

Read: 1) Determination Order No. DDQ-11/2006/Adm-5/54/B-2, Mumbai, dt.24.12.2008.
2) Letters dt.23.10.2008, 12.02.2009 and 18.03.2009 from M/s. Jumboking Foods Pvt. Ltd.
3) This office letter dt.01.07.2009 calling the applicant for hearing on dt.14.07.2009.
Heard: Shri Rajat Talathi,, Chartered Accountant attended the hearing on dt.14.07.2009.

PROCEEDINGS

(Under section 24 of the Maharashtra Value Added Tax Act, 2002)

No. DDQ-11/2009/Adm-3/07/B-2

Mumbai, dt.08.12.09

A determination order nO. DDQ-11/2006/Adm-5/54/B-2, Mumbai, dt.24.12.2008 was passed in the case of the applicant, M/s. Jumboking Foods Pvt. Ltd. wherein the issue involved was the rate of tax on 'Jumbo King 'Vada Pav' sold by the vending points/franchisees of 'Jumbo King Foods Pvt. Ltd. It was held that the outlets where "Jumbo Wada Pav" is sold are 'eating houses' and therefore, the sale of "Vada Pav" is not eligible for coverage under schedule entry C-94 {Farsan}. The applicant by his letter dt.23.10.2008 had requested for prospective effect to the determination order to be passed in his case. However, the said application and thereby the request for prospective effect remained to be considered while passing the determination order. The applicant by his letter dt.18.03.2009 has requested for rectification of the aforementioned determination order passed in his case with respect to the decision on prospective effect.

02. CONTENTION AND HEARING

The case was taken up for hearing on dt.14.07.2009. Shri Rajat Talathi, C.A. attended on behalf of the applicant. He submitted that the request for prospective effect be considered in view of factors such as past rulings, statutory misguidance. It is submitted as follows :

1. He was informed by the Sales Tax Department on dt.20.01.2006 that "wadapav" being an item of 'farsan' would be covered by the notification issued under schedule entry C-94 of the MVAT Act dt.01.06.2005, thereby attracting VAT @ 4%.
2. By letter dt.10.04.2007, the applicant was asked to take note that the clarification dt.20.01.2006 was based on facts as disclosed in the communication of the applicant. It was also informed that whether any of the outlets can be classified for the purposes of Maharashtra Value Added Tax Act, 2002 as restaurant, eating house, etc. shall always be a question of fact i.e. to be examined at the time of assessment and/or during scrutiny of return/refund claims.
3. By yet another letter dt.11.6.2007, the applicant was sent a copy of the DDQ dt.31.5.2007 in the case of M/s. Parampara Foods Products informing the applicant to arrange his affairs accordingly.
4. The Determination Order in the applicant's case was passed by the order u/s 56(1)(e) dt.24.12.2008 holding that the applicant is an eating house/restaurant and accordingly the goods sold are not covered by the notification dt.1.6.2005 in respect of farsan and therefore the rate of VAT @ 12.5% is attracted. The Order is silent about the request made for prospective application of the decision u/s. 56(2) and the Commissioner's decision on the same.

In the above circumstances, the present application has been preferred for the rectification of the order of DDQ dt.18.3.2009. The applicant has submitted that the records will show that the letter dt.23.10.2008 praying for the prospective effect was filed on 24.10.2008 and it appears, inadvertently, that the same has not been considered and hence, the order dt.24.12.2008 does not have any mention of the same. This being a mistake apparent on record, it is prayed that an order u/s.24(1) be passed. In support of the prayer, it is submitted as follows :

Bonafide belief : Your applicant carried a bonafide belief that the sale effected by your applicants are 'counter sales' of vadapav and accordingly is eligible to avail the benefit of notification issued under schedule C-94(a) in respect of 'farsan' attracting VAT @ 4%. Your appellants were guided by the clarificatory letter issued to your applicant dt.20.01.2006 stating clearly that your applicant is eligible for the concessional rate of tax @ 4%.

Moreover, on receipt of the suo moto communication dt.11.06.2007 from your office, your applicant replied vide their letter dt.15.7.2007 stating that the decision of the DDQ order dt.31.5.2007 in case of M/s. Parampara Foods Product is not applicable to your applicants. Further, your applicants in the same letter pleaded that if your applicant were wrong; let the Ld. Officer pass appropriate order. There was no reply to this communication. This prompted your applicant to believe that the stand taken by your applicant is correct. This in fact, strengthened the bonafide belief that your applicant carried.

