

Read: Application dt.24.09.2010 filed by M/s. Sundaram Edusys Pvt. Ltd holder of TIN 27770753263V.

Heard : H.S. Kulkarni, Advocate, along with Shri A.P. Shah, (MD) and Shri R.I. Jani, C.A attended on behalf of the applicant.

PROCEEDINGS

(Under Section 56(1)(e) of The Maharashtra Value Added Tax Act,2002)

No.DDQ-11-2010/Adm-3/49/B- 3

Mumbai,dt. 12/12/2011

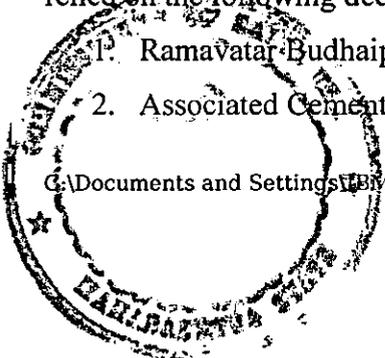
A determination application dt.24.09.2010 is filed by M/s. Sundaram Edusys Pvt. Ltd seeking determination of the rate of tax applicable on the products 'E-class' sold by them through sale invoice no.455 dt.21.9.2010.

02. FACTS & CONTENTION

The applicant is a company engaged in sale of educational material. The applicant submitted that they have copied all the books upto SSC and converted these books into digital form so that the students develop more interest in studies and it also becomes easy for them to understand the subject. It is stated that the product is nothing but a copy of text book in digital format. It is stated that while clarifying the rate of tax on 'E-class' through communication vide No.DDQ-10/2010/Adm-3/68/B-442, dt.13.9.2010, reliance is placed by the revenue on the Supreme Court decision in the case of Associated Cement Companies Ltd. v. Commissioner of Customs (20010 124 STC 59) though the ratio of the said judgment cannot be made applicable in the applicant's case. According to the applicant, the said decision is based on the legal provisions of Customs Act, 1962 wherein the apex court has opined that customs duty is not leviable on intangible goods. However, sales tax is leviable on such intangible goods. It is argued that under sales tax law the entry for intangible goods and the rate of tax are both specified in the schedule. The applicant has further argued that under the customs law, purchase of plant and the purchase of technical know how and license fees have been treated as a single transaction and taxed @ plant which is the only tangible goods. In sales tax, this will be treated as 3 different transactions. The purchase of plant and the purchase of technical know how will be taxed under different entries at different rates while the license fees will be taxed under the lease act under the applicable entry at the applicable rate. Therefore, it is submitted that the emphasis supplied on the decision in the case of Associated Cement while clarifying the matter is misplaced and cannot be made applicable in the applicant's case. It is argued that the case of the applicant falls under sales tax law and therefore it should be decided as per common parlance test. In support of this argument the applicant relied on the following decisions,-

1. Ramavatar Budhaiprasad v. The Asstt. Sales Tax Officer, Akola & another (12 STC 286).

2. Associated Cement Co. Ltd. v. State of M.P. & other (144 STC 95)



3. Noorie Manure Mill v. Commissioner, Trade Tax, U.P. (7 VST 545)

It is argued that the Supreme Court of India has consistently followed the common parlance test while deciding the classification of goods under sales tax law. Common parlance test means how the persons selling and purchasing the commodity treat it. The applicant sells the product 'E-Class' treating it as a book and the customers who purchase it also treat the product as a book and not as pen drive. The E-class contains the complete volume and it is not necessary to put many pen drives together because each pen drive, being the complete volume, is covered by entry A-6.

Argument against entry C-56

- ⊗ The entry A-6 does not have an exclusion clause for entry C-56. Therefore entry C-56 cannot be referred to while interpreting entry A-6.
- ⊗ From the contention made above it is clear that E-Class is covered by entry A-6.
- ⊗ Since we are not selling pen drive, the Central Excise circular is not applicable to us.
- ⊗ Even if it is held that E-class is also covered by Entry C-56, it should be classified under Entry A-6 which carries lesser rate of tax.

