

Read: 1) Application dt. 12/12/2005 from M/s. Thermadors Pvt. Ltd.
2) This office letter dt. 26/7/2007 calling the applicant for hearing on dt. 7/8/2007.
Heard: Shri A.B. Ghanekar, S.T.P., attended the hearing on dt. 7/8/2007.

PROCEEDINGS

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

No.DDQ-11/2005/Adm-2/106/B- 01

Mumbai, dt. 22.08.2007

An application is received from M/s. Thermadors Pvt. Ltd., situated at 40, WMDC, Industrial Complex, Ambethan Road, Kharabwadi, Chakan, Tal. Khed, Pune - 410501 for determination of the rate of tax applicable to the product as "Three Piece Eye Dropper" sold by the invoice no. 146 dt. 09/12/2005.

02. FACTS OF THE CASE

The applicant is a private limited company registered under the Companies Act, 1956. The applicant has a unit at Pimpri manufacturing Fiberglass reinforced plastic products. Another unit at Chakan under the Package Scheme of Incentives is manufacturing preimpregnated rovings. One more unit at Kharabwadi Village, Ambethan Road, Chakan, is manufacturing "Three Piece Eye Droppers" in plastic consisting of bottle, nozzle and cap used as presterilised primary packing for eye formulations.

The raw materials required for manufacturing of the above "Three Piece Eye Droppers" are mainly LDPE (LUPOLLEN), HDPE, pigment, etc. All these raw materials are also known as 'plastic granules'. The raw materials are mainly imported. The applicant has described the manufacturing process as follows :-

Manufacturing process

1. The bottles are manufactured using fully automatic injection blow moulding machine with injection base mould, core for injection and blowing cavity.
2. The process involves granules of linear density polyethylene fed automatically into a hopper which then passes through heated electronically controlled extruder. The indirect heating is provided by two numbers of indirect heating units for moulds.
3. The preplasticised material is injected into the Injection Cavity after the injection core closes. With this a "perform" for the bottle is made.
4. The above "perform" is swung into the blowing cavity and the bottles are blown to exact size.
5. The bottles are ejected automatically after a built-in-cooling cycle.

6. The moulded bottles get deposited on to the conveyor in a clean room with a clean air facility and transported to the clean room packing area.
7. The caps are moulded with injection moulding process using High Density Polyethylene and Nozzles using Low Density Polyethylene. The caps and nozzles are also converted in a clean room environment.
8. The bottles/caps and nozzles untouched by hand gets deposited into a specially made plastic bag and an online sealing machine double seals.
9. Every pack of 1800 bottles are, along with 1800 each of caps and nozzles, packed into a pre-normed container which is sent out for irradiation to B.A.R.C., Mumbai, before supplies are effected.

All the three components are packed independently in equal quantities and dispatched to customers. After the medicine manufacturing companies fill the medicine in the bottle, the nozzle is fitted and finally the bottle is sealed with the cap which is automatically locked to maintain the ingredient of the medicine as it is.

At present the applicant is charging Vat @ 4% on the impugned product, being covered by the entry at sr. no. 164 for the excise heading 3923 of the notification dt. 1/4/2005 issued for the purposes of the schedule entry C-54 of the Maharashtra Value Added Tax Act, 2002.

03. CONTENTION & HEARING

The case was taken up for hearing on dt. 7/8/2007. Shri A.B. Ghanekar, STP, attended the hearing. He contended that, the impugned product is an industrial input covered by the excise heading 3923 and therefore taxable @ 4%. He reiterated the facts that, the product is sold to pharmaceutical companies.

The applicant submits that, the products of the applicant are exclusively purchased by the medicine manufacturing units. The product is specially designed on computerized imported machinery which is exclusively for pharmaceutical manufacturing industries. Since, the product to be packed is a medicine, the product of the applicant is specially designed to pack the said medicines so as to ensure long term stability of storage in normal condition and to retain the original ingredients. There are no sales at all directly to the consumers/traders or non manufacturing units. The applicant contends that, the product is exclusively used for primary packing of the medicines manufactured by the pharmaceutical manufacturing companies. The applicant submits that, the product is used

for conveyance of the goods in the distribution channels to the consumers. In the light of the above, the applicant contends that, the product being a packing material for the industrial units, would be covered by the sr. no. 164 of the notification dt. 1/4/2005 and sr. no. 203 of the notification dt. 1/9/2005 issued for the purposes of the schedule entry C-54.