As it is well known, it is not necessary to have a previous order/decision on any particular issue holding a contrary view to create impression held by the assessee. The Tribunal in the case of M/s. Foam India Pvt. Ltd. (Appeal No.77 of 1975 dt.23.4.1976) has held that there was no warrant for the proposition that only a previous order of commissioner can form a due basis for holding a bonafide impression. As such, the appellants in that case were given prospective effect of DDQ.

The Bombay High Court in the case of M/s. Quality Frozen Foods Ltd. vide their order dt.20.6.2008 has held that the widely held impression in the market also created the bonafide belief. In a very recent case, in the matter of M/s. Kayani Bakery (Rectification Application No.27 & 28 of 2009 dt.31.3.2009) arising from appeal No.6 & 7 of 2008 dt.4.7.2008, has held that the market leaders, Monginies Foods were given protection of the prospective effect and therefore the entire industry followed the DDQ. In the present case, your applicants were themselves given clarification by the office of the sales tax dept. and therefore the bonafide belief was compounded.

Statutory misguidance : The Hon'ble Commissioner as also the Hon'ble Tribunal has also considered the 'norm statutory misguidance' as one of the criteria for giving the prospective effect to the DDQ order. Even the guidance from the earlier DDQ orders were considered for giving prospective effect. In the case of M/s. National Dairy Development Board (DDQ No. DDQ-1196/Adm-5/220/B-19, dt.24.4.1998), the applicant were guided by the order passed by M/s. Mafco and the decision of the Tribunal in the case of M/s. Tasty Bite Eatables Ltd. which came only on 22.11.1996, the applicant's liability to pay tax was protected upto 30.9.1996 by resorting to section 52(2).

03. OBSERVATIONS

The issue before me is the grant of prospective effect to the Determination order No. DDQ-11/2006/Adm-5/54/B-2, Mumbai, dt.24.12.2008 passed in the applicant's case. The determination order has elaborately discussed the case of the applicant and it was determined that the applicant being an 'eating houses', the sale of "Vada Pav" by the applicant would not be eligible for coverage under schedule entry C-94 for Farsan. All the arguments of the applicant with respect to the applicant not being an 'eating house' were discussed with reference to the judgments on the subject. Hence, I refrain from dealing with any arguments made by the applicant in the present proceedings in respect of the merits of the case.

It is seen that the applicant has made the request for prospective effect in the determination proceedings but the same remained to be considered. I am in agreement with the applicant when it is pointed out that this is a mistake which needs to be rectified. The issue of prospective effect is to be decided with regard to the circumstances of each case. Hence, I begin by assessing the facts before me as follows :

The applicant has pointed that the Department had issued a clarification dt.20.01.2006 wherein it was stated that "...This office prima facie, is of the view that 'Vada-Pav' sold through the outlets would be 'farsan' for the purpose of schedule entry C-94 more specifically notified at Sr. No. 28 in notification dt. 1.6.2005". By letter dt.10.04.2007, the applicant was asked to take note that the clarification dt.20.01.2006 was based on facts as disclosed in the communication of the applicant. It was also informed that whether any of the outlets can be classified for the purposes of Maharashtra Value Added Tax Act, 2002 as restaurant, eating house, etc. shall always be a question of fact i.e. to be examined at the time of assessment and/or during scrutiny of return/refund claims. By yet another letter dt.11.6.2007, the applicant was sent a

copy of the DDQ dt.31.5.2007 in the case of M/s. Parampara Food Products informing the applicant to arrange his affairs accordingly. Now, the determination order in the case of the applicant was passed on dt.24.12.2008 wherein it was observed that all the judgments have unanimously given an expanded meaning to the term 'restaurant'. Premises as diverse as railway platforms, hand carts, ice-cream depots have been held as 'eating houses'. It was further observed that none of the judgments have placed much emphasis on the element of service while defining an "eating house". Thus, it is seen that there existed no ambiguity in the matter. Applying the ratio of the above cases, the applicant should have very well understood the nature of his business and the category to which it belongs.

Having seen that there existed no uncertainty as to the understanding of the law, I move on to the applicant's argument that he was guided by the clarification issued by the Department. As mentioned earlier, owing to the clear ratio laid down by the various decisions, it was an established position of law that the premises of the applicant fell in the category of an 'eating house'. Hence, there should not be any question of protecting the liability upto the date prior to the date of the clarification given by the Department.

