

Read:- 1. (a) Application dt. 26/04/2006
(b) Application dt. 05/06/2006
from M/s. Phonographic Performance Limited., holder of Registration Certificate No. VAT TIN 270704000762V.
2. This office letter dt. 2/1/2007 calling the applicant for hearing on 9/1/2007.
Heard:- Shri. S. P. Surte, Advocate attended on behalf of the applicant.

PROCEEDINGS

(Under section 56 of the Maharashtra Value Added Tax Act,2002)
No.DDQ-11-2006/ Adm-5/26/B-06 Mumbai,dt. 30.04.2007

This is a set of two applications received from M/s. Phonographic Performance Limited, of Cresnet Towers, B/68, Veera Estate, Off New Link Road, Andheri (West), Bombay-400 053 requesting determination for applicability of the provisions of the Maharashtra Value Added Tax Act,2002 in respect of the following : -

- Q.i** Whether the applicant could be regarded as a dealer for the purpose of levy of sales tax and whether the transactions of the applicant would be liable to sales tax under the provisions of Maharashtra Value Added Tax Act,2002.”
- Q.ii** If the answer to the question no.1 is in the affirmative, whether MVAT or CST tax liability would arise on the issue of licences to the licencees situated outside the State of Maharashtra in respect of the sale transaction evidenced by the invoice no. PPL/05-06/RT/0003 dt. 1/2/2006. ”

02. FACTS OF THE CASE

The applicant is a company incorporated on 24th April,1941 under the Companies Act,1956, as a company limited by guarantee and not having a share capital. The applicant is registered as a copyright society under the Copyright Act. It is one of the three copyright societies registered in India.

The objects for which the company is established as seen from the Memorandum of Association are –

- (a) To carry on business in India and abroad of issuing or granting license for the Public performance of gramophone records, perforated rolls and other contrivances by means of which sounds may be mechanically and/or electrically reproduced (all of which contrivances are hereinafter included in the term “record”).

- (b) To purchase from manufacturers of records and/or the owners of or being otherwise entitled to the benefit of or interest in the copyrights in such records hereinafter called the "Proprietors" all or any of the rights or remedies of the proprietors by virtue of the Copyright Act, 1957 and to exercise and enforce such rights and remedies in the Company's name.
- (c) To obtain from the proprietors such assignments, assurances, powers of attorney or other authorities or instruments as may be deemed necessary or expedient for enabling the company to acquire all or any part of the legal estate in the copyrights of such records after payment to the proprietors such fees as may be agreed upon between the Company and the proprietors and to exercise and enforce in its own name or otherwise all such rights and remedies as aforesaid and to execute and do all such assurance, agreements and other instruments and other instruments and acts as may be deemed necessary or expedient for the purpose of the exercise or enforcement by the Company of such rights and remedies as aforesaid.
- (d) To make from time to time alter or vary any rules for regulating (1) the method and proportions by and in which and the times at which the net moneys received by the Company in respect of the Public performance of any such records as aforesaid shall be divided and apportioned among the members of the Company; (2) the administration of the property or business of the Company and any matters incidental thereto.
- (e) To distribute the net moneys received by the Company in the exercise of the foregoing powers after making provision thereout for the expenses and liabilities of the Company incurred in such exercise or in otherwise carrying out the purposes and operations of the Company, and for any contributions or payments for any of the purposes specified in the next following subclause hereof, amongst the members of the Company entitled thereto in accordance with the rules for the time being in force with respect to the distribution thereof.
- (f) To grant gratuities, donations, pensions and emoluments to any person at any time in the employment of the Company, or engaged in any business acquired by the Company, and the wives, widows, families and dependants of any such

persons, and establish and support or aid in the establishment and support of any charitable or benevolent associations or institutions, and to subscribe or guarantee money for charitable or benevolent purposes in any way connected with the purpose of the Company or calculated to further its objects.

- (g) To carry on any business which may seem to the company capable of being conveniently carried on in connection with the above objects or calculated, directly or indirectly, to enhance the value of or render profitable any of the property or rights of the Company or the proprietors.
- (x) To carry on business in India and abroad of audio visual works of members.
- (y) To carry on business in India and abroad of aggregation and distribution of digital content on behalf of Owners of Copyrights of sound recordings/literary and musical works and audio visual works.
- (z) To carry on business in India and abroad of issuing/granting license for the recording/re-recording of the literary and musical works on behalf of the Copyright Owners, or exclusive Owners of the said works.
- (aa) To carry on business in India and abroad of Public Performance on behalf of the Copyright Owners, be it Owners of musical / literary works or Performers in sound recording or audio visual works.
- (ab) To carry on business in India and abroad of collectively administering any Copyright, within the meaning of the word "Copyright", as mentioned in the Copyright Act, 1957, as amended from time to time.

3. CONTENTION

The applicant has argued as follows in favour of his contention of not being a dealer :-

- 1) Referring to the definition of dealer under the MVAT Act, 2002 in respect of his contention of not being a dealer, the applicant submits that, as per the said definition, only the following persons are regarded as dealers under the MVAT, in so far as the present **case** is concerned :
 - (a) Any person engaged in the business of buying and selling of goods whether for commission, remuneration or any other consideration.