The applicant put forth his alternative contentions thereby referring the following observations of the Supreme Court,-

1. The tangible articles so imported contain information or knowledge for use by the appellants.
2. For the purpose of attracting levy it would be immaterial as to what are the types of goods imported or what is contained in them or recorded thereon. The contents will be relevant for the purpose of valuation.

In view of the above, the applicant argued that the Supreme Court has treated the intangible goods as contents and the tangible goods as containers. Same analogy may be applied in the applicant's case thereby treating the text book as contents and the pen drive as the container. In other words, the text book Balbharti has been digitally packed in the pen drive and thus the provisions of section 7 of the MVAT Act becomes applicable. Section 7, in effect, states that the container will be taxed at the rate the contents. Even on this ground the 'E-class' cannot be taxed at the rate applicable to the container i.e the pen drive, but should be taxed at the rate applicable to the contents i.e the text book Balbharti. On the basis of the above facts and circumstances, it is prayed that 'E-class' be held as a book covered by Entry A-6.

Prayer for prospective effect:-

It is stated that, in case the plea for classification of 'E-class' under entry A-6 is not acceptable, then the order may be made effective from the date of order.

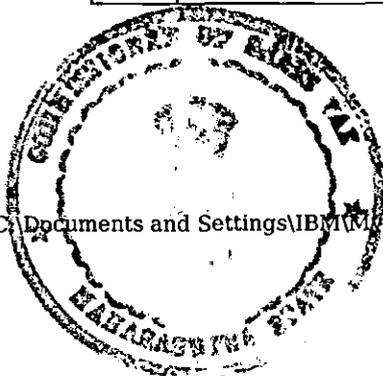
03. HEARING

Shri H.S. Kulkarni, Advocate, along with Shri A.P. Shah, (MD) and Shri R.I. Jani, C.A. attended on behalf of the applicant. The impugned product submitted for determination is 'e-class'. It is an educational text-book in audio-visual form. The material contained in 'Balbharti text book' - from 1st to X standards are incorporated in the text book which is in a 'pen drive'. He submitted that determination is sought on the 'e-class' which is the syllabus incorporated in a 'pen-drive'. The applicant supplies 'e-box' with the 'e-class' which is optional and the 'pen-drive' can be attached to 'e-box' which is in turn attached to a television. In the above way, the students can be taught the entire material on the T.V. and the teacher can teach with the help of a remote-control. It is the contention of the applicant that the product is a 'book' which is therefore tax free, though the content is in digital form. The applicant has also submitted certificates from schools. The applicant had earlier applied for clarification. He was informed that the product is an 'IT Product' taxable @ 4%/5% from 1.4.2010. However, the applicant does not agree with the above and feels that the product is a 'book' and is tax free. The applicant has brought the samples of the product. As the 'e-class' only incorporates educational material, the applicant has argued that it is a 'book'. A demonstration was also shown on the contents of the book.

04. OBSERVATIONS

I have carefully gone through the facts and circumstances of the case and also taken into account the contentions put forth by the applicant. The question posed for determination pertains to the classification of the product 'e-class'. It is the contention of the applicant that the 'e-class' is nothing but a book in the digital form and therefore the same would be covered by schedule entry A-6 of the MVAT Act. The entry is as follows –

A-6	<i>Books including almanacs, panchangs, time tables for passenger transport services and periodicals ,but excluding - annual reports, application forms, account books, balance sheets, calendars, diaries, catalogues, race cards, publications which mainly publicise goods, services and articles for commercial purposes</i>	Nil	1.4.2005 to 30.4.2005
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A-6	<i>Books including almanacs, panchangs, time tables for passenger transport services and periodicals, maps, charts, orreries and globes, ,but excluding - annual reports, application forms, account books, balance sheets, calendars, diaries, catalogues, race cards, publications which mainly publicise goods, services and articles for commercial purposes</i>	-do-	1.5.2006 to 31.1.2006
A-6	<i>Books, that is to say, every volume or part or division of a volume including almanacs, panchangs, time tables for passenger transport services and periodicals, maps, charts, orreries and globes, but excluding_ annual reports, application forms, account books, balance sheets, calendars, diaries, catalogues, race cards, publications which mainly publicise goods, services and articles for commercial purposes and publications which contain space exceeding eight pages for writing.</i>		01.02.2006 to till date