04. OBSERVATIONS

I have gone through all the facts of the case. The product under consideration is “Three Piece Eye Dropper”. The question before me is the determination of the rate of tax applicable to the impugned product. Let me begin with ascertaining the claim of the applicant in respect of the schedule entry applicable to the impugned product. As has been mentioned in the preceeding para, the applicant claims that, the relevant schedule entry of the Maharashtra Value Added Tax Act, 2002 is C-54. Hence, let me reproduce the said entry as below :-

Industrial inputs and packing materials as may be notified from time to time by the State Government in the *Official Gazette*

As can be seen the above schedule entry pertains to,

1. Industrial inputs and packing materials.
2. Industrial inputs and packing materials as may be notified from time to time.

Thus, it is not only essential that, the product should be an Industrial input and packing material **BUT** the same should have been notified for the purposes of the schedule entry C-54. This means that, there would be cases wherein the product may qualify as an Industrial input and packing material. However, the product may not have been notified for the purposes of the schedule entry under the Maharashtra Value Added Tax Act, 2002.

In the present case, the claim of the applicant is that, the product is an “industrial packing material”. In the light of the same, I would proceed by ascertaining first as to whether the product qualifies as a “packing material” and thereafter whether the product has been notified for the purposes of the schedule entry C-54.

To qualify as an “industrial packing material”, the product should have application in industries as a packing material. This is essential as a packing material has use in industries as well as day to day use. Herein, I would reproduce the observations from cases which have adjudicated on a like matter as involved in the present case :-

1. M/s. Samrudhi Industries [DDQ-11/2003/Adm-5/40/B-8 Mumbai, dt. 20/02/2004]

The then Commissioner while deciding the issue had observed thus,

"Since the term "Input" is qualified as "Industrial Inputs" in the notification it does not include all inputs but only inputs of an industry. The very qualification for judicious interpretation shall equally be applicable to "Packing Material" since they are placed together in conjunction by the word "and". As such the entry C-I-29 covers "Industrial Inputs and Industrial Packing Materials alone in it."

2. M/s. Samrudhi Industries vs. State of Maharashtra [32 MTJ 226]

Against the aforementioned Determination Order as at 1. above, the applicant M/s. Samrudhi Industries preferred an appeal before the Tribunal in which the Determination Order has been upheld. While deciding the issue, the Hon. Tribunal had an opportunity to discuss the meaning of the term "Industrial inputs and packing materials" as understood for the purposes of the then schedule entry C-I-29 for "Industrial inputs and packing materials". The same could be reproduced thus,

"The plain reading of the entry indicates that the articles required for industrial purposes are only covered under the entry. The Commissioner of Sales Tax has rightly considered the importance of conjuncture "and". It is impossible to bifurcate "Industrial Inputs" from Packing Material. It is impossible because the aims and objects to incorporate the entry is to give benefit in taxes for growth of the industry. This aim and object is discussed by the Commissioner of Sales Tax in his order and that cannot be disbelieved."

The Tribunal further observed that,

"This case mainly involves the interpretation of the Schedule Entry C-I-29 and the notifications issued thereunder. The genesis of the Schedule Entry C-I-29 has been discussed at length in para 6 of this Tribunal's Judgment in the case of M/s. Thermolite Packaging (India) Pvt. Ltd., Appeal No. 4 of 2003 decided on 4.9.2004. Right from the inception of the Bombay Act, the endeavour of the Legislature was to keep at the minimum the tax incidence on the Industrial Inputs and the Packing Materials (including the conveyance materials), which go into the making and supply of the final manufactured product. It is from that point of view that the provisions enabling the manufacturers to effect purchases on Form 15 at concessional tax rate and those allowing set-off in respect of the tax paid in excess of that rate were made. Subsequently, the withdrawal of the Form 15 provisions from 1.10.1995 caused hardships to the industry and it is to mitigate them that the Legislature/Government introduced the Notification Entry A-88 under Section 41 of the Bombay

Act as also the aforesaid Schedule Entry C-I-29. So far as the said Schedule Entry C-I-29 is concerned, the Legislature did not extend the benefit to all the Industrial Inputs and Packing Materials as was the position prior to 1.10.1995. The benefit was given to only such Industrial Inputs and Packing Materials as are specified by the State Government from time to time by the notification in the Government Gazette. The Government has to take a conscious decision as regards whether any Industrial Input or Packing Material is to be notified for the purposes of the said Schedule Entry C-I-29. It is only on the Government's so notifying an item that it would befall the said Schedule Entry as an Industrial Input and Packing Material."

