

Read: Determination application dt.25.11.09 filed by M/s. J.P. Morgan Securities India Pvt. Ltd.

Heard: Shri C. B. Thakkar, Advocate, Shri Divyesh Lapsiwala & Shri Bharat, [BHRC Associates] attended for hearing.

PROCEEDINGS

(Under Section 56(1)(b) of The Maharashtra Value Added Tax Act,2002)

No.DDQ-11-2009/Adm-3/59/B-3

Mumbai,dt.07.12.10

An application is received from M/s. J.P. Morgan Securities India Pvt. Ltd. having address as J.P. Morgan Tower, off. CST Road, Kalina, Santacruz - East, Mumbai-400098. From the determination application, following questions can be formulated for the purpose of determination in these proceedings:-

1. "Whether on facts and circumstances of the case, the applicant can be a 'dealer' within the meaning of Explanation to Clause (vii) appended to section 2(8) of the MVAT Act, 2002?"
2. "Whether on the facts and circumstances of the case, prospective effect can be granted to the determination order?"

02. FACTS & CONTENTIONS

The applicant company is registered under the Indian Companies Act, 1956 and engaged in stock broking activity on any recognized stock exchange. It is revealed from the memorandum of association produced by the applicant that the object of the company is to carry on non banking finance company activity. In addition, they are also engaged in stock broking activity on any recognized stock exchange. The applicant company submitted that, in order to engage in non banking finance company activities, the company is registered as a 'Non Banking Financial Institution' (NBFI) with the Reserve Bank of India under the Reserve Bank of India Act, 1934. They further submitted that, to achieve the object of share broking, the company holds registration under the Securities and Exchange Board of India Act, 1992 and also operates as a Professional Clearing Member of the National Securities Clearing Corporation Ltd. on the Derivatives Segment. It is the contention of the applicant company that though the company is holding registration as NBFC it is not engaged in financial business like financial leasing, mortgage or other similar finance services. This factual position can be observed from the fact that the income of the company is from interest and other sources. It is stated that the applicant company is at present carrying on the following activities:-

- ⌘ Investments including investment and trading in corporate bonds, Government securities, treasury bills, certificate of deposits, commercial paper.
- ⌘ Securitization of corporate loans. It also includes issuance of commercial paper and structured notes.
- ⌘ Settlement and clearing activities for futures and options transaction executed by clients through trading member on stock exchanges.
- ⌘ The applicant company is registered with the service tax authorities for provision of such clearing services.

It is contended that, in view of the activities carried on by the applicant company as stated hereinabove, it can be seen that the company is basically providing securitization of corporate loans as NBFC and not at all dealing in any sale or purchase

of goods. They referred to the fact that there may be an occasional transactions of sale/purchase of capital assets which is incidental and required for carrying out above service activities. It is argued that the applicant is not an 'insurance and financial corporation'. Likewise, it is also not covered in the second schedule to the RBI Act, 1934. They referred to the Explanation clause (vii) appended to Section 2(8) of the MVAT Act, 2002 whereby certain persons/categories are mentioned which are 'deemed dealers' within the meaning of the said Explanation Clause which is reproduced here as under:-

"(vii) Insurance and Financial Corporation, institution or companies and banks included in the Second Schedule to the Reserve Bank of India Act, 1934 (II of 1934)."

It is contended that the issue rose in these proceedings as to whether the applicant company is covered by the above clause. They maintained that the applicant company is not covered by the above clause (vii) and therefore not a 'dealer' within the meaning of section 2(8) of the MVAT Act. They maintained that the company is not at all covered by above deeming provision and therefore they are not a 'dealer' qua the activities carried on by the applicant company. In support of his contention, they made the following arguments,-

1. The deemed category of dealer in clause (vii) can be split into two categories as under;

i) Insurance and Financial Corporations,

ii) Institutions or companies and banks included in the Second Schedule to the Reserve Bank of India Act, 1934 (II of 1934).

The applicant company cannot be included in the second category as it is not a bank and therefore, not included in the Second Schedule to the Reserve Bank of India Act. (RBI Act). It is only registered as a NBFC and not as a bank. Therefore, it cannot be included in the said category. The second schedule of the RBI Act covers only banks, institutions or companies cannot be included in the second schedule.

2. It is contended that for the sake of clarity, position can be seen with alternative break up of clause (vii) which seems to be a more appropriate interpretation. The categories covered by clause (vii) can be bifurcated as under;

i) Insurance and Financial Corporations, Institutions or companies.

ii) and Banks included in the Second Schedule to the Reserve Bank of India Act, 1934 (II of 1934).

