FITOUT CAPITAL EXPENDITURE:**
The Licensor shall provide the Facilities and the FF&E as per Annexure A and Annexure B. the said FF&E has been/ shall be, as the case may be, handed to the Licensee hereof. The ownership in the said Facilities and the FF&E shall continue to be that of the Licensor's and the Licensee shall hand over the Facilities and the FF&E to the Licensor on vacating the Licensed Premises. The Licensor shall pass on the warranty benefits of the installed facilities and the FF&E to the Licensee. Any furniture, fittings and equipments, installed by the Licensee within the Licensed Premises, for its own use and occupation, shall continue to belong to the Licensee and shall be removed by the Licensee before handing over the Licensed Premises to the Licensor in a reasonably maintained condition, subject to normal wear and tear, on the expiry of the Term.
7. **TAXES AND OUTGOINGS**
- 7.1 During the Term, the Licensor shall regularly bear and pay the Pune Municipal taxes in respect of the Licensed Premises and all increases thereto that may arise or be chargeable.
- 7.2 During the Term, the Licensee shall regularly bear and pay all expenses and common maintenance charges of the building proportionately in relation to the Licensed Premises thereof, applicable cesses, duties and all increases thereto (collectively 'Taxes and Outgoings' applicable to the Licensee that may arise or be chargeable.. The Licensor agrees to the pay service tax and/or VAT charges relating to the Licensed Fees payable by the Licensee for the Licensed Premises. For the sake of clarity it is stated here that the Licensor shall raise an invoice/demand note on the License Fee for the Chargeable Area indicating the service tax rate, amount, category of service under which service tax is charged, Service Tax registration number and the Licensed Fee for the FF&E therein indicating the VAT registration number, VAT rate and amount payable thereon which should be dated, containing PAN and signed by the authorized signatory. The said amounts shall be paid by the Licensee within seven (7) working days of receipt of the invoice/ demand note.
- 7.3 the Licensor shall make available to the Licensee, the warranty benefits of the FF&E provided in the Licensed Premises as may be applicable. However, the post warranty maintenance of the said FF&E shall be the responsibility of the Licensee.
9. **LICENSEE'S COVENANTS**
The Licensee, to the intent that such obligation may continue throughout the term of this Agreement, hereby covenants with the Licensor as follows:
- 9.1.8 at the time of vacating the Licensed Premises or on expiry of the license granted in terms hereof, the Licensee shall remove and take away all the furniture, equipment, installations and fittings made by the Licensee in the Licensed Premises and the Facilities, hereof and hand over the Licensed Premises to the Licensor reinstated to its original condition to the best extent (normal wear and tear accepted);
- **Annexure A**
List of Facilities
And FF&E
FF&E List
- A) FF & E Owned by Symphony:
1. Work Stations – 234 Nos. (5 feet x 5 feet)
 2. Closed Cabin with Modular Table & Back Unit – 6 Nos.
 3. Lobby F.H. Modular Partitions
 4. Lobby area 5 Seater Meeting Room with Modular Table 3 Nos.
 5. Lift Lobby area 12 Seater Conference Room with Modular Table
 6. Lobby area 8 Seater meeting Room with Modular Table.
 7. 4 Seater Faculty Room with Modular Counter
 8. Ductable package AC's in the work area – 111 TR (17 x 5 TR + 12 x 2 TR)
 9. All the UPS Units
 10. P.A.C. : 27TR (27TR x1)
 11. All sofas and chairs
 12. All equipments in Lab area
 13. Genset
 14. Fire Extinguisher
 15. Internal Sinage
 16. CCTV Units

17. Access Control
- B) FF& E Owned by Owner/ builder:
1. Pantry cum Breakout Room with L.H.S. & O.H.S. – 1 No.
 2. Electrical Room, UPS Room & Lab Room 1 No.
 3. Toilet Blocks Fixtures & Fittings.
 4. A.H.U. Room – 2 Nos.
 5. All Carpentry Door & Storages with 1 No. Security Table
 6. Lab Room – No.1
 7. Pantry – 1 no
 8. UPS room.