- (b) Any agent who buys or sells goods belonging to the principal.
 - (c) Any society which buys goods from or sells goods to its members.
- 2) The applicant invites my attention to the following points :
 - a) The applicant is not is not a society engaged in the business of buying and selling of goods on behalf of the members, as contemplated under the provisions of section 2(8)(d) of the MVAT Act. It only grants license to a third party and there are no transactions with the members except the remittance of the consideration received from third party after deducting the expenses incurred.
 - b) The applicant is not working in the capacity of an agent, where he buys and sells goods on behalf of a 'principal' to a third party. The applicant only grants the licenses to perform the music belonging to the music owners. The applicant is not the owner of the copyright nor is he an agent of the music company for the purpose of granting licenses to the third party. The applicant is only a facilitator between the music company and the third party for the public performance of the music. In this regard, the applicant submits that, the arrangement between the music owners (the members of the society) and itself is not a principal – agent relationship in view of the fact that, the applicant, by virtue of the statutory provisions, grants license to the third party. In this regard, the applicant submits that, the relationship between two parties would be regarded as a principal agent relationship in case where the same falls within the definition of agent and principal as per section 182 of the Indian Contract Act,1972. As per the Indian Contract Act, an agent is a person employed to do any act for another or to represent another in dealings with third person. In the instant case, the applicant acts only for the members of the society, who cannot be regarded as another person, especially when the applicant is a copyright society formed for the collective administration of copyrights belonging to its

members. It is by virtue of the rights granted under the Copyright Act that, the applicant enters into agreements with various parties to whom it grants the license as per the Copyright Act. Hence, the applicant submits that, it cannot be regarded as an agent of the members while granting the licenses to third parties nor can the members be regarded as its principals.

- c) The applicant also submits that, it has been a settled principle that, a transaction between two parties would be regarded as a principal – agent relationship only where the agent transacts with a third party representing that, the goods belongs to the principal. In the instant case, the applicant is not issuing or granting any license mentioning that, the same is being issued on behalf of its members. The applicant would also like to emphasize that, it is, by virtue of its incorporation as a copyright society, formed for collective management of copyrights owned by its members, authorised to grant the license to third parties. Hence, the relationship should not be regarded as one between a principal and an agent.
- d) The applicant submits that, it has been held by the Supreme Court in the case of Bhopal Sugar Industries Limited Vs. STO (1977 40 STC 42 SC) that, a contract of agency differs essentially from a contract of sale inasmuch as an agent after taking delivery of the property does not sell it as his own property but sells the same as the property of the principal and under his instructions and directions. In the present case, the applicant grants the license to the third party by entering into agreements. The applicant does not grant the license after taking the delivery of the property or after the copyright owner transfers the copyrights to the society. This is because of the fact that, the applicant is not granted any rights in the copyright which it can transfer by representing its members. Since there is no delivery of the property or transfer of the copyright to the applicant, to complete a transaction representing the members, the arrangement cannot be

regarded as one giving rise to a principal – agent relationship. As has been submitted already, the applicant merely acts as a facilitator for the collective management of the copyrights.

- e) The applicant is only providing a service for the administrative ease of the copyright owners as has been contemplated by the Copyright Act. The role of the applicant in the entire process of granting a license is that, of a facilitator or co-coordinator, who could be treated as a service provider. No where does the applicant function in the capacity of a dealer as contemplated under the provisions of MVAT nor does the applicant hold himself out as an agent of his members.
- f) The applicant also submits that, the copyright society is not receiving any consideration from its members or from the third party for carrying out the functions of granting or issuing licenses, but is merely entitled to deduct the expenses incurred while distributing the fee that is collected to the members of the applicant. Only, the administrative expenses that are incurred are reimbursed to the applicant. Hence, the applicant cannot be regarded as an agent who acts on behalf of the Principal, for a consideration, for the purpose of being treated as a dealer under the MVAT. In fact, there is no consideration flowing from the members to the applicant.

This could be seen from the provisions of section 34(3) of the Copyright Act, whereby the Copyright society is authorized to collect the fee and distribute the same to its members. The entitlement to defray its expenses arises from the above provisions which have parliamentary sanction and not on the basis of individual agreements with its members or third parties. Hence, the transactions of the applicant are not liable to sales tax under the provisions of MVAT.

- 3) The applicant prays that, the Commissioner will appreciate that, there is a lack of clarity and the nature of arrangement, the copyright society has with its members, has not been tested under the Sales Tax law. Therefore, in the unlikely event that the application is disposed off in the

otherwise, the determination may be made prospectively applicable in order to prevent any hardship to the copyright society which is not a commercial organization.

- 4) As regards the Question No.ii, the applicant submits that, the question is raised as the licensee is situated outside the State of Maharashtra. He further submits that, it is difficult to determine the place where the intangibles covered by the aforementioned invoice are located and also equally difficult to determine the place where the property in the said intangibles is transferred. In respect of this difficulty, the applicant has placed reliance on the Supreme Court judgment in the case of 20th Century Finance Corp. Ltd.(1989 75 STC 217 SC). The applicant prays that, if the transaction evidenced by the invoice no. PPL/05-06/RT/0003 dt. 1/2/2006 is held as liable to CST being an interstate transaction, then the determination be given a prospective effect.

In his written submission dt. 2nd February,2007 which was given after the hearing held on 9/1/2007, the applicant has sought to bring to my notice the following points :-

- 1) He has pointed to certain provisions of the Copyright Act.

Section 33(1) of the Copyright Act,1957 states that, "No person or Association of persons shall, after coming into force of the Copyright (Amendment)Act,1994 commence or, carry on the business of issuing or granting licenses in respect of any work in which copyright subsists or in respect of any other rights conferred by this Act except under or in accordance with the registration granted under sub-section (3).