It is argued that even if, the position is looked into from above angle, still the applicant company cannot be covered by above clause (vii). Being a company, the applicant can befall in category (i) above. However, the above category (i) covers only Insurance and Financial companies. It is argued that the applicant-company is not an 'Insurance and Financial company' and there is no insurance business in the case of applicant-company and hence, applicant-company cannot be covered under this category also.

It is further argued that it is also clear that the above clause (i) cannot cover only Financial Companies. The mandate of the clause is to cover 'Insurance and Financial' Corporation/Companies etc.. Had there been intention to cover insurance corporation/companies and financial corporation/companies separately then the category would have been shown by the wordings like 'Insurance or

Financial' Corporation/Companies etc.. However, the word used is 'and'. The meaning of the conjunctive 'and' is as under in the Concise Oxford Dictionary.

"and - connecting words, clauses, or sentences that are to be taken jointly..."

Thus, insurance and financial words are required to be taken jointly. Therefore unless the company to be included in the above category is Insurance and Financial company, it cannot be covered there. Since, that is not the position in case of applicant-company, it cannot be covered by above clause (vii).

3. Without prejudice to above contention, the applicant company further contended that even if the words Insurance and Financial are read disjunctively still the applicant-company is not covered in the said category (i) discussed above. The words 'Financial' contemplates the activity which is akin to activity carried on by banks, like accepting public loans and lending. The nature of activity of applicant-company is already narrated above. It is basically investment related activity and rendering of services. Therefore, it cannot be considered as a Financial Company or Corporation, 4. **PROSPECTIVE EFFECT:-** In the line of above argument, they prayed for prospective effect in case the applicant company is held to be covered by the Explanation clause appended to section 2(8) of the MVAT Act, 2002. They contended that no guidelines about scope of above deeming clause is available so far. The applicant company is under a genuine belief that they cannot be considered to be a 'dealer' covered by MVAT Act and therefore this is a fit case for granting such prospective effect to the determination order. In this connection, it is argued that the applicant-company is incorporated on 27th July, 1998. Since then its business has remained that of rendering services. There are no sales/purchase activities of goods as normal dealer. The issue only arises because of deeming provision. At the most, applicant-company can be liable to the extent of disposal of goods like used assets or scrap of them etc.. However, it is stated that the wordings of clause (vii) are very confusing. It also appears that there is clear intention to cover 'Banks' but there is no intention to cover NBFC etc.. If at all, the applicant-company is to be covered it can be covered in the category of insurance and financial company. However, as explained above there is no certainty and clarity in the said clause (vii). There is also no precedent till today, explaining the scope of above clause (vii). In fact, the applicant-company has to file this application to know the correct scope of the said clause (vii). Therefore, in the interest of justice and equal and fair treatment, the order is required to be made prospective so that the applicant-company should not incur any unexpected financial liability for the prior period.

Finally, they requested to determine the question put forth for determination in accordance with the provisions of law as also in light of the facts and circumstances as stated hereinabove.

03. DOCUMENTS SUBMITTED

- i. Letter of Authority.
- ii. Copy of Memorandum of Association.
- iii. Copy of Registration Certificate with RBI.
- iv. Copy of Registration Certificate with SEBI.
- v. Copy of Final Accounts for 31.3.2009.

04. HEARING

Shri C. B. Thakkar, Advocate, Shri Divyesh Lapsiwala & Shri Bharat, [BHRC Associates] attended on behalf of the applicant company. They stated that the applicant company is a non banking finance company. Banks do rental banking or corporate banking. NBFCs play a limited role in that they can only do certain functions. They invest in Govt. bills, treasury bills, corporate bonds, commercial paper. It is informed that they also deal in securitization of loans. They buy 'loans' from companies which give home loans on the basis of the present market value and take over them to sell it further. The third activity carried on by the applicant company is broking activity. They deal in providing clearing services. They pay service tax on it. It is their contention that they are not 'deemed dealers' and therefore would not be covered by the scope of Explanation clause (vii) appended to section 2(8) of the MVAT Act. They argued that, they are not Insurance Company, as also they are not a financial corporation. They are also not a bank notified under the Second Schedule of the RBI Act. Therefore it is their argument that they are not 'dealer' under the VAT Act - they have also not taken any Registration under the Act. While concluding, they maintained that in case the applicant company fails in the determination proceeding to decide the same in their favor, prospective effect should be given to the determination order since the applicant company is under a bona fide belief that they are not covered by the scope of the section 2(8) of the MVAT Act.

