

Read:- 1. Application dated 24/11/2005 from M/s. Katara Dental Pvt. Ltd.
2. This office letter dated 29th December, 2005 calling the applicant for hearing on 04/01/2006.
Heard:- Shri Nitin Shah, Advocate attended alongwith Dr. Mukesh D. Katara.

PROCEEDINGS

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

No.DDQ-11-2005/Adm-5/100/B-02

Mumbai,dt. 20.2.2007

An application is received from M/s. Katara Dental Pvt. Ltd., Apurva Complex, 56, Ganeshkhind Road, Aundh, Pune-411 007 for determination of the question as follows :-

"Whether we can pay tax at the schedule rate on the sale effected by us by way of Works Contract vide bill no. 20962 dated 22/09/2005 after making the deduction of 40% to 50% on account of process loss as the value of material which gets transferred is only to the extent of 50% to 60% or after making the deduction of 20% as provided in the Table in rule 58."

02. BACKGROUND OF THE CASE

The applicant is a laboratory engaged in the making of prostheses as per the prescription received from the different Prosthodontists or dental surgeons.

Prosthodontics is a branch of dental arts and science pertaining to the restoration and maintenance of oral function by the replacement of missing teeth and structures by artificial devices. The team of technicians at the applicant's place works in unison with the dentist. After diagnosis, the dentist prescribes specifications and requires the team of technicians to carry out his instructions for making a suitable part. Thus, the dentist and the applicant's team have to constitute a team for getting the desired result.

The initiation of the activity starts when the patient visits the Dental Surgeon for replacing lost teeth/tooth structure. The Surgeon then prepares the abutment teeth to receive the dental prostheses. He then, makes an impression of the dental arches. The impression is then poured in either plaster or die stone plaster to make the master model which is sent to the applicant. The applicant's work begins from here. The following processes are then carried out :-

PROCESS OF FABRICATION OF DENTAL PROSTHESES

1] Articulation

The laboratory work begins from here. The upper and lower models are occluded in the correct jaw relationship and mounted on an articulator, which replicate the opening and closing of the dental arches. The articulators are hinge instruments that are used during the job work being done and are not sent to the doctor with the completed job.

2] Wax up and Casting

The prosthetic restoration framework is then hand-carved on the master model in wax. This process is done with the help of hand instruments that are heated on a bunsen flame. The wax pattern thus made is then sprued and invested into a mould or ring. The mould or investment ring is then introduced into a furnace where the wax is burnt out and at an appropriate temperature, molten metal is forced into the void or 'the space left' by the wax by a process called "casting by lost wax method" in an appropriate casting machine.

The materials that are used at this stage include die spacers, different kinds of waxes, debubbliser sprays, investment materials (powders and liquids). All the materials used in this procedure are processing materials only and are not passed on to the doctor.

3] Devesting, Sandblasting and Finishing

On retrieving the casting from the investment ring by breaking the investment material, the casting is then sandblasted with a 250-micron grit size of aluminum oxide. The idea is to remove any residual investment material powder but this also simultaneously abrades the surface of the casting resulting in loss of alloy. The framework of the prostheses is then separated from the sprue and the casting button. This is done by cutting the metal sprues with a cutting disc. This results in some more loss of alloy. The frame work that is thus retrieved has undergone what is called a casting shrinkage and needs to be then fitted on the master model on which the wax pattern was made. This is done by selectively grinding the fitting surface of the framework until all interferences in the seating in the direction of the path of placement are removed and until the framework is fully seated. Further the casting is then grinded to achieve a proper shape and contour and needs to be finished so that there are no sharp edges. The finished framework is then again sandblasted with 100-micron grit to roughen the surface so that the veneering material can attach very firm to the metal frame (Bonding).

All the steps mentioned above involve sandblasting, grinding, shaping, finishing etc., with abrasive materials and tools resulting in a substantial processing loss of the alloy. The amount of alloy passed on with the prostheses is a fraction of the alloy that the process was started with.

4] Ceramic Veneering or Porcelain Build Up

The casting or framework is then veneered or covered with tooth colored ceramic materials to make the prostheses appear tooth colored and therefore natural looking. This process is called the Ceramic Veneering or Porcelain Build up.