It is seen from the above that the entry for book for the period from 1.4.2005 to 30.4.2005 did not cover maps, charts, orreries, globes. The same were inserted in the entry and included in the schedule entry from 1.5.2005. However, the entry was again amended w.e.f. 1.2.2006. The major change which came into the entry was that the term 'book' was defined and the entry was also made exhaustive as is evident by the use of the word 'that is to say' after the word 'books'. The above means that only a product which falls within the definition of book as given in the schedule entry or expressly mentioned in the entry would be covered by it.

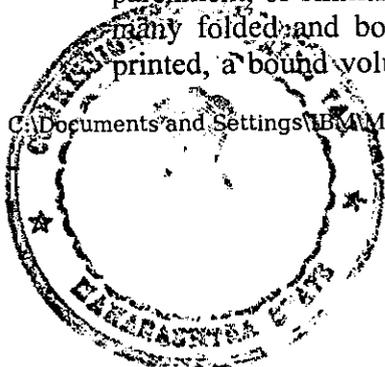
In the schedule entry as existing from 1.4.2005 to 31.1.2006, the term 'book' was not defined. . Although the term 'book' is not defined for the above period, any product to fall within the entry for book has to conform to the characteristics of a book. In order to ascertain that, the meaning of the term 'book' has to be seen. The meaning of the term 'book' is given in three of the standard dictionaries are as under:-

Book : 1) A writing, a written charter or deed.

2) A (written) narrative, record, list, register.

3) (Generally) A collection of sheets of paper of other substance, blank, written, or printed, fastened together so as to form a material whole; especially such a collection fastened together at the back, and protected by covers. (**Shorter Oxford English Dictionary**).

2) In general, a written or printed narrative, record, representation, or series of these. Specifically, (a) A formal written document. (b) a collection of tablets of sheets of paper, parchment, or similar material, blank, written or printed, strung or bound together commonly, many folded, and bound sheets containing continuous printing or writing; especially, when printed, a bound volume, or a volume of some size, as distinguished from a pamphlet (c) A



volume without a cover (d) A literary composition, (e) A major division of a treatise or literary work (**Webster's New International Dictionary**).

3) A writing, a written document. (2) A (written) narrative of account, list, register, (3) (Generally) A written or printed treatise or series of treatises, occupying several sheets of paper or substance fastened together so as to compose a material whole (a) Specially such a treatise occupying numerous sheets or leaves fastened together as one edge called the back, so as to be opened at any particular place, the whole being protected by binding or covers of some kind (b) The material articles so made up, without regard to the nature of its contents, even though its pages are occupied otherwise than with writing or printing, or are entirely blank. (c) A literary composition such as would occupy one or more volumes, without regard to the material form or forms in which it actually exists. (4) That in which we may read, and find instructions or lessons (5) A number of sheets of blank writing paper bound together to form a volume in which he keep records of commercial transactions, minutes of meetings etc. (**Murray's New English Dictionary**).

What is seen from the above that a 'book' should consist of several pages and the book should be a written document. The Webster's dictionary defines 'book as a written or printed narrative or a record'. The Murray English Dictionary defines book as a 'written document or a written treatise'. The Shorter Oxford English Dictionary also defines 'book as a collection of paper or their substitutes'. What is seen from the above is that the book is essentially a written document. The Law Lexicon defines book as under:-

Book. A treatise, written or printed on any material and put together in any convenient form. Any printed literary compilation; a collection of sheets bound together containing manuscript entries or intended to contain such entries; the name of several important papers prepared in the progress of a cause, although entirely written and not at all in book form.

The word book as defined in the Printing Presses and Books Act (XXV of 1867) includes part of a volume of pamphlet. *Emperor v. Hari Govind Limaye* 13 I.C. 827 = 14 Bom. L.R. 40.