Sub-section (3) that, "The Central Government may, having regard to the interest of the author and other owners of rights under this Act, the interest and convenience of the public and in particular of the groups of persons who are most likely to seek licenses in respect of the relevant rights and the ability and professional competence of the applicants, register such association of persons as a copyright society subject to such conditions as may be prescribed.

Rule 14G of the Copyright Rules, 1958 deals with – “Conditions subject to which a copyright society may accept authorization and an owner of right may withdraw such authorization.

- (1) Copyright society may accept from an owner of rights or his duly authorized agent, exclusive authorization to administer any right in a work if such owner or such agent enters into an agreement, in writing with the copyright society specifying the rights to be administered, the duration for which such rights are authorized to be administered, the quantum of fees agreed to and the frequency at which such fees shall be paid by the copyright society in accordance with its scheme of Tariff and distribution.
- (2) The owner of the copyrights shall without prejudice to the rights under the agreement and subject to the condition of a prior notice of sixty days, be free to withdraw such authorization in case the copyright society fails to fulfill its commitments as laid down in the agreement.”

Rule 14H of the Copyright Rules, 1958 deal with –“Conditions subject to which a copy right society may issue licence, collect fees and distribute such fees:

- (1) A copy right society may issue licences and collect fees in accordance with its scheme of Tariff in relation to only such work as it has been authorised to administer in writing by the owners of rights and for the period for which it has been so authorized.
- (2) The distribution of fees collected shall be subject to deduction not exceeding fifteen per cent of the collection on account of administrative expenses incurred by the copyright society.”

According to him the above provisions prove that, the Copyright Society is merely authorized to administer the copyrights belonging to the owners under an agreement and it is allowed merely to issue paper licenses and to collect fees for the same. The main function of the Copyright Society is firstly to issue licenses in respect of the rights administered by the society. Secondly to collect fees in pursuance of such licence and thirdly to distribute such fees amongst the member owners of the copyright after recouping administrative expenses, subject a limit of 15% of license fee collected. Under section 35 of the Copyright Act, the society is subject to collective

control of the owner of copyrights. That apart, the activities of the copyright society are stringently and continuously monitored by the Central Govt. through the Registrar of Copyrights, Copyright Board. The applicant has to maintain documents such as Register of Owners, Register of Authorizations, Register of Fees, and Register of Disbursement.

2) The applicant has placed reliance on the various clauses in the Memorandum of Association.

(a) As per clause (ab) of the Memorandum of Association, the applicant is to carry on business in India and abroad of collectively administering any Copyrights and for this purpose, the applicant has got itself registered as a Copyright Society.

(b) Some of the music companies are the members of the applicant-society and some music companies are not. The applicant tries to convey the point that, it is not compulsory for each and every company to get themselves registered with the applicant society.

(c) The applicant has submitted a copy of 'public performance licence'. The applicant submits that, from a reading of the explanations and the conditions mentioned therein, it can be concluded that, the applicant society is not carrying on any business activity.

(d) The applicant submits that, it not necessary for any member to pay any membership fees. It is more or less a society registered with the object of general public utility. The owner of copyright in sound recording authorizes/issues mandate to the applicant to enter into agreement with the explorers of a copyright, to give them a best deal. The applicant is also authorized to take all appropriate actions for any infringement of the same, in their own name under the Copyright Act. The applicant has the machinery and professional manpower to monitor the songs played and performed etc., that belong to the member Copyright owner.

(e) The applicant has placed reliance on the following cases :-

- 1) State of Gujarat vs. Vivekanand Mills [19 STC 103 (SC)]
- 2) Dy.Commissioner of Agricultural Income Tax & Sales Tax, Quilon v. Travancore Rubber and Tea Company [20 STC 520 (SC)]

- 3) State of Gujarat Vs. Raipur Manufacturing Company [19 STC 1 (SC)]
 - 4) Dy. Commissioner of Agricultural Income Tax & Sales Tax, Quilon v. Midland Rubber and Produce Company Ltd. [25 STC 57 (SC)]
 - 5) Girdharilal Jeevanlal vs. the Asstt. Commr. of Sales Tax [Appeals] Nagpur and Another { 8 STC 732(Bom.)]
 - 6) State of Madras vs. Gannon Dunkerley Co. (Madras) Ltd. [9 STC 353]
 - 7) Madurai K.J. U. Sangam Ltd., vs. State of Tamil Nadu [45 STC 473 (Madras)]
 - 8) Khedut Sahakari Ginning and Pressing Society Ltd. vs. The State of Gujarat [29 STC 105 (SC)]
 - 9) Anand Taluka Co-operative Cottonseeds ginning and Pressing Society Ltd., [87 STC 180 (Gujarat)]
- (f) The applicant has placed reliance on the definitions of 'business', 'sale', 'sale price' and 'dealer' under the Bombay Sales Tax Act, 1959 and Maharashtra Value Added Tax Act, 2002.
- (g) The applicant prays that, if it is held as a dealer then, the determination may be given a prospective effect.