The material that is veneered comes in the form of powders that are mixed with special liquids to form a consistency that the technician can apply, sculpt, carve

and shape. Each unit or tooth needs to be built up in layers to imitate the layers in the natural tooth to give a polychromatic effect and translucency at the edges. Each layer is a different powder, and the technician at a time needs to mix all the different shade powders at one time with the special liquids in porcelain built up palette (similar to an artists' colour palette). It is never possible to mix the exact quantity of powder that would be needed and always a larger amount needs to be mixed so as to get a minimum workable mix on the palette. The different layers that are applied on the frame are opaque, cervical, dentine, transparent, enamel, effect and finally the glaze.

The built up on the framework is then introduced into a programmable furnace to fire, harden and bond the porcelain to the metal framework. It takes up to six firing cycles to complete the job. Each time a further mixing of the powders needs to be done. Before the glaze firing, each unit needs to be adjusted for shape, contour, occlusion, etc. This is done with the help of abrasive stone and diamond tools. This too results in a further loss of ceramic material. Again here, the quantity of porcelain that actually goes out with the prostheses is very miniscule as compared to what went into its making.

The dental laboratory also sends the dental prostheses to the dental surgeon at various in between stages for trials in order for him to verify the fit, shape, contour, shade etc. The dental surgeon may also make some adjustments by selectively grinding, finishing etc., until he/she and the patient is satisfied with the restoration. Each and every unit is individually fabricated for a particular patient and can only be fitted specifically on the particular tooth.

There are no standard norms available, for the calculation of material that is presumed to be passed on to the dentist or patient. The applicant has gone through the effort of weighing each and every unit at several in between and final steps and collected data for a period of 5 months to arrive at some averages.

The applicant, thus, stresses that there are substantial processing losses in the fabrication of dental prostheses. After carrying out the various processes as described above, the applicant finally makes the prostheses as required by the surgeon for treating the particular patient.

03. TAX TREATMENT BY THE APPLICANT

Till 31/03/2005, the applicant has regularly paid tax under the repealed Works Contract Act on the above activity. The applicant is of the opinion that, with the introduction of VAT, the method and manner of paying tax has been changed. Now, a dealer executing a works contract can either pay the tax under the composition scheme as per section 42 or can pay tax after making deductions specified under rule 58. The applicant has opted to pay the tax after making the deductions as per rule 58. However, as the Act is entirely new, the applicant has doubts as regards the method and manner. Till July 2005, the applicant has paid the

tax as per the schedule rate on the entire amount. However, from August, 2005, the applicant has started paying tax after making deduction of 20% as specified in the Table mentioned in the rule 58. In short, the question posed by the applicant is “what should be the sale price of his goods?”

04. CONTENTION & HEARING

The case was taken up for hearing on 04/01/2006 when Shri Nitin Shah, Advocate attended alongwith Dr. Mukesh D. Katara. The applicant is of the opinion that the activity carried on by the applicant is a works contract as held by the Commissioner in DDQ No. WCT-1491/DDQ-2/Adm-12/B-113 dated 20/03/2001 in the case of Sai Dantakala Ceramic. The applicant has tried to stress the point that, during the process of making the prostheses the entire material used i.e. (Alloy and Ceramic) does not get transferred. There is a process loss to the extent of 40% to 50%. Besides, a number of processing materials like waxes, investment materials, sand blasting materials, finishing and polishing tools, etc., are consumed during the process of fabrication of the prostheses. In conclusion, the actual transfer is related to only 40-50% of the alloy and ceramic material only. It is not possible for the applicant to ascertain the labour charges involved in making of the prostheses.

During hearing, the Advocate argued that, there is no sale of material by the applicant’s laboratory to the doctors as relationship of seller and purchaser does not exist. There is an already existing DDQ which has determined the said activity as a works contract. It is further argued that, relying upon the determination, they are treating it as a works contract. In the process, only miniscule material is transferred and hence the tax to be levied is only to the extent of the property transferred.

He alternatively argued that, in case the transaction is treated as a transaction of sale, then prospective effect be given to the determination order.

