

Read : Application dt.Nil (received on dt.16.05.2012) by Securities and Exchange Board of India.
Heard: Shri K. S. Choksi, C.A and Shri Anand [Asstt. Manager at SEBI] attended the hearing.

PROCEEDINGS

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

No.DDQ-11/2012/Adm-6/15/B-1

Mumbai, dt. 10.11.2014

The applicant, Securities and Exchange Board of India, situated at SEBI Bhavan, Plot No. C-4A, "G" Block, Bandra Kurla Complex, Bandra (E), Mumbai - 400 051, prays for determination of the following question :

"Whether the Securities and Exchange Board of India (SEBI) established by Securities and Exchange Board of India Act, 1992(15 of 1992) enacted by Parliament of India to protect the interests of investors in securities and to promote the development of, and to regulate, the securities market and for matters connected therewith or incidental thereto, is a deemed dealer within the meaning of Section 2(8) of the Maharashtra Value Added Tax Act, 2002 since 1st April 2005?"

02. FACTS & CONTENTION

The application states thus -

1. *"Securities and Exchange Board of India (SEBI) is an autonomous body and is established under Securities and Exchange Board of India Act, 1992 by parliament of India.*
2. *We are not having any purchase and sales in our activities as defined as 'Turnover of Purchases' u/s 2 (32) of Maharashtra Value Added Tax Act, 2002 (MVAT Act) and 'Turnover of Sale' u/s 2 (33) of MVAT Act.*
3. *Section 2(8) of MVAT Act, read as follows: (Section reproduced)*
None of the Section as well as proviso or explanation are applicable to us. However, for the sake of clarification, we are making this application for confirmation that we are neither a "Dealer" nor "Deemed Dealer" under MVAT Act.
4. *In this connection we submit our particulars as follows :*
 - A. *SEBI established under Securities and Exchange Board of India Act, 1992(15 of 1992)(SEBI Act) by Parliament of India. The preamble of the SEBI Act reads as under:*
"An Act to provide for the establishment of a Board to protect the interests of investors in securities and to promote the development of, and to regulate, the securities market and for matters connected therewith or incidental thereto."
 - B. *The functions of SEBI are prescribed under Section 11 of the SEBI Act, which lays down the duty of SEBI to protect the interest of investors in securities and to promote the development of and to regulate, the securities market. Under the SEBI Act, 1992, SEBI is mandated to take the following measures:*
 - i) *regulating the business of stock exchanges, registering and regulating the working of stock broker, sub broker and other market intermediaries;*
 - ii) *prohibiting fraudulent and unfair trade practices relating to the securities market;*
 - iii) *promoting investor's education and training of intermediaries of security market;*
 - iv) *prohibiting insider trading in securities;*
 - v) *regulating substantial acquisition of shares and takeovers of companies;*
 - vi) *regulating matters relating to issue of capital, transfer of securities and other matters incidental thereto (Section 11A). In this respect, SEBI is empowered to make Regulations for carrying out the purposes of the SEBI Act.*
 - vii) *Further, in order to ensure regulatory compliance by market intermediaries, SEBI conducts, inspection and investigation in the functioning of these entities and the person associated with the securities market and in case of default, appropriate legal proceedings are initiated such as prosecution proceedings before Criminal Courts, Adjudication proceedings for imposing monetary penalty and passing of appropriate orders suspending or canceling the certificate of those intermediaries.*

viii) As a remedial measure SEBI is also vested with the powers to issue directions in the interest of investors, or orderly development of the securities market, against any intermediary or person associated with the securities market.

C. In addition to the role prescribed under SEBI Act, SEBI also administers the provisions of other Acts such as Securities Contracts (Regulation) Act, 1956 (SCRA), Depositories Act, 1996 and certain provisions of the Companies Act, 1956.

- (i) SCRA, 1956 - Under the provisions of SCRA, SEBI is empowered to grant and renew the recognition to the stock exchanges and clearing corporations, approve corporatization and demutualization of stock exchanges, make and/or approve the bye laws framed by stock exchanges etc. In order to ensure compliance with statutory requirement, SEBI conducts inquiry and investigations against the functioning of stock exchanges and in case of default appropriate actions are initiated such as prosecution proceedings, Adjudication proceedings and passing of other appropriate directions.
- (ii) Depositories Act, 1996 - Under the provisions of Depositories Act, SEBI grants certificate of registration for commencement of business of depositories. Further, the depository participants are also granted certificate of registration by the Board (SEBI). Further, SEBI has framed Depositories Regulations, 1996, for regulating the business of depositories and depository participants. SEBI, from time to time, conducts inspection and investigations and take appropriate action, such as launching prosecution proceedings, initiating Adjudication proceedings for imposition of monetary penalty and passes other appropriate directions against the defaulter.
- (iii) Companies Act, 1956 - Section 55A of the Companies Act confers powers upon SEBI in respect of issue and transfer of securities and non-payment of dividend, over the companies whose securities are listed on stock exchange or intended to get its securities listed on any stock exchange. As prescribed, SEBI administers the specified provisions of the Companies Act and ensures that the public money is raised in accordance with the provisions of law. Against the defaulting companies and its directors/officers in default, SEBI has the power to initiate appropriate action including launching of prosecution proceedings.

