

Read - 1. Application dt. 21.11.2005 by M/s. Mahyco Monsanto BioTech (India) Ltd., holder of B S T No. 400059/S-3973.
2. Written submission made by the applicant dt.11.2.2008.
Heard - Shri. P.V. Surte, Advocate on behalf of M/s. Mahyco Monsanto BioTech (India) Ltd.

PROCEEDINGS

(Section 9 of the Lease Act read with section 52 (1)(e) of the B.S.T. Act, 1959 /read with section 96(1)(a) of the MVAT Act, 2002)

No. DDQ 11/2005/Adm-3/103/ B- 02

Mumbai, Date :-28.4.08

An application has been submitted by the applicant holding certificate of registration under the Bombay Sales Tax Act, 1959 bearing No. 400059/S-3973 and under the Central Sales Tax Act 1956, bearing No. 400059/C-3615, and bearing address - Ahura Centre, 5th floor, 96, Mahakali Caves Road, Andheri (East), Mumbai-400 093, posing the following question for determination :-

1. Whether the sub-license of Monsanto Technology vide agreement dated 26th April 2002 amounts to 'sale' under section 2(10) of the Maharashtra Lease Tax Act, 1985?
2. If the transaction vide agreement dated 26th April 2002 amounts to a 'sale' under the Maharashtra Lease Tax Act, 1985, whether the same is covered under any of the entries in the Schedule to the Maharashtra Lease Tax Act, 1985?
3. Whether the applicant is liable for registration under the Maharashtra Lease Tax Act, 1985.

02. FACTS OF THE CASE

The applicant is engaged in the business of growing hybrid variety of crop seeds and undertaking research and development in relation to the same. The applicant has the license to test, produce, and sell insect Tolerant Cotton Planting Seed in India using technology developed by Monsanto Company, USA (called "Monsanto Technology"). The applicant has the further right to sub-license the Technology to users / producers in India.

It is stated that Monsanto Technology' means the cumulative information, data, know-how and technology of Maonsanto which is an Insect Resistance Technology. The applicant through Agreement dated 26.4.2002 executed at Mumbai has sub-licensed 'Monsanto Technology' to M/s. Ajeet Seeds Ltd. 2nd Floor, Tapadia Terraces, Adalat Road, Aurangabad 431 001. Under this Agreement, Ajeet Seeds Ltd. ('Ajeet') has been granted a non-exclusive, non-transferable sub-license to use Monsanto Technology to test, produce and sell Genetically Modified Cotton Planting Seeds in India. Genetically Modified Hybrid Cotton Planting Seed means Hybrid Cotton Planting Seed which is genetically modified using Monsanto Technology to exhibit insect Tolerance.

In term of the above agreement, the applicant has received payments of the following amounts towards the sub-license of the 'Monsanto Technology'.

Sr. No.	Period	Date	Amount in Rs.
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1	Initial Fee	26.04.2002	25,00,000
2	Initial Fee	06.01.2003	10,00,000
3	Initial Fee	03.02.2003	5,00,000
4	Initial Fee	07.02.2003	7,37,500
5	Initial Fee	07.02.2003	2,62,500
	Total		50,00,000

The applicant has stated that it is their understanding that they are not liable to pay tax under the provisions of the Maharashtra Lease Tax Act, 1985 upto 31.3.2005 and under the Maharashtra Value Added Tax Act, 2002 from 1.4.2005, on the above Sub-license Agreement as 'Monsanto Technology' being 'technical know-how' is not covered by any of the entries under the Schedule to the Maharashtra Lease Tax Act, 1985.

It is further stated by them that the Monsanto Technology sub-licensed under the Agreement being 'technical know-how' is a good of incorporeal or intangible character. 'Goods of incorporeal or intangible character' are covered under entry 21 of the Schedule to the Maharashtra Lease Tax Act, 1985. Entry 21 reads as follows.

.'''The transfer of the right to use the goods of incorporeal or intangible character, that is to say -

1. Patents
2. Trademarks
3. Import Licenses
4. Copyrights as described in section 14 of the Copy Rights Act, 1957 (14 of 1957) (w.e.f. 1.5.2001)
5. Designs, registered under the Designs Act, 1911 (2 of 1911) (w.e.f. 1.5.2001)

It is contended that the entry 21 of the Schedule does not simply enumerate the items specified therein. It covers the genus 'goods of incorporeal or intangible character' and refers to the items as forming species of the genus. Therefore, though goods of incorporeal or intangible character are covered under Entry 21, the taxability is restricted to those incorporeal or intangible goods which are specified. It is stated by them that this is evident from the use of the words 'that is to say' in which circumstances the field of operation of the entry is limited and restricts the same to the items enumerated therein.