05. OBSERVATIONS

I have gone through all the facts of the case. The issue before me pertains to,

- A) WHETHER SALE OR WORKS CONTRACT** - Whether the transaction evidenced by the sale bill no. 20962 dt. 22/09/2005 is a transaction of sale or works contract.
- B) QUANTIFICATION OF TAX** - If it is a works contract then, how the tax would be quantified in respect of the said transaction.

A] WHETHER SALE OR WORKS CONTRACT

There is already a determination order in the case of *Sai Dantakala Ceramic*, DDQ No. WCT-1491/DDQ-2/Adm-12/B-113 dated 20/03/2001. It was observed therein that, the applicant transfers property in goods which are involved in the execution of Works Contract entrusted to him and therefore, valuable consideration, commission, or remuneration earned by the applicant has got a direct nexus with the transfer of property (howsoever negligible) taking place in the completion of job awarded to the applicant. Since there was presence of volume, frequency, continuity and regularity of the transactions, it was inferred from the review of the circumstances attendant upon the transaction in question of preparation and supply of partial denture and restoration of decayed teeth that, the applicant was carrying on a business and is a 'dealer' as contemplated in section 2(1)(d) of the Works Contract (Re-enacted) Act, 1989 and therefore, liable as a dealer under the said Act.

The facts of the present case are similar to the facts in the above DDQ.

(i) Applicability of the Earlier DDQ

Now, the applicability of the above determination in present times with the new emerging concepts needs to be ascertained. This is so, as the concept of works contract has evolved over a period of years with regard to a catena of decisions by the various Courts of law. Hence, I need to examine the issue with regard to the changed position of law in order to ascertain the applicability of the determination order in the case of *Sai Dantakala Ceramic*, DDQ No. WCT-1491/DDQ-2/Adm-12/B-113 dated 20/03/2001 to the facts of the present case.

I have also to observe that, the authority of declaring the classification is vested with the Commissioner in terms of the provisions contained in sub-section (1) of section 56 of the Act. The provisions contained in sub-section (4) declare that, if a question arises from any order passed earlier then, the application cannot be entertained afresh. In order to evaluate the situation, it is always necessary to examine before declaring the application not maintainable, as to whether the situation declares :

- (a) a changed position of law by interpretation or following the ratio of High Court or Supreme Court judgment, or
- (b) the facts and circumstances of the case are changed so as to deviate from the view point canvassed earlier.

(ii) Nature of Transaction

I now proceed to ascertain the nature of the impugned transaction. I have already reproduced herein earlier, the process of fabrication of dental prostheses.

There are two relationships involved in the one transaction between the three parties- (1) patient and doctor (2) doctor and laboratory (applicant)

There is no doubt as regards the relationship between the patient and the doctor. If during the treatment of a patient in a hospital, he or she is given a pill, then such transaction is not taxable as a sale. Doctors, lawyers and other professionals render service in the course of which it cannot be said that there is a sale of goods when a doctor writes out and hands over a prescription or a lawyer drafts a document and delivers it to his/her client. The said activity/contract is basically a service contract and not a contract for sale so as to get covered by the scope of the provisions of the MVAT Act, 2002.

It is very clear that there exists no seller-buyer relationship between them which could result in any obligation to discharge any liability under either the Bombay Sales Tax Act or the Works Contract Act or for that matter, the present Maharashtra Value Added Tax Act.

I now have to see the implications of the relationship between the doctor and laboratory (applicant). The applicant admits that the relationship with the doctor results in an obligation to discharge any liability in the nature of a '*works contract*' and not as a '*sale*'.

The '*taxable event*' in case of sale or works contract is transfer of property in goods from one person to another for valuable consideration. In case of works contract, transfer of property in goods is at the moment when the contractor affixes, attaches, mixes or blends his movable goods with the movable or immovable property of the contractee during the execution of the works contract.

The applicant has strongly contended that the impugned transaction is a '*works contract*'. It therefore becomes necessary for me to distinguish between a sale and a works contract so as to classify transactions of the nature as the one under consideration.