5. Hence, SEBI's functions and activities cannot be construed as activities of 'business' as per Section 2(4) of MVAT Act. Since SEBI is not engaged in the "business" of any buying or selling of goods for the purposes of or consequential to its engagement in or, in connection with or incidental to or in the course of performing its functions as per Section 11 of SEBI Act, hence we are not considered as a "dealer" under Section 2(8) of MVAT Act, 2002.
6. SEBI holds properly in its own name as per the provisions of the SEBI Act. The SEBI General Fund is constituted under Section 14 of the SEBI Act. The method of application of this Fund is also prescribed by the statute.
7. As per Section 4(2) of SEBI Act, the general superintendence, direction and management of the affairs of the Board shall vest in a Board of Members which may exercise all powers and do all acts and things which may be exercised or done by the Board. The Central Government does not have day-to-day control over administration of SEBI. Hence, we can not be termed even as a "deemed dealer" under Section 2(8) of the MVAT ACT, 2002.
8. We have received a notice u/s. 64 of MVAT Act, 2002 in Form No. 603 from STO (C-003), Survey Branch, Mumbai for business Audit
9. We have activities in the form of sale of scrap as well as acquisition and sale of movable property as our fixed assets. Since we are not a dealer as per section 2(8) of MVAT Act, we believe that we are not liable to pay any VAT. "

In view of the above, the question as reproduced above is requested to be clarified.

03. HEARING

The case was taken up for hearing on dt.06.05.2014 when Shri K. S. Choksi, C.A. and Shri Anand [Asstt. Manager at SEBI] attended the hearing. It was sought to make a point that the applicant is not covered by any of the clauses of deemed dealer and particularly clause (x)

which pertains to "any other corporation, company, body or authority owned or constituted by or subject to administrative control, of the Central Government any State Government or any local authority". It is submitted that their object clause does not refer to any object of carrying on the business and selling or supplying goods in a commercial sense. Therefore, any activity of purchase or sale of goods has to be seen with the intention which is never to purchase or sale any goods. The applicant's attention was invited to certain provisions of the SEBI Act as per which the Central government is having a say in the functioning of the Board :

- Management of the Board – appointment of Chairman, Member.
- Obtaining of permission to submit information to outside party.
- Central Government makes grants to the Board.
- Annual statement placed before Central Government and then before Parliament.
- Central Government establishes appellate Tribunals, provides officers and employees.
- Board is bound by directions on questions of policy as Central Government may give in writing from time to time.
- Central Government may by notification supersede the Board.
- Board shall furnish such returns and statements in regard to any existing or proposed programme for the promotion and development of securities market as the Central Government may require.
- A report at the end of the each financial year giving a full and true account of the activities is to be given to the Central Government.
- Central Government establishes Special Courts.
- Central Government makes rules, has power to remove difficulties.

With regard to the above, it was argued thus :

1. As referred in clause 4(1) of the SEBI Act, there is 1 Chairman, 2 members of the Central Government, 3 whole time Directors and totally 5 independent Directors may be appointed by the Central Government. However, in the sub clause (2), the Board has been given all the powers for the superintendence, direction and management and all the balance powers have been given to the Chairman for the general superintendence and carrying out the directions on the affairs of the SEBI. The clause does not speak about any responsibility or reporting to the Central Government on the activities as per the objects of the Act.
2. SEBI was formed by a Fund of 7.5 crs. given by IDBI, UTI and a third agency and these funds have been subsequently returned to the said initial contributors. The surplus or deficit is neither given to the Central Government nor received from the Central Government but it remains as a corpus. SEBI has not received any grant from Central Government but a loan received has been repaid.
3. The Tribunals are not a part of SEBI.
4. The audit by Comptroller and Auditor General (CAG) is applicable to every Government body. However, the SEBI has independent internal auditor (an external Chartered Accountant firm) who certifies the Accounts as approved by the Board, making it complete. The CAG will audit as per the Government protocol.
5. The objects of SEBI are not covered under the definition of 'business' under the MVAT Act,2002.

However, it was stated that the applicant is constituted by the Ministry of Finance, Government of India by an act of the Parliament but is not subjected to the administrative control of the Government. It was alternatively requested that if the submission is not acceptable, the applicant may be granted prospective effect from 1st April 2005. The applicant also gave a written submission and reliance was placed on 2 judgments in support of the claim that the applicant is not a dealer. The facts as stated in the application are reiterated in the written submission. While reproducing the definitions of 'business' and clause (x) to the

definition of 'dealer' under the MVAT Act,2002, it is contended as follows :

- "Business: To regard an activity as business, there must be a course of dealings, either actually continued or contemplated to be continued with a profit motive, there must be some systematic and real or organized course of activity or conduct with a said purpose of making a profit. To infer from a course of transactions that it is intended thereby to carry on business, ordinarily there must exist the characteristic of volume, frequency, continuity system indicating an intention to continue the activity of carrying on the transaction of a profit. But, no single test or a group of tests are decisive of the intention to carry on business. Hence, such must be decided in the circumstances of each particular case.
- Meaning of expression "Carries of Business" - To regard an activity as business, there must be a course of dealings, either actually continued or contemplated to be continued with a profit motive. By the use of expression "Profit motive", neither is it intended that profit must be earner, nor does it cover a mere desire to make some monetary gain out of a transaction or a series of transactions.
- SEBI being an autonomous body constituted under a separate enactment and having its own board empowered with all the powers for the functioning of SEBI. "

While reproducing the following extracts form the SEBI Act, it is contended thus :

"Management of the Board (SEBI):

4(2) The general superintendence, directions and management of the affairs of the Board shall vest in a Board of members, which may exercise all power and do all acts and things which may be exercised or done by Board.

4(3) Save as otherwise determined by regulations, the Chairman shall also have powers of general superintendence and direction of the affairs of the Board and may also exercise all power and do all acts and things which may be exercised or done by that Board.