Now, it is the argument of the applicant that he acted on the clarification given by the Department and hence, his liability be protected on that count. The rate of tax for the purposes of the schedule entry C-94 of MVAT Act, 2002 is 4% & for schedule entry E-1 is 12.5%. Hence question of protecting the liability. The case of the applicant falls under the category of misclassification by both the applicant himself as well as the departmental authorities. In a few determination orders, I have, on the basis of the circumstances of each case, taken the stand that 'genuine statutory misguidance' is one of the basis of granting prospective effect. In the case of M/s. Vinod Stainless Steel works [Determination order no. DDQ-11-2005/Adm-5/17/B-1, dated 13/3/06], it was observed that *"For the purpose of protecting the liability, I need to look at the most important point as regards the time when the misclassification was first noticed either by the departmental authorities or by the applicant dealer himself"*. In the present case, it is seen that the clarification is issued on dt.20.01.2006. However by letter dt.10.04.2007, the applicant was informed that whether any of the outlets can be classified for the purposes of MVAT Act, 2002 as restaurant, eating house, etc. shall always be a question of fact i.e. to be examined at the time of assessment and/or during scrutiny of return/refund claims. This shows that the applicant was made aware that the rate of tax in the case of the applicant depended on the fact whether the applicant was an 'eating house' or otherwise. The clarification expressed a prima facie view that the 'vada pav' sold through the outlets would be 'farsan' for the purposes of the schedule entry C-94. I am inclined to accept the prayer of the applicant that, prospective effect may be granted in view of the specific clarification issued to them. However, it is seen that a separate letter was issued to the applicant making him aware of the peculiarity of the question posed for clarification by him. All the facts of the case were not taken into consideration before expressing the view. Hence, the same was sought to be amended by making the applicant aware that the classification rested on examination of facts. As mentioned earlier, relying on the ratios laid down by the various decisions in this regard, the applicant is expected to understand the view expressed in the second clarification issued. The applicant has counter argued that he had written a letter to the Department after the receipt of the third letter from the Department. The non-reply by the Department led him to believe that that the stand taken by him was correct. I am not convinced by this argument of the applicant. The second clarification had expressed the view in clear terms and the applicant should have arranged his affairs accordingly. Ignorance of the law cannot be claimed as an excuse for non-compliance with the provisions. The applicant would have made a point if there was no effort on the Department to amend the wrong view expressed in the first clarification issued to the applicant. The second clarification issued to the applicant sought to make matters clear by advising the applicant to ascertain the possibility of the applicant being an 'eating house'. The applicant became aware or was made aware of the misclassification by the letter dt.10/4/07. Hence, the request of the applicant to protect his liability till the date of the determination order is not found acceptable. In view of the statutory misguidance, the applicant deserves to be given benefit of doubt, by way of protecting the liability up to the date on which the applicant was communicated about

the misclassification. The applicant's request to grant prospective effect for reason of the clarification issued to him is found justified only for the period from the issue of the first clarification till the date of the second clarification i.e from dt.20.01.2006 till dt.10/4/07.

The applicant has cited a few cases in support of his request for prospective effect to the determination order passed in his case. I have gone through the judgments and it is clear that grant of prospective effect to determination order depends on the facts & circumstances of each case. The applicant has pleaded that the applicant being a market leader in the Trade, the clarification given to him was followed by the Trade. As mentioned earlier, I am in agreement with the applicant when the applicant drives home a point that his liability be protected. However, the period for protection sought by the applicant is not acceptable. In the present case, the misguidance to the applicant was cured by making aware of misclassification by the letter dt.10/4/07. Hence, I have come to the conclusion that the question of protecting the liability arises for the period from the issue of the first clarification till the issue of the second clarification.

04. In view of the deliberations held hereinabove, it is hereby ordered that

ORDER

(Under Section 24(1) of the Maharashtra Value Added Tax Act, 2002)

No.DDQ-11/2009/Adm-3/07/B-2

Mumbai, dt.08.12.09

For reasons as elaborately discussed in the order, the request for granting prospective effect to the determination order DDQ-11.06/Adm-5/54/B-2, dt.24/12/2008 is considered and it is herewith ordered that the liability of the applicant is protected for the period from dt.20.01.2006 till dt.10/4/07 [from the date of issue of the first clarification upto the date on which the applicant was communicated about the misclassification].

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