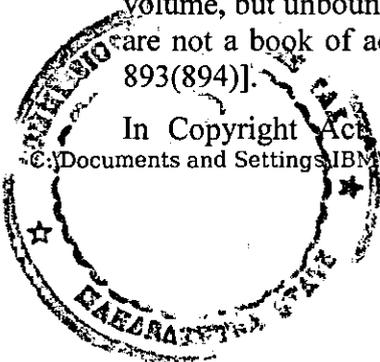
"Book" has been defined in the Registration Act to include a portion of a book and also any number of sheets connected together with a view of forming a book or portion of a book.

"In its ordinary sense a 'book' signifies a collection of sheets of paper bound together in a manner which cannot be disturbed or altered except by tearing apart. The binding is of a kind which is not intended to be movable in the sense of being undone and put together again. A collection of papers in a portfolio or clip, or strung together on a piece of twine which is intended to be untied at will, would not, in ordinary English, be called a book.

The definition of 'book' given in the English Copyright Act, 1845, S.3 is that the term means and includes "every volume, part or division of a volume pamphlet, sheet of letter press, sheet of music, map, chart, or plan separately published."

The term "book" in S.34 of Evidence Act means a collection of sheets of paper bound together with the intention that such binding shall be permanent, and the papers used collectively in one volume, but unbound paper, in whatever quantity, though filled up with one continuous account, are not a book of account within the purview of S.34. [*Mukandram v. Dayaram*, 23 Ind. Cas. 893(894)].

In Copyright Act, 1886, Book "includes any review, magazine, periodical work, works
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published in a series of books or parts, transactions of a society or body, and other books of which different volumes or parts are published at different times".

The word also includes Trade Lists [Exchange Telegraph Co. v. Gregory, 1896 IQB 147].

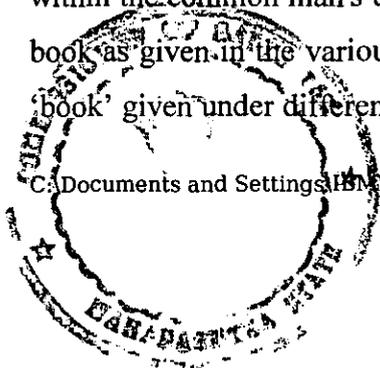
Trade catalogue and advertisements, whether illustrated or not, though distributed gratis, are books for which there might be copyright. (Hotten v. Arthur, 1 H & M 603)

A book must be judged as a whole with its introduction and acknowledgment or dedication. AIR 1930 All. 401.

"A good book is the precious life-blood of a master spirit embalmed and treasured up on purpose to a life beyond life". (Milton, Areopagitica).

A new edition is a new 'book' if, in substance, it is the result of new labour, as distinguished from a mere reprint. (Black v. Murray, 9 Sess, Ca. 341).

The emphasis in all the above dictionaries is on writing and also on the fact that the book should be a collection of sheets. In the present case, the Balbharati text is converted into digital form which is then carried in a 'pen-drive'. The product is a USB drive like device that digitally stores the entire syllabus for the Maharashtra State Board SSC, VIII, IX and X in English and Marathi medium. Apart from the above, it also has features like animation, demonstration of experiments, learning techniques and important questions. The students are taught each subject chapter by chapter by a real teacher in a virtual class-room etc. The e-class requires a projector, laptop or TV with the USB Port. The components of the product are an 'e-box' which is a portable pen-drive applicator which enables one to view the contents from pen-drive on a TV and it comes with a remote control. The other component is e-screen or a LCD screen with USB port. Can the above product be called a book? I cannot accept the contention of the applicant in this regard. The e-class is not a collection of sheets. It does not fall within the definition of book. Any person or a common man would not call the pen-drive, USB Port like device a book. It may substitute a book or it may complement a book. A student studying SSC syllabus would buy the 'Balbharati text' first and then in order to understand this book will buy the e-class. E-class is an entire integrated device which supplements or substitutes the book and gives a learning experience by creating a virtual class-room. There are teachers to teach and explain the contents of the Balbharati text with the help of certain innovative features. The e-class admittedly helps the student to understand the contents in a better way but this does not imply that the e-class is a book. Like I said earlier it is something which is more than the book and it seeks to give a different learning experience to the student by taking them into a digital class-room. It cannot be called a book as it does not fall within the common man's understanding of a book and it also does not conform to the description of a book as given in the various dictionaries cited above. The Law Lexicon refers to the definition of the 'book' given under different acts where the term 'book' is invariably defined as a 'collection of sheets'