All Civil Works
Flooring tiles, Vitrified
Carpets
Blinds
Electrical cabling
Electrical panels
UPS cabling upto the floor
Networking cabling
Glass partitions
reception areas
Toilet blocks
Handicap toilets
2 nos. Network racks in hub room/patch room on each floor
Jack Panels 24 Nos.
Electrical fittings
False Flooring
False Ceiling
Access control cabling for two points on each floor
CCTV cabling
BMS Room (Common)
Fire Alarm system
Fire Panels
Smoke Detectors
MSEB main panels-common for all floors
AHU Panels
Transformer – (Common)
Parking blocks
Lights in the parking (Common)
Security Tables
Fire exit door on each floor
Security cabin at the entrance (Common)

From the above, it can be seen that admittedly, the applicant has allowed the client to occupy the sixth floor alongwith Furniture, Fixtures and Equipments. The agreement states that "The Licensee was desirous of taking a suitable premises for its use and occupation which is fully operational infrastructure with all the facilities for the purposes of running its office, conducting software development, data processing, running call center, training and other information technology related services and other purposes incidental thereto and the said Building was suitable to meet the requirements of the Licensee, the Building known as Amar Apex". The decision to occupy the said floor was taken while the building was being constructed. If we look at the intention of the client then it is seen that they intended to occupy not the premises, as like any other brick n cement structure but they intended to occupy premises with all the infrastructure, fully operational. Thus, the essence of the contract is a premises with infrastructure for running of the office. None would deny that any rent fixed for this requirement would include the consideration for the premises alongwith the consideration for the infrastructure.

Now, if we look at the Fee structure, then it is seen that though a consolidated fee of Rs.53/- per sq. ft. has been fixed, we find that a breakup thereof is also available thus -

- The Licensee shall pay to the Licensor a monthly License Fee calculated at the rate of Rs.53/- (Rupees Fifty Three Only) per square feet per month for the Chargeable Area of the sixth floor viz, Rs. 12,29,918/- (Rupees Twelve Lacs Twenty Nine Thousand Nine Hundred and Eighteen Only).
- The monthly License Fee mentioned hereinabove shall be apportioned in the following manner and two separate demand Notes/Invoices shall be issued:
 - i. Rs. 27.80 (Rupees Twenty Seven and Eighty Paise only) per square feet for the Chargeable Area per month;
 - ii. Rs. 25.20 (Rupees Twenty Five and Twenty Paise only) per square feet for the Chargeable Area towards the FF&E, provided in Annexure A.
- The floor area of 22756 sq ft is calculated @ Rs. 53/- (Rupees Fifty Three only) and totals to Rs. 12,06,068/- (Rupees Twelve Lakhs Six Thousand and Sixty Eight only).
- The License Fee payable for the total Terrace (160 sq ft) area in the Sixth floor is calculated @ of 50% of Rs. 53/- (Rupees Fifty Three only), viz, Rs.26.50 (Rupees Twenty Six and Fifty paise only) per sq feet and the same totals to Rs. 4,240/- (Rupees Four Thousand Two Hundred and Forty only).
- The License Fee payable for the A.C. Gantry area (340 sq.ft) area on the Sixth floor is calculated at @ for 50% of Rs. 53/- (Rupees Fifty Three only), viz, Rs. 26.50 (Rupees Twenty Six and Fifty paise only) per sq feet and the same totals to Rs 9,010/- (Rupees Nine Thousand and Ten Only).
- The total license fee payable for 200 sq. ft. of the proportionate lobby area on the ground floor is calculated @ Rs. 53/- (Rupees Fifty Three only) per sq ft and the same totals to Rs. 10,600/- (Rupees Ten Thousand and Six Hundred only).

