Read – Application dt. 10.3.2007 by M/s. New Datta Bakery, holder of TIN No. 27630358647V.

Heard -Shri. P.V. Surte, Advocate on behalf of M/s. New Datta Bakery.

PROCEEDINGS

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

No. DDQ 11/2007/Adm-3/13/ B-06 Mumbai, Date :-31.3.08

An application has been preferred by the applicant seeking determination on the following question :

''Whether the sale covered by cash memo No. 1272 dated 18.2.2007 for sale of 35 packets of "Khari" weighing 200 Gm. Each sold at Rs.8/- per packet for Rs. 280/- is covered by Entry 107(11)(f) of the MVAT Act, 2002, attracting tax at 4%?

02. FACTS OF THE CASE

It is stated that the main business of the firm "New Datta Bakery" is to manufacture bakery products and sell it in wholesale and retail basis. The bakery products manufactured by the firm are Sliced Bread, Bread in Loaf, Toast, Khari, Bunpav, Butter (Tough bun), Jeerabutter etc.

The applicant earlier put the question as to whether the bakery products like Sliced Bread, Bread in Loaf, Toast, Khari, Bunpav, Butter (Tough bun), Jeera butter etc manufactured by the firm falls within Schedule A-7. The applicant was informed through letter dt 31.9.2007 that the schedule entry A-7 covers bread and therefore the products of the applicant would not be covered by it. The applicant was called upon to submit their say as to why their application should not be rejected summarily for non compliance of Rule 64(2)(d) and Rule 64(2) of the MVAT Rules, 2005. The applicant through letter dt 1.10.07 informed that it was too late to call upon the applicant to show cause why his application should not be summarily rejected. If it was liable for summary rejection, it was not necessary to record a finding. It was argued that Rule 64(2)(d) refers to summary rejection of the application if the application does not contain a statement of facts in detail with evidence and Rule 64(2)(e) refers to the circumstances in which the dispute has arisen. The applicant stated that it will neither be just nor proper to reject the application on the ground that it is incomplete within the meaning of Rule 64(3)(a). The applicant raised the second objection with regard to the query put to him to state the cause of dispute. In this connection, the applicant referred to section 56 of the MVAT Act, 2002, which requires a dealer to file an application in order to find out whether any tax is payable in respect of any particular sale or if tax is payable the rate thereof. The applicant has argued that this does not necessarily mean that there must exist a dispute between two persons. The provisions of section 56 are for a statutory ruling by the Commissioner. Under the circumstances, the applicant requested that the application should not be rejected summarily as proposed in this office letter dated 11.9.2007.

In a later submission dt 24.10.07, the applicant in suppression of the earlier question, expressed the wish that the determination be restricted only to the question as to whether 'Khari' is covered by schedule entry C-107 (11)(f).

03. HEARING

Shri P.V. Surte, Advocate, attended on 26/2/2008. He did not give any oral submission but produced a written submission containing his arguments.

The applicant has stated in the written submission that as far as the manufacturing process and ingredients are concerned, Khari is manufactured with the process of mixing of raw materials, followed by fermentation, remix, moulding, panning, pruning and baking. The ingredients are also similar for all the products. The applicant has along with the application, the zerox copies of books written by scientist of Mahatma Phule Krushi Vidyapeeth, Rahuri, on the subject of bakery products.

It is submitted therein that Khari, no doubt, is a bakery product and there is no entry either for "Khari" or for a Bakery Product in the Schedule 'C' appended to the MVAT Act, 2002. Therefore, their submission is that Khari is nothing but food stuff and food provision being goods covered by Schedule 'C' Entry 107(11)(f) appended to the MVAT Act, 2002 and therefore, attracts tax at 4%. The applicant is a manufacturer of Khari. He is engaged in the business of selling Khari. It is stated that Khari is a bakery Product and it is squarely covered by the expression "Food Stuff" and Food Provisions appearing in Schedule C Entry 107(11)(f) of the MVAT Act, 2002 and is taxable at 4%.

It is argued that what is sold is not ready to serve food. It is ready to sell food. Secondly, Khari is not served for consumption. In the circumstances, the applicant has requested to hold that the sale covered by cash memo No. 1272 dated 18.2.2007 is covered by Entry 107(11)(f) of Schedule C appended to the MVAT Act, 2002.In the alternative, it is submitted that in case, the submission as above is not accepted, the order passed may be made prospective in view of the fact, that the application is pending for eleven months.