04. JUDGEMENTS

The applicant has referred to the following judgements in support of his contentions:

- (i) In State of Madras vs. Pyare Lal Malhotra (1976 - 37 STC 319), the Supreme Court was concerned with interpretation of item (iv) of section 14 of the Central Sales Tax Act, 1956, which starts with (iv) iron and steel, that is to say'

is to say', the Supreme Court extracted a paragraph from Stroud's Judicial Dictionary (4th Edn., Vol.5 at page 2753) and observed that the expression 'that is to say' is employed to make clear and fix the meaning of what is to be explained or defined. Such words are not used, as a rule, to amplify a meaning while removing a possible doubt for which purpose the word 'includes' is generally employed. In unusual cases, depending upon the context of the words 'that is to say' this expression may be followed by illustrative instances.

(ii) In *Sait Rikhaji Furtarmal vs. State of Andhra Pradesh* (1992 - 85 STC 1) the Supreme Court was concerned to decide the scope of item (vi) of section 14 of the Central Sales Tax Act, 1956 as in force since 1.4.1973, which covered 'oilseeds', that is to say, - (i) Groundnut or Peanut, etc. "-The Supreme Court held that the description of the entry was exhaustive and hence jeera, methi, ajwain, saunf and cardamom were not oilseeds falling within the scope of this entry.

It is therefore contended by the applicant that though entry 21 covers goods of incorporeal or intangible character, as is evident from the construction of the entry, the use of the phrase 'that is to say' restricts the scope of taxation only to those enumerated therein. It is informed that Entry 22 was inserted in the Schedule to the Maharashtra Lease Tax Act, 1985 with effect from 1.5.2001. The said entry reads as follows.

"22. All goods other than those covered by any entry of this Schedule and goods covered by Schedule A, appended to the Bombay Sales Tax Act, 1959 and goods fully exempted from payment of tax under section 41 of the Bombay Sales Tax Act, 1959."

It is contended that Entry 22 is in the nature of a residuary entry to cover goods not covered in the preceding entries of the Schedule. Since, the genus 'goods of incorporeal or intangible character' already having been covered under entry 21, rest of such types of goods of incorporeal or intangible nature would be excluded from entry 22. It is stated that 'Goods of incorporeal or intangible character' have always been treated as a separate class of goods under the sales tax and allied laws in Maharashtra. It is stated by the applicant that it has always been the intention of the State Legislature to tax only those intangible or incorporeal goods which are specified in the Schedules, while not levying tax on other goods of such nature. The applicant has stated that for the purpose, reference may be made to the introduction of tax on goods of incorporeal or intangible character under the Bombay Sales Tax Act, 1959 in 1988. Entry 36 in Part I of Schedule C was inserted on 17.3.1988. The Statement of objects and Reasons to the Bill stated:

"Some of these amendments propose levy of increase mainly with a view to augment the revenue of the State and to which reference has been made in the Finance Minister's speech and budget proposals."

The applicant has stated that if the goods of incorporeal or intangible character were already covered by the residuary entry 102 in Schedule C II attracting tax at 10 per cent, levy of tax at 4 per cent of Patents, Trademarks and Import Licenses, covered by

entry 36 would amount to reduction in the revenue of the State and not increase in the revenue. It is further stated that the aforesaid statement would indicate that the Patents, Trademarks and Import Licenses were not considered to be exigible to tax under the Bombay Act which has been in force since 1.1.1960. It is further stated that the levy of tax thereon at 4 per cent was intended to bring increase in the revenue of the State.

It is further stated that Notification entry 252 inserted on 26.3.1988 exempted sales or purchases upto 17th March, 1988, of goods of incorporeal or intangible character, that is to say, (a) Patents (b) Trademarks and (c) Import Licenses. It is stated that if goods of incorporeal or intangible character other than these three types were considered to be covered by the residuary entry 102 of Schedule C II, insertion of the said entry 252 would mean that all other types of such goods were intended to be taxed at 10 per cent since 1.7.1981 and before that date at the aggregate rate of 8 per cent during 15.4.1974 till 30.6.1981, at 6 per cent during 1.1.1966 till 14.4.1974 and at 5 per cent during 31.12.1965 under entry 22 in Schedule E to the Bombay Act which the schedule along with other Schedules A, B, C and D was in force since 1.1.1960.