3. M/s. B. G. Shirke Construction Technologies (P) Limited v. Addl. Commissioner of Commercial Taxes [(2007) 5 VST 655]

The Supreme Court of India while interpreting the meaning of the term "industrial inputs" had observed that, the expression "*industrial inputs*" means either component part or raw material or packing material.

The above can be best understood from the following examples :-

1. The packing material used in packing of goods coming out of industries to be sent to the wholesalers/retailers for ultimate delivery to the final consumers. For e.g. the packing used for cement, etc.,
2. The packing material used in packing of goods to be given as gifts. For e.g. coloured wrapping paper used to wrap gift articles.

The schedule entry is very specific in the sense that, it covers only "Industrial inputs and packing materials", thereby, leaving no scope for any other type of packing material, other than industrial packing material, to be included in the impugned entry.

Turning to the facts of the present case, the applicant has submitted that, his product is used mainly in pharmaceutical manufacturing industries. The applicant has submitted the sample of the product. It can be seen that, the impugned product is indeed a product used for the packing of medicines/formulations which are to be administered in drops. For e.g. eye/ear/nose formulations. The product comes in a 3 piece set i.e., bottle, nozzle and closure caps. From the sample of the product, it can be said that, the product would have use in pharmaceutical manufacturing industries and not otherwise. I am satisfied that, the impugned product would qualify to be termed as an "industrial packing material".

Having decided as above, the question now is whether the impugned product is notified for the purposes of the schedule entry C-54 of the Maharashtra Value Added Tax Act, 2002. The notification for the purposes of the above entry is based on the classification of products under the Central Excise Act. The description against any particular excise heading may not necessarily match the description against the heading notified for the purposes of the schedule entry C-54. There would be cases wherein a particular excise heading matches the description against the heading notified but an exclusion clause may have been provided in the description against the heading notified for restricting the coverage of certain products. The method of taxation under Sales Tax and Central Excise being different, it is not necessary that, the heading descriptions under both the statutes must match. Herein, I would reproduce the **Note 2 and 3** to the notification on "Industrial inputs and packing materials" as below :-

Note.- (2) Where any commodities are described against any heading or, as the case may be, sub-heading, and the aforesaid description is different in any manner from the corresponding description in the Central Excise tariff, 1985, then only those commodities described as aforesaid will be covered by the scope of this notification and other commodities though covered by the corresponding description in the Central Excise Tariff will not be covered by the scope of this notification.

Note.-(3) Subject to Note 2, for the purpose of any entry contained in this notification, where the description against any heading or, as the case may be, sub-heading, matches fully with the corresponding description in the Central Excise Tariff, then all the commodities covered for the purposes of the said tariff under that heading or sub-heading will be covered by the scope of this notification.

The above notes are self explanatory and hence, without delving any further, I move on to ascertain the claim of the applicant in respect of the heading 3923 notified for the purposes of the schedule entry C-54. The applicant has submitted a copy of the excise invoice evidencing the sale of the impugned product. The excise heading mentioned thereon is **3923.50.90**. The description under Central Excise against this heading is as follows :-

392350 - Stoppers, lids, caps and other closures:
39235010 - - - Caps and closures for bottles
39235090 - - - Other

So far 2 notifications have been notified for the purposes of the impugned schedule entry. Let me reproduce the descriptions against the aforementioned heading notified for

the purposes of both the notifications **along with** the description against the same heading under the Central Excise Act as follows :-

Heading	Notification dt. 1/4/2005 Sr. No. 164	Notification dt. 1/9/2005 Sr. No. 203	Central Excise
39.23	Articles for the conveyance or packing of goods, of plastics, stoppers, lids, caps and other closures, of plastics but not including- (a) insulated wares (b) bags of the type which are used for packing of goods at the time of sale for the convenience of the customer including carry bags	Articles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics but not including- (a) insulated wares (b) carry bags that is to say bags of the type which are used for packing of goods at the time of sale for the convenience of the customer	Articles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics

The difference between the 2 notifications lies in the clause (b) of both the notifications as follows :-

- (b) in **notification dt. 1/4/2005** excludes bags including carry bags
- (b) in **notification dt. 1/9/2005** excludes carry bags.

