

Read -1. A set of two applications, both dt. 27.6.2006 by M/s. Kayani Bakery holder of TIN No. 27060005541V.

2. Application dt. by M/s. Chavan Foods holder of TIN No. 27250062327.

3. Application dt: 3.11.2007 by M/s Yaash Bakers, holder of TIN No.27500361968V.

Heard 1. Shri. P.V. Surte, Advocate (on behalf of M/s. Kayani Bakery and M/s. Chavan Foods)

2. Shri.R.P.Mody ,Chartered Accountant (on behalf of M/s Yaash Bakers)

PROCEEDINGS

(U/s. 56 (1)(e) and section 56(2) of the Maharashtra Value Added Tax Act, 2002.)

No. DDQ 11/2006/Adm-3/45-46-87/B- 7

No. DDQ 11/2008/Adm-3/01/B-

Mumbai, Date :- 26.2.2008

A set of four applications has been received seeking determination on a question common to all of them and therefore, the issue is disposed through a common order. The questions posed by the three applicants are as follows :

a) M/s Chavan Foods

- Whether the sale of 'Ice cream' sold through invoice no. 526 dt. 1.9.2006 is liable to tax @4% being covered by schedule entry C-107-(11)(f)?

b)M/s Kayani Bakery

- Whether the sale of 'Cakes' sold through invoice no. 9164 dt. 26.6.2006 is liable to tax @ 4% being covered by schedule entry C-107-(11)(f)?
- Whether the sale of 'Biscuits' sold through invoice no.3923 dt. 26.6.2006 is liable to tax @4% being covered by schedule entry C-107-(11)(f) ?

c)M/s Yaash Bakers

- Whether the sale of 'Cakes' sold through invoice no. 9164 dt. 26.6.2006 is liable to tax @ 4% being covered by schedule entry C-107-(11)(f)?

02. FACTS OF THE CASE

A) Kayani Bakery :-

M/s. Kayani bakery has filed two separate applications for determination of rate of tax, one requesting determination on 'cakes' and the other on 'biscuits.

It is stated that they are manufacturers of Cakes, Biscuits & Bread. They have charged sales tax at 4% on sales of cakes and biscuits under the belief that it is covered by schedule entry 107(11)(f) of Schedule 'C' appended to the Maharashtra Value Added Tax Act, 2002. The aforesaid biscuits are manufactured by the process of baking out of

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ingredients like maida, sugar, butter, baking powder & flavoring essences. It is argued that the biscuits are used as food stuff and on reading the above entry 107(11)(f) of Schedule 'C' appended to the MVAT Act, 2002, it is amply clear that any food article which is consumed as 'food stuff' are covered by the scope of this entry. It is further argued by the applicant that the terms "food stuff & food provisions" are not defined under the MVAT Act and hence the common parlance test may be applied. It is stated by him that in common parlance "food stuff" is something that is eaten and that the term "food" would, no doubt, in its wider meaning include every article of food which is cooked by the application of heat. Therefore, any item of food prepared by heating would be "food stuff".

It is submitted by the applicant that there is no dispute with regard to the rate of tax applicable to the sale of 'Bread' which is covered by Entry 7 of Schedule A. The dispute pertains to the classification of Biscuits and Cakes for which there is no specific entry as in the past.

It is argued by the applicant that the rule of construction says that if there is no specific entry, then the goods will be covered by the residuary entry. Under the MVAT Act, 2002, Entry 1 of Schedule E is the residuary entry which refers to all goods not covered by any of the other schedules and such goods will attract tax at 12.5%. It is further argued by the applicant that, before invoking the provisions of the residuary entry, it is absolutely necessary to find out whether the disputed goods are covered by any of the entries in Schedule A to D appended to the MVAT Act, 2002 and the Supreme Court while deciding the Civil Appeals filed by Commissioner of Central Excise, V/s. Simplex Mills Co. Ltd. **140 STC 125 (SC)** observed that Tariff Heading No. 59.09 is the residuary heading to cover all the enumerated goods, provided, they do not fall in any other heading of section XI. It is argued by the applicant that by applying the aforesaid test, it is found that Biscuits and Cakes are covered by Entry 107(11)(f) of the MVAT Act, 2002 and will attract tax 4%.

