

Read -1) Application dt. 28.11.2007 by M/s. Lutf Foods Pvt. Ltd holder of RC no 27020003817V.

2) The letter of the applicant dt.02 September, 2008.

Heard - Shri. Neerav Lathia, C.A.

PROCEEDINGS

(U/s. 56 (1)(a) of the Maharashtra Value Added Tax Act, 2002.)

No. DDQ 11/2007/Adm-3/55/ B-3

Mumbai, Date: 30.1.09

The application is filed by M/s. Lutf Foods Pvt. Ltd. having address as A-403, Rajesh Apartment, Chandavarkar Road, Borivali (W), Mumbai-400 092 requesting determination on the rate of tax on the products namely Breads, Farsan, Cakes, Pastries and Savouries like Paneer Finger Rolls, Pan Pizza, Veg Burger etc. being food stuffs would be covered by schedule entry C-107(11)(f) of the MVAT Act, 2002.

02. FACTS OF THE CASE

M/s. Lutf Foods Pvt. Ltd. is a registered dealer under MVAT Act, bearing Registration Certificate No.400092/S/3917 TIN No.27020003817V engaged in the manufacturing activity of the products namely Breads, Farsan, Cakes, Pastries and Savouries like Paneer Finger Rolls, Pan Pizza, Veg Burger etc. It is submitted by the applicant that, they have collected tax @ 12.5% on the sales of Cakes, Pastries and various Savouries till 30th April, 2006. However, keeping in mind certain changes effected by the Government of Maharashtra in Schedule Entry C-107(11) w.e.f.1.2.2006 by virtue of which new sub-entry (f) were incorporated in the main entry C-107(11) the applicant felt that Cakes, Pastries and various Savouries being food stuffs would be covered by the scope of this new sub-entry C-107(11)(f) exigible of tax @ 4%. In the light of the new sub entry under entry C-107(11)(f) it was felt by the applicant that cakes, pastries being food stuffs ready to eat and sold to other dealers and not served for consumption will attract tax @ 4% and the entry C-107(11)(f).To confirm the belief the applicant sought clarification about the rate of tax by making an application dt.25.2.2006 to the Department of Legal Matters. It was informed to him by the Department of Legal Matters through letter dt.6.5.2006 that the rate of tax on cakes, pastries, paneer finger roll, pan pizza and veg burger is 4% being covered by schedule entry C-107(11)(f). Acting on this clarification, the applicant started collecting sales tax @ 4% on the sale of cakes, pastries, paneer finger roll etc. Then the applicant became aware of the determination in the case of M/s Parampara Food products where 'ready-to-eat' products were held as covered by the residual entry. The applicant has made the application to clear the doubts.

03. CONTENTION

The applicant has contended that the products would be covered by schedule entry C-107(11)(f) as they are covered by the expression 'food stuffs'. They have contended that the expression 'ready to serve' excludes food which is served for consumption in a hotel. The entry C-107(11)(f) has used two words 'food stuffs' and 'food provisions' and both the words have to be given different meaning. It is argued that the Commissioner has given the same meaning to both the words by holding that only substance which go into the preparation of goods are covered by the words 'food stuffs'. However, such substances are covered by the words 'food provisions'.

The applicant has also prayed for prospective effect in case the Commissioner comes to the conclusion that the products are covered by the residuary entry 'E-I'.

05. OBSERVATIONS

I have carefully gone through the details submitted by the applicant. The question posed by the applicant regarding the rate of tax applicable to the sale of cakes, pastries, paneer

finger roll, pan pizza and veg burger has already been decided by the Commissioner of Sales Tax in the case of M/s. Monginis Foods and M/s. Delicia Foods DDQ-11/2007/Adm-3/25/B-1, and DDQ-11/2007/Adm-2/26/B-1, Mumbai, dt.6.11.2007 in which similar products i.e. cakes, pastries, paneer finger roll, pan pizza and veg burger were held to be covered by the schedule entry E-I and taxable @ 12.5%. After examining the contentions of the applicants in the case of M/s. Monginis Foods and M/s. Delicia Foods, the Commissioner in a detailed order has conclusively held that all the products are 'ready to serve products' and ready to serve products being excluded from the purview of schedule entry C-107(11)(f), the impugned products would not be covered by schedule entry C-107(11)9f). The applicant in the present case has made a similar argument for similar products .

In the backdrop of the above facts, I would like to draw attention of the applicant to Section 56(4) of the MVAT Act, 2002.

Section 56(4): If any such question arises from any order already passed under this Act or any earlier law, no such question shall be entertained for determination under this section; but such question may be raised in appeal against such order.

The sub-section says that when a question arises from any order already passed under this Act no such question shall be entertained for determination under this section. As the question raised by the applicant has already been decided in the case of M/s. Monginis foods and M/s. Delicia foods (cited supra) the question becomes non maintainable and cannot be entertained for determination. I therefore reject the application being non maintainable.