4. HEARING

The case was taken up for hearing on 9/1/2007 alongwith the applicant's application for determination of a similar question under the Bombay Sales Tax Act, 1959. Shri S. P. Surte, Advocate attended the hearing. He submitted that, the applicant is a public limited company by guarantee and issues licences for the public performance of music rights. He has argued that, the transaction entered into by the applicant is not a sale. He relied upon the provisions of sections 33(1) and 33(3) of the Copyright Act, 1957. He pointed out to the definition of 'member' from the Memorandum of Association. He submitted that, the applicant does not get the exclusive copyright. The music company is at liberty to exploit the rights independently. There is also no consideration. The receipts are only of licence fees and not any consideration. The licence fee is not fixed but depends upon the usage of the licence. The applicant is only helping the members without any profit motive. His role is only as a facilitator. He is neither purchasing the copyright nor selling the same. He is not carrying on any activity in the nature of business and hence, he is not a dealer.

It is alternatively argued that, since the receipt of fee depends upon the future eventuality, it is an actionable claim and not goods as per the Sale of Goods Act.

5. OBSERVATIONS

I have gone through all the facts of the case. The issue before me pertains to the applicability of the provisions of the Maharashtra Value Added Tax Act, 2002 to the activities of the applicant. Hence, it would be pertinent to reproduce herein the relevant provisions of the said Act so as to appreciate the issue in question.

Section 2 (4) “business” includes, --

- (a) any service;
- (b) any trade, commerce or manufacture;
- (a) any adventure or concern in the nature of service, trade, commerce or manufacture;
whether or not the engagement in such service, trade, commerce, manufacture, adventure or concern is with a motive to make gain or profit and whether or not any gain or profit accrues from such service, trade, commerce, manufacture, adventure or concern.

Explanation.- For the purpose of this clause, --

- (i) the activity of raising of man-made forest or rearing of seedlings or plants shall be deemed to be business;
- (ii) any transaction of sale or purchase of capital assets pertaining to such service, trade, commerce, manufacture, adventure or concern shall be deemed to be a transaction comprised in business;
- (iii) sale or purchase of any goods, the price of which would be credited or, as the case may be, debited to the profit and loss account of the business under the double entry system of accounting shall be deemed to be transactions comprised in business;
- (iv) any transaction in connection with the commencement or closure of business shall be deemed to be a transaction comprised in business;

Section 2 (8) “dealer” means any person who for the purposes of or consequential to his engagement in or, in connection with or incidental to or in the course of, his business buys or sells, goods in the State whether for commission, remuneration or otherwise and includes,-

- (a) a factor, broker, commission agent, del-credere agent or any other mercantile agent, by whatever name called, who for the purposes of or consequential to his engagement in or in connection with or incidental to or in the course of the business, buys or sells any goods on behalf of any principal or principals whether disclosed or not;
- (b) an auctioneer who sells or auctions goods whether acting as an agent or otherwise or, who organizes the sale of goods or conducts the auction of

goods whether or not he has the authority to sell the goods belonging to any principal whether disclosed or not and whether the offer of the intending purchaser is accepted by him or by the principal or a nominee of the principal;

(c) a non resident dealer or as the case may be, an agent, residing in the State of a non-resident dealer, who buys or sells goods in the State for the purposes of or consequential to his engagement in or in connection with or incidental to or in the course of, the business.

(d) any society, club or other association of persons which buys goods from, or sells goods to, its members;

Explanation- For the purposes of this clause, each of the following persons, bodies and entities who sell any goods whether by auction or otherwise, directly or through an agent for cash, or for deferred payment, or for any other valuable consideration, shall, notwithstanding anything contained in clause (4) or any other provision of this Act, be deemed to be a dealer, namely:-

- (i) Customs Department of the Government of India administering the Customs Act, 1962; (52 of 1962)
- (ii) Departments of Union Government and any Department of any State Government;
- (iii) Local authorities;
- (iv) Port Trusts;
- (iv-a) Public Charitable Trust;
- (v) Railway Administration as defined under the Indian Railways Act, 1989 (24 of 1989) and Konkan Railway Corporation Limited;
- (vi) Incorporated or unincorporated societies, clubs or other associations of persons;
- (vii) Insurance and Financial Corporations, institutions or companies and Banks included in the Second Schedule to the Reserve Bank of India Act, 1934; (II of 1934).
- (viii) Maharashtra State Road Transport Corporation constituted under the Road Transport Corporation Act, 1950; (LXIV of 1950)
- (ix) Shipping and construction companies, Air Transport Companies, Airlines and advertising agencies;
- (x) any other corporation, company, body or authority owned or constituted by, or subject to administrative control, of the Central Government, any State Government or any local authority;

Exception I. – An agriculturist who sells exclusively agricultural produce grown on land cultivated by him personally, shall not be deemed to be a dealer within the meaning of this clause.

Exception II. – An educational institution carrying on the activity of manufacturing, buying or selling goods, in the performance of its functions for achieving its objects, shall not be deemed to be a dealer within the meaning of this clause.

Exception III. – A transporter holding permit for transport vehicles

(including cranes) granted under the Motor Vehicles Act, 1988 (59 of 1988), which are used or adopted to be used for hire or reward shall not be deemed to be a dealer within the meaning of this clause in respect of sale or purchase of such transport vehicles or parts, components or accessories thereof.