It can be seen from the above that -

1. The total chargeable area as per the clauses from the agreement is 23206 sq. ft.
2. The same is calculated thus -

"Total Chargeable Area" shall be the area consisting of 22756 sq ft of the Sixth floor, 160 sq ft of the terrace on the Sixth floor and 340 sq.ft of A.C. Gantry Area and 200 sq ft of lobby on the ground floor which amounts to $22756 + 160 \div 2 + 340 \div 2 + 200 = 23206$ sq ft.
3. The consideration for the chargeable area of 22756 sq. ft. on the sixth floor is fixed at Rs.53/- per sq. ft. which comes to Rs.12,06,068/-. The bifurcation of this consideration is available further. Of the amount of Rs.53/-,
 - Rs.27.80/- is shown as consideration for the chargeable area of 22756 sq. ft.
 - Rs.25.20/- is shown as consideration for the FF&E.
4. The balance chargeable area is 450 sq. ft. [$23206 - 22756 = 450$ (80+170+200)] which is on account of terrace ($160/2 = 80$ sq. ft.), A.C. Gantry area ($340/2 = 170$ sq.ft) and lobby (200 sq. ft.). For this area, the consideration is fixed thus-
 - For the Terrace (160 sq. ft.) on the sixth floor, it is calculated @ of 50% of Rs.53/- viz, Rs.26.50 per sq. ft. and the same totals to Rs.4,240/-.
 - For the A.C. Gantry area (340 sq. ft.) on the sixth floor, it is calculated at @ of 50% of Rs.53/- viz, Rs.26.50/- per sq. ft. and the same totals to Rs.9,010/-.
 - For the proportionate lobby area (200 sq. ft.) on the ground floor, it is calculated @ Rs.53/- per sq. ft. and the same totals to Rs.10,600/-.

5. On the basis of the above, it can be seen that the total consideration for a month is Rs.12,06,068/- + Rs.4,240/- + Rs.9,010/- + Rs.10,600/- = Rs.12,29,918/-
6. From the points 2 and 4, what can be seen is that :
 - In respect of the terrace area and the A.C. Gantry area on the sixth floor -
 - For the purposes of calculation of chargeable area, the chargeable area is considered at half of the area that actually is. Thus, terrace of 160 sq. ft. and A.C. Gantry area of 340 sq. ft. are considered at 80 sq. ft. and 170 sq. ft. respectively ("Total Chargeable Area" shall be + 160 divided by 2 + 340 divided by 2 + ...).
 - For the purposes of calculation of rate for the chargeable area, the chargeable area is considered as it is which means it is not considered half of the actual area as considered for calculating the chargeable area. However, here the rate is considered at half of the rate that actually is (@ of 50% of Rs.53/- viz, Rs.26.50 per sq. ft.).
 - In respect of the lobby area on the ground floor, there is no reduction of chargeable area or rate by half of what the area or the rate actually is. The chargeable area is kept at 200 sq. ft. and the rate for the chargeable area is kept at Rs.53/- per sq. ft.

Thus, as observed by me above, part of the consideration is indeed fixed towards the premises i.e the immovable aspect and part towards the FF&E. This FF&E has been defined thus - "FF&E" shall mean the Furnitures, Fixtures and Equipments affixed in the Licensed Premises in terms of Annexure A. As the term suggests, FF&E is the movables. The Furniture, fixtures and equipments are the things which can be moved from one place to another. There is yet another definition of "Facilities" in the agreement which states that it shall mean the amenities, furniture and fixtures more particularly described in Annexure A hereto to be fit out in the Premises, in accordance with the design approved by the architect of the Licensee and attached hereto as Annexure B, having the technical specifications mentioned therein and as shown on the plans attached hereto and marked as Annexure B. Thus, facilities also mean the Furniture, fixtures alongwith the amenities as have been listed in Annexure A. Attention be paid to the words 'fit out in the premises' in the aforesaid definition of 'Facilities'. It means the movable fittings which would be installed in the premises which are the immovable property. I would reproduce herein the clause about Letter of Intent :

"In furtherance to the said Letter of Intent, pending completion of the balance construction of the balance building, the Licensee has requested the Licensor to grant a license with respect to the commercial premises on the Sixth Floor admeasuring 22756 sq.ft. along with the Furniture, Fixtures and Equipments (the "FF&E") together with Lobby admeasuring 200 sq.ft and the open balcony/ies/terrace ad measuring 160 sq ft together with A.C. Gantry area admeasuring 340 sq.ft together with 25 car parking spaces in the basement, as per the Marked Parking Plan enclosed herewith as Appendix - I. and Annexure II The list of FF&E provided in the Licensed Premises is set forth in Annexure A of this Agreement."