Power of Central Government to supersede the Board

17(1) If at any time the Central Government is of opinion -

(a) that on account of grave emergency, the Board is unable to discharge the functions and duties imposed on it by or under the provisions of this Act; or

(b) that the Board has persistently made default in complying with any direction issued by the Central Government under this Act or in the discharge of the functions and duties imposed on it by or under the provisions of this Act and as a result of such default the financial position of the Board or the administration of the Board has deteriorated; or

(c) that circumstances exist which render it necessary in the public interest so to do, the Central Government may, by notification, supersede the Board for such period, not exceeding six months, as may be specified in the notification.

g) Section 25 of the SEBI Act - Exemption from tax on Wealth Income:

Notwithstanding anything contained in the Wealth Tax Act, 1957 (27 of 1957), the Income Tax Act, 1961 (43 of 1961) or any other enactment for the time being in force relating to tax on wealth, income, profit or gains

(a) the Board;

(b) the existing Securities and Exchange Board from the date of its constitution to the date of establishment of the Board,

shall not be liable to pay wealth - tax, income -tax or any other tax in respect of their wealth, income, profit or gain derived.

h) To regard an activity as business there must be a course of dealings, either actually continued or contemplated to be continued with a profit motive, there must be some real and systematic or organized course of activity or conduct with a set purpose of making profit. To infer from a course of transactions that it is intended thereby to carry on business,

i) Ordinarily there must exist the characteristics of volume, frequency, continuity system indicating an intention to continue the activity of carrying on the transactions of profit. But no single test or group of test is decisive of the intention to carry on a business. It must be decided in the circumstances of each particular case, whether an inference could be raised that the assessed is carrying on the business of purchasing or selling of goods within the meaning of statute. Director of Supplies and Disposals, Calcutta Vs. Member, Board of Revenue, West Bangle, Calcutta, 20 S.T.C 398.

j) With reference to Section 2(8) of MVAT Act: "Dealer":

It is difficult to lay down a single group or group of test which can be called decisive to the intention of a person to carry on business "the activity which the person must indulge in is not merely the activity of selling in the sense of transferring property of goods, but be the activity of carrying on the business of selling or supplying goods. What the legislature has emphasized is not the act or the activity of selling but the act or activity of carrying on the business... If we construe the expression "carrying on the business of selling or supplying goods". In a commercial sense, then it is clear that the object of the person who carried on the business must be to sell or to supply goods. A person may either produce goods or purchase goods with the object of ultimately selling them. Unless that object is present and unless that intention is clear, the mere activity of selling or supply would not constitute the carrying on of business of selling or supplying.

The burden of proving that the assessee was carrying on a business of selling goods lay upon the sale tax authorities. Deputy Commissioner of Agriculture Income Tax vs. Travancore Rubber and Tea Company, 1967.

k) Based on the above and matter stated in the Application SEBI prays:

- On consideration of the definition of "Business" along with relevant explanations and notes to the definitions under the MVAT Act, 2002, there must be a course of dealings, either actually continued or contemplated to be continued. It may be noted that the main objectives of SEBI are to
 - Protect the interest of the investors in securities*
 - Promote the development of securities market*
 - Regulate the securities market*
- Hence, the activities undertaken by the SEBI cannot be considered as "Business" under the MVAT Act, 2002.
- The definition of "Dealer" along with relevant explanations and notes to the definitions under the MVAT Act, 2002, the intention must be there to carry on a business and the purchase of goods must be with the intention to ultimately selling them. Keeping in the view the main objective of SEBI as referred to in the above para, there appears to be no intention to carry in business and the assets sold by SEBI were not purchased with the intention to ultimately sell them. Hence SEBI cannot be considered as a 'Dealer' under the MVAT Act, 2002.
- SEBI is an autonomous body constituted by a separate enactment and having its own board empowered with all the powers for its functioning of SEBI by virtue of Section 4 (2) & (3) of SEBI Act, 1992. The Central Government has powers under section 16(1) to issue directions on questions of policy and certain additional powers under section 17 (1) to be exercised under special circumstances. In view of this, SEBI cannot be considered to be under administrative control of the Central Government and hence cannot be construed as Deemed Dealer as per the clause (x) of the explanation to Section 2(8) on "Dealer"."

A written submission of dt.nil was received on dt.04.09.2014. While reproducing the definition of 'dealer' under the MVAT Act,2002, it is contended as follows :

"In this context, it is submitted that SEBI established under the Securities and Exchange Board of India Act, 1992 (15 of 1992) (SEBI Act) by Parliament of India to protect the interest of investors in securities and to promote the development of and to regulate, the securities market and for matters connected therewith or incidental thereto. SEBI is an autonomous body constituted under a separate enactment having its own board empowered with all the powers for the functioning of SEBI.

It can be stated that a person effecting sales has to ascertain that whether he is doing so in the capacity of a dealer having regard to the frequency, continuity, regularity, volume etc. of the transactions. In this regard, attention is drawn to the order dated 30.9.1966 passed by the Hon.ble Supreme Court of India in the matter of State of Gujarat vs. Raipur Manufacturing Co. Ltd., wherein it was held that-

"In disposing of miscellaneous old and discarded items, the Company was not carrying on business of selling those items. In order that receipts from the sale of a commodity may be included in the taxable turnover it must be shown that the assessee was carrying on business in that particular commodity, and to prove that fact it must be established that the assessee had an intention to carry on business in that commodity.

The characteristics of volume, frequency, continuity and regularity indicating an intention to continue the activity of carrying on the transactions with a profit motive must exist. But no test is

decisive of the intention to carry on the business, and the intention has to be inferred in the light of all the circumstances. Where a person comes to own in the course of his business of manufacturing or selling a commodity, some other commodity which is not a by-product or subsidiary product of that business, and he sells that commodity, cogent evidence that he has intention to carry on business of selling that commodity would be required. In the present case, no presumption can be raised, on the facts, that when the goods were acquired there was an intention to carry on the business in those discarded materials, nor can it be said that the goods became part of or an incident of the main business of -selling textiles., as they were not by-products or subsidiary products arising in the course of manufacturing textiles".

It is submitted that Value Added Tax (VAT) is a tax upon every value addition and is leviable on each sale happening in respect of goods. As stated above, SEBI is a regulatory body and is not engaged in the business of selling goods or services. Moreover, VAT is payable only on the sales of goods where the threshold limit of turnover of sales is crossed by the dealer. For the purpose of section 2(8) of the MVAT Act, SEBI cannot be considered as a dealer or a deemed dealer."