Section 2 (12) “goods” means every kind of moveable 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;

Section 2 (24) “sale” means a sale of goods made within the State for cash or deferred payment or other valuable consideration but does not include a mortgage, hypothecation, charge or pledge; and the words “sell”, “buy” and “purchase”, with all their grammatical variations and cognate expressions, shall be construed accordingly;

Explanation, – For the purposes of this clause, –

- (a) a sale within the State includes a sale determined to be inside the State in accordance with the principles formulated in section 4 of the Central Sales Tax Act, 1956; (74 of 1956);
- (b) (i) the transfer of property in any goods, otherwise than in pursuance of a contract, for cash, deferred payment or other valuable consideration;
- (ii) the transfer of property in goods (whether as goods or in some other form) involved in the execution of a “works contract” namely, 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 or 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;

Now, it first needs to be ascertained as to whether, the applicant is carrying on any business and hence, liable for registration under the MVAT Act, 2002. To

understand the activities of the applicant, we have to first refer to the nature of the activities of the applicant. The applicant being a company, its scope of work will have to be studied from the Memorandum of Association (MOA). I have already reproduced in **para no. 02**, the relevant objects which would throw a light on the nature of activities carried on by the applicant.

The following can be inferred from the objects,

1. Clause (a) of the MOA speaks about the activity of the applicant as regards carrying on business in India and abroad of issuing or granting license for the Public performance of gramophone records, perforated rolls and other contrivances by means of which sounds may be mechanically and/or electrically reproduced.

It can be seen that, there is a business of issuing or granting licenses. As per the definition of 'business', there should be buying or selling of 'goods'. The question which immediately surfaces is, whether licenses are 'goods'. The question as to what are "goods", for the purposes of sales tax is as follows :-

"A "goods" may be a tangible property or an intangible one. It would become goods provided it has the attributes thereof having regard to (a) its utility; (b) capable of being bought and sold; and (c) capable of being transmitted, transferred, delivered, stored and possessed. If a software whether customized or non-customised satisfies these attributes, the same would be goods".

The 'goods' i.e., copyrights, in the present case, certainly have 'utility'. It also needs to be seen as to whether the 'goods' in the present case are capable of being -

- (a) bought and sold; and
- (b) transmitted, transferred, delivered, stored and possessed.

In this regard, we would have to refer to the definition of 'Copyright' as explained in the Article of Association of the company as follows :-
'Copyright' means the exclusive right to do or authorize the doing of the following acts in respect of a work or any such substantial part thereof, namely -

- (i) to reproduce the work in any material form which includes

storing of it in any medium by electronic means;

- (ii) to issue copies of the work to the public which are not already in circulation;
- (iii) to perform the work in public or communicating it to the public;
- (iv) to make any cinematograph film or sound recording in respect of the work;
- (v) to make any translation or adaption of the work;
- (vi) to do in relation to a translation or on adoption of the work, any of the acts specified as above.

The point at (i) would definitely cover tangible goods which could be

(a) bought and sold; and

(b) transmitted, transferred, delivered, stored and possessed.

The clause (a) would thus, satisfy the requirements of the definition of 'business' under the MVAT Act, 2002 as regards "buys or sells, goods".

2. The clause (b) of the MOA speaks about the activity of the applicant as regards purchase from manufacturers of records and/or the owners of or being otherwise entitled to the benefit of or interest in the copyrights in such records all or any of the rights or remedies of the proprietors by virtue of the Copyright Act, 1957 and to exercise and enforce such rights and remedies in the Company's name.

This clause satisfies the requirements of the Sale Of Goods Act. The essence of sale is the transfer of the title to the goods for price, paid or to be paid. In the present case, by virtue of the above clause, the applicant purchases records along with the rights or remedies of the proprietors.

The term "purchase" appears to me, to form an integral part of the contract, clearly exhibiting, an intention of the nature of transaction that, the applicant enters into the contract for sale.

In Corpus Juris, Volume 55, page 36, the law is thus stated :

"Sale' in legal nomenclature, is a term of precise legal import, both at law and in equity, and has a well defined legal signification, and has been said to mean, at all times, a contract between parties to give and pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought or sold."

The applicant is not merely issuing the licence but passing on the copyright and thus effecting the sales of intangible goods.

The clause (b) of Memorandum of Association would thus, satisfy the requirements of the definition of 'business', 'dealer' and 'sale' under the MVAT Act, 2002. The fact that, the applicant is engaged in the purchasing of rights of records from manufacturers would lay to rest the argument of the applicant that, it only grants license to a third party and there are no transactions with the members except the remittance of the consideration received from third party.

3. The clause (c) of the MOA speaks about the applicant obtaining from the proprietors such assignments, assurances, powers of attorney or other authorities or instruments as may be deemed necessary or expedient for enabling the applicant to acquire all or any part of the legal estate in the copyrights of such records. The applicant exercises and enforce in its own name or otherwise all such rights and remedies as aforesaid and to execute and do all such assurance, agreements and other instruments and other instruments and acts as may be deemed necessary or expedient for the purpose of the exercise or enforcement by the applicant of such rights and remedies.

In the present case, by virtue of the clause (c), the applicant is in a position to transfer the rights of the goods which is an essential ingredient of any transaction involving 'sale'.

The predominant argument of the applicant that, the company merely acts as a facilitator for the collective management of the

copyrights, has been silenced by virtue of the above 2 clauses of the MOA.

It is clear that, the applicant is engaged in the activity of leasing of copyrights of music records, etc. One of the peculiar features of a lease of copyrights of music records is that, the rights can be given to multiple users simultaneously.

4. The clause (d) of the MOA speaks about the method and proportions by and in which and the times at which the net moneys received by the Company in respect of the Public performance of records is to be divided and apportioned.

The clause (e) of the MOA speaks about the distribution of the net moneys received by the Company after making provision thereout for the expenses and liabilities of the Company incurred in exercise or in otherwise carrying out the purposes and operations of the Company, and for any contributions or payments for any of the purposes, amongst the members of the Company entitled thereto in accordance with the rules with respect to the distribution thereof.

