

READ : Application dt.31.12.2013 by Stressed Assets Stabilization Fund.

HEARD : Smt. Nikita Badheka (Advocate) attended alongwith Sh. Mankad(DGM, SASF), Sh.Vijayadheer (DGM, SASF) and Sh.Badheka(Advocate).

PROCEEDINGS

(under section 56(1) & (2) of the MVAT Act, 2002)

No.DDQ-11-2014/Adm-6/1/B- 2

Mumbai, dt. 28/03/2014

The applicant, Stressed Assets Stabilization Fund (SASF), informs that it is a Trust set up by the Central Government by the Trust Deed dt.24.09.2004. The following questions are posed for determination :

1	<i>Whether the applicant, which is an SPV specifically, constituted by the Central Government is a 'dealer' in terms of the provisions of the MVAT Act?</i>
2	<i>Whether the Applicant Trust is discharging the functions as per the Trust Deed settled by the Central Government and carrying on the functions assigned in the Trust Deed can be said to be carrying on business of buying and selling goods in terms of the provisions of the MVAT Act?</i>
3	<i>Whether transfer of Stressed Assets to the Applicant Trust under a Transfer Deed amounts to purchase by the Applicant in terms of the provisions of MVAT Act.</i>
4	<i>Whether realization of debt by enforcing the underlying security by the applicant Trust amounts to sale of Assets by the Applicant Trust?</i>
5	<i>Whether realization of debt by the Applicant in the eight cases specified in Annexure 3 herein amounts of Sale by the Applicant in terms of the provisions of MVAT Act.</i>
6	<i>If the answer to the above question is yes, whether the sale of immovable property can be taxed by the State of Maharashtra and whether there is any independent sale of movable property by the Applicant.</i>
7	<i>Whether the recovery of debt by the other institutions for 25 cases of debt for the property situated in the State of Maharashtra and where the Applicant has received only the proceeds, amounts to sale of assets by the Applicant.</i>
8	<i>Whether the Applicant can be treated as dealer in view of Article 285 of the Constitution of India as the Applicant has only discharged the functions of the Central Government as per the directives of Central Government as stated in the Trust Deed where the Settlor and Beneficiary are the Central Government.</i>
9	<i>Whether the applicant is required to take registration under the MVAT Act,2002?</i>

02. FACTS & CONTENTION

The application states thus -

- *The Central Government as a Settlor and Beneficiary set up a special purpose vehicle (SPV) in the form of a Trust.*
- *Clause 4 of the Trust Deed titled 'Objects of the Trust' is reproduced below - "The Trust shall manage, administer and realize the Stressed Assets and for the purpose do all such acts, deeds and things as may be required including without limitation taking action for realization and recovery of dues with or without intervention of the courts/tribunals and as if it were an arrear of land revenue, arriving at one time settlements, negotiated settlements and taking measures to enforce the available securities for effective and efficient recovery under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act,2002 or securitisation, restructuring or reconstruction of Stressed Assets and for this purpose act as Trustees, managers, administrators, receivers, valuers or otherwise and engage, appoint, discharge, remove and replace any intermediaries, agents, professionals or consultants."*

The Trust Deed was entered into between the President of India through Finance Secretary and various officials from the Central Government and persons otherwise appointed as Trustees therein as more specifically stated in the Trust Deed.

As can be seen from the clause 3 of the Preamble of the Trust Deed, the Government as a Settlor has decided to set up a Special Purpose Vehicle (SPV) in the form of a Trust for acquiring by transfer the Stressed Assets of IDBI for administering and managing the Stressed Assets WITH

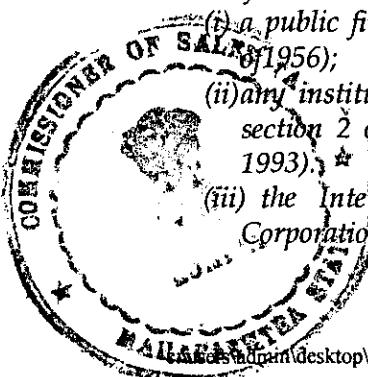
A VIEW TO RECOVER THE AMOUNTS DUE THEREUNDER and for the purpose create a Stressed Assets Stabilization Fund (SASF) for IDBI.