or a 'volume'. The impugned product does not possess this essential characteristic. In past judgements, educational maps and charts have been held as books. In the case of M/s. Must educational aids (S.A no 1497, 1498, 1499 & 1500 of 1991 dt 26.2.1993) it was observed by the Tribunal that, "the entry for books should be taken in its broadest sense and not in the sense in which the people ordinarily understand that term. It is to be remembered that the charts before us directly relate to the books prescribed in schools and colleges. In other words, the charts are prepared by the appellants and sold by the appellants to facilitate the understanding of the alphabets, maps, problems of mathematics, science etc. The educational aids manufactured and prepared by the appellants are educative and constructive and, therefore, we hold that the difference in size and shape would not make any difference." In the Tribunal decision cited above, charts were held as books. The Tribunal mainly based its decision upon the definition of book in the 'Law Lexicon'. In it, a book is described as a 'writing or a collection of sheets of paper'. The Tribunal observed that as a book is writing it would cover charts and if this chart instead of being one is fastened together it would make a book. However, this analogy cannot be applied in the present case. The Pen Drive is not a 'writing' and it cannot be put together to form a book. Therefore, it will not come under Schedule entry A-6.

As far the entry which came in entry after 1.4.2006, any possibility of the impugned product being covered by it is completely eliminated by the compact definition of 'book' given in it. The 'book' is defined as a 'volume or part or division of a volume. What does the word 'volume' mean?

The Wikipedia defines 'volume' as a-

- Volume is one a collection of written or printed sheets bound together and constituting a book.
- One book of a related set or series.
- A set of issue of periodical often covered one year.
- A roll of parchment or the like or of a manuscript.

Volume as defined in the Webster's dictionary:- A bound assemblage of printed sheets; forming a book of one or several separately bound parts of a book.

Oxford dictionary:- i) Historical roll of parchment; papyrus containing written matter; literature work or of one recorded or preserved in this form which was customary in ancient time.

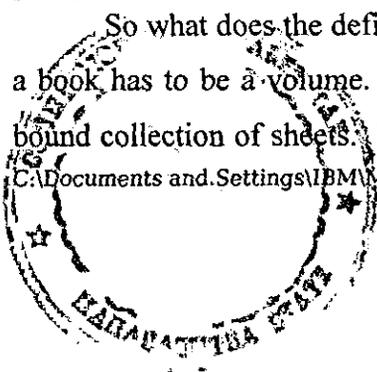
ii) A collection of written or printed sheets bound together so as to form a book.

iii) Something comparable to a book.

iv) A separately bound portion or division of a work; one of a number of book forming a related set o series.

So what does the definition do is that it makes clear that anything to fall within the definition o a book has to be a volume. A volume as defined above should be in physical form - it should be bound collection of sheets. Therefore, the impugned product which is not a bound collection of she

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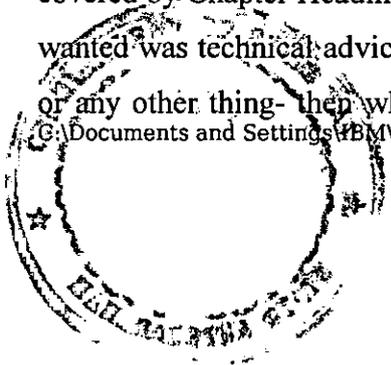
or in fact is not even made of paper cannot be called a volume or a book. When a book are presented a series, they are identified as 'Volume-I' or 'Volume-II' etc. The series of CDs or series of pen-drives are not called or mentioned as 'volumes'. With regard to the above, I found it difficult to categorize product of the applicant in the schedule entry A-6.