In view of the above clauses, the applicant submits that, the applicant is only acting as a facilitator and not undertaking any sale operations. The applicant would however, not succeed in the above argument as, the applicant engages in purchase and sale of copyrights for which it receives consideration. The above clauses would not, in any way, alter the essence of the transactions entered into by the applicant with the purchasers and sellers of copyrights.

The applicant further argues that, he is not entitled to fix the rates for transfer of copyrights. in this respect, the following observation from the case of Bhopal Sugar Industries Limited Vs. STO (1977 40 STC 42 SC) could be seen :-

“Another circumstance relied upon by the respondent was the fact that the appellant was under the terms of the agreement to sell the goods at a price

fixed and not higher or lower than that. We have already indicated that when a company enters into a distribution agreement it always fixes a particular price in order to protect its goodwill and in order to control the market. Such fixation of the price by itself would not be a restriction which would take away the freedom of contract of sale. Such a stipulation is found in almost all the agreements entered into between the monopolist companies and their distributors."

A common feature of any distribution agreement is that, the seller insists on a particular price at which the property is to be sold and impose certain restrictions in order to protect his goodwill and ensure the quality of his goods to be distributed through sale.

06. We could also have a look at the relevant provisions from the Copyright Act.

SECTIONS

Section 33 of the Copyright Act pertains to registration of copyright societies which issue licenses. An owner of copyright, in his individual capacity continue to have the right to grant licenses in respect of his own works consistent with his obligations as member of the registered copyright society. The section is worded as follows,

(1) No person or association of persons shall, after coming into force of the Copyright (Amendment) Act, 1994 commence or, carry on the business of issuing or granting licenses in respect of any works in which copyright subsists or in respect of any other rights conferred by this Act except under or in accordance with the registration granted under sub-section (3) :

Section 34 pertains to Administration of rights of owner by copyright society (CS).

- (a) A CS may accept from an owner of rights exclusive authorisation to administer any right in any work by issue of licenses or collection of license fees or both; and
- (b) An owner of rights shall have the right to withdraw such authorisation without prejudice to the rights of the CS under any contract.
- (c) It shall be competent for a CS to enter into agreement with any foreign society or organisation administering rights corresponding to rights under this Act.
- (d) Subject to such condition as may be prescribed, a CS may:-
 - (i) issue licenses in respect of any rights under this Act.
 - (ii) collect fees in pursuance of such licenses.
 - (iii) perform any other functions consistent with the provisions of Section 35.

Section 34-A pertains to payment of remunerations by copyright society.

Section 35 pertains to control over the CS by the owner of rights. Every CS shall be subject to the collective control of the owners of rights under this Act. The CS shall –

- (i) obtain the approval of such owner of rights for its procedures of collection; and
- (ii) obtain their approval for the utilisation of any amounts collected as fees for any purpose other than distribution to the owner of rights; and
- (iii) provide to such owners regular, full and detailed information concerning all its activities, in relation to the administration of their rights.

Section 36 pertains to submission of returns and reports by a CS to the Registrar of copyrights. Any officer duly authorised by the Central Government in this behalf may call for any report and also call for any records of CS for the purpose of satisfying himself that the fees collected are being utilized or distributed in accordance with the provisions of the Act.

RULES

Rule 14 pertains to conditions subject to which a CS may issue licenses, collect fees and distribute such fees. A CS may issue licenses and collect fees in accordance with its scheme or Tariff in relation to only such works as it has been authorised to administer in writing by the owners of rights and for the period from which it has been so authorised.

The distribution of fees shall be subject to a deduction not exceeding 15% of the collection on account of administrative expenses incurred by the CS.

Rule 14J pertains to Tariff scheme. The wordings of the rule are,

“As soon as may be, but in no case later than three months from the date on which a CS has become entitled to commence its copyright business, it shall frame a scheme of tariff, to be called the “Tariff scheme” setting out the nature and quantum of fees or royalties which it proposes to collect in respect of such copyright or other rights administered by it.”

Rule 14 K pertains to Distribution scheme. The wordings of the rule are,

- (1) *As soon as may be, but in no case later than 3 months from the date on which a CS has become entitled to commence its copyright business, it shall frame a scheme called the 'Distribution Scheme' setting out the procedure for collection and distribution of the fees of royalties specified in the Tariff Scheme among the owners of copyright or other rights whose names are borne on its Register of Owners maintained under C (i) of Rule 14(1) for the approval of such owner.*
- (2) *Any distribution under the Distribution Scheme shall, as far as possible, be in proportion to the income of the CS from actual use of the work or works of each owner of rights.*

Rule 14L pertains to meetings of CS's. The CS shall not amend the approved Tariff & Distribution Scheme except with the consent of the owners obtained at a general meeting.

Rule 14M pertains to Accounts and audit. Every CS shall maintain proper accounts of the fees any royalties collected in a financial year, payments made out of such collections to the owners of rights and other expenditure incurred for meeting administrative expenses and related matters with the approval of the owners of rights,

provided that a CS shall not spend more than 15% of its collection towards its administrative expenses.

Thus, section 33 & rule 14J make a reference to the business of the copyright society which pertains to issue or grant of licenses. The activity of the applicant being in the nature of a lease would be covered by the provisions of the MVAT Act, 2002.