It is submitted by the applicant that they manufacture biscuits and cakes for sale and do not serve them for consumption. It is also submitted by the applicant that the 'Biscuits' and the 'cakes' manufactured by them are not ready to serve foods. It is further

stated that what is ready to serve food has been dealt with in the case of Alibaba Restaurant in a case decided under section 52 of the Bombay Sales Tax Act, 1959, by the Commissioner of Sales Tax, on 9th November, 1984. Thereafter, the law was amended so as to exclude ready to serve food and it was subjected to tax under section 8A at the last stage. They have argued that ready to serve food is necessarily cooked food served at the time of break fast, lunch or dinner and in that sense of the term and biscuits and cakes are not regarded as ready to serve foods. In the period, 'Biscuits and cakes' continued to be classified separately as shown below:

C-II-35(1)	Sweets and sweetmeats including Shrikhand, Basundi and Dudhpak, Cakes, Pastries, Biscuits and other confectioneries.	01-07-1981 To 30.09.1995
C-II-9	Bakery products including cakes, pastries, biscuits but excluding those covered by any other entry of this schedule.	01-10-1995 To 31.03.2005

After introduction of MVAT Act, 2002, there is no separate entry for the Bakery products including cakes, pastries and biscuits and therefore, a question arises as to whether these goods are covered by any other entry. It is submitted by the applicant that entry 107(11)(f) covers 'Biscuits and cakes' which have been excluded from entry 94(a) of Schedule C .It is submitted, that 'Biscuits and Cakes' are squarely covered by the expression 'Food Stuffs'. The applicant has made reference to the decision from West Bengal in the case of Diamond Biscuit Company V/s. State of West Bengal 6 STC 110 wherein it was observed that biscuits are a kind of food as they are cooked in an oven through application of heat. The applicant has cited the case of State of Gujarat v/s. Gokaldas Trading Company, 82 STC 248 (Guj) in which it was held that **“Food”** means something that can be eaten or offered to a hungry person. If an article is normally eaten or it can be offered as food to a normal person who is hungry then, it can be regarded as 'food stuff or food provision'. Also, decision of the Gujarat High Court in the case of State of Gujarat V/s. Sarabhai Chemicals reported in 27 STC 170 (Guj) is cited. The High Court was concerned with the expression 'food stuffs and food provisions of all kinds'

appearing in entry 6 of Schedule E of the Bombay Sales Tax Act, 1959. The Court referred to the Webster's dictionary in order to find out the dictionary meaning of the expression "Food and Food Stuffs" and finally concluded that the manner in which an article is known by those associated with it, is important in deciding the issue. It is argued that meaning in common parlance was referred to by relying upon two decisions of the Supreme Court in the case of Ramavatar Budhaiprasad v/s. Assistant Sales Tax Officer, Akola, reported in 12 STC 286 (SC) and the Commissioner of Sales Tax V/s. Jaswantsingh Charan Singh 19 STC 469 (SC). It was observed that sales tax statute, being one levying a tax on goods, must in the absence of a technical term, be presumed to have used the term according to meaning ascribed to it in common parlance.

Reference is also made to the judgment of the Supreme Court in the case of State of Bombay V/s. Virkumar G. Shah reported in AIR 1952 SC 335. The question before the Supreme Court was whether turmeric was food stuff. The Court observed that the term food stuff is ambiguous. In one sense it has a narrow meaning and is limited to articles which are eaten as food for purpose of nutrition and nourishment. In a wider sense, it includes everything that goes into the preparation of food proper. Therefore, an article which is eaten as food for the purpose of nutrition would be "Food Stuff". Those articles which are eaten at the table would be covered by the expression 'food stuff and food provisions'.

