

Read:-1. Application dated 21st November, 2005 from M/s. India Gypsum Limited holder of Registration Certificate No. 400069/S/4170.

2.This office letter dated 25th January, 2006 calling the applicant for hearing on 07/02/2006.

3. Letter dated 8th February, 2006 from the applicant.

Heard:- Shri Gaganjyot Singh, Sr.Manager, M/s. India Gypsum Limited alongwith Shri Prashant Deshpande and Shri Himesh Kampani of M/s. PricewaterhouseCooperas (p) Ltd.

PROCEEDINGS

(Under section 56(2) of the Maharashtra Value Added Tax Act, 2002)

No.DDQ-11-2005/Adm-5/96/B-1

Mumbai, dt. 04/05/2006

An application is received from M/s. India Gypsum Limited of 349, Business Point, 7th Floor, Western Express Highway, Andheri(East), Mumbai - 400 069 for granting of prospective effect to the determination order No. DDQ-11-2005/Adm-5/56/B-1 Mumbai, dated 14/11/2005 passed in the case of the applicant.

The applicant had earlier made an application for determination according to which the product "Gypsum Board" put for determination was determined as covered by schedule entry E-1 of Schedule 'C' of the Maharashtra Value Added Tax Act,2002. The applicant now prays for giving prospective effect to the determination Order No. DDQ-11-2005/Adm-5/56/B-1 Mumbai, dated 14/11/2005 i.e from the date of the order.

02. BACKGROUND OF THE CASE

The issue for determination in the order dated 14/11/2005 was, whether "gypsum board & gypsum plaster" are covered within the ambit of the expression "Gypsum of all forms and description" under entry No. 41 of Schedule 'C' of the Maharashtra Value Added Tax Act,2002. It was held that the benefits of inclusion under the entry C-41 cannot be extended to "gypsum board". Accordingly, it was determined as covered by the residuary entry no.1 of the Schedule E appended to the Maharashtra Value Added Tax Act, 2002. The applicant now prays that the above referred order be given prospective effect from the date of the order i.e from 14/11/2005.

03. CONTENTION

The applicant has requested for granting prospective effect to the aforesaid order on the following grounds :-

- (i) Schedule entry C-41 covers "Gypsum of all forms and description". The applicant manufactures 'gypsum board' which contains more than 95% of natural or synthetic gypsum. The language of the entry and the factual details led the applicant to hold a bonafide view that 'gypsum board' is covered under schedule entry C-41 of the Maharashtra Value Added Tax Act, 2002.
- (ii) There were various judicial precedents supporting his aforesaid view. It is mentioned by the applicant in his application that following judicial precedents had laid him to hold the view that the product gypsum board is covered under entry C-41 of the Maharashtra Value Added Tax Act, 2002.

- 1) Commissioner of Sales Tax V/s. Sultan Shev Co. (40 STC 583)
- 2) Kapildeoram Baijnath Prosad V/s. J. K. Das and Others (5 STC 365)
- 3) Ghasi Ram Hari Ram V/s. Commissioner of Sales Tax, Delhi (30 STC 88)

In the present application, the applicant has cited the following cases in support of his view that the product gypsum board was covered under entry C-41 of the Maharashtra Value Added Tax Act, 2002 and hence the soundness of his application for prospective effect :-

- a) **The State of Gujarat V/s. Sakarwala [19 STC 24 (SC)]** : It was observed as follows – “Patasa, harda and alchidana fall within the definition of “sugar” in entry 47 of Schedule A to the Bombay Sales Tax Act, 1959, and their sales are exempt from the payment of sales tax. The word “sugar” in entry 47 is intended to include within its ambit all forms of sugar, that is to say, sugar of any shape or textile, colour or density and by whatever name it is called”.
- b) **The Collector of Sales Tax, Bombay State Vs. Gaurimal Mahajan and Sons [10 STC 452]**: It was observed as follows - “ Sale of “dressed poultry” can be regarded as sale of “meat” within the meaning of Entry 4 of Schedule II to the Bombay Sales Tax Act,1946”.

- (iii) The Commissioner in his clarificatory circular No. 29T of 2005 dated 23rd September,2005 had clarified that ‘plaster of paris’ would be adequately covered by the scope of the entry C-41. The applicant claims that on the basis of the above circular, he formed the view that the product “Gypsum Board” would also be covered by the scope of the schedule entry C-41 of the Maharashtra Value Added Tax Act, 2002

Due to the above reasons as well as claimed judicial misguidance, the applicant prays for prospective effect.