07. The applicant has submitted a copy of an agreement between Phonographic Performance Ltd.(Licensor) and Synergy Media Entertainment Ltd (Licensee) entered into on 26/05/2006. Clause 2 of the said agreement could be reproduced as follows:-

“2. The Licensor Members **own and/or control** the copyrights including the broadcasting rights in their sound recordings of Indian and International music and, by joining the Licensor, the Licensor-Members have exclusively authorized The Licensor to issue Broadcasting Licences for the territory in respect of such sound recordings which have been assigned to the Licensor. The Licensor is the competent authority to issue such broadcasting Licences in the Territory in the Licensor’s capacity as the Copyrights Society in respect of sound recordings registered with the Govt. of India.”

The above clause once again proves that, the applicant owns the rights in respect of records of music, etc., and therefore is authorized to engage in activities of sale/purchase in respect of the same.

08. Let me discuss the following cases on which the applicant has placed reliance:-

1) State of Gujarat vs. Vivekanand Mills [19 STC 103 (SC)]

It was held on the facts that, in selling the cotton with a view to avoid locking up of funds, it could not be inferred that, the respondent sold the goods with intention to carry on the business of selling cotton and sales were not liable to sales tax.

The facts of the present case are not similar to the facts of the above case. In the impugned case, the applicant is carrying on the business of issuing/granting licences of music works.

2) Dy.Commissioner of Agricultural Income Tax & Sales Tax, Quilon v. Travancore Rubber and Tea Company [20 STC 520 (SC)]

It was held that, onus of proving that, the assessee was carrying on business and was, therefore, a 'dealer' within the meaning of section 2(b) of the Central Sales Tax Act, 1956, was on the department, and that, the department had not discharged that onus.

In the present case, the Memorandum of Association of the applicant-company itself proves that, the applicant is engaged in the business of purchase, from manufacturers of records, of copyrights in such records.

3) State of Gujarat Vs. Raipur Manufacturing Company [19 STC 1 (SC)]

The following observations could be seen.

"Whether a person carries on business in a particular commodity must depend upon the volume, frequency, continuity and regularity of transactions of purchase and sale in a class of goods and the transactions must ordinarily be entered into with a profit-motive. By the use of the expression – 'profit motive', it is not intended that, profit must in fact be earned.

In fact, the above judgement supports the revenue as the applicant's activity possesses all the characteristics of business that is laid down by apex court, namely, volume, frequency, continuity and regularity.

4) Dy.Commissioner of Agricultural Income Tax & Sales Tax, Quilon v. Midland Rubber and Produce Company Ltd. [25 STC 57 (SC)]

It was held that, the sales tax department had not discharged the onus of proving that the respondent was carrying on business and was, therefore, a "dealer" within the meaning of section 2(b) of the Act. The fact that, the respondent was registered as a dealer was not decisive on the question as to whether the turnover of the inter-State sales of rubber sheets was taxable under the Act.

In the present case, the Memorandum of Association of the applicant-company itself proves that, the applicant is engaged in the business of purchase, from manufacturers of records, of copyrights in such records.

5) State of Madras vs. Gannon Dunkerley Co. (Madras) Ltd. [9 STC 353]

It was held that, in order to constitute a sale, it is necessary that, there should be an agreement between the parties for the purpose of transferring title to goods, which of course presupposes capacity to contract, that it must be supported by money consideration, and that as a result of the transaction property must actually pass in the goods. Unless all these elements are present, there can be no sale.

As explained earlier, the applicant's activity fulfills all the characteristics of sale and as such the said judgement has no applicability in the present case.

6) Madurai K.J. U. Sangam Ltd., vs. State of Tamil Nadu [45 STC 473 (Madras)]

The assessee was a manufacturer's association obtaining imported materials from the State Trading Corporation, on the basis of requirement of its members. The allotment to members was in the presence of Textile Control Authorities. No invoices were issued to the members. It was held that, the role of the assessee in the scheme of the distribution was only that of an intermediary between its members on one hand and the textile control authorities and State Trading Corporation on the other. It did not have any property in the goods which it transferred to its members.

Such are not the circumstances of the present case. Here, the applicant is carrying on the business of issuing and granting of licences and possesses all the rights in respect of the copyrights.

7) Khedut Sahakari Ginning and Pressing Society Ltd. vs. The State of Gujarat [29 STC 105 (SC)]

It was held by the Supreme Court, that none of the bye-laws of the society show that, the society had purchased the goods entrusted to it by its members. Accordingly, the society was not liable to pay purchase tax on the cotton received from its members.

In the present case, the Memorandum of Association of the applicant-company itself proves that, the applicant is engaged in the business of purchase, from manufacturers of records, of copyrights in such records.

Thus on the facts & the case and the clear objects of Memorandum of Association the judgement of the apex court is not applicable.

8) **Anand Taluka Co-operative Cottonseeds ginning and Pressing Society Ltd., [87 STC 180 (Gujarat)]**

It was held that, the test is as to who has to bear the loss in case the overall transactions result in loss at the hands of the so-called agent. On the aforesaid principle, it was held that, the property in the goods does not pass in favour of the dealer-opponent society at any stage. The society merely acts as a conduit pipe between the members and the purchaser.

Such are not the facts of the present case.