The applicant has also drawn attention to the judgement in M/s Bharat Forge and Press Industries (P) Ltd vs. Collector of Central Excise (1990) (45) E.L.T. 525 (S.C) wherein the criteria for classification of goods under residuary entry was brought under consideration. In this regard, the Supreme Court held that it was settled that only such goods which cannot be brought under the various specific entries in the tariff should be attempted to be brought under the residuary entry. In other words, unless the department can establish that the goods in question can by no conceivable process of reasoning be brought under any of the tariff items, resort cannot be had to the residuary item.

In the case of Superintendent of Central Excise and Others vs. Vac Met Corpn.(1985) (22) E.L.T. 330 S.C.), the principle of classification of goods was under consideration. The Supreme Court held that Specific Tariff entry would have precedence over a General Tariff entry. Accordingly, when an article falls within a specific entry such goods must necessarily be excluded from the general entry.

05. DOCUMENTS ATTACHED

For the purpose of this determination, the following are **enclosed**:

- (a) Copy of Agreement dated 26.4.2002 with Ajeet Seeds Ltd.
- (b) Copy of challan for Rs. 100/- towards application fees.

06. HEARING

The case was fixed for hearing on 15/1/2008. Shri P.V. Surte, Advocate, attended for the hearing. He stated that the applicant, Mahyco Monsanto is in the business of trading in Hybrid Crop Seeds. The company has got a license from Monsanto USA to sell the Hybrid Crop Seed technology which they have licensed to M/s Ajeet Seeds through agreement dt.26/4/2002. The consideration received by him is Rs.50,00,000/-. As per their contention, 'Technical Know How' is not taxed under the Lease Act. Although technical know how is included in the entry for 'goods of intangible nature' under the BST Act they have not been included in the corresponding list under the Lease Act. They also argued that this did not imply that the product would be taxable under residuary entry. The list of intangible goods is already given in schedule entry 21 of the Lease Act. Entry 22 which is the residuary entry in the Lease Act covers only

tangible goods and therefore, 'technical knowhow' not specified in any of the entry would be exempted from tax. The applicant has also made a plea for prospective effect. It is also stated by them that they do not wish to press the other questions posed by them in the application. The only question that remains now is the rate of tax on the lease of technical know how.

During the hearing, a further clarification was sought from the applicant on the term 'Monsanto Technology' and the way in which this technology is transferred to licenses. The applicant gave a written submission in which the following is submitted :

- The applicant i.e. "Mahyco Monsanto BioTech (India) Limited" is a joint venture between Monsanto Holdings Pvt. Ltd and Mahyco Seeds Ltd. The joint venture endeavors to jointly develop and commercialize Insect Resistant Hybrid Cotton Planting Seeds, etc. in India.
- The applicant has been granted the license to use Monsanto Technology i.e. technical know-how by Monsanto USA through Monsanto Holdings Pvt. Ltd. The said technology is further sub-licensed to other sub-licensees like Ajeet Seeds Ltd on a nonexclusive nontransferable basis to use the technology to test, produce and sell Genetically Modified Hybrid Cotton Planting Seeds. The definition of "Monsanto technology" and other related terms in the sub-license agreement is provided in Annexure.
- The technology is granted in form of donor seeds to the sub-licensees which are then backcrossed with their germplasm for development of a new hybrid cotton seed with Bt. Gene for commercial use. Such seed is then multiplied and sold by sub-licensees to the farmers for sowing.
- In simple terms, the technical know-how is nothing but the insect resistant technology through the medium of seeds licensed by applicant. The technical know-how is further used by the sub licensee to develop commercial seeds for cultivation. The technical know-how is only sublicensed i.e. the sub-licensee is only allowed to use the technical know-how for a particular period, the proprietary rights to the technical know-how always remains with Monsanto.
- For sublicensing the said technology, the applicant receives a fixed fee plus a running royalty based on number of Bt. Cotton hybrid seed packets sold.