Reply to queries raised during hearing was given thus :

Sr. No.	Queries	Replies
1.	<p><u>Management of the Board (Section 4 of SEBI Act, 1992):</u> <i>Board shall consists of a Chairman, two members from the officials of the Ministry of the Central Government, one member from amongst the officials of the Reserve Bank, and five other members of whom at least three shall be Whole Time Members to be appointed by the Central Government.</i></p>	<p>SEBI was established by the Government of India in the year 1988 and given statutory powers in 1992 with Securities and Exchange Board of India Act, 1992 being passed by the Parliament of India. As per Section 4(2) of the SEBI Act, 1992 - <i>The general superintendence, direction and management of the affairs of the Board shall vest in a Board of Members, which may exercise all powers and do all acts and things which may be exercised or done by the Board.</i> <i>Even though members are appointed by the Central Government, it is neither subjected to administrative control nor owned by the Central Government.</i></p>
2.	<p><u>Grants by the Central Government (Section 13 of the SEBI Act, 1992):</u> <i>The Central Government may, after due appropriation made by Parliament by law in this behalf, make to the Board grants of such sums of money as that Government may think fit for being utilized for the purposes of the SEBI Act, 1992.</i></p>	<p>The said sections empower SEBI to avail grants from the Government, if required. However SEBI has not taken any grants from the Government till date. <i>SEBI has Corpus Fund of Rs.7.50 crore as on 31.03.2014, which was equally contributed by IDBI, ICICI and IFCI.</i> <i>SEBI corporate body created by the legislature with defined powers and functions and is financially independent. It is not owned or funded by the Central Government.</i></p>
3.	<p><u>Accounts and Audit (Section 15 (4) of the SEBI Act, 1992 :</u> <i>The accounts of the Board as certified by the Comptroller and Auditor-General of India or any other person appointed by him in this behalf together with the audit report thereon shall be forwarded annually to the Central Government and that Government shall cause the same to be laid before each House of Parliament.</i></p>	<p>Comptroller and Auditor General of India (C & AG) is the title of a Government official in Jurisdictions. C&AG is responsible for supervising the quality of accounting and financial reporting of an entity/organization. They conduct the Regular/Statutory audit which is applicable to all the Government Companies/entities formed by the Parliament of India. <i>Books of accounts of SEBI are regularly audited by an Independent Internal Auditor.</i> <i>Since , C& AG's Audit procedure would be the same for all Government Companies or entities formed by the Parliament of India and not for SEBI alone, it could not be said that SEBI is under the supervisory or administrative control of the Central Government.</i> <i>Further, maintenance of Books of Account is a requirement for all entities in India and Audit thereon by the Statute.</i> <i>Any suggestions or actions on finance cannot be considered as an Administrative Control of the Central Government.</i></p>
4.	<p><u>Board shall be bound by such directions on questions of policy as the Central Government may give in writing to it from time to time.</u></p>	<p>It applies to all the organizations/body formed by the Parliament of India. <i>The principle role of SEBI is to protect the interest of investors in securities and to promote the development of, and to regulate the securities market. Any suggestions or actions cannot be considered as an Administrative Control of the Central Government.</i></p>

5.	<i>Power of Central Government to Supersede the Board (Section 17) of the SEBI Act, 1992.</i>	<i>It applies to all the organisations / body formed by the Parliament of India, when the disputes arises on interpretation of laws or provisions.</i>
6.	<i>Returns and Report [Section 18(1) of the SEBI Act, 1992]:</i> <i>The Board shall furnish to the Central Government at such time and in such form and manner as may be prescribed or as the Central Government may direct, such returns and statements and such particulars in regard to any proposed or existing programme for the promotion and development of the securities market, as the Central Government may, from time to time, require.</i>	<i>It applies to all the organisations / body formed by the Parliament of India. Eg : Autonomous body.</i> <i>The principle role of SEBI is to protect the interest of investors in securities and to regulate securities market. Any Suggestions or actions cannot be considered as an Administrative Control of the Central Government.</i>
7.	<i>Returns and Report (Section 18 (2) of the SEBI Act, 1992):</i> <i>Without prejudice to the provisions of sub-section (1), the Board shall, within ninety days after the end of each financial year, submit to the Central Government a report in such form, as may be prescribed, giving a true and full account of its activities, policy and programmes during the previous financial year.</i>	<i>It applies to all the organisations / body formed by the Parliament of India. Eg : Autonomous body.</i> <i>The principle role of SEBI is to protect the interest of investors in securities and to regulate securities market. Any Suggestions or actions cannot be considered as an Administrative Control of the Central Government.</i>
8.	<i>Power to remove difficulties (Section 34 (1) of SEBI Act, 1992).</i> <i>If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order, published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act as may appear to be necessary for removing the difficulty.</i>	<i>It applies to all the organisations / body formed by the Parliament of India, when the disputes arises on interpretation of laws or provisions.</i> <i>However till today, the Central Government has not issued directions or instructions to the Board under the section 34 of SEBI Act.</i>
9.	<i>SEBI has obtained permission from Central Government to disclose any financial details or report to outsider (if any).</i>	<i>SEBI is an autonomous body and is established under the SEBI Act, 1992. SEBI as a regulatory body is to protect the interest of investors in securities and to promote development of and regulate the securities market in India. In such cases, if SEBI has to obtain permission, it does not imply that SEBI is under administrative control of the Central Government. ”</i>

03. OBSERVATIONS

I have gone through the facts of the case. The applicant informs that it is an autonomous body established under Securities and Exchange Board of India Act, 1992 by the Parliament of India. During hearing, it was sought to make a point that the applicant is not covered by any of the clauses of deemed dealer and particularly clause (x) which pertains to "any other corporation, company, body or authority owned or constituted by or subject to administrative control, of the Central Government any State Government or any local authority". It is submitted that their object clause does not refer to any object of carrying on the business and selling or supplying goods in a commercial sense and therefore, any activity of purchase or sale of goods has to be seen with the intention which is never to purchase or sale any goods. However, it was stated that the applicant is constituted by the Ministry of Finance, Government of India by an act of the Parliament but is not subjected to the administrative control of the Government. It is informed that the applicant engages in activities of sale of scrap as well as acquisition and sale of

movable property as fixed assets. It is in these circumstances of engaging in transactions of sale of movable goods that the applicant has posed the following question for determination -

"Whether the applicant is a deemed dealer within the meaning of Section 2(8) of the Maharashtra Value Added Tax Act, 2002 since 1st April 2005?"