The applicant has argued that though 'biscuits and cakes' are bakery products they are also 'food stuffs' within the meaning of entry 107(11)(f) which does not specifically exclude biscuits and cakes. Under the circumstances, sales of biscuits and cakes are liable to tax at the rate of 4% being goods covered by entry 107(11)(f) of the MVAT Act, 2002. It is accordingly prayed that suitable order may be passed on the applications.

The applicant has stated that the DDQ in the case of Parampara (No.DDQ-11-2005/Adm-5/76/B- 3 dt. 31/05/2007) has no application and also, DDQ in the case of Monginis Foods Pvt. Ltd and M/s Delicia (No-DDQ-11-2007/Adm-2/25/B- 1 and No-DDQ-11-2007/Adm-2/26/B- 1 dt 6.11.07)dt. 6.11.2007 is not applicable. In the latter case it was held that Cakes, Pastries and snacks are ready to serve food & therefore, they are excluded from C-107(11)(f). It is further stated that there are two exclusion clauses in the

entry. The applicant has argued that this is not correct as only ready to serve food has been excluded. There is no reference to "Food ready to eat". Food Stuffs are goods ready for sell and not ready to serve.

Reference has also been made to DDQ in the case of Shri Krishna Food Industries (No-DDQ-11/2007/Adm-5/2-3/B-5 dt.30.11.07) wherein 'mutter karanji' was claimed as 'farsan' covered by C-94. The applicant has argued that they are not concerned with C-94. A reference has been made to determination in the case of Uttara Foods & Feeds P. Ltd. (No-DDQ-11/2007/Adm-5/2-3/B-5 dt.30.11.07). In that case, the issue was whether 'Biscuits' are covered by the expression 'Food Stuff'. It is held that 'Biscuits' are ready to eat products. It is submitted that 'Biscuits' are foodstuff 'ready to sell' and are not 'ready to serve food'.

The applicant has further stated that though entries in the repealed schedule cannot be referred for the purpose of MVAT Act, 2002 and this does not mean that the meaning which was given to various expressions should not be followed. In the alternative, it is prayed that prospective effect may be considered.

B) M/s. Chavan Foods

It is submitted that they are registered dealers under the Maharashtra Value Added Tax Act, 2002 holding TIN No. 27250062327 dated 1.4.2006. They are manufacturer of ice creams. It is informed that they have charged Sales Tax at 4% on sales of Ice cream being covered by Entry No. 107(11)(f) of Schedule "C" appended to Maharashtra Value Added Tax Act, 2002.

The ice cream is manufactured out of Milk, Sugar, Essences, Custard Powder and Dry Fruits etc. The process of manufacturing ice cream is given as under:

'The milk is overboiled for about an hour to reduce the water contents of the Milk. Sugar is then added while the milk is boiling to sweeten the milk. After adding the sugar the mixture is boiled for about ten to fifteen minutes and custard powder is added and the milk is further boiled for ten minutes. The emulsion is then allowed to cool and then it is churned.

Fruits like raspberry, strawberry, mango, pine-apple etc. or essence and

colour are added, and when the whole thing is frozen it is semi-solidified. Then dry and sweetened fruits like Apricot and Pista and Almond Scrappings are sprinkled over the frozen, semi-solidified Ice Cream before it is sold.

It is argued that an identical question arose before the Hon'ble Bombay High Court in the case of Commissioner of Sales Tax Vs. Pure Ice Cream Company 36 STC 18 that the sales of Ice Cream effected by the Respondent at their depots are covered by the said Entry No. 14 of Schedule "A" i.e. cooked food, at the relevant time. It is further added that the Hon'ble High Court has held that the Ice cream sold by the Respondent was "Cooked Food" and accordingly entitled for exemption.