07. DECISION

I have gone through the facts of the case and also the submissions made by the applicant. The applicant had posed three questions in the written application. However, the applicant during the course of hearing, submitted that they only want determination on the rate of tax of 'technical know-how' and they wish to withdraw the other two queries. As to the rate of tax, it is the submission of the applicant that only those goods of intangible and incorporeal nature that are defined under entry 21 of the Maharashtra Transfer of Right To Use Any Goods for Any Purpose Act (hereinafter referred to as the Lease Act) would be taxable @ 4%. The other goods of intangible and incorporeal nature that are not defined and not mentioned in entry 21 are tax free or exempted from tax.

It is seen from the agreement between M/s Mahyco Monsanto and M/s Ajeet seeds that Monsanto Technology has got a license from Monsanto Technology USA to sub license technical know how. The technical know how sublicensed by M/s Mahyco

Monsanto to M/s Ajeet Seeds gives a right on a nonexclusive and non transferable basis to use the technology to test, produce and sell technically modified Hybrid Cotton Planting Seed. This technology is granted in the form of donor seeds to Ajeet Seeds which are then backcrossed for development of new Hybrid Seeds. After the single seed is developed it is multiplied and sold to sub-licensee. In simple terms, the technology is nothing but insect resistance technology. I have also seen that the applicant has received a fixed fee and running royalty based on the number of Hybrid Seeds packed and sold. The applicant has stated that this is a lease of technology by Monsanto (I) to Ajeet Seeds.

The contention of the applicant is regarding the taxability of the transaction and it is their opinion that the technical know how is not being specified in any of the entries of the Lease Act and therefore it should be exempted from tax. The schedule entry under consideration under the Lease Act is as follows:

Entry-21	<i>The transfer of the right to use the goods of incorporeal or intangible character, that is to say-</i> <i>(a) Patents</i> <i>(b) Trade Marks</i> <i>(c) Import licences</i> <i>(d) Copyrights as described in section 14 of the Copy Rights Act, 1957 (14 of 1957)</i> <i>(e) Designs, registered under the Designs Act, 1911 (2 of 1911).</i>
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Entry 21 of the Lease Act covers the lease of goods which are incorporeal or intangible in nature. Although the entry taxes incorporeal goods like 'patents' trademarks, 'import licenses' etc it does not specify 'technical know-how in it. The applicant has seized the omission to prove that unspecified goods of incorporeal nature would be exempted from tax. In order to understand the issue involved in this case, it will be necessary to have a look at the legislative history of the taxation of 'intangible or incorporeal goods' which is an interesting study in itself.

Intangible or incorporeal goods were not taxed under the BST Act up to 17/3/1988. In the light of the Supreme Court's decisions in the case of H. Anraj vs. Government of Tamilnadu (61 STC 165) the goods were taxed for the first time and incorporated in a new entry 36 in part 1 of Schedule-C and the tax rate in respect of which is 4%. The taxation was important enough to merit a trade circular which was issued by the Commissioner of Sales Tax (No.AMD-1088/9/Adm-3/Cir.No.6 of 1988) in which the introduction of the schedule entry for goods intangible and incorporeal nature is explained in the following terms:-

'....In the context of these amendments to the schedules, special mention has to be made in respect of levy of tax on goods of incorporeal or intangible character that is to say, patents, trademarks and import licences. Such goods are being taxed for the first time in the light of the Supreme Court's decision (61 STC 165) in the case of H. Anraj V/s. Government of Tamilnadu and Shri Dipak Dhar & others v/s the State of West Bengal, in which it is stated that beneficial rights in moveable property are goods on which sales tax can be constitutionally levied.

Accordingly, sale of beneficial interest in property of intangible or incorporeal nature (like patents, trademarks, import licences, lottery-tickets etc.) is a sale of moveable property exigible to sales tax. *Implications of this judgment was that all such goods fell in the residuary entry C-II-102 liable to tax @ 10%**. By the said amendment, the said goods are taken out of the residuary entry C-II-102 with effect from 17/3/1988 and are incorporated in a new entry 36 in Part-I of schedule C, the tax rate in respect of which is 4%. The scope of the term "Goods of incorporeal or intangible character" has been restricted to patents, trademarks and import licences. Accordingly, sales or purchases of patents trademarks or import licences would attract tax @ 4% with effect from 17/3/1988 (5.00 P.M.). (*Emphasis added)

It is clearly explained by the Commissioner in the aforesaid Circular that the implication of the judgment in the case of H. Anraj was such that all goods of intangible and incorporeal nature fell in the residuary entry C-II-102 liable to tax @ 10%. What the said amendment had done was to take out the goods of intangible character from the orphanage of the residuary entry and put them in a specific entry wherein they were taxed @ 4%.