04. OBSERVATIONS

The issue in this case is whether J.P. Morgan Securities India Pvt. Ltd. is a 'dealer' for the purpose of MVAT Act, 2002. It is the contention of the applicant company that the applicant is not a dealer as they are not carrying on the activity of buying and selling of goods. The definition of the term 'dealer' is reproduced below:-
The term "Dealer" is defined in Section 2(8) of the MVAT Act and the same reads as under:-

"Dealer" means any person who, for the purpose 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,-

(1)....(4)

Explanation,- For the purpose of this clause, each of the following person, bodies and

entities who [sells 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.vi

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);

The applicant company has argued that it is not engaged in buying and selling of goods and it has also not done any hypothecation or mortgage of goods. The applicant company has canvassed the proposition that it physically provides securitization of corporate loans and also undertakes the clearing and settlement of derivative

transaction. In the submission dt.10.9.2010 it was submitted by the applicant company that though the Company holds registration as NBFC he does not carry on any activities of accepting deposits from public, financial loans, mortgages loans, vehicle loans as performed by other NBFCs. The main objects of the Company as seen from the Memorandum of Association is to carry on and engage in the business as stock-brokers, under-writers, margin bankers, primary dealer in government security market, money market, instrument future and forward debt instrument, fixed deposit etc. The other objects of the company are to manage investment pools and manage investment portfolios for both Indian residents and non-residents. It is also empowered through the MOA to engage in any and all kinds of financial businesses including the granting of loans and to purchase, acquire, invest, transfer, sell, dispose of or trade in any and all securities, financial assets, properties, secured assets, debts, receivables, participation certificates etc. With reference to all the above objects, it is the contention of the applicant that he is not a dealer under the MVAT Act.

A 'dealer' as defined under the MVAT Act under sub-clause (8) of clause (2) is one who buys or sells goods in the State. The applicant company has contended that the business of theirs is purely financial and there is no buying or selling of goods. There is also sale of property secured by hypothecation. In the objects listed in the Memorandum of Association, under (C), the applicant's other objects are to manufacture/import/export computers and software/hardware, and so also it is empowered to lease and provide on hire purchase plant and machinery. However, the applicant has not actually undertaken any of the above but effected only pure financial transactions.

However, the definition of a 'dealer' under the MVAT Act also provides for an explanation through which certain categories of entities who sell any goods are deemed to be 'dealers' notwithstanding the definition of 'business' or any other provision of the Act. Under the said explanation listed at (vii) is the following category.

"(vii) Insurance and Financial Corporation, institution or companies and banks included in the Second Schedule to the Reserve Bank of India Act, 1934 (II of 1934)."

The applicant company has claimed that though it is a NBFC it is not covered under the above clause. I have already reproduced the written submission of the applicant. However, I do not agree with the same. I agree with the applicant that the NBFC is not a 'bank' as it is not included in the second schedule to the Reserve Bank of India Act. Therefore, categories in the definition can be bifurcated as below:-

1. Insurance and financial corporation, institution and company;
2. Banks included in the second schedule.

The above splitting has to be done as the word 'second schedule' to the RBI Act cannot be made applicable to insurance companies or financial corporations, institutions or companies as they are not required to be included in the second schedule of the RBI Act. The second schedule refers only to Schedule Banks as defined under Section 2(e) of the Act. Thus, the only category which seems to be seen is whether it falls under (1) above. It is admitted by the applicant that it is a company and therefore it can fall in category (1). However, it is contended by them that it is not both 'an insurance and financial corporation' and therefore it is not covered by the category of insurance and financial company. The applicant further argued that the word 'financial company' should not be read in isolation as the clause intends to cover companies which are covered both in the business of finance and insurance. As per the applicant, even if there was an

intention to bifurcate insurance and finance then the category would have been shown as 'insurance or finance corporations' etc. Therefore, the words 'insurance' and 'finance' are required to be taken jointly. Further he says that even if the insurance and finance are read separately the words 'finance' contemplates activity undertaken by banks and therefore, the applicant cannot be a finance company.

I disagree with the above. The words 'insurance and financial' are both adjectives which are applicable to three nouns- corporations, institution or companies. Therefore, the categories which would be covered by the sub-clause (vii) are:

- ⌘ insurance corporations, institutions or companies;
- ⌘ Financial corporations, institutions or companies.

The words 'insurance and financial' cannot be read together. Insurance companies are governed by the Insurance Act 1938 while Non-banking Financial Companies are governed by the RBI Act, 1934. Therefore, it was never the mandate of the legislature to take insurance and finance together. If what the applicant company says is correct then it brings companies which are both in insurance and finance business into the category of 'deemed dealers'- this does not seem plausible for reasons I have given later in this order. The word 'insurance and finance' should be read separately as two adjectives applicable to three nouns - corporation, institution and companies.