It is contended by the applicant that the device is a Pen Drive which contains the whole material of the syllabus in a concise form. It is the contention of the applicant that the text book 'Balbharti' has been digitally packed in the pen drive and thus the provisions of section 7 of the MVAT Act become applicable. The Section 7 is reproduced as below:-

..''Where any goods are sold and such goods are packed in any material, the tax shall be leviable under section 6 on the sales of such packing material, whether such materials are separately charged for or not, at the same rate of tax, if any, at which tax is payable on the sales of the goods so packed.

The section specifies that the rate of tax on the packing material shall be the same as that of the contents. I do not see the applicability of the above as the 'pen drive' is not a packing material. It is a media for the contents. A packing material is something which packs something tangible. The pen drive does not pack the contents- it is a medium in which the contents can be seen, stored, used and exploited. The contents cannot be put to use without the USB port. Whereas, in the case of packing material, the contents are different from the packing material. Even if, the argument of the applicant is considered in the line of section 7 of the MVAT Act with regard to levy of tax, if any, at which tax is payable on the sale of the goods so packed, the applicant does not succeed in establishing that the goods so packed in it is a 'book'. I have already canvassed the proposition as to how the product is not a book.

The applicant has contended that the Supreme Court judgment in the case of Associated Cement Co. (124 STC 59) is not applicable to them. It is the contention of the applicant that the judgment is not applicable because under the Customs Act, duty is not leviable on intangible goods like technical knowhow and therefore, it was decided by the Court that the customs duty should be levied on tangible i.e. media – the disks in which the drawings etc (technical knowhow) was incorporated. However, I differ with the applicant in this regard. It was categorically held by the Court that drawings, plans and manuals which were imported are goods because the pictures and manuals are covered by chapter heading 49 of the Customs Act. The Supreme Court also held that the transaction involving import of drawings and architectural designs which the Supreme Court held to be goods because it is covered by Chapter Heading 49 of the Customs Tariff Act. Secondly, the Court admitted that what was wanted was technical advice but the movement the advice is put on media -whether paper or diskette or any other thing- then what is supplied becomes chattel. The applicant has contended that because



technical know how was not goods under the Customs Act, the tax was levied on the media. However, such is not the case. A minute reading of the judgment would reveal that the Supreme Court has held that once input is put into a media then both become inseparable and the tax should be levied on the media. Nowhere has the Supreme Court observed that technical know how is an intangible which is not subject to tax under the Customs Act. Also, nowhere has the Supreme Court ever referred that because tax cannot be levied on technical know how tax is levied on the media. In fact, the Supreme Court has only laid down that once something is put into media it becomes a tangible and the tax can be levied on the media. This is the only ratio in this judgment and the applicant seems to have misinterpreted the ratio.

The applicant has also referred to certain judgments in order to support his contention that the common parlance test should be followed while deciding his case. I agree with the fact that the test of common parlance is an important test in deciding the classification. However, the schedule entry also has to be looked into and one cannot go beyond the limits laid down by it. When the schedule entry defines 'book' as a volume then only a volume would be a book. Secondly, the test of common parlance in-fact goes against the applicant. The common man on the street would never call 'e-class' a book. His idea of a book would always be something which resembles a collection of sheets, print and bound together- a pen-drive never fall within that category.

Now, that I have held that the impugned product is not covered by schedule entry A-3, I shall have to decide the classification of the product. Let me examine whether the product would be covered by excise heading 8524 which is notified for the purpose of schedule entry C-56. The schedule entry is reproduced as under :

C-56	IT products as may be notified by the State Government from time to time	5%
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The heading 8524 is notified for the purpose of schedule entry C-56 which is reproduced as under:-

8524	Records, tapes and other recorded media for sound or other similarly recorded phenomena, including matrices and masters for the production of records, but excluding products of Chapter 37.
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The above heading covers all media containing recorded phenomena. It contains video tapes of educational nature, children video films and IT Software on CD Rom, floppy disc or other media. The question is as to whether the impugned product which is a 'USB flash drive' is an IT product or not?