The question now arose as to the tax liability of such i.e. all goods of intangible or incorporeal nature up to 17/3/1988 i.e. up to the date on which the specific entry C-I-36 was brought in the statute. Therefore, Government by issuing Government Notification No.STA-1088/60/Taxation-2 dt.26/4/1988 granted full tax exemption on such sales or purchases. It was clarified in the Circular issued later (Circular No.12 of 1988 dt.30/3/1988) that *no tax is payable on sales or purchases of any goods of incorporeal or intangible character effected up to 17/3/1988*. What is implied in the aforesaid amendment as also the clarification issued by the Commissioner of Sales Tax is that up to 17/3/1988 no goods of intangible or incorporeal character would fall under residuary entry C-II-102. In other words, they would have been taxed @ 10% up to 17/3/1988 if the notification entry had not been brought to protect them from the vigor of the residuary entry.

All goods of intangible character including Patent, Trademark, Import Licence were protected from tax up to 17.3.88. From 17.3.88, Patents, Trademarks and Import Licences attracted tax @ 4% as they were incorporated in schedule entry C-I-36. Now the question arose as to the taxability of other goods of intangible character which were not covered or specified in schedule entry C-I-36. If the applicant's contention that incorporeal goods not covered specifically under the category of intangible or incorporeal character would be eligible for exemption is accepted, then this would imply that under the BST Act, goods of incorporeal character other than patents, trademark and import licences (which are specified in C-I-36) were also understood to be exempted. Was this the state of affairs? If yes, then I am inclined to accept the contention of the applicant. However, such is not the case.

It is worthy to see that Notification Entry A-89 was brought in the statute by GNFD No.STA-1098/CR/46/Taxation-2,dt.29/4/1998 w.e.f.1/5/1998 and the notification is reproduced as follows.

A-89	<i>Sales or purchases made by the registered dealer on or after 17/3/1988 of goods of incorporeal or intangible character which are not covered by schedule C-I of the Act at the time of said sale or as the case may be, purchases</i>
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This notification entry was amended by notification dt.10/5/2001 and the words 'Registered Dealer' were deleted from it. The notification entry exempted the sale of those goods of intangible character after 17.3.88 which were not specified under schedule entry C-I-36. The Legislature felt the need of doing so owing to the fact that if the notification entry had not been brought, the unspecified goods of incorporeal or intangible character like copy right, designs, technical know how would have been relegated to the residual entry. In order to save these unspecified goods from being taxed under the residuary entry they were given the benefit of exemption through the notification. The claim made by the applicant fails to explain the *raison d'être* of notification entry 'A-89'.

After 1/5/1998 a number of products of incorporeal and intangible nature like technical know how, goodwill were brought in the schedule under the BST Act in the schedule entry C-I-26(the new form of the old entry C-I-36). Subsequently, the notification entry 'A-89' was converted into schedule entry A-47 which is as follows:

A-47	<i>goods of incorporeal or intangible character other than those specified in schedule C.</i>	<i>1/5/1998 to date.</i>
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This puts beyond doubt what I have been arguing in the preceding paragraphs. The goods of incorporeal or intangible character which are not specified in schedule C are exempted from tax through 'A-47' simply because they would have been covered by the residual entry, had it not been for the notification entry A-89 or schedule entry A-47. The legislative intention to bring the entries was to nullify the possibility of the unspecified products being covered by the residual entry. If the legislature had contemplated on similar lines as like the applicant, then there was surely no need to introduce either A-89 or A-48. This is clear.

Now we shall turn to the entries under the Lease Act. Under the Lease Act, entry 21 which is very similar to the entry under the BST Act (old entry C-I-36), goods of incorporeal or intangible character like patent, trademark and import licence were brought in the schedule from 1/5/2000. Copy rights and designs were also introduced in the entry from 1/5/2000. The argument of the applicant' is that technical know how not being specified in the schedule entry under the Lease Act is exempted from tax. This argument is unacceptable as the history of the entry shows in the clear terms. Under the BST Act, unspecified goods of intangible character were given the protection of notification entry because if that was done they would have fallen under the residuary entry. The legal maxim '**Contemporanea expositio est optima et fortissima in lege**' is well known-A contemporaneous exposition is the best and most powerful in law. The contemporaneous exposition was that goods of intangible or incorporeal character not specified in the entry would come under the residual entry and in order to preempt such a situation such goods were notified as exempted up to the time they were

included in the specific entry under the BST Act. However, no such protection is granted under the Lease Act to unspecified incorporeal goods. Therefore they fall under residuary entry E-22. There is no notification entry under Lease to save them from such a fate.