04. DECISION

It is seen that the applicant is a manufacturer of 'Khari Biscuits'. The khari biscuits as admitted by the applicant is a bakery product. It is the submission of the applicant that the product is covered by C-107(11)(f) of the MVAT Act. The khari sold by the applicant is nothing but a biscuit. The classification of biscuits has been decided by me in the determination order in the case of M/s. Uttara Foods (No-DDQ-11/2007/Adm-5/2-3/B-5 dt.30.11.07) and in the case of M/s Kayani Bakery (No-DDQ-11/2006/Adm-3/45-46-87/B-7 dy. 26.2.08). In view of the fact that the matter has already determined by me the present issue would have become non maintainable. But it is seen that the applicant had applied in March 2007 and therefore his application was on record when M/s. Uttara Foods was called for hearing. Therefore, the present issue cannot be rejected as non maintainable.

The applicant had made argument that the khari are not ready to serve food but ready to sell food. I have already dealt with this argument in the earlier determination orders. I have clearly stated that food which are ready to serve i.e. food which can be directly served on the table without any further processing are not covered by the schedule entry C-107(11)(f). This is because of the specific wordings of the schedule entry C-107(11)(f).

The following can be easily observed on a dissection of the entry :

1. Schedule entry C-107(11)(f) covers 'food stuff and food provisions' which are in the nature of semi processed, raw ,semi cooked food.

2. The entry excludes ready to serve food. Ready to serve food means ready to eat food i.e. food which is ready for consumption.
3. The explanation excludes food served for consumption. Food served for consumption means food which is served in hotel, eating houses, restaurant etc.
4. Thus, there are two exclusions in the entry. The exclusion in the main clause excludes food which is ready to eat. The explanation excludes food which is served for consumption.

By applying the criteria, it has been held by me in several determination orders that cakes, pastries, mutter karanji, kothimbir vadi, muesli are all food which are excluded from the entry by virtue of the fact that they are ready to serve food i.e food which can be eaten as it is and which does not need any further processing. Thus the term ''ready-to-serve' means 'ready-to-eat food'. Such 'ready-to-serve' food is excluded from the main entry itself. The misconception was that the exclusion to ready to serve food in the main entry necessarily means and therefore excludes food served in hotel, eating houses etc and it does not refer to such food which are ready-to-eat and which are not served in a hotel. However, the food which is served in hotel is excluded through the explanation and not through the exclusion in the main clause. There are two exclusions in the entries both of which have to be given same meaning. The explanation excludes food served in a hotel, eating house etc and the exclusion in the main entry excludes ready-to-eat food. Therefore, the argument of the applicants in the earlier cases as well as in the case before me that both the exclusions exclude food served in hotel, eating house etc. is not acceptable simply because if the legislature had intended to exclude only food served in hotel, eating house etc. it would not have provided two exclusion clauses to provide for the same contingency. The fact that it has given two exclusion clauses is indicative of the fact that two different classes of goods or two different situations were meant to be excluded. While drafting the schedule entry, the draftsman was fully conscious of the explanation or the exclusion in the main clause and when the explanation was added to the entry C-107(11)(f) necessary care would have been taken by him to restrict the application of the explanation to the other sub entries excluding (f). But such is not the case. It was intended there should be two exclusions in the schedule entry and which were accordingly interpreted by me in all the earlier determination orders. Thus the following meaning only can be given to the two exclusions.

a) The exclusion in the main clause excluded food ready to serve.
b) The explanation excludes food served in the eating houses, hotels etc.

Now, when the scope of the entry is made clear I would turn to the facts of the present case. Khari is a ready to serve food. It can be eaten as it is. It is ready for consumption and therefore it stands excluded from the schedule entry C-107(11)(f) as the main entry excludes 'ready-to-serve' food. The applicant has tried to argue that the product is a ready to sell food and therefore what is excluded is ready to serve food and not ready to sale food. However, there is no distinction between 'ready to serve food' and 'ready to sale food '. The word 'serve' need not be associated with a hotel or restaurant. Food which is ready can be served in a home also. When such food is ready for consumption and sold it becomes a ready to sell food. The verbs 'sale' is of no consequence as far as the main entry is concerned. The food ready to

serve excluded in the main clause is that food which is ready for consumption- the fact that it is sold in a shop is immaterial.

05. PRAYER FOR PROSPECTIVE EFFECT

The applicant has sought prospective effect to the determination order in case the order is not held in their favour. 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. Therefore, the prayer for prospective effect is rejected.

5. In view of the above, I pass the following order.

ORDER

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

No.DDQ-11/2007/Adm-5/13/B- 06 Mumbai, dt.31.3.08

The sale of 'khari' through cash memo No.1272 dt.18/2/2007 is taxable @ 12.5% through schedule entry E-1.

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