The 'USB flash drive' is described in the Wikipedia as under:-

A **USB flash drive** is a data storage device that consists of flash memory with an integrated Universal Serial Bus (USB) interface. USB flash drives are typically removable and

rewritable, and physically much smaller than a floppy disk. Most weigh less than 30 g (1 oz). As of September 2011[update] drives of 256 gigabytes are available, and storage capacities as large as 2 terabytes are planned, with steady improvements in size and price per capacity expected. Some allow up to 100,000 write/erase cycles (depending on the exact type of memory chip used)[and 10 years shelf storage time.

USB flash drives are often used for the same purposes for which floppy disks or CD-ROMs were used. They are smaller, faster, have thousands of times more capacity, and are more durable and reliable because of their lack of moving parts. Until approximately 2005, most desktop and laptop computers were supplied with floppy disk drives, but floppy disk drives have been abandoned in favor of USB ports.

USB Flash drives use the USB mass storage standard, supported natively by modern operating systems such as Linux, Mac OS X, Windows, and other Unix-like systems. USB drives with USB 2.0 support can store more data and transfer faster than a much larger optical disc drives like CD-RW or DVD-RW drives and can be read by many other systems such as the Xbox 360, PlayStation 3, DVD players and in some upcoming mobile smartphones.

Nothing moves mechanically in a flash drive; the term *drive* persists because computers read and write flash-drive data using the same system commands as for a mechanical disk drive, with the storage appearing to the computer operating system and user interface as just another drive. Flash drives are very robust mechanically.

A flash drive consists of a small printed circuit board carrying the circuit elements and a USB connector, insulated electrically and protected inside a plastic, metal, or rubberized case which can be carried in a pocket or on a key chain, for example. The USB connector may be protected by a removable cap or by retracting into the body of the drive, although it is not likely to be damaged if unprotected. Most flash drives use a standard type-A USB connection allowing plugging into a port on a personal computer, but drives for other interfaces also exist.

USB flash drives draw power from the computer via external USB connection. Some devices combine the functionality of a digital audio player with USB flash storage; they require a battery only when used to play music.

The impugned product is described as a 'USB flash drive like device' or a pen drive'. This is because the product cannot be used to copy or store data. It contains recorded data on a chip. Also, the device can be used only on the T.V as it comes with an 'e-box'. In order to see the contents on a computer it has to be loaded on a PC or the server. However, the device cannot be directly attached to a PC due to piracy fears but can be seen with specific software. It cannot be disputed that the product is a flash drive. It has recorded content. It is seen from the 'Wikipedia' that the 'flash drive' is a data storage device that consists of flash memory and it is therefore covered by excise heading 8524 and by schedule entry C-56.

05. PRAYER FOR PROSPECTIVE EFFECT

The applicant has made a plea that in case the determination is held against the applicant then the order should be made prospective in effect thereby protecting the past liability of the applicant. However, it is seen that while making such plea the applicant has not advanced any specific argument

so as to convince me that the applicant is eligible for being granted the benefit sought by him. In other words, the applicant has not proved any case of statutory misguidance or otherwise. The applicant content himself that his product is a 'book' meant for schedule entry A-6 of the MVAT Act though the applicant himself know that the contents of the impugned product is in digital form i.e. of intangible nature and the schedule entry A-6 does not covers the goods of intangible nature. Thus, I come to the conclusion that the applicant is not eligible for the benefit sought under the wrong perception without any rational basis and without any cogent reason. I would fortify my observation on the basis of the judgment delivered by the Hon. MSTT in the case of M/s. Dinodia Textiles (4 MTJ 236) wherein it was held that grant of prospective effect under section 52 depends on the fact of the case. A simple belief of the assessee that a commodity is tax free may not entitle on assessee to prospective effect. Accordingly, the prayer of the applicant is rejected being devoid of any merits.

06. With reference to the above, I pass the following order.

ORDER

(Under Section 56(1)(e) of The Maharashtra Value Added Tax Act,2002)

No.DDQ-11-2010/Adm-3/49/B- 3

Mumbai, dt. 12/12/2011

1. The product 'E-class' sold by the applicant through sale invoice no.455 dt.21.9.2010 would be covered by schedule entry C-56 taxable @ 5%.
2. The prayer for prospective effect is rejected for the reasons as discussed above.



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