Thus, the above clause also echoes that the agreement is for the premises and along with it for the furniture & fittings. Therefore, the consideration has been accordingly fixed separately on

both these counts. The Furniture and fittings have been enumerated in the Annexure A. Then we see above that even facilities have been defined to mean the furniture & fittings as listed in the Annexure A. Thus, we can safely say that the consideration has been apportioned between immovable and movables. Now, the FF&E have been specified in an Annexure of the Agreement. The Annexure mentions that certain things are owned by the applicant and certain others are owned by the client of the applicant. At the cost of repetition, for immediate reference, I would reproduce the same again thus -

Annexure A
List of Facilities
And FF&E
FF&E List

A) FF & E Owned by Symphony:

1. Work Stations – 234 Nos. (5 feet x 5 feet)
2. Closed Cabin with Modular Table & Back Unit – 6 Nos.
3. Lobby F.H. Modular Partitions
4. Lobby area 5 Seater Meeting Room with Modular Table 3 Nos.
5. Lift Lobby area 12 Seater Conference Room with Modular Table
6. Lobby area 8 Seater meeting Room with Modular Table.
7. 4 Seater Faculty Room with Modular Counter
8. Ductable package AC's in the work area – 111 TR (17 x 5 TR + 12 x 2 TR)
9. All the UPS Units
10. P.A.C. : 27TR (27TR x1)
11. All sofas and chairs
12. All equipments in Lab area
13. Genset
14. Fire Extinguisher
15. Internal Sinage
16. CCTV Units
17. Access Control

B) FF& E Owned by Owner/ builder:

1. Pantry cum Breakout Room with L.H.S. & O.H.S. – 1 No.
2. Electrical Room, UPS Room & Lab Room 1 No.
3. Toilet Blocks Fixtures & Fittings.
4. A.H.U. Room – 2 Nos.
5. All Carpentry Door & Storages with 1 No. Security Table
6. Lab Room – No.1
7. Pantry – 1 no
8. UPS room.

All Civil Works
Flooring tiles, Vitrified
Carpets
Blinds
Electrical cabling
Electrical panels
UPS cabling upto the floor
Networking cabling
Glass partitions
reception areas
Toilet blocks
Handicap toilets
2 nos. Network racks in hub room/patch room on each floor
Jack Panels 24 Nos.
Electrical fittings
False Flooring
False Ceiling
Access control cabling for two points on each floor
CCTV cabling
BMS Room (Common)
Fire Alarm system
Fire Panels
Smoke Detectors
MSEB main panels-common for all floors
AHU Panels

Transformer – (Common)
Parking blocks
Lights in the parking (Common)
Security Tables
Fire exit door on each floor
Security cabin at the entrance (Common)

As can be seen, the FF&E are divided in two parts showing the ones provided by the applicant and the ones owned by the client of the applicant. If we look at the ones owned by the client of the applicant, it is seen that there are some items such as -

1. **Closed Cabin** with Modular Table & Back Unit – 6 Nos.
2. **Lobby area 5 Seater Meeting Room** with Modular Table 3 Nos.
3. **Lift Lobby area 12 Seater Conference Room** with Modular Table
4. **Lobby area 8 Seater meeting Room** with Modular Table.
5. **4 Seater Faculty Room** with Modular Counter
6. Access Control