04. In a communication dt. 08/02/2006 addressed to this office, the applicant has sought to place on record the following additional submissions in support of his argument for prospective effect to the determination order. The main thrust of the argument of the applicant is that the application for prospective effect can be made even after the original order is passed i.e. if it is not made alongwith the original order, the issue as regards prospective effect can be raised later in a separate application. The applicant has placed reliance on the following cases in support of his above claim :-

- 1] M/s. Ashish Enterprises v. State of Maharashtra [Appeal No. 85 of 1998 decided on 24th February, 1999]:** It was held that sub-section 2 of section 52 of the Bombay Sales Tax Act, does not in any way lay down any time limit for the purpose of any affected dealer making any prayer with regard to the nature of liability involved in a particular Determination Order. The order of the Addl.Commissioner of Sales Tax denying the benefit of prospective effect to the Determination was annulled.
- 2] Commissioner of Central Excise, Salem Vs. M/s Madras Aluminium Company Ltd. [2006 TIOL 32 CESTAT – MAD] :** The contention of the revenue was that, as their reference application against the Tribunal’s final order for allowing Modvat credit to the assessee was pending before the High Court, the said final order of the Tribunal was not fit to be allowed as a precedent. This contention was rejected. It was held that, the pendency of an appeal against Tribunal’s order does not mean that the Tribunal’s order has no precedential value.
- 3] Sancheti Food Products Ltd. Vs. Union of India [1993 (67) ELT 248 (Cal.)] :** The point involved was, whether the Customs Authorities can refuse to comply with the order of the Tribunal. It was held that, “The mere fact that the application under section 130(3) [section for reference application] of the Act has been filed does not mean that that acts as a stay of the operation of the judgment and order of the Tribunal.
- 4] Commissioner of Customs, Mumbai Vs. Yakub I. Yusuf [2002 (147) ELT 567 TRIB] :** A reference had

that since the disposal of the reference application by the High Court was pending, the operation of Misc. Order be stayed. The said request was rejected. Reliance was placed on the law laid down by the Calcutta High Court in the case of M/s. Sancheti Food Products Limited V/s. Union of India [1992 (67) ELT 248 (Calcutta)]. In this judgment, the High Court maintained that the filing of the reference application could not act as the stay of the operation of the order.

5] Collector of Central Excise, Jamshedpur Vs. TELCO [1998 (103) ELT 50 (TRIB)] : It was held that, "The mere fact that the point of law arising out of judgments on similar counts stands referred to the High Court does not take away the ratio of the judgment as observed by the Calcutta High Court in the case of M/s. Sancheti Food Products Limited V/s. Union of India [1992 (67) ELT 248 (Calcutta)]."

6] Union of India Vs. Shashi Deo Jha [1999 (113) ELT 385(Cal.)] : It was held that a discretionary power has to be exercised on sound legal principles and reasonably. Such a power cannot be exercised on whims or caprice.

7] Bharat Warehousing Corporation And Others Vs. Collector of Customs, Calcutta [1988 (34) ELT 423(Cal.)] : It was held that the decision to grant or refuse to grant must be taken on a conscious application of mind taking into consideration all the relevant factors for the purpose.

8] R. P. David And Others Vs. Agricultural Income -Tax Officer And Another [1972 (86) ITR 699] : The following observations from the case could be seen :-

"Wherever a statute invests a discretionary power in a public officer, it is normally for exercise in favour of the person concerned unless there is some sound and relevant reason for denying the benefit of the discretionary power".

05. HEARING

The case was fixed for hearing on 07/02/2006. Shri Gaganjyot Singh, Sr.Manager attended alongwith Shri Prashant Deshpande of PricewaterhouseCoopers (P) Ltd and Shri Himesh Kampani. He stated that as per the judgment of the Tribunal in the case of M/s. Ashish Enterprises [Appeal No. 85 of 1998 decided on 24th February, 1999], the application for prospective effect can be made separately i.e even after passing of the determination order.

He further argues that if the plea for the prospective effect is not made at the time of hearing or if it is not mentioned in the application for determination then, the same can be made within the time period of filing of an appeal i.e. within 60 days. Hence, the argument of the applicant is that the present application for prospective effect is filed within reasonable time.

06. OBSERVATIONS

I have carefully gone through all the facts of the case. The question before me pertains to the point as regards granting of prospective effect to a determination order earlier passed. I shall go through each of the claims of the applicant in support of his request for prospective effect to the determination order dated 14/11/2005.