In order to qualify as a works contract, the contract must fulfill two basic conditions:-

1. There has to be a works contract.
2. There has to be a transfer of property in goods in some form or the other.

The definition of works contract envisages an agreement between two persons, one owning the property or the goods and the other carrying out certain specific works on it. There has to be pre-existence of certain goods, which are required to be altered, ornamented, finished, processed, treated, etc., in terms of the contract. In other words, there has to be a property owned by somebody, who engages somebody else to carry out certain works involving application or affixation of certain materials to that property. In works contract, the transfer of property takes place on the principal of accession or accretion. In works contract, goods have to be involved or used in the execution of a contract and there has to be a transfer of ownership of the said goods during execution as an integral part of the said execution of the contract. It is important that, goods have to be incorporated whether as goods or in some other form. In other words, goods have to exist in some form or the other in the original property or goods acted upon, after the vesting or transfer takes place.

In the case before me, it cannot be said that it is a case of works contract as there is no accession or accretion on pre-existing property. In fact, property is not transferred on any pre-existing property. The denture prepared by the laboratory in consultation with the dentist is itself a chattel and the completed chattel is delivered to the dentist by the dental laboratory and as such, this contract is thus a contract for sale. The argument of the applicant that the denture prepared by the laboratory is customized for an individual and has no marketability also does not hold good. The Supreme Court, in the recent judgment in the case of M/s. Kone Elevators (140 STC

22 (S.C)), has distinguished between sale and works contract. The observation could be thus seen,-

"It can be treated as well settled that there is no standard formula by which one can distinguish a "contract for sale" from a "works-contract". The question is largely one of fact depending upon the terms of the contract including the nature of the obligations to be discharged thereunder and the surrounding circumstances. If the intention is to transfer for a price a chattel in which the transferee had no previous property, then the contract is a contract for sale. Ultimately, the true effect of an accretion made pursuant to a contract has to be judged not by artificial rules but from the intention of the parties to the contract. In a "contract of sale", the main object is the transfer of property and delivery of possession of the property, whereas the main object in a "contract for work" is not the transfer of the property but it is one for work and labour. Another test often to be applied to is : when and how the property of the dealer in such a transaction passes to the customer : Is it by transfer at the time of delivery of the finished article as a chattel or by accession during the procession of work on fusion to the movable property of the customer ? If it is the former, it is a "sale"; if it is the latter, it is a "works-contract".

The observations of the Supreme Court are very clear and unambiguous so as to come to a conclusion that, the transaction in question is a transaction of sale and not a transaction of works contract.

06. We may have a look at the various judgments which could throw light on our understanding of the fine nuances of a sale and a works contract.

[i] The principle of the distinction between a contract for work and labour and one of sale and purchase has been succinctly stated in *Halsbury's Laws of England, 3rd Edition, Vol. 34, page 6, para. 3*, as follows :

"3. Contract of sale distinguished from contract for work and labour. - A contract of sale of goods must be distinguished from a contract for work and labour. The distinction is often a fine one. A contract of sale is a contract whose main object is the transfer of the property in, and the delivery of the possession of, a chattel as a chattel to the buyer. Where the main object of work undertaken by the payee of the price is not the transfer of a chattel qua chattel, the contract is one for work and labour. The test is whether or not the work and labour bestowed end in anything that can properly become the subject of sale; neither the ownership of the materials, not the value of the skill and labour as compared with the value of the materials, is conclusive, although such matters may be taken into consideration in determining, in the circumstances of a particular case, whether the contract is in substance one for work and labour or one for the sale of a chattel."

The above passage was approved in the case of *State of Rajasthan v. Man Industrial Corporation Ltd. ([1969] 24 S.T.C. 349 at 353 (S.C.))*.

[ii] The Bombay High Court in the case of *M/s. Studio Ratan Batra P. Ltd* 35 STC 522 and the Supreme Court Judgment in the case of *M/s. Hindustan Aeronautics Ltd* 55 STC 314 has distinguished between contract for sale and contract of work on the above principal.

It has been held by the Bombay High Court in the case of *M/s. Studio Ratan Batra P. Ltd.* that, the test to determine whether a particular transaction is a contract of work and labour or of skill and labour or a contract of sale is one of the intention of the parties which is to be gathered from the terms of the contract and the surrounding circumstances.

- (a) If the parties intend to contract for a chattel, then it is a contract of sale even though work of skill and labour may have to be bestowed for bringing into being the chattel.
- (b) On the other hand, if the parties contract for the rendering of work and labour or skill and labour, it is not a sale though in the execution of the contract, the passing of materials may be incidentally involved.