In the above examples, closed cabin, lobby area meeting room, lift lobby area conference room, faculty room are the premises, the immovable property and it belongs to the applicant. How then could '4 Seater Faculty Room with Modular Counter' be owned by the client of the applicant. The client could own the modular table but not the faculty room. The above description could have been like 5 seater table in lobby area meeting room etc. Therefore, it is felt that there are errors in describing the FF&E. Before scheduling the case for hearing, the applicant was asked as to the ownership of the FF&E and it was informed that the applicant is the owner. During hearing in the matter, this submission was sought to be rectified by stating that the ownership is as per the Annexure A and not solely of the applicant. It is felt that the FF&E is all about the movable items provided in the premises by either the applicant or his client. Only then the bifurcation as regards 'owned by applicant' or 'owned by client' could make sense. The premises are owned by the applicant and therefore, no point or purpose is served in stating that the UPS room or the A.H.U room or the Civil Works are owned by the applicant. We have seen that the decision to allot the premises of the applicant to the client was taken when the construction was in process. Therefore, the arrangement of the sixth floor was as per the requirements of setting up of an office for the client. An office would mean sitting arrangements for the staff, for the supervisory cadres or the management and also meeting/conference rooms, lobby, sitting room, etc. The design of the office as per the requirement of the client would be a part of the Civil Works. When a premises to be used as office are taken on leave and license, it doesn't mean that only open space without any construction thereon would be taken on lease. There would invariably the construction as to walls and rooms as per the drawings provided during construction. Yes, movable partitions or dividing a premise into cabins by creating temporary separations which are not R.C.C works is also possible after building the four walls of the floor. But in the instant case there is civil works involved with design as per plans. When we look at the style in which the consideration has been fixed, things become clearer. In consideration of the Civil works i.e the construction on the floor as per the designs which constitutes the immovable property, the consideration has been fixed thus -

- Consideration towards chargeable area at Rs.27.80 per sq. ft.
- Consideration towards the terrace area at Rs.26.50 per sq. ft.
- Consideration towards the A.C. Gantry area at Rs.26.50 per sq. ft.
- Consideration towards the lobby area at Rs.53/- per sq. ft.

To suggest that the above consideration is only for the area i.e the open area without any construction thereon would again involve the same issue that taking premises on leave to be used as office would always mean a R.C.C work, a civil work with bricks and cement having walls. Therefore, the rent for immovable property would always mean that it is the consideration for the civil works such as creation of rooms, lobby area, etc. Therefore, the mention of civil works as in rooms in the list of FF&E does not depict a clear picture. When we buy a flat, the same comes with construction of walls and space partitions by walls to designate areas such as living room, kitchen, toilets, terrace, etc. The kitchen platforms, the W.C, the choice of flooring tiles, etc. which represent the movable goods are the ones specified as the facilities or the amenities to be given. The amenities list would not have mention of living room, study room or kitchen. If Air conditioner is provided in the Sleeping Room then the same would be listed as an amenity but not the Sleeping Room. In the present case, other than constructing the R.C.C structure which is to be made available for use as office premises, the applicant has provided certain items in the constructed premises. These are the movable items and find listed in the Annexure A as FF&E. In this sense as is common in the construction industry, the list of FF&E would be the movable items or as the name itself denotes, the furniture, fixture and equipments which constitute movable goods. And therefore, we have items in the list such as security table, carpets, blinds, glass partition, etc. to name a few. Additionally, it needs also to be pointed out that the bifurcation of consideration is available only in respect of the chargeable area of 22756 sq. ft. and not for the other rent calculated for the other area, namely the terrace area and the A.C. Gantry area on the sixth floor and the lobby area on the ground floor. Here, other than the civil R.C.C construction, no movable items would be provided and therefore the consideration therefor is fixed in terms of the R.C.C work only i.e the immovable portion which has been constructed. And it is therefore, that we find clauses in the Agreement to the effect that -

- *"Facilities" shall mean the amenities, furniture and fixtures more particularly described in Annexure A hereto to be fit out in the Premises,...*
- *The Licensee would shall hand over the Facilities and the FF&E to the Licensor on vacating the Licensed Premises.*
- *The Licensor shall pass on the warranty benefits of the installed facilities and the FF&E to the Licensee.*
- *.....;Provided however that the Licensor shall not be responsible and/or liable for taking insurance of the facilities installed by it in the Licensed Premises and the fixtures, furniture, articles or things brought in or fixed by the Licensee in the Licensed Premises;*
- *....The Licensor shall be solely responsible for the quality of (i) construction of the Licensed Premises; and (ii) fixing and maintaining the Facilities as per the plans.*
- *...However, the Licensee shall be responsible for the insurance of the furniture, fixtures and electricals installed by it in the Licensed Premises.*

What the above shows that the Furniture and Fittings or the FF&E are referred to as being installed or fitted out and not constructed. The use or choice of the words hints at the same being

movable or immovable. Where immovable was involved, the words used are 'construction' and in the case of movables, the words used are fitted, installed, handed over, etc.