The applicant has relied upon the words 'that is to say' in the entry 21 to prove that the entry is limited. I agree with the applicant when he says that the words 'that is to say' limit the scope of the entry. When the words 'that is to say' are used after the words 'goods of incorporeal or intangible character', it entails that only the products specified would be covered by it. In other words, the unspecified products though in existence, are not placed under the umbrella of a specific entry. It certainly does not mean that such goods have not taken birth because they are not recognized through a schedule entry. Unspecified goods like goodwill, copyright were brought in the BST Act much later and it would be too far-fetched to assume that they were not in existence before they were brought in the entry.

I would like to quote some decisions in this regard. In the case of Commissioner of Sales Tax Vs. India Tube Mill and Metal Industries (34 MTJ 151) the issue was whether duty free advance licenses would be covered by schedule entry C-I-36 in the year 1993-94. The only goods of intangible character then covered by the said schedule entry C-I-36 were patent, trademark and import licence. Therefore, the question arose as to under what rate should DFA Licence be taxed? The Tribunal had made the following observations:-

"It can thus be seen that during the relevant period only three items were specified to be goods of incorporeal or intangible character in the said schedule entry C-I-36 and were liable to tax @ 4%. **All other goods of intangible or incorporeal character were not specified in any of the schedule entry appended to the Bombay Act and therefore they would befall under the residuary entry C-II-102 and hence were exempt from tax under the notification entry A-89 under section 41**".

This was a reference application against the judgment in which it was observed by the MSTT that the DFA licence are not specified in the schedule entry C-I-36 and therefore they are covered by residuary entry C-II-102 and hence exempted from tax under notification entry A-89. Thus it is clear from the observations of the MSTT that incorporeal goods not specified in the entry fell under the residuary entry and were not exempted by any chances.

The MSTT in the case of Aplab Ltd. (S.A. No.1757 to 1760 of 2000, decided on 26/7/2002) has expressed a similar opinion. The issue in this case was the taxability of software. It was contended by the applicant in that case that, software would be covered by entry A-89 therefore no tax is payable on the sales of software. The department had taxed software @ 10%. The Tribunal made the following observations:-

It is a settled issue that the goods of incorporeal and intangible character are goods and legislature is competent to levy the tax on the sales turnover of these goods. **The specific entry for the software package were specifically introduced under sub entry 5 of entry 26 of Schedule 'C-I' w.e.f. 1/10/1995. Prior to that, there was no specific entry**

for the software package and thus in relation to the period before us it was covered by C-II-102, a residuary entry and liable for tax @ 10%.

This also clarifies that intangible goods not specified in entry C-I-36 (before 1/10/1995 in entry C-I-26, after 1-10-1995 would be covered by residuary entry) It is only because of the notification exempting them that they are not taxable under the residuary entry. I also quote another judgment in this case Bhagwati Exports Pvt. Ltd. (24 MTJ 658). In this case the issue was regarding the rate of tax to be levied on export quota. The assessing authority had levied tax on the sale of export quota for the year 1989-90. It was held by him that export quota being not specified in schedule entry C-I-36 would be covered by the residuary entry C-II-102. The Tribunal has made the following observations:-

“In the present proceedings the only claim made before us is regarding the sale of export quota being exempted from tax under notification entry 'A-89'. Therefore the limited issue before us is regarding whether the applicant would be legally entitled for exemption under notification entry A-89 in respect of the sales of export quota effected by the applicant in the financial year 1989-90 & 1990-91. It is very clear that the export quota is legally covered by residuary entry C-II-102 since it is not been specifically mentioned in entry C-I-36. In these circumstances, since the sales of export quota are the sale of goods on incorporeal or intangible character not covered by C-I and since they are effected after 17/3/1988 they are eligible for exemption under 'A-89'."