[iii] In the case of *Deputy Commissioner of Sales Tax v. Dr. Paran's Dental Laboratories* 67 STC 249 (Ker.), it was observed that teeth prepared by the dentist for a particular customer, if not taken delivery would be a waste and hence, what is manufactured is not marketable goods. Accordingly, it was held that "teeth setting charges" is not a transaction of sale of goods exigible to levy of sales tax under the Act.

The above judgment would not stand today as it is settled now that even a single customer constitutes a market as held by the Supreme Court in the case of *Andhra Pradesh Electricity Board* 95 STC 595 (SC).

The judgment of *Dr. Paran's Dental Laboratories* also goes on to show as to how the concept of works contract has been subject to different opinions at different points of time, thus necessitating a fresh look in the present circumstances.

The point to be noted is that, the transaction of "teeth setting charges" was held as a works contract only because the goods were not marketable. Otherwise, the transaction would have been one of the nature as a sale.

[iv] The Karnataka High Court in the case of M/s. Klick and Co 86 STC 426 has held that preparation of Block according to specifications/designs or photographs given by customer and supply of such Block is a sale and not a works contract.

[v] In case of M/s. Unique Blocks v. State of Maharashtra (21 MTJ 390), the Tribunal following the ratio of M/s. Klick and Co has held that preparation and supply of Printing Blocks is a contract of sale and not a works contract.

[vi] In the case of Studio Kamalalaya And Another V. Commercial Tax Officer And Others 89 STC 307 (WBTT), it was observed as follows,

"So, the distinction is fine but clear that in the case of a works contract, the basic goods which is the subject-matter of works contract should belong to a person other than the contractor.

*The goods involved in a works contract cannot be regarded as appropriated to the contract, or as sold, unless these have been affixed to or made part of the corpus. Affixation or becoming a part of the corpus is the essence of "deemed sale". There is no sale of the materials as such on the basis of any agreement but it is on the basis of an overall contract that the materials involved in the execution of such contract undergo a change of ownership on the **theory of accretion**.*

It is, therefore, the principle of accession which brings about the transfer of the property in goods involved in works contract. In other words, the transfer of property by accession inheres in deemed sale in a works contract and is an essential element thereof."

The above cases establish the point that, in case of a works contract, the principle of accession brings about transfer of property in goods belonging to a person other than the contractor.

I also find support to my above view from various judicial pronouncements. The West Bengal Tribunal in the case of M/s. Bijoy Processing Industries v. Commercial Tax Officer, Central Section And Others 92 STC 503 (SC) has observed that,-

"It is now well-settled that deemed sale or contractual transfer under sub-clause (b) of clause (29-A) of article 366 and section 6D takes place on the principle of accession and accretion [see Builders Association of India v. Union of India [1989] 73 STC 370 (SC)]. Transfer of property in goods effected by accession is the cornerstone of the works contract envisaged in the said section. For the purposes of taxation in a works contract, the following ingredients or pre-requisites have to be there. There has to be a contract between two parties

relating to a particular property or goods and with regard to a particular job or work [the nature of the job or work has been mentioned in section 2(b)]; goods have to be involved or used in the execution of such a contract and there has to be a transfer of ownership of the said goods during execution as an integral part of the said execution of the contract, such transfer being effected on the principle of accession. It is important that goods have to be incorporated whether as goods or in some other form. In other words, goods have to exist in some form or the other in the original property or goods acted upon, after the vesting or transfer takes place."

[vii] In the case of **P. A. Premkumar V. State Of Kerala And Another** 117 STC 76 (Ker.), a test was laid down that, basic goods are to be provided by the customer which would be subjected to processing, etc., by the person performing the works contract. There is accretion to goods or the property or nucleus of a property which originally belonged to the customer in the case of a works contract.

07. In view of the above judicial pronouncements and specially the recent judgment of the Supreme Court in the case of M/s. Kone Elevators, the earlier view taken by the Additional Commissioner of Sales Tax, treating the transaction of preparing the denture as a works contract needs to be changed.