While on the issue of movables and immovable and a list given by the applicant disputing certain items to be immovables, I would cite herein the decision of the Hon. Supreme Court in the case of Commissioner of Central Excise, Ahmedabad v. Solid and Correct Engineering Works [(2010) 5 SCC 122] as to what constitutes immovable and movable property. The Hon. Court has very elaborately dealt with the issue and it would be useful to go through the observations -

"18. It is not the case of the respondents that plants in question are per se immoveable property. What is argued is that they become immovable as they are permanently imbedded in earth in as much as they are fixed to a foundation imbedded in earth no matter only 1= feet deep. That argument needs to be tested on the touch stone of the provisions referred to above. Section 3(26) of the General Clauses Act includes within the definition of the term "immovable property" things attached to the earth or permanently fastened to anything attached to the earth. The term "attached to the earth"; has not been defined in the General Clauses Act, 1897. Section 3 of the Transfer of Property Act, however, gives the following meaning to the expression "attached to the earth":

(a) rooted in the earth, as in the case of trees and shrubs;

(b) imbedded in the earth, as in the case of walls and buildings;

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached."

19. It is evident from the above that the expression "attached to the earth" has three distinct dimensions, viz. (a) rooted in the earth as in the case of trees and shrubs (b) imbedded in the earth as in the case of walls or buildings or (c) attached to what is imbedded for the permanent beneficial enjoyment of that to which it is attached. Attachment of the plant in question with the help of nuts and bolts to a foundation not more than 1= feet deep intended to provide stability to the working of the plant and prevent vibration/wobble free operation does not qualify for being described as attached to the earth under any one of the three clauses extracted above. That is because attachment of the plant to the foundation is not comparable or synonymous to trees and shrubs rooted in earth. It is also not synonymous to imbedding in earth of the plant as in the case of walls and buildings, for the obvious reason that a building imbedded in the earth is permanent and cannot be detached without demolition. Imbedding of a wall in the earth is also in no way comparable to attachment of a plant to a foundation meant only to provide stability to the plant especially because the attachment is not permanent and what is attached can be easily detached from the foundation. So also the attachment of the plant to the foundation at which it rests does not fall in the third category, for an attachment to fall in that category it must be for permanent beneficial enjoyment of that to which the plant is attached.

20. It is nobody's case that the attachment of the plant to the foundation is meant for permanent beneficial enjoyment of either the foundation or the land in which the same is imbedded.

21. In English law the general rule is that what is annexed to the freehold becomes part of the realty under the maxim quidquid plantatur solo, solo cedit. This maxim, however, has no application in India. Even so, the question whether a chattel is imbedded in the earth so as to become immovable property is decided on the same principles as those which determine what constitutes an annexation to the land in English law. The English law has evolved the twin tests of degree or mode of annexation and the object of annexation. In Wake V. Holt (1883) 8 App Cas 195 Lord Blackburn speaking for the Court of Appeal observed:

"The degree and nature of annexation is an important element for consideration; for where a chattel is so annexed that it cannot be removed without great damage to the land, it affords a strong ground for thinking that it was intended to be annexed in perpetuity to the land."

22. The English law attaches greater importance to the object of annexation which is determined by the circumstances of each case. One of the important considerations is founded on the interest in the land wherein the person who causes the annexation possesses articles that may be removed without structural damage and even articles merely resting on their own weight are fixtures only if they are attached with the intention of permanently improving the premises. The Indian law has developed on similar lines and the mode of annexation and object of annexation have been applied as relevant test in this country also. There are cases where machinery installed by monthly tenant was held to be moveable property as in cases where the lease itself contemplated the removal of the machinery by the tenant at the end of the tenancy. The mode of annexation has been similarly given considerable significance by the courts in this country in order to be treated as fixture. Attachment to the earth must be as defined in Section 3 of the Transfer of Property Act. For instance a hut is an immovable property, even if it is sold with the option to pull it down. A mortgage of the super structure of a house though expressed to be exclusive of the land beneath, creates an interest in immovable property, for it is permanently attached to the ground on which it is built.