The terms 'financial' and 'insurance' are connected by the term 'and'. The applicant has contended that if both 'financial' and 'insurance' companies' were intended to be covered then they would have been joined by the conjunction 'or'. In Stroud's Judicial Dictionary, 3rd Ed. it is stated at page 135 that "and" has generally a cumulative, sense, requiring, the fulfillment of all the conditions that it joins together, and herein it is the antithesis of "or". **Sometimes, however, even in such a connection, it is, by force of a contents, read as "or"**. Similarly in Maxwell on Interpretation of Statutes, 11th Ed., it has been accepted that "to carry out the intention of the legislature it is occasionally found necessary to read the conjunctions 'or' and 'and' one for the other". Therefore, in law, the word 'and' has become synonymous with "or" which is taken to mean the same thing, and which is a preferred term for the concept of "either or both", which and/or attempts to convey. Thus, the practice to use the terms synonymously and it is not proper to give importance as to whether 'and means both or either of the two. It will be more appropriate to examine the intention of the Legislature while drafting the statute. The Andhra Pradesh High Court (Municipal Corporation of Hyderabad vs. T.V.Sarma A.I.R 1972,Andhra Pradesh 96) has observed that the word 'or' can be read as 'and' and the word 'and' can be read as 'or' where it is necessary to give effect to the intention of the Legislature.

Also, what the applicant claims makes no sense. Insurance and finance are two separate fields and insurance companies rarely do finance. Therefore, the probability that the clause includes only those companies which are both insurance and financial is very remote. The clause says 'Insurance and Financial companies'- the term 'insurance' is mentioned first and, if the applicant's contention is accepted then this implies that the clause covers an 'insurance' company which does finance. I have already mentioned that it is a rarity that a predominantly insurance company is also a financial company. Under the provisions of the Insurance Act, an 'insurer' is defined as follows:-

(9) "Insurer" means-

(a) any individual or unincorporated body of individuals or body corporate incorporated under the law of any country other than India, **carrying on insurance business** not being a person specified in sub-clause (c) of this clause which-

- (i) carries on that business in India, or
- (ii) has his or its principal place of business or is domiciled in India, or
- (iii) with the object of obtaining insurance business, employs a representative, or maintains a place of business, in India;

(b) any body corporate [not being a person specified in sub-clause (c) of this clause] carrying on the business of insurance, which is a body corporate incorporated under any law for the time being in force in India; or stands to any such body corporate in the relation of a subsidiary company within the meaning of the Indian Companies Act, 1913 (7 of 1913), as defined by sub-section(2) of section 2 of that Act, and

(c) any person who in India has a standing contract with underwriters who are members of the Society of Lloyd's whereby such person is authorized within the terms of such contract to issue protection notes, cover notes, or other documents granting insurance cover to others on behalf of the underwriters.

but does not include a principal agent' chief agent, special agent' or an insurance agent or a provident society as defined in Part III;

An Indian insurance company is defined as follows:

[(7A) "Indian insurance company" means any insurer being a company-

(a) which is formed and registered under the Companies Act, 1956 (1 of 1956);

(b) in which the aggregate holdings of equity shares by a foreign company, either by itself or through its subsidiary companies or its nominees, do not exceed twenty-six percent paid-up equity capital of such Indian insurance company;

(c) whose sole purpose is to carry on life insurance business or general insurance business or re-insurance business.

Explanation- For the purpose of this clause, the expression "foreign company" shall have the meaning assigned to it under clause (23A) of section 2 of the Income-tax Act, 1961(43 of 1961);]

Thus, it is seen from the above that an insurance company is established with the sole purpose of carrying on insurance business. The following is the list of all 'Life insurance' and 'General Insurance companies' in India obtained from the website of the Insurance Regulatory and Development Authority.