It is clear from the aforesaid judgment that the goods not specified under the schedule entry fell under residuary entry. It is not disputed that the sale of technology is a sale of 'technical know how' under the Lease Act. Under the Lease Act, 'technical know how' is not covered under the schedule entry covering 'goods of incorporeal and intangible character'. Therefore, following the view held by the department as reflected in the Circular and as already interpreted by the Tribunal in various cases shown above, such goods fall under the residuary entry. This has been a popular and widely held view. Following the same course of logic under the Lease Act, the intangible or incorporeal goods not specified in the schedule entry would fall under the residuary entry. There is no notification entry in the Lease Act exempting technical know how from being taxed. Therefore, it would fall under residuary entry 'E-22'. The residuary entry under the Lease Act is reproduced as follows:

Entry-22	<i>All goods other than those covered by any other entry of this Schedule and goods covered by Schedule A, appended to the Bombay Sales Tax Act, 1959 and the goods fully exempted from payment of tax under section 41 of the Bombay sales Tax Act, 1959.</i>
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It covers all goods other than:

- (a) Those covered by any other entry of this schedule.
- (b) Goods covered by schedule-A of the BST Act.
- (c) Goods fully exempted from payment of tax U/s.41.

Technical know how is not covered by any other entry of this schedule. It is not covered by the Schedule-A of the BST Act as it is covered by C-I-26. It does not fall under the notification entry appended to the BST Act. It therefore would be covered by schedule entry 22 and is taxable @ 4% under the Lease Act.

08. LIABILITY UNDER THE MVAT ACT

The applicant had argued that he is not liable under the MVAT Act, 2002 as the proviso to sub-section (1) to section 96 of the MVAT Act says that the liability under the MVAT Act should not exceed the liability under the erstwhile lease act. The section is reproduced below:

(f) Where any dealer liable to pay tax under the Bombay Sales Tax Act, 1959 (Bom. LI of 1959), or, as the case may be, under the Maharashtra Sales Tax on the Transfer of the Right to use any Goods for any purpose Act, 1985 (Mah. XVIII of 1985), has at any time before the appointed day effected any sale by delivery of goods on the hire purchase or any system of payment by instalments or, as the case may be, by transfer of the right to use any goods for any purpose (whether or not for a specified period) and any amount of sale price in respect of the full tax pertaining to such delivery or transfer has been admitted or paid before the appointed day, the said amounts shall be shown by the said dealer in the appropriate returns to be filed under this Act and the [tax due on such amounts at the rates applicable under this Act] shall be paid accordingly and all the provisions of this Act shall apply to the said dealer, delivery or transfer and the said amounts, accordingly, notwithstanding that the delivery or transfer has taken place before the appointed day;

Provided that, the liability of the said dealer to pay tax under this Act, in respect of the sale price due and payable after the appointed day, shall not exceed the liability which would have accrued under the repealed Acts, if they had continued to be in force;

The limitation provided by the section would have been applicable had it been held that the applicant is not liable to pay any tax under the Lease Act. The liability of the applicant under the lease act is 4% and the liability under the MVAT is also 4% - 'technical know-how' is taxable @ 4% under schedule entry C-39. Therefore, the liability under the MVAT Act would not exceed the liability under the Lease Act. Hence, the bar provided by the section 96(1)(f) does not come into play due to the observations given in the order that 'technical know-how' is taxable @ 4% under schedule entry 22 of the lease act.

09. PRAYER FOR PROSPECTIVE EFFECT

The applicant has made a prayer for prospective effect u/s. 8 of the Lease act r/w. Section 52(2) of the BST Act. The Commissioner is empowered to direct that the DDQ shall not affect the past transaction of a dealer. This is a discretionary power that is to be exercised judiciously. Statutory misguidance is one such ground on the basis of which the prospective effect is given. In the instant case, the applicant was very much aware of the issue regarding taxability of intangible goods. The whole history, as it

were, under the BST Act was before them. Therefore, there is no case for statutory misguidance. The applicant was not misguided by the department. In fact, the Circulars issued from time to time provided the right guidance. I therefore reject the prayer for prospective effect.

In view of the aforesaid discussion, I pass an order as follows:

ORDER

(section 9 of the Lease Act read with section 52 (1)(e) of the B.S.T. Act, 1959/read with section 96(1)(a) of the MVAT Act, 2002)

NO.DDQ-11/2005/Adm-5/103/B- 02

Mumbai, Date :28.4.08

1) The sales of 'Monsanto Technology' or 'Technical Know how' by the applicant to M/s. Ajeet Seeds through agreement dated 26th April 2002 is taxable @ 4% being covered by entry 22 of the Lease Act.

2) The prayer of prospective effect is rejected for reasons discussed in the order.

Sanjay Bhatia
Commissioner of Sales Tax,
Maharashtra State, Mumbai