23. The courts in this country have applied the test whether the annexation is with the object of permanent beneficial enjoyment of the land or building. Machinery for metal-shaping and electro-plating which was attached by bolts to special concrete bases and could not be easily removed, was not treated to be a part of structure or the soil beneath it, as the attachment was not for more beneficial enjoyment of either the soil or concrete. Attachment in order to qualify the expression attached to the earth, must be for the beneficial attachment of that to which it is attached.

Doors, windows and shutters of a house are attached to the house, which is imbedded in the earth. They are attached to the house which is imbedded in the earth for the beneficial enjoyment of the house. They have no separate existence from the house. Articles attached that do not form part of the house such as window blinds, and sashes, and ornamental articles such as glasses and tapestry fixed by tenant, are not affixtures.

24. Applying the above tests to the case at hand, we have no difficulty in holding that the manufacture of the plants in question do not constitute annexation hence cannot be termed as immovable property for the following reasons:

(i) The plants in question are not per se immovable property.

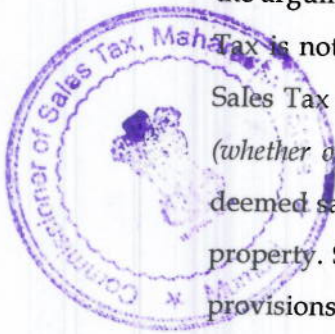
(ii) Such plants cannot be said to be "attached to the earth" within the meaning of that expression as defined in Section 3 of the Transfer of Property Act.

(iii) The fixing of the plants to a foundation is meant only to give stability to the plant and keep its operation vibration free.

(iv) The setting up of the plant itself is not intended to be permanent at a given place. The plant can be moved and is indeed moved after the road construction or repair project for which it is set up is completed."

The above observations were reproduced to bring to notice the principles to be followed in the matter of ascertaining the nature of a property, whether movable or immovable. I have to observe that the decision as regards movable or immovable property would rest on the facts of each case. In the present case, as can be seen from a perusal of all the facts, the consideration towards FF&E is the consideration for the movable property which are to be fitted or installed and thereby, capable of removal.

I would conclude the discussion to observe that the present agreement clearly spells out the bifurcation of the consideration towards the immovable and movable items. The consideration towards the civil works which represents the immovable property given on rent is not amenable to tax under the MVAT Act, 2002. The consideration of Rs.25.20/- per sq. ft. shown as consideration for the FF&E is the consideration towards the movable goods and therefore, the same is amenable to tax being the consideration for the lease of the said goods. The MVAT Act, 2002 constitutionally empowers taxing of such sales which fall in the deemed sale category. Therefore, the argument that Service tax being levied on the transaction, there would be no liability to Sales Tax is not a good one. The incidence of tax under the both the statutes is different. Under the Sales Tax Act, the consideration towards 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 is a deemed sale. Under the Service tax Act, the taxable event or service is the renting of immovable property. Such is not so in the case of the MVAT Act, 2002. Therefore, there is no conflict in the provisions or incidence of tax under both the statutes. We have seen above that there is no composite consideration as such but the bifurcation of the consideration is available towards movable and immovable goods. It had been a different case if no such apportionment of consideration was available. The transfer of the right to use the movable goods in the present case would, therefore, rightly attract the provisions of the Sales Tax statute. The consideration thereof is fixed at Rs.25.20/- per sq. ft. and the amount calculated at that rate against the chargeable area of 22756 sq. ft. would be the sale price for the particular month. I have to observe that the applicant has been rightly charging taxing tax on the consideration calculated @ Rs.25.20/- per sq. ft. As regards the rate of tax to be discharged, it is seen that insufficient details about the items are available. However, a prima-facie view is that the items mostly fall in the unspecified category



and therefore, would fall in the residuary schedule entry E-1 of the MVAT Act, 2002, thereby liable to tax @12.5%. It is, therefore, that the applicant, too, has discharged tax @12.5%.

Having seen that the apportionment of the consideration towards the FF&E would constitute the taxable amount for the purposes of the MVAT Act, 2002, I would now move on to deal with the arguments of the applicant.