The above difference is not material to the facts of the impugned case as the product involved herein is not a carry bag. The crucial point to be seen here is whether the heading under Central Excise has been reproduced in its entirety for the purposes of the notification. If the answer is in the affirmative, the product gets covered by the notification. If the answer is in the negative, the difference in the descriptions is to be examined with respect to the facts of the case under consideration.

In the present case, the heading description under Central Excise matches with the description against the heading notified for the purposes of both the notifications subject to an **exclusion clause** which has been inserted for the purposes of the notifications. There is no such **exclusion clause** under Central Excise.

It can be seen that, the **exclusion clause** is for the following :-

1. insulated wares
2. bags including carry bags used for packing of goods at the time of sale for the convenience of the customer.

Turning back to the heading under which the product has been covered under Central Excise i.e **3923.50.90**, it can be seen that neither the said heading nor the description against the said heading i.e **Other** finds a mention in the notification for the

purposes of the entry C-54. Herein would arise the need for application of the **Rules for interpretation** and the **Notes** appended to the notification. I have already reproduced herein earlier the **Note 2** and **3** to the notification on "Industrial inputs and packing materials". Applying the same, it can be said that, since the description against the main excise heading, which is 3923, has been reproduced in its entirety for the purposes of the notification, the sub-classification is bound to be covered. Now as regards the **exclusion clause**, it can be seen that, the impugned product is neither an insulated ware nor a bag including carry bag used for packing of goods at the time of sale for the convenience of the customer. It is an industrial packing material and is not sold across the counter to individuals. It is not for the convenience of the customer for carrying the product at the time of sale.

The above would, in effect, mean that, the product is covered by the description for the purposes of both the notifications. This would further mean that, the product would be covered by the schedule entry C-54 of the Maharashtra Value Added Tax Act, 2002, thereby attracting tax @ 4%.

Now, there is a decision in the case of **Unimed Technologies Ltd. v. Commr. of Customs ((2006) 76 ELT 742 (Trib))** wherein it has been held that, dropper bottles, dropper inserts and tamper proof closures are classified under the heading **39233090**. The heading **392330** pertains to Carboys, bottles, flasks and similar articles. The applicant has mentioned the excise heading applicable to his product as **3923.50.90** which pertains to Stoppers, lids, caps and other closures. In the aforementioned case, it was held that, the unlike conventional bottles, the dropper bottle is a container with dropper insets & closures, each part conforming to a certain specification to render them in totality to an "Eye drop delivery entity". The classification of such specialized package/containers delivery system would appropriately be under **3923 30 90**. The present product is similar to the product in the above case. Hence, the classification under **3923 is correct**. The sub-classification differs. However, since the main excise heading under Central Excise (which is similar to that under Customs) has been taken in its entirety for the purposes of the notifications, it follows that all the sub classifications within the main heading would be covered by the notification. Hence, I would not enter into the debate as to which of the

two i.e., **3923 30 90 or 3923.50.90** is the exact excise heading applicable to the product so far as there is no confusion as regards the main heading .

05. In view of the discussion held hereinabove, I pass an order as follows :-

ORDER

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

No.DDQ-11/2005/Adm-2/106/B-01

Mumbai, dt. 22.08.2007

The question posed for determination as regards the rate of tax applicable to the product "Three Piece Eye Dropper" sold by the invoice no. 146 dt. 09/12/2005 is answered as being covered by the notifications issued for the purposes of the schedule entry C-54 of the Maharashtra Value Added Tax Act, 2002, thereby attracting tax @ 4%.

(SANJAY BHATIA)
Commissioner of Sales Tax,
Maharashtra State, Mumbai.