It can be seen that the applicant has admitted to effecting a sale of goods, movable goods. Further, it is also seen that the applicant has posed a specific question - *whether deemed dealer?* I have to state herein that the definition of 'dealer' under the MVAT Act,2002 has a specific deeming provision whereby specified persons or institutions organizations, etc. are particularly endowed with the status of a 'dealer' for the purposes of the MVAT Act,2002. I would elaborate the same as I reproduce the said provision thus -

Clause (8) of section 2 of the MVAT Act,2002

"dealer" means any person who, for the purposes of or consequential to his engagement in or, in connection with or incidental to or in the course of, his business buys or sells, goods in the State whether for commission, remuneration or otherwise and includes,-

- (a) a factor, broker, commission agent, del-credere agent or any other mercantile agent, by whatever name called, who for the purposes of or consequential to his engagement in or in connection with or incidental to or in the course of the business, buys or sells any goods on behalf of any principal or principals whether disclosed or not;
- (b) an auctioneer who sells or auctions goods whether acting as an agent or otherwise or, who organises the sale of goods or conducts the auction of goods whether or not he has the authority to sell the goods] belonging to any principal whether disclosed or not and whether the offer of the intending purchaser is accepted by him or by the principal or a nominee of the principal;
- (c) a non resident dealer or as the case may be, an agent, residing in the State of a non-resident dealer, who buys or sells goods in the State for the purposes of or consequential to his engagement in or in connection with or incidental to or in the course of, the business,
- (d) any society, club or other association of persons which buys goods from, or sells goods to, its members;

Explanation.— For the purposes of this clause, each of the following persons, bodies and entities who sell any goods whether by auction or otherwise, directly or through an agent for cash, or for deferred payment, or for any other valuable consideration shall, notwithstanding anything contained in clause (4) or any other provision of this Act, be deemed to be a dealer, namely:-

- (i) Customs Department of the Government of India administering the Customs Act, 1962 (52 of 1962);
- (ii) Departments of Union Government and any Department of any State Government;
- (iii) Local authorities;
- (iv) Port Trusts;
- (iv-a) Public Charitable Trust;
- (v) Railway Administration as defined under the Indian Railways Act, 1989 (24 of 1989) and Konkan Railway Corporation Limited;
- (vi) Incorporated or unincorporated societies, clubs or other associations of persons;
- (vii) Insurance and Financial Corporations, institutions or companies and Banks included in the Second Schedule to the Reserve Bank of India Act 1934 (II of 1934);
- (viii) Maharashtra State Road Transport Corporation constituted under the Road Transport Corporation Act, 1950 (LXIV of 1950);
- (ix) Shipping and construction companies, Air Transport Companies, Airlines and Advertising Agencies;
- (x) any other corporation, company, body or authority owned or constituted by, or subject to administrative control, of the Central Government, any State Government or any local authority;

Exception I.— An agriculturist who sells exclusively agricultural produce grown on land cultivated by him personally, shall not be deemed to be a dealer within the meaning of this clause.

Exception II.— An educational institution carrying on the activity of manufacturing, buying or selling goods, in the performance of its functions for achieving its objects, shall not be deemed to be a dealer within the meaning of this clause.

Exception III.— A transporter holding permit for transport vehicles (including cranes) granted under the Motor Vehicles Act, 1988 (5 of 1988), which are used or adopted to be used for hire or reward shall not be deemed to be a dealer within the meaning of this clause in respect of sale or purchase of such transport vehicles or parts, components or accessories thereof."

Thus, it can be seen that the MVAT Act has designed a special provision, a deeming provision under the umbrella of the Act. Certain categories have been deemed to be 'dealers' under the clause providing for the definition of a 'dealer'. The deemed dealer provision under the MVAT Act,2002 becomes operational when the categories enumerated thereunder sell any goods whether by auction or otherwise. The Explanation clause which introduces the deeming provision further provides that the deemed dealer provision would operate notwithstanding anything contained in clause (4) or any other provision of the Act. Here clause (4) refers to the definition of 'business' under the MVAT Act,2002. Therefore, when a certain category or class is deemed to be a 'dealer', one does not have to go about ascertaining whether the said deemed dealer carries on any business. The principle of interpretation of the impugned deeming provision is that when a particular category is deemed to be a dealer then one has not to go about ascertaining whether the said category-

- a. *could be termed as a dealer?*
- b. *could be said to be carrying on business?*
- c. *carries on business for profit?*

There remains no scope for consideration of or dealing with pretexts such as non-business or non-dealer, no profit, etc. The Explanation in clear terms provides that the enumerated categories would deemed to be a dealer when they sell any goods by auction or otherwise. Thus, the definition itself specifies that a sale of goods, whether by auction or otherwise, would render the persons, bodies, entities, etc. enlisted in the clauses to be a dealer. A deeming provision creates a legal fiction which is ordained to operate sans any interruption. When a certain category is considered as falling under a deeming provision, it is not to be ascertained whether the said category could be said to be falling under the deemed provision.