06. PRAYER FOR PROSPECTIVE EFFECT:

The applicant has made a prayer for prospective effect and has requested that the determination order be made applicable from the date on which this determination order would be passed and the liability of the applicant up to the date of passing of this determination order should be protected. It is maintained by the applicant that he was statutorily misguided by the clarification issued earlier by the Commissioner vide their communication dt. 6.5.2006 . It is the contention of the applicant that he has acted in a bonafide manner as per the clarification given by the department thereby collecting 4% tax on the sales of their products and the same were paid into the Government Treasury. It is argued that if the Commissioner of Sales Tax would have decided the matter otherwise, it could not affect the tax liability of the applicant till the date of the contrary decision taken by the Commissioner and therefore it is a fit case for giving prospective effect.

Before dealing with the prayer of the applicant, I would examine the provisions underlying the power to give determination as also the power to make it applicable prospectively. The section dealing with determination and 'prospective effect' is reproduced as under:

56. Determination of disputed questions -

(1) If any question arises, otherwise than in a proceedings before a Court or the Tribunal under section 55, or before the Commissioner has commenced assessment of a dealer under section 23, whether, for the purposes of this Act, -

1. any person, society, club or association or any firm or any branch or department of any firm, is a dealer, or
2. any particular person or dealer is required to be registered, or
3. any particular thing done to any goods amounts to or results in the manufacture of goods, within the meaning of that term, or

4. any transaction is a sale or purchase, or where it is a sale or purchase, the sale price or the purchase price, as the case may be, thereof, or
5. in the case of any person or dealer liable to pay tax, any tax is payable by such person or dealer in respect of any particular sale or purchase, or if tax is payable, the rate thereof, or
6. set-off can be claimed on any particular transaction of purchase and if it can be claimed, what are the conditions and restrictions subject to which such set-off can be claimed,

the Commissioner shall, subject to rules, make an order determining such question.

Explanation.-For the purposes of this sub-section, the Commissioner shall be deemed to have commenced assessment of the dealer under section 23 when the dealer is served with any notice by the Commissioner under that section.

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

As per the above provisions, the Commissioner determines a question under sub-section (1) of section 56 of the MVAT Act. The Commissioner, then, if the circumstances so warrant, may under powers granted under sub-section (2) of section 56 direct that the *determination passed under sub-section (1) of section 56* be made applicable prospectively. Thus, in order that powers under *sub-section (1) of section 56* are exercised, an order of determination has to be passed under *sub-section (1) of section 56*. *In the present case, no order under sub-section (1) of section 56 is passed and therefore, there is no order to which prospective effect could be given and therefore, the prayer for prospective effect cannot be entertained, and is hereby rejected.*

However, I bring to the notice of the applicant the MSTT decision in the case of M/s. Monginis foods and M/s. Delicia foods (VAT Appeal No.14, 15 of 2007 dt.4.7.2008) which has partly confirmed the order of the Commissioner and held that cakes, pastries, paneer finger roll, pan pizza and veg burger etc. are covered by the residuary entry 'E-I' and are taxable @ 12.5%. In the determination order, prospective effect was given to M/s. Monginis Foods up to 31.5.2007 for cakes, pastries, paneer finger roll, pan pizza and veg burger. However, the Tribunal amended the order of the Commissioner and held that the prospective effect is granted from the date of the communication of the order of the Commissioner i.e. from 14.11.2007 for all products. I shall reproduce the deciding part of the order here as under:

.."The request of the prospective effect of the appellants is accepted and prospective effect is granted from the date of the communication of the order of the Commissioner to the appellant i.e. from 14.11.2007 for all products. **The benefit of prospective effect shall be available to the franchisee and distributors of the appellant for the products of the appellant only. It is also directed that the appellants, their franchisees and distributors shall not be entitled for prospective effect if they have collected the tax in excess of 4%. This benefit is subject to the condition of tax collection. If the franchises and distributors have collected the tax in excess of 4%, the benefit of prospective effect shall not be available to the distributors and franchisees.**

In view of the above, if the applicant fulfills the conditions given above he will be eligible for prospective effect, the applicability of the order of the MSTT to the applicant being a matter of factual verification.

07. In view of the aforementioned deliberations, it is hereby ordered that,.

ORDER

(Under section 56(1)(e) and 56(2) of the MVAT Act, 2002.)

No. DDQ 11/2007/Adm-3/55/ B-3

Mumbai, Date:30.1.09

- The application of the applicant is non-maintainable under Section 56(4) of the MVAT Act, 2002.
- If the applicant fulfills the conditions given in the MSTT decision in the case of M/s Monginis and Delicia Foods (cited supra) laid down in the deciding part of the order, then he will be eligible for prospective effect, the applicability of the order of the MSTT to the applicant being a matter of factual verification.

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