It is informed by the applicant that a letter had been sent by this office dt.14.9.2007 drawing their attention to the order in the case of M/s. Parampara Food Products (No. DDQ-11/2005/Adm-5/76/B-3 dated 31.5.2007) passed by the Commissioner of Sales Tax, and it was further stated that the issue raised in the application is covered by the above determination. In the letter it was informed that the application is liable to be rejected as infructuous as the issue has been already decided. Lastly, the applicant was directed to put forth his contention within 15 days from the date of receipt of the said letter. By a reply dated 24.9.2007, filed on 28.9.2007 the applicant objected to the proposal and he requested for personal hearing. It is submitted by them that their application is not infructuous. It is argued that it is not covered by the determination dated 31.5.2007 in the case of Parampara Food Products, for several reasons. In that case, the said applicant carried on the business of manufacture and sale of spices, whereas they do not deal in spices. Their business is to manufacture and sell ice-cream. In that case, the application was filed on 12.9.2005 and decided on 31.5.2007. It is stated that they had filed the application on 26.10.2006. In that case, their client should have been made a party to the said determination, which was not done. In that case, the goods involved were ready to eat food items whereas in their case the goods involved are ready to sell ice-cream. It is stated that, reliance was placed on Schedule C Entry 91 which pertains to Spices of all varieties, whereas they do not deal in spices. It is further informed that the contention in that case was that they were selling ready to cook, eat and ready to serve food, whereas

their contention is they are selling and dealing in ready to sell food. The applicant argues that the determination order referred to has no application to the facts of their case. It is argued that the provisions of the Act make a clear distinction between food ready to serve and food for sale. What is excluded is food ready to serve by the explanation.

C) YAASH BAKERS

The applicant has requested rate of tax on 'cake and pastries'. The applicant has informed that they have collected tax @ 4% on the sale of cakes.

03. DECISION

The Advocate, representing the applicants in this case, has argued that the impugned products 'cakes', biscuits' and 'ice creams' being 'foodstuffs and food provisions' are covered by the entry.

The issue of classification of cakes and biscuits has been dealt with by me in the determination orders in the case of M/s Monginis Foods Pvt. Ltd and M/s Delicia Foods (No-DDQ-11-2007/Adm-2/25/B- 1 and No-DDQ-11-2007/Adm-2/26/B- 1 dt 6.11.07) wherein it was held by me that 'Cakes ,Pastries and snacks like Paneer rolls, Burgers etc' which are 'ready-to-serve' foods would not come under the said entry as 'ready-to-serve' foods are excluded from it. In the case of M/s Uttara Foods (No-DDQ-11/2007/Adm-5/2-3/B-5 dt.30.11.07) it has been held that 'biscuits' are not covered by schedule entry C-107 (11)(f). The same principles would apply in the present case as the products viz- ice creams, cakes and biscuits are all 'ready-to-serve' foods As the category of 'ready-to-serve' foods' are excluded from the schedule entry, foods which are ready for consumption and which do not need any further processing would not come under the entry.

The claim of the applicant is that the clause 'ready-to-serve' in the entry is to be interpreted as food served for consumption in a hotel, eating house etc. I have already dealt with this line of argument advanced by the applicants in M/s Monginis (cited supra) and M/s Srikrishna and M/s Uttara Foods and Feeds (cited supra). The applicants in the present case are aware of the orders and therefore, there is no need for reiteration. However, the advocate has also put forth certain claims as to how the earlier orders are not applicable to them. These claims shall be addressed later but before coming to them I

shall, in brief delineate at the cost of repetition , why I find the argument that 'ready-to-serve' food implies what the applicants imply it to be, devoid of any potency.

This reasoning is not acceptable in the context of the existing schedule entry. As the entry stands, it comes with two exclusion clauses.

- The first exclusion clause provided in the main entry which excludes 'ready-to-serve' food from it.
- The Explanation provided to the schedule entry which explicitly excludes 'food served for consumption' from the scope of the schedule entry.

The schedule entry for foodstuffs and food provisions under the BST carried only one exclusion through which 'ready-to-serve' food was excluded from the entry. However, under VAT the schedule entry for foodstuffs and food provisions excludes two categories—'ready-to-serve' food and 'food served for consumption.' The Explanation through which 'food served for consumption' is excluded is made applicable to the sub-clauses (a) to (f) of sub-entry (11) of entry C-107 and is very plain in its meaning. The Legislature through the Explanation has excluded all the items specified in the sub-entries if they are served in hotels, eating houses, restaurants and similar entities. This interpretation is unambiguous and there cannot be two opinions about it.