In *Balasubramania Thevar v. Nallamuthu Moopanar*, 1960-2 Mad LJ 116, it was observed thus,

"We may thus arrive at two different principles, in dealing with a statutory fiction as applying to certain facts. Firstly, the Court is entitled to and bound to ascertain, for what purposes the fiction was enacted, between what persons it should be operative, and how it should be given effect to. Secondly, in giving effect to a legal fiction, the corollaries of the assumed identity cannot be shirked; it is not merely proper, but even necessary, to assume the other facts also upon which the fiction can operate."

To sum up, the *Explanation* clearly states thus :

1. *It would apply only to the persons, bodies and entities enlisted thereunder.*
2. *The persons, bodies and entities enlisted thereunder would be deemed as dealers when they sell any goods for cash, or for deferred payment, or for any other valuable consideration.*
3. *The sale may be – i. by auction or otherwise
ii. directly or through an agent*
4. *The persons, bodies and entities enlisted thereunder shall be deemed to be dealers notwithstanding anything contained in clause (4) or any other provision of the MVAT Act,2002.*

Thus, the specified categories would be deemed to be dealers when they sell goods. Needless to say that the *Explanation* is applicable to the persons, bodies and entities as have been enumerated in the clause. In the present case, it is informed that the applicant engages in activities of sale of scrap as well as acquisition and sale of movable property as fixed assets. Thus, one of the criteria, as required by the *Explanation*, of effecting a 'sale' of goods is satisfied. Therefore, it now remains to be seen and decided as to whether the applicant fits into any of the categories mentioned therein. Of the categories enumerated under the *Explanation* to the clause (8) of the definition of 'dealer', I would have to invite attention to the following sub-clause, the reason being that it has been vehemently contended that clause (x) of the *Explanation* to the definition of 'dealer' does not apply to the applicant. I would look at the said clause thus-

(x) *any other corporation, company, body or authority owned or constituted by, or subject to administrative control, of the Central Government, any State Government or any local authority*

It is seen that the sub-clause expressly covers *any other corporation, company, body or authority owned or constituted by, or subject to administrative control, of the Central Government, any State Government or any local authority*. The applicant in the present case, has informed that it has been constituted by the Ministry of Finance, Government of India by an act of the Parliament. However, while stating so, the applicant has hastened to argue that it is not subjected to the administrative control of the Government. To deal with this argument, I have to understand what the aforesaid clause seeks to cover. The clause covers -

- *any corporation, company, body or authority*
- *such corporation, company, body or authority should be*
 - a. *owned or*
 - b. *constituted by, or*
 - c. *subject to administrative control*

of the Central Government, any State Government or any local authority.

It is worth noting that the words '*owned*', '*constituted by*' and '*subject to administrative control*' are separated by the word '*or*'. The '*expression 'or'* is a conjunction used to link alternatives. Thus, it is not the case that to fit into the clause (x), administrative control of the Central Government is the only criterion which the *corporation, company, body or authority* has to satisfy. Either of the 3 contingencies would apply to a *corporation, company, body or authority* so long as the contingencies in the aforesaid activities are performed by the Central Government, any State Government or any local authority. Therefore, the argument of the applicant that it is not subjected to the administrative control of the Government would be ineffective if it is a fact that the applicant is either owned or constituted by the Central Government. I look to ascertain the same thus :

The applicant is an autonomous body, which has been constituted by an Act of the

Parliament of India. The website of Securities and Exchange Board of India (SEBI) states that SEBI was enacted on April 12, 1992 in accordance with the provisions of the Securities and Exchange Board of India Act, 1992. The website of the Ministry of Finance, Government of India states that the Capital Market (CM) Division under the Department of Economic Affairs (DEA) deals with all matters related to Primary Market, Secondary Market and External Markets. It deals with the establishment related matters of SEBI, SAT (Securities Appellate Tribunal) and SUUTI (Specified Undertaking of Unit Trust of India). The work under the Primary Market Section is stated thus -

Primary Market Section

- Primary Market
- Related Intermediaries and Participants
- SEBI Board Meeting (Primary responsibility)
- SEBI Act
- Related Rules and Regulations
- Corporate Bond/Debt Market Development
- National Institute of Securities Market
- Collective Investment Schemes
- Private Equity and Venture Capital
- Financial Literacy
- FLRC (all policies & technical matters)
- Domestic Credit Rating Agencies
- Budget related matter of PM Section
- Sectoral Charge - Ministry of Corporate Affairs

Regulatory Establishment Section

- SEBI Establishment
- SAT Establishment
- Related Rules and Regulations
- Financial Regulatory Architecture
- Sectoral Charge of Departments of Disinvestment, Expenditure, Revenue, Financial Services

CM (Coordination) Section

- Internal coordination within CM Division
- Reports and Returns
- Internship programme
- Coordination of Budget related matters

The website of the Department of Economic Affairs gives further information of the Capital Market (CM) Division thus -

Institutions under the administrative control of DEA

- Security Printing and Minting Corporation of India Ltd
- National Savings Institute
- Securities and Exchange Board of India
-

Acts administered by DEA

Indian Trusts Act, 1882 (2 of 1882)(Section 20 dealing with investments)
The Indian Security Act, 1920 (10 of 1920)
.....
The Securities and Exchange Board of India Act, 1992 (15 of 1992)
.....

Even details about the Department of Economic Affairs for the purposes of the Right to Information Act provide inputs thus -

“DEA is the nodal agency of the Union Government to formulate and monitor country's economic policies and programmes having a bearing on domestic and international aspects of economic management. A principal responsibility of this Department is the preparation of the Union Budget annually (excluding the Railway Budget). Other main functions include:

- Formulation and monitoring of macroeconomic policies, including issues relating to fiscal policy and public finance, inflation, public debt management and the functioning of Capital Market including Stock Exchanges. In this context, it looks at ways and means to raise internal resources through taxation, market borrowings and mobilization of small savings;
- Monitoring and raising of external resources through multilateral and bilateral Official Development Assistance, sovereign borrowings abroad, foreign investments and monitoring foreign exchange resources including balance of payments;
- Production of bank notes and coins of various denominations, postal stationery, postal stamps; and Cadre management, career planning and training of the Indian Economic Service (IES).