It would be proper to reproduce herein the decision in the case of **M/s. Sahakari Khand Udyog [95 STC 572 (SC)]** wherein the Apex Court held that, a co-operative society was liable to pay purchase tax. The facts of the case are as follows :-

The main object of the appellant, a co-operative society was to encourage development of agricultural industries amongst its members by introducing modern methods of and promotion of principles of co-operation and joint farming methods. It supplied to its members seeds, manure, agricultural implements and expert advice and assistance, for production of sugarcane. The society crushed the sugarcane supplied by the members, and manufactured sugar which it sold in the market. It was held that, in view of the bye-laws of the appellant- society, the Sahakari Khand Udyog was not an agent of the producers of sugarcane for selling their product.

The society manufactured sugarcane out of the sugarcane grown and supplied by its members and others. The sugarcane required by the society was purchased from members as well as non-members. It is true that, the society had been formed for the benefit of the members and the sale proceeds from the sugar manufactured and sold were distributed as far as possible amongst its members but, the society could not be described as an agent of the members to sell sugarcane grown by them.

Reliance was placed by the appellant on the **Khedut Sahakari** case. However, the Supreme Court differentiated both the cases in this case. The bye-laws which were taken into account in the case of M/s. Khedut Sahakari were quite different from the bye-laws of the Sahakari Khand Udyog Mandali.

Our own Tribunal, relying upon the judgement of Apex court in the case of Sahakari Khand Udyog, held in the case of M/s. Vasantdada Patil Sahakari Sakhar Karkhana on similar facts that the applicant there was as a dealer.

The ratio laid down in the above case could well be made applicable to the present case as there exist similarities such as sale proceeds to be distributed amongst members.

08. The above discussion could be summarized to mean that,

- (a) that the applicant is a dealer under the provisions of both the earlier Lease Act as well as the MVATA,2002,
- (b) the transactions of the applicant are liable to tax under the provisions of the respective Acts.

10. I now come to the question no. (ii). The applicant has posed a question in his subsequent application to this office dated 05-06-2006, such that, if the transactions of the applicant are held liable to tax then, under which Act i.e. MVATA,2002 or CST Act, 1956 would the applicant, be liable to pay tax on the following bill:-

<u>Bill Date</u>	<u>Bill No.</u>	<u>Name of the party</u>	<u>Particulars</u>
01-02-06	PPL/05-06/ RT/003	M/s.Bharti Cellular Ltd., New Delhi	Ring tone

I have elaborately discussed above as to, how the activities of the applicant get covered by the definition of 'sale' under the Maharashtra Value Added Tax Act,2002. From the above bill, it is seen that, the applicant has entered into an inter-state transaction of sale.

Now, the definition of 'sale' under section 2(g) of the Central Sales Tax Act, 1956 was amended by the Finance Act No. 20 of 2002 dt. 11/5/2002. By virtue of the said amendment, 'a 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' was included in the definition of 'sale' under the Central Sales Tax Act, 1956.

In the case presented before me, the applicant has entered into an agreement with M/s Bharti Airtel, Delhi. Since, the applicant is perceived to reside in Maharashtra, the intangible good, i.e., in this case 'copyright' resides in Maharashtra.

The sale is effected to M/s. Bharti Airtel, New Delhi and therefore, this would be an interstate sale under the CST Act.

10. PROSPECTIVE EFFECT

The applicant has requested for prospective effect to the determination order, if the transaction is held liable to tax. Thus, he requests to protect his liability upto the date of the order by giving the determination order a prospective effect.

It is seen that, the applicant has obtained registration under the MVAT Act, 2002 w.e.f. 30/09/2005. The applicant has also applied for grant of administrative relief in respect of dues, if any, prior to obtaining registration. The prayer of the applicant needs to be weighed in the light of the provisions under the MVAT Act, 2002 as also the erstwhile Lease Act, so as to decide, whether there truly existed a statutory misguidance.

Now, the definitions of 'sale' as well as 'dealer' under both the aforementioned Acts, were quite clear. Also, the Memorandum of Association of the applicant-company very clearly outlines the objects of the company. The applicant was aware of the nature of his transactions. The activities of the applicant were covered under the provision of the above Acts. There exists no ambiguity regarding the provisions of the law.

In view of the above, the applicant cannot claim any statutory misguidance in support of his prayer for prospective effect. The shelter of prospective effect is justified in cases where there truly existed circumstances leading to statutory misguidance. Hence, I do not find any merit in the plea of the applicant. The applicant was content applying his own reasoning to the activities carried on by him. I have already dealt in detail on each of the claims of the applicant and their inappropriateness. Also, there were judicial pronouncements. The position of law being very clear, there is no scope for any statutory misguidance.

The applicant's prayer for prospective effect is therefore rejected.

11. In view of the deliberations recorded hereinabove, it is hereby ordered as under:-

ORDER

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

No.DDQ-11-2006/ Adm-5/26/B-06

Mumbai,dt.30.4.2007

The questions of the applicant are answered as follows :-

Q.i Whether the applicant could be regarded as a dealer for the purpose of levy of sales tax and whether the transactions of the applicant would be liable to sales tax under the provisions of Maharashtra Value Added Tax Act,2002."

Ans The applicant is a 'dealer' in terms of the provisions of the Maharashtra Value Added Tax Act,2002. The activities of the applicant would be liable to tax under the said Act.

Q.ii If the answer to the question no.1 is in the affirmative, whether MVAT or CST tax liability would arise on the issue of licences to the licencees situated outside the State of Maharashtra in respect of the sale transaction evidenced by the invoice no. PPL/05-06/RT/0003 dt. 1/2/2006. "

Ans The transaction in question being an inter-state sale transaction would be liable to tax under the provisions of the Central Sales Tax Act,1956.

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