[1] The applicant has, in a separate application, requested for granting prospective effect to the determination order dated 14/11/2005. It is his argument that such a separate application can be made if the request for prospective effect is not made in the original application for determination. In this regard, the applicant has cited the case of M/s. Ashish Enterprises [Appeal No. 85 of 1998 decided on 24th February, 1999] wherein it was held that sub-section 2 of section 52 of the Bombay Sales Tax Act, does not in any way lay down any time limit for the purpose of any affected dealer making any prayer with regard to the nature of liability involved in a particular Determination Order.

Tax Act, 2002. The sub-section (2) of section 56 reads thus :-

" The Commissioner may direct that the determination shall not affect the liability under this Act of the applicant's or, if the circumstances so warrant, of any other person similarly situated, as respects any sale or purchase effected prior to the determination."

The plain reading of the above sub-section clearly implies that the determination of the rate of tax as well as fixing liability is a conjoint process. It is always along with the determination of the applicable rate that the effect from which the rate is applicable is decided. The applicant has failed to tap this aspect in his original application for determination of the applicable rate of tax.

The powers of prospective effect under section 52(2) are not in isolation, but are to be exercised along with the powers under section 52(1) of the Bombay Sales Tax Act, 1959. The initiation of proceeding under section 52 is by virtue of sub-section (1) and the proceedings are closed, when the order under sub-section (1) of section 52 is passed. Sub-section (2) of Section 52 only provides and empowers the Commissioner to direct the prospective effect of order, which is passed under Section 52(1). No independent proceedings and order is contemplated under Section 52(2), and as such, power under this sub-section is required to be exercised, only while passing the order under sub-section (1) of section 52. The powers under section 52(2) can only be exercised while exercising the powers under section 52(1). Once the order under section 52(1) is passed the proceeding under section 52(2) gets closed.

The above discussion could be summarized to mean that a request for prospective effect should be made along with the original application for determination or it can be made at the time of hearing. It cannot be made as a separate proceeding.

The reliance of the applicant on the case of M/s. Ashish Enterprises [Appeal No. 85 of 1998 decided on 24th February, 1999] is not acceptable for reasons as discussed as above. The department has filed a reference to the High Court as regards a decision on the same point. The said matter is pending for decision. The applicant argues that the order of the Tribunal cannot be overlooked even though any reference to any Court is pending. In this regard, he has placed reliance on the following cases (as reproduced in para no. **04**. (point [1] to [8]) :-

- 1] Commissioner of Central Excise, Salem Vs. M/s Madras Aluminium Company Ltd. [2006 TIOL 32 CESTAT – MAD]
- 2] Sancheti Food Products Ltd. Vs. Union of India [1993 (67) ELT 248 (Cal.)]
- 3] Commissioner of Customs, Mumbai Vs. Yakub I. Yusuf [2002 (147) ELT 567 TRIB]
- 4] Collector of Central Excise, Jamshedpur Vs. TELCO [1998 (103) ELT 50 (TRIB)]
- 5] Union of India Vs. Shashi Deo Jha [1999 (113) ELT 385 (Cal.)]
- 6] Bharat Warehousing Corporation And Others Vs. Collector of Customs, Calcutta [1988 (34) ELT 423 (Cal.)]
- 7] R. P. David And Others Vs. Agricultural Income -Tax Officer And Another [1972 (86) ITR 699]

[2] Thus the next argument of the applicant pertains to application for prospective effect made separately, i.e., after the determination order is passed. In this regard, we may have a look at the following provisions under the Maharashtra Value Added Tax Act, 2002.

"Section 23(8) – Assessment : *The Commissioner may call for the record of any matter and conduct an examination in respect of the same, in the manner as provided in sub-section (2), call for the books of accounts and other evidence in such matter and after hearing the dealer concerned pass an appropriate order of assessment in the matter notwithstanding the fact that in a similar matter, the Tribunal has given a decision against the State*

an appeal before the appropriate forum against the order of the Tribunal and such appeal is pending before such appropriate forum :

Provided that, no order of recovery of the dues including the penalty or interest or forfeiture shall be passed by the Commissioner or the State Government in such case, pending decision by such forum, in the matter, and on decision of the appropriate forum, the Commissioner shall modify the order in accordance with the order of such forum after giving the dealer concerned, an opportunity of being heard."

As can be seen from the section reproduced above, even under the section for assessment there is no bar as to passing an order in a case wherein a decision either by the High Court or by the tribunal is pending.

Hence, the reliance of the applicant on the cases cited as reproduced in para no. **04** (point [1] to [8]) as regards the point of over looking the order of the Tribunal is not acceptable.