ORGANISATIONAL UNITS

Presently, the work of DEA is organised in the following distinct but complementary Divisions:

AID, ACCOUNTS & AUDIT DIVISION

This Division is responsible for disbursement of loans and grants from multilateral/ bilateral donor agencies, debt servicing of loans to multilateral/ bilateral donors, accounting of external assistance, export promotion audit and supply of management information to credit Divisions.

ADMINISTRATION DIVISION

All administrative and establishment matters, including protocol, and implementation of Official Language Policy fall within the domain of this Division.

BILATERAL COOPERATION DIVISION

BC Division deals with Bilateral Development Assistance from all G-8 countries. One of the main functions of the Division is to extend concessional Lines of Credit to other developing countries. It also monitors the progress of implementation of Externally Aided Projects and administers all short term foreign training programmes.

BUDGET DIVISION

BUDGET DIVISION.
Apart from preparation of Union Budget and other allied issues like market borrowings, accounting and auditing procedures and financial relationship with the State Governments. This Division also deals with mobilization of small savings through the National Savings Organisation (NSO).

MANAGEMENT OF INVESTMENT
CAPITAL MARKET DIVISION

CAPITAL MARKET DIVISION
It is primarily responsible for policy issues related to development of the securities markets (i.e. share, debt and derivatives), External Commercial Borrowing and administration of Foreign Exchange Management Act (FEMA), 1999. It also looks after the administrative matters of the Specified Undertaking of Unit Trust of India (SUUTI), the Securities and Exchange Board of India (SEBI), Securities Appellate Tribunal (SAT) and Pensions Funds Regulation and Development Authority (PFRDA).

Pensions Funds Regulator
ECONOMIC DIVISION

ECONOMIC DIVISION

Thus, it is seen that SEBI is a body constituted by an Act of the Parliament of India and is also under the administrative control of the Capital Market Division of the Department of Economic Affairs under the Ministry of Finance, Government of India. This satisfies 2 of the contingencies in the definition - '*constituted by*' and '*subject to administrative control*' of the Central Government.

I would also refer to the various provisions of the SEBI Act. Section 3 of the SEBI Act pertains to '**Establishment and incorporation of Board**'. It states thus -

- (1) "With effect from such date as the Central Government may, by notification, appoint, there shall be established, for the purposes of this Act, a Board by the name of the Securities and Exchange Board of India.
- (2) The Board shall be a body corporate by the name aforesaid having perpetual succession and a common seal, with power subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall, by the said name, sue or be sued.
- (4)"

The above provision establishes beyond doubt that the SEBI is *constituted by the Central Government*. Other provisions of the SEBI Act may also be seen -

Sections 4 to 6 of the Act pertain to powers of the Central Government in respect of appointment, term of office, conditions of service and removal from office, of the Chairman and the members of the Board. Section 11 pertains to functions of the Board which include performing such functions and exercising such powers under the provisions of the Securities Contracts (Regulation) Act, 1956(42 of 1956), as may be delegated to it by the Central Government. Section 13 pertains to a provision for grants to the Board by the Central Government. As per section 15, the Board shall maintain proper accounts and other relevant records and prepare an annual statement of accounts in such form as may be prescribed by the Central Government in consultation with the Comptroller and Auditor- General of India. The accounts of the Board as certified by the Comptroller and Auditor- General of India or any other person appointed by him in this behalf together with the audit report thereon shall be forwarded annually to the Central Government and that Government shall cause the same to be laid before each House of Parliament. Sections 15K to 15M, 15P to 15S are concerned with establishment and composition of Securities Appellate Tribunals, qualifications, filling up of vacancies, resignation and removal of Presiding Officer or Member and staff of the Securities Appellate Tribunal. Sections 16 and 17 empower the Central Government to issue directions and to supersede the Board, respectively. The provisions of section 18 require the SEBI to furnish returns and reports to the Central Government. Section 20 provides that any person aggrieved by an order of the Board may prefer an appeal to the Central Government within such time as may be prescribed. As per section 22, the members, officers and employees of the Board shall be deemed, when acting or purporting to act in pursuance of any of the provisions of the SEBI Act, to be public servants within the meaning of section 21 of the Indian Penal Code (45 of 1860). Section 23 provides that no suit, prosecution or other legal proceedings shall lie against the Central Government or Board or any officer of the Central Government or any member, officer or other employee of the Board for anything which is in good faith done or intended to be done under the SEBI Act or the rules or regulations made thereunder. Section 24B empowers the Central Government to grant immunity to any person, who is alleged to have violated any of the provisions of the SEBI Act or the rules or the regulations made thereunder. Section 29 empowers the Central Government to make rules. Section 31 requires that every rule and every regulation made under the Act shall be laid, as soon as may be after it is made, before each House of Parliament. Section 34 empowers the Central Government to remove difficulties, if any difficulty arises in giving effect to the provisions of the SEBI Act and by order, published in the Official Gazette, make such provisions not inconsistent with the provisions of the Act as may appear to be necessary for removing the difficulty.