And in the above changed circumstances, the Commissioner has an authority to entertain the application. In the situation, when the Commissioner deals with a determination order passed earlier in any other case and takes a different view of the matter making a proposition by overruling the earlier determination, in such circumstances overruling is not by offering an opportunity of hearing to a adversely affected dealer. In such circumstances, the provisions of review in sub-section (3) shall be applicable. In the present case, it is not a situation of suo-moto revision and therefore, the permission of the Government does not become necessary according to me on harmonious and judicious interpretation of the provisions of law.

Hence, the argument of the applicant as regards the need of a prior permission from the Government for review of the earlier determination order is not acceptable.

08. Thus, if the thing to be delivered has any individual existence before delivery, as the sole property of the party who is to deliver it, then it is a sale. The impugned supply of dental prostheses in the light of the above judgments is nothing but a "sale".

In the present case, the property passes by transfer at the time of delivery of the finished article as a chattel. As far as intention of the parties is concerned, the intention is certainly to sell and buy dental prostheses. The applicant is known to the buyer as being engaged in the manufacture of dental prostheses as per specifications. Accordingly, the doctor has approached the applicant and they have entered into agreement for manufacture and supply of dental prostheses. There is clearly an intention to supply dental prostheses, property in which is transferred from the applicant. This is certainly a contract for chattel and hence sale of moveable goods i.e. dental prostheses. Merely because the preparation of dental prostheses involves some skill will not make the transaction, a work of art instead of sale. The impugned transaction cannot be said to be a works contract as there are no goods belonging to a person other than the contractor in which there is transfer of property by the principle of accretion.

A heavy reliance was placed on the recent judgment of the Supreme Court in the case of Bharat Sanchar Nigam Ltd. It is argued that, the 46th amendment of the Constitution has not altered the meaning of the word "goods" and also the dominant nature test is still required to be applied to composite transaction not covered by Article 366 (29A).

The amended Article 366 (29A) of the Constitution covers the specific situation of works contract. The applicant's argument does not survive once it is held that the transaction is a sale and not a works contract. I, therefore, need not comment upon the applicability of the Supreme Court Judgment in the case of BSNL Ltd.

09. Having extensively dealt with the issue as regards the classification of the impugned transaction and thereafter satisfied myself that, the transaction in question is a sale, let me now look at the second question raised by the applicant.

B] QUANTIFICATION OF TAX

The answer to the above question would arise only if the earlier question was answered in the affirmative. It now being decided that, the impugned transaction is a 'sale', there arises no necessity to answer the applicant's question as regards tax computation as a 'works contract' under the Maharashtra Value Added Tax Act, 2002. The applicant will have to pay tax on the impugned transaction of 'sale' as per the provisions of the Maharashtra Value Added Tax Act, 2002.

10. PROSPECTIVE EFFECT

I have already mentioned earlier that, in a similar activity as the present one, it was held in the case of Sai Dantakala Ceramic that, the activity of preparation and supply of partial denture and restoration of decayed teeth is a transaction of works contract liable to tax under the Works Contract (Re-enacted) Act, 1989.

In the present proceeding, as discussed above, I have come to the conclusion that, the transaction in question is of the nature of a sale and not a works contract. The departure from the earlier view is due to the changed position of law following the ratio of judgments by the various Courts, and especially the recent Supreme Court judgment in the case of M/s. Kone Elevators Ltd.

The applicant has not prayed for granting prospective effect to this determination order, if the transaction in question is held as a 'sale' instead of a 'works contract' as contended by him. However, it is felt that the law laid down by the earlier determination order has been followed over the years. Any departure from the earlier view would cause inconvenience and hardships to the dealers who have been following the earlier view so far. Hence, it is thought prudent and equitable to make the present order prospective so as to save the interest of those following the earlier determination.

11. In view of the deliberations 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-5/100/B-02

Mumbai,dt. 20.2.2007

Question : "Whether we can pay tax at the schedule rate on the sale effected by us by way of Works Contract vide bill no. 20962 dated 22/09/2005 after making the deduction of 40% to 50% on account of process loss as the value of material which gets transferred is only to the extent of 50% to 60% or after making the deduction of 20% as provided in the Table in rule 58."

Answer : The question does not survive in view of the above observations treating the impugned transaction as a sale and not a works contract.

(B. C. KHATUA)
Commissioner of Sales Tax,
Maharashtra State, Mumbai.