| | NAME OF THE LIFE INSURANCE COMPANY | NAME OF THE GENERAL INSURANCE COMPANY |
|----|--|--|
| 1. | Bajaj Allianz Life Insurance Company Limited | Bajaj Allianz General Insurance Co. Ltd. |
| 2. | Birla Sun Life Insurance Co. Ltd | ICICI Lombard General Insurance Co. Ltd. |
| 3. | HDFC Standard Life Insurance Co. Ltd | IFFCO Tokio General Insurance Co. Ltd. |
| 4. | ICICI Prudential Life Insurance Co. Ltd | National Insurance Co.Ltd. |
| 5. | ING Vysya Life Insurance Company Ltd. | The New India Assurance Co. Ltd. |

| | | |
|-----|---|---|
| 6. | Life Insurance Corporation of India | The Oriental Insurance Co. Ltd. |
| 7. | Max New York Life Insurance Co. Ltd | Reliance General Insurance Co. Ltd. |
| 8. | Met Life India Insurance Company Ltd. | Royal Sundaram Alliance Insurance Co. Ltd |
| 9. | Kotak Mahindra Old Mutual Life Insurance Limited | Tata AIG General Insurance Co. Ltd. |
| 10. | SBI Life Insurance Co. Ltd | United India Insurance |
| 11. | Tata AIG Life Insurance Company Limited | Cholamandalam MS General Insurance Co. Ltd. |
| 12. | Reliance Life Insurance Company Limited. | HDFC ERGO General Insurance Co. Ltd. |
| 13. | Aviva Life Insurance Company India Limited | Export Credit Guarantee Corporation of India Ltd. |
| 14. | Sahara India Life Insurance Co, Ltd. | Agriculture Insurance Co. of India Ltd. |
| 15. | Shriram Life Insurance Co, Ltd. | Star Health and Allied Insurance Company Limited |
| 16. | Bharti AXA Life Insurance Company Ltd. | Apollo Munich Health Insurance Company Limited |
| 17. | Future General India Life Insurance Company Limited | Future General India Insurance Company Limited |
| 18. | IDBI Federal Life Insurance Company Ltd., | Universal Sompo General Insurance Co. Ltd. |
| 19. | Canara HSBC Oriental Bank of Commerce Life Insurance Company Ltd. | Shriram General Insurance Company Limited, |
| 20. | AEGON Religare Life Insurance Company Limited. | Bharti AXA General Insurance Company Limited |
| 21. | DLF Pramerica Life Insurance Co. Ltd. | Raheja QBE General Insurance Company Limited, |
| 22. | Star Union Dai-ichi Life Insurance Co. 051 | SBI General Insurance Company Limited |
| 23. | IndiaFirst Life Insurance Company Limited | Max Bupa Health Insurance Company Ltd. |

Thus, it is seen from the above that 'insurance companies' are known and registered as 'insurance companies'. Their sole business is to insure- an insurance company therefore cannot be a finance company at the same time. Also, a finance company which does insurance as a secondary activity would always be known only as a finance company and not as an insurance company for the simple reason that they both are governed by separate acts.

Also, I do not agree with the applicant that the applicant company is not a financial company. It is granted registration as a 'financial company' by the RBI and therefore it cannot fall outside the category of financial company. The term 'financial company' is defined under the RBI Act of 1934. It is defined as a 'financial institution which is a company'. Further a 'financial institution' is defined as any non-banking institution which carries of financing whether by way of loans or advances or otherwise of any activity other than its own, acquisition of shares, bonds, stocks or securities issued by the Government or local authority. The applicant during the hearing stated that they invest in Govt bills/treasury bills/commercial paper. They also deal in securitization of loans. Therefore, the applicant is a financial company. Also, the applicant is incorrect when it says that the word 'financial company' refers to banks. Banks have been included as a separate category in the clause itself and therefore if the term 'financial company' referred to banks then the word 'bank' would not have been separately mentioned. Also, banks are governed by the Banking Regulation Act, 1949 and Non-banking financial companies are regulated by the RBI Act. Therefore, the applicant is granted registration as a 'Non-banking financial company' under section 45IA of the RBI Act. The business of the company is investment, securitisation and underwriting which is nothing but finance.

05. PRAYER FOR PROSPECTIVE EFFECT

The applicant company has also prayed for prospective effect in case the determination order is not held in his favour. I, however, find no reason whatsoever for granting him prospective effect as there is neither any statutory misguidance nor is there any ambiguity in the statute.

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

ORDER

(Under Section 56(1)(b) of The Maharashtra Value Added Tax Act, 2002)

No.DDQ-11-2009/Adm-3/59/B-3

Mumbai, dt.07.12.10

Q.1. Whether on facts and circumstances of the case, the applicant can be a 'dealer' within the meaning of Explanation Clause (vii) appended to section 2(8) of the MVAT Act, 2002?

Ans. In the affirmative.

Q.2. "Whether on facts and circumstances of the case, prospective effect can be granted to the determination order?"

Ans. In the negative.

**(Sanjay Bhatia)
Commissioner of Sales Tax,
Maharashtra State, Mumbai**