A perusal of the above provisions under the SEBI Act makes me observe that apart from constituting the Board i.e the SEBI, the Central Government has a say in all matters right from

appointment of members to their removal, grants, returns, audit, appeals, power to make rules, etc. The above provisions were also pointed to the applicant during hearing. However, the applicant was strongly of the view that these provisions do not translate to mean that the applicant is under the administrative control of the Central Government. I have reproduced hereinearlier, the written submission of the applicant in this regard which was tendered post hearing. With regard thereto, I have to observe that with the very evident provisions of the SEBI Act and more importantly, a Department under the Central Government itself affirming the exercise of administrative control over the affairs of the SEBI as well as the administration of the Act by which the Board was constituted, there wouldn't remain anything to argue to the contrary. Furthermore, even if the argument that SEBI is not under the administrative control of the Central Government is accepted then also, it is seen that there is no escape from the clutches of the clause (x) as the applicant has not denied it being constituted by the Ministry of Finance, Government of India by an act of the Parliament. And I have observed hereinabove that clause (x) becomes applicable in the event any of the 3 contingencies as contemplated therein are fulfilled. Therefore, all arguments for inapplicability of the deeming dealer provision on counts of '*no administrative control by Central Government*', as sought to be contended by the applicant, seem superfluous. This is especially so in the light of circumstances showing fulfillment of any of the contingencies (*i.e SEBI, being a body constituted by the Central Government*) as envisaged in the clause (x) of the *Explanation* to the definition of dealer under section 2(8). The reliance on the case laws is also misplaced as the same are not in interpretation of facts and provisions as are appearing in the instant case under consideration before me.

An overview of all above makes me summarize thus -

1. *SEBI is a body constituted by an Act of the Parliament of India.*
2. *The Capital Market Division of the Department of Economic Affairs under the Ministry of Finance, Government of India overlooks the work of the SEBI Act and Rules, SEBI establishment, etc.*
3. *The Securities and Exchange Board of India Act, 1992 (15 of 1992) is administered by the Capital Market Division of the Department of Economic Affairs, Government of India.*
4. *The Securities and Exchange Board of India is under the administrative control of Department of Economic Affairs, Government of India.*

In addition to above, a point worth noticing is that there exists a special provision in the SEBI Act whereby SEBI enjoys special exemption from tax on *wealth, income, profits or gains*. No such exemption exists in respect of the transactions of sale that would be effected by SEBI. In

fact, the MVAT Act,2002 has, by way of a special provision, accorded the status of a 'dealer' on SEBI. Further still, it is worth noting that the legislature has by way of a specific mention provided that it is not to be seen whether SEBI carries on business or otherwise. The MVAT Act,2002 has, by way of express mention, provided for that the other provisions of the MVAT Act,2002 would not come in the way of the conferring of such status.

Thus, the MVAT Act, by enacting a deeming fiction has accorded the status of a 'dealer' on *corporations, companies, bodies or authorities owned or constituted by, or subject to administrative control, of the Central Government, any State Government or any local authority*. In the present case, the applicant is specifically constituted by the Government of India as well as is under the administrative control, of the Central Government. Further, the applicant engages in activities of sale of scrap as well as acquisition and sale of movable property as fixed assets. Therefore, these facts call for a direct application of the above provision. There appears no reason for the applicant to dispute the aforesaid observations as the facts are clear beyond doubt. Therefore, I have to conclude that the facts of the present case squarely fit into the aforesaid clause (x). Thus, it can be seen that the applicant qualifies as a 'deemed dealer' under the above clause (x). Since the applicant fits into the deemed dealer category, a *non-obstante clause*, which does away with the ascertainment of the applicability of the other provisions, it does not become necessary for me to ascertain the fulfillment of the provisions namely business, profit, etc. The deeming provision is specifically brought into picture when the enumerated categories effect sale of goods, whether by auction or otherwise.

In view of all above, I would conclude that the applicant is a 'deemed dealer' for the purposes of the MVAT Act,2002, more specifically under clause (x) of the Explanation to the definition of 'dealer' under section 2(8) thereof, for engaging in activities of sale of scrap as well as acquisition and sale of movable property as fixed assets.

05. PROSPECTIVE EFFECT

The applicant has prayed for prospective effect to the determination order. We have seen above that the provision is very unambiguous. The facts of the case are such that the applicant, an autonomous body, has been specifically constituted by the Government of India and it is also under the administrative control, of the Department of Economic Affairs, Government of India. Further, the applicant is engaging in sale of scrap as well as acquisition and sale of movable property as fixed assets. The legislature has by way of inclusion of a specific clause to the effect in the definition of 'dealer' provided for 'a corporation, company, body or authority owned or constituted by, or subject to administrative control, of the Central Government', to be a 'deemed dealer' for the purposes of the MVAT Act,2002 when they engage in sale of assets. In view thereof, there should not have been a reason for any ambiguity

or any scope for confusion or any interpretation issues.

In circumstances of a case of a request for prospective effect, one has to see the facts of each case and the available provisions. The prevailing provisions are to be scrutinized for any ambiguity or scope for mis-interpretation. Also, it needs to be seen whether there was any statutory misguidance. No such contingencies exist in the present case. The applicant has not made out a case for favourable consideration of the request for prospective effect. In view thereof, I am not inclined to accept the request for prospective effect.

06. In view of the deliberations held hereinabove, I pass an order thus -

PROCEEDINGS

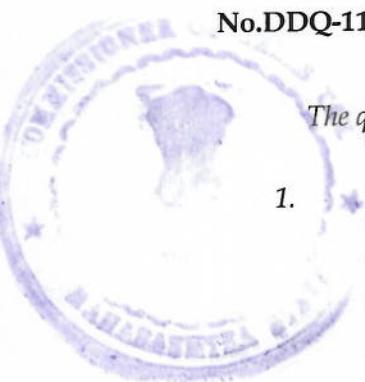
(under section-56(1)(e) and section-56(2) of the Maharashtra Value Added Tax Act, 2002)

No.DDQ-11/2012/Adm-6/15/B- 1

Mumbai, dt. 10.11.2014

The question posed for determination is answered such that -

1. *The Securities and Exchange Board of India is a 'deemed dealer' under clause (x) of the Explanation to the definition of 'dealer' under section 2(8) of the Maharashtra Value Added Tax Act, 2002 for engaging in activities of sale of scrap as well as acquisition and sale of movable property as fixed assets..*
2. *The request for prospective effect is rejected.*



DR. NITIN KAREER
10/11/14

**COMMISSIONER OF SALES TAX,
MAHARASHTRA STATE, MUMBAI**