Now, there is also an exclusion to 'ready-to-serve' food provided in the main entry. The Explanation already excludes the items ' food served for consumption in a hotel etc and therefore the only logical construction that can be placed on 'ready-to-serve' food is that it implies food which is 'ready-to-eat'. One of the prime principles of interpretation is that one should give meaning to each and every word in a statute—nothing is redundant in a statute. The two exclusions provided in the entry carry a meaning and a purpose. Both the exclusions i.e exclusion to 'ready to serve food' from the main entry and the exclusion provided in the Explanation render themselves to construction and they imply the following:

Thus,

- The exclusion of 'Ready to serve foods in the main entry' excludes food ready to eat in any place.
- The exclusion of 'Food served for consumption' as given in the explanation excludes food served in a hotels, restaurants, eating houses, refreshment rooms, boarding establishments and other similar entities.

Cakes, Biscuits and Ice creams are food products which are ready for consumption. They are not in raw or unfinished form. The schedule entry C-107(11)(f) specifically excludes the category of 'ready to serve foods' i.e food which is ready-to eat. Here, the allusion to ready-to-serve foods should be construed as food which is ready to eat where nothing more needs to be done to make it ready for the table. Such foods are specifically excluded from the purview of schedule entry C-107(11)(f). Also, the products which are specifically mentioned under the entry are Raw foods, Semi-cooked foods, Semi-processed foods, Ready-to-mix foods and Ready-to cook foods which all belong to the specific category of 'foods which are not ready-to-eat'. The products sold by the applicant are Cakes, Biscuits and Ice creams. They are ready to eat products. They are not 'raw, semi-processed, semi-cooked, ready-to-mix or ready-to-cook foods'. It is a 'ready-to-serve food' and therefore, it would not come under the schedule entry C-107(11)(f).

The Advocate has argued that the expression 'ready-to-serve' in the entry necessarily refers to 'food served in a hotel.'" However, it has already been enunciated earlier that the Explanation excludes food served in a hotel, restaurant and similar entities. The exclusion to 'ready-to-serve' food in the main entry excludes 'ready-to-eat' food. There is no distinction between ready-to-eat foods and ready-to-serve foods. Food is not necessarily served only in a hotel. Food is also 'served' in a home. The word 'serve' means to 'set food before'. The food can be set before a person in a home as well as in a hotel.

Thus, the expression 'ready -to serve 'foods implies 'ready-to-eat' foods. The food served in the hotel is excluded from the schedule entry through the Explanation provided to the schedule entry . Both the exclusions i.e exclusion to 'ready to serve food' from the main entry and the exclusion provided in the Explanation render themselves to construction and are to be construed as follows :

Thus,

- The exclusion of 'Ready to serve foods in the main entry' excludes food ready to eat in any place.
- The exclusion of 'Food served for consumption' as given in the explanation excludes food served in hotels, restaurants, eating houses, refreshment rooms, boarding establishments and other similar entities.

I shall now deal with the contentions of the applicant as to how the determination order in the case of M/s Parampara (cited supra), M/s Monginis (cited supra) and M/s Uttara Foods are not applicable to the present case.

- The applicant has argued that in common parlance the impugned products are perceived as food and therefore they fall under schedule entry C-107(11)(f). It is necessary to point out that the products being 'ready-to-serve' fall out of the ambit of C-107(11)(f). The test of common parlance is of little relevance when the meaning conveyed by the schedule entry is plain and simple.
- The applicant has argued that recourse to the residual entry be taken only when the possibility of classification in the other entries is ruled out. However, I fail to find any specific entry which might cover the products. The entry which comes closest is schedule entry C-107(11)(f) which excludes 'ready-to-serve' food. And the products of the applicant being 'ready-to-serve' are excluded. Therefore, the products, in absence of a specific entry, are classified under the residual entry.
- The argument of the applicant is that the cakes, biscuits and ice creams are ready-to-sale and not ready-to-serve products. I have dealt with this aspect in the earlier orders.' The exclusion to 'ready-to-serve' food in the main entry excludes 'ready-to-eat' food. There is no distinction between ready-to-eat foods and ready-to-serve foods. Food is not necessarily served only in a hotel. Food is also 'served' in a home. The word 'serve' means to 'set food before'. The food can be set before a person in a home as well as in a hotel. The association of only an 'hotel' with the word 'serve' is limiting and erroneous.