The applicant has argued that the entire premises along with FF&E and facilities have been given to the Licensee and a single lump sum 'License Fee' has been charged. With regard to this argument, I would invite attention to the observations of the Hon. Supreme Court in *Bharat Sanchar Nigam Ltd. and Anr.* (2006 145 STC 91(SC)) in respect of telephone connections wherein it has been held that *"the nature of the transaction involved in providing the telephone connection may be a composite contract of service and sale. It is possible for the State to tax the sale element provided there is a discernible sale and only to the extent relatable to such sale"*. In the present case, we see that the impugned agreement itself provides an apportionment of the consideration towards the licensed Premises and the FF&E. The latter constitutes the movable property. Therefore, the argument of the applicant is incorrect. Hereinafter, I have also dealt with the argument that both Sales Tax and Service Tax cannot be levied on the same transaction. At the cost of repetition, I state that such are not the facts of the present case where we find a bifurcation of the consideration towards immovable and movable property and there is no clash of the incidences of tax under the aforementioned statutes in respect of the present transaction. And further not all the consideration is considered as being taxable for the purposes of the Sales Tax statute. It is only that portion of the consideration which has been clearly spelt out in the agreement as being receivable on account of the FF&E to be enjoyed by the client which is being considered as taxable under the MVAT Act, 2002 as the same relates to the transfer the right to use the movable goods for a valid consideration for a specified period. It is not disputed that the FF&E are being enjoyed along with the Licensed Premises. But the agreement expressly mentions that the agreement is for the right to use and occupy the Licensed Premises and the FF&E. Therefore, as discussed above, the consideration towards the FF&E, the movable goods is being considered for taxation under the Sales Tax Act. In view of the facts not being the same, I refrain to discuss about reliance on the case of *Imagic Creative Pvt. Ltd.* (cited supra).

I refrain from discussing and distinguishing the case of *State Bank of India* (cited supra) as cited by the applicant as the facts in the case before me are not similar to the said case. Here, there is an express agreement and a clear demarcation of the consideration to be given for the right to use the FF&E which constitutes the movable goods eligible for levy of Sales Tax. Also reliance on the case of *Karthik Engineering Works* (cited supra) is not proper as the applicant mentions that it was a case of composite consideration. Similarly there is reliance on the cases wherein it has been held that in absence of the proper mechanism to determine the value for levy

of the tax, the same cannot be levied. As repeated^{by} me hereinabove, in the present case, a break-up of the consideration is available.

05. PROSPECTIVE EFFECT

The applicant has requested for prospective effect if the contention of his is not acceptable. We have seen above that a part of the transaction pertaining to consideration receivable on account of the FF&E @ Rs.25.20/- per sq. ft. is for the transfer of the right to use the movable goods and is therefore, exigible to tax under the provisions of the MVAT Act, 2002. It is seen that the applicant has also discharged liability on the very consideration of Rs.25.20/- per sq. ft. received towards the FF&E. Of the total consideration of Rs.53/-, the break-up of which is available in the Agreement itself, the applicant has considered Rs.25.20/- for levy of Sales Tax and accordingly has discharged Service Tax on the remaining consideration of Rs.27.80/-. Thus, it is seen that even before the determination was given, the applicant has acted as per the available provisions. In the circumstances, no case for favourable consideration of the request for prospective effect is made out.

06. In view of the detailed deliberations, it is determined thus -

PROCEEDINGS

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

No.DDQ/11-2010/Adm.3/18/B- 2

Mumbai, dt. 22/03/2016

For reasons as discussed in the body of the order, it is herewith determined that -

- *the applicant is liable to pay tax under the provisions of MVAT Act, 2002 on the amount received towards license fees for Facilities and FF&E vide bills No.25 dated 25.02.2009, Bill No.10 dated 25.01.2009, Bill No.17 dt.25.01.2009.*
- *the rate of tax would be 12.5% being covered by Schedule entry E-1 of the Maharashtra Value Added Tax Act, 2002.*
- *the request for prospective effect is rejected.*

(RAJIV JALOTA)

COMMISSIONER OF SALES TAX,
MAHARASHTRA STATE, MUMBAI