[3] The applicant further argues that the present application for prospective effect is filed within reasonable time. He argues that if the plea for the prospective effect is not made at the time of hearing or if it is not mentioned in the application for determination then, the same can be made within the period of filing of an appeal, i.e., within 60 days.

Thus the argument of the applicant is not acceptable as it has been observed by me in the preceding para that the plea for prospective effect should be either alongwith the application for determination or during hearing. Hence, the applicant's argument is not found convincing. Once it is decided that the plea for the prospective effect should be made either alongwith the application for determination or during hearing then, the question of the said plea being made in a separate application does not arise. Also, it is not of relevance as to whether this application has been filed in time or not.

Hence, the argument of the applicant as regards application for prospective effect being filed within reasonable time is not acceptable.

[4] In view of the above discussion, this application is in itself non- maintainable. It is mentioned by the applicant in his application that the following judicial precedents had laid him to hold the view that the product gypsum board is covered under entry C-41 of the Maharashtra Value Added Tax Act, 2002.

- 1) Commissioner of Sales Tax V/s. Sultan Shev Co. (40 STC 583)
- 2) Kapildeoram Baijnath Prosad V/s. J. K. Das and Others (5 STC 365)
- 3) Ghasi Ram Hari Ram V/s. Commissioner of Sales Tax, Delhi (30 STC 88)
- 4) The State of Gujarat V/s. Sakarwala [19 STC 24 (SC)]
- 5) The Collector of Sales Tax, Bombay State vs. Gaurimal Mahajan and Sons [10 STC 452]

I need not comment on the argument of the applicant as regards judicial misguidance. The reason being, this application for prospective effect is not maintainable. Hence, the question of discussing whether the said request for prospective effect is supported by valid reason or does not arise.

The plea of the applicant to give prospective effect to the determination order owing to his reliance on the cases as cited hereinabove is not applicable.

Thus, the request for prospective effect being in itself non- maintainable, it is not necessary to establish statutory misguidance as regards reliance on judicial precedents in support of the request for prospective effect.

[5] The applicant has put forth a request to review the order under section 56(3) of the Maharashtra Value

reproduced as follows :-

"The Commissioner, for reasons to be recorded in writing may, on his own motion review an order passed by him under sub-section (1) or (2) and pass such order thereon as he thinks just and proper. The Commissioner may direct that the order of review shall not affect the liability of the person in whose case the review is made in respect of any sale or purchase effected prior to the review and may likewise, if the circumstances so warrant, direct accordingly in respect of any other person similarly situated:

Provided that, no order shall be passed under this sub-section unless the dealer or the person in whose case the order is proposed to be passed has been given a reasonable opportunity of being heard :

Provided further that, before initiating any action under this sub-section, the Commissioner shall obtain prior permission of the State Government."

The plain reading of the above sub-section helps one to understand that the review as meant in this section is of an order already passed. The power of review is exercised by the Commissioner suo motu. It cannot come as a request from the applicant. It is exercised by the Commissioner when he notices any impropriety in an order already passed. No such impropriety exists in the determination order dated 14/11/2005 passed in the applicant's own case. Hence, the question of its review does not arise.

Thus, the request of the applicant for review cannot be entertained as the provisions of law do not permit such review initiated at the request of an applicant. A review becomes necessary when there is a change of law or a change of opinion. In the present case, no such order considering the request for prospective effect is already passed. Also, there is no change of law or opinion. There has been given no opinion in the first place. Since there was no request for prospective effect in the application for determination, there was no comment/opinion/order passed regarding the same in the determination order. Hence, the question of reviewing an order as regards the point which was never under consideration in the original determination does not arise.

Thus, the request of the applicant for review cannot be accepted as the same cannot be made by an applicant.

07. Having regard to the discussion held hereinabove, I am of the view that the applicant's request for prospective effect is not maintainable.

08. In view of the deliberations put forth hereinabove, I pass an order as follows :-

ORDER

(Under section 56(2) of the Maharashtra Value Added Tax Act, 2002)

No.DDQ-11-2005/Adm-5/96/B-01

Mumbai, dt.04.05.2006

The application for granting prospective effect to the determination Order No.DDQ-11-2005/Adm-5/56/B-1 Mumbai, dated 14/11/2005 is herewith rejected, being non- maintainable. The request of the applicant for review of the order dated 14/11/2005 is also rejected, being not acceptable.

(B. C. KHATUA)

**Commissioner of Sales Tax,
Maharashtra State, Mumbai.**