- The applicant has pointed out that the DDQ in the determination order in the case of M/s Parampara (cited supra) does not apply to his case as the former had to deal with the classification of 'spices' whereas the issue in the present case is of 'biscuits' and 'cakes'. This argument is untenable as determination order is more about the scope of schedule entry C-107(11)(f) rather than the specific nature of the goods. Also, the DDQ in M/s Parampara was about 'ready-to-serve' foods like 'Chana Masala' and not about spices. The common thread that runs through both the issues is that 'biscuits', cakes, ice-creams and 'Chana masala' -one of the products in Parampara- were all 'ready-to-serve food' and therefore, the conclusion arrived at in M/s Parampara becomes applicable.

The dispute about the classification under C-107(11)(f) is now laid to rest by the amendment to schedule entry C-107 wef 1.2.2008. The clause (f) to sub-entry (11) in schedule entry C-107 is now deleted through notification no VAT-1507/CR-4/Taxation-1 dt 1.2.2008.

04. PRAYER FOR PROSPECTIVE EFFECT

All the applicants have applied for prospective effect under section 56(2) of the MVAT Act. It is prayed that alternatively, if for any reasons, the Hon. Commissioner comes to the conclusion, that the impugned products are covered by Schedule Entry E-I liable to S.T. at 12.5% then discretion vested by virtue of provisions of section 56(2) may be exercised and prospective effect to the order may be given, so as to protect the liability as they were specifically informed by the Commissioner that, the products are covered by the entry C-107(11)(f) attracting 4% S.T.

I have gone through the written submission of the applicant given in connection to their prayer u/s 56 (2) of the MVAT Act. Under this section, the Commissioner is empowered to protect the liability of the applicant prior to the determination order. This is a discretionary power of the Commissioner to be exercised judicially and from the provisions of section 56(2) of the Maharashtra Value Added Tax Act, 2002, it is clear that, grant of prospective effect to a determination order depends on the facts and circumstances of each case. 'Genuine statutory misguidance' is one of the basis of granting prospective effect. However, there is no statutory misguidance in this case. In fact, M/s Chavan Foods and M/s Yaash bakers were informed about the DDQ passed in C:\Documents and Settings\SALESTAX\Desktop\DDQ-08\Chavan Foods, Kayani Bakery & Yaash Bakers.doc 11

the case of M/s. Parampara Food Products (cited supra) through letter dt 14.9.2007 and letter dt.23.11.2007 respectively. Therefore, the prayer for prospective effect is rejected.

05. In the backdrop of the discussion held herein above, it is hereby ordered that, -

ORDER

(Under section 56(1) (e) and section 56(2) of the Maharashtra Value Added Tax Act, 2002)

No. DDQ 11/2006/Adm-3/45-46-87/B-7

No. DDQ 11/2008/Adm-3/01/B-

Mumbai, dt. 26.2.2008

a) M/s Chavan Foods

- The sale of 'Ice cream' sold through invoice no. 526 dt. 1.9.2006 is liable to tax @ 12.5% being covered by schedule entry E-1.

b)M/s Kayani Bakery

- The sale of 'Cakes' sold through invoice no. 9164 dt. 26.6.2006 and the sale of 'Biscuits' sold through invoice no.3923 dt. 26.6.2006 is liable to tax @ 12.5% being covered by schedule entry E-1.

c)M/s Yaash Bakers

- The sale of 'Cakes' sold through invoice no. 9164 dt. 26.6.2006 is liable to tax @ 12.5% being covered by schedule entry E-1.

2. The prayer for prospective effect made by all the applicants is rejected.

SANJAY BHATIA
Commissioner of Sales Tax,
Maharashtra State, Mumbai.

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