- The Central Government specifically allocated Rs.9000 Crore in the budget for 2004-05 for extending a loan to the Trust so created. Clause 5 of the Preamble of the Trust Deed sets out the modus operandi of the SASF. Kindly refer to the main terms of the Trust Deed under the heading Constitution of fund. It is stated that the Government has constituted the fund called SASF and transferred to the Trustees Rs. 100 towards the corpus of the fund.
- The phrase "stressed assets" is specifically defined under the Trust deed clause 2(d) as follows:-
Stressed Assets: Stressed Assets shall mean the assets financed by IDBI in the form of loans and advances, (i) in rupee or in foreign currency, including subscription to shares, stocks and debentures of industrial concerns (ii) pursuant to understanding, right issues, private subscription or exercise of conversion option contained in the loan documentation, which have become non-performing assets or have the potential of becoming non-performing assets in the books of IDBI.
- Thus, what is effectively transferred by IDBI to SASF is a legal debt. The ownership in property is not transferred to SASF. SASF merely received the legal debt- Receivables assigned by IDBI for the purpose of recovery of the loans from defaulting borrowers.
- Clause 4 of the Trust Deed lays down the objects of the Trust. The main object is the realization and recovery of dues with or without intervention of the court/tribunal as if it were arrears of Land Revenue. The Trust is also empowered to arrive at one time settlement, negotiated settlement and taking measures to enforce the available securities for effective and efficacious recovery under Securitization and Reconstruction of Financial Assets and Enforcement of Security interest Act 2002 (SARFAESI Act)
- Clause 14 of the Trust Deed gives power to the trustees to borrow the money with or without Securities from Government or IDBI or its successor an amount not exceeding Rs.9000 Crore and repay the amount from the Recovery or Realization of stressed assets. However Clause 18 (c) of the Trust Deed makes it clear that the officer and the staff cost shall be borne by IDBI or its successor. Presently, the successor of the IDBI, i.e. IDBI Bank Ltd is taking care of all the cost of the Trust.
- The Finance Minister in the union budget for the year 2004-05 made a provision of Rs. 9000 crore for extending a loan to this Special Purpose Vehicle (SPV). This money is to be invested in Non Interest Bearing Special Securities to be issued by Central Government. SASF would in turn receive, by transfer the Stressed Assets from IDBI in exchange of Special Securities issued by Government of India to IDBI. One more notification was issued by the Central Government to facilitate this action of the Central Government, i.e. Notification No. 41 dated. 9-10-2004, wherein SASF was specified to be public financial institution for the purpose of Section 2(h) (ii) of the Recovery of Debts to Banks And Financial Institution Act,1993 (DRT Act for short)
- What is Financial Institution in terms of DRT Act can be seen in 2(h) "financial institution" means-
 - (i) a public financial institution within the meaning of Section 4A of the Companies Act,1956 (1 of 1956);
 - (ia) the securitization company or reconstruction company which has obtained a certificate of registration under sub-section(4) of section 3 the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act,2002(5)of 2002);
 - (ii) such other institution as the Central Government may, having regard to its business activity and area of its operation in India by notification, specify;

The phrase financial institution is defined under the SARFAESI Act as follows:-

Definition:- 2(m) "financial institution" means-

- (i) a public financial institution within meaning of section 4A of the Companies Act, 1956(1 of 1956);
- (ii)any institution specified by the Central Government under sub-clause (ii) of clause(h) of section 2 of the Recovery of debts due to banks and Financial Institution Act,1993(51 of 1993);
- (iii) the International Finance Corporation established under the International Finance Corporation (Status, Immunities and Privileges) Act,1958(42 of 1958);



- (iv) any other institution or non-banking financial company as defined in clause (f) of section 45-I of the Reserve Bank of India Act, 1934(2 of 1934), which the Central Government may, by notification, specify as financial institution for the purpose of this Act;
- It must be remembered that SARFEASI Act is special act to regulate Securitization and empowering the bank and financial institutions to take possession of the Securities and to sell them without the intervention of the Court.

Similarly the Debt Recovery Tribunals were established under the DRT Act to provide for establishments of Tribunals for expeditious adjudication and recovery of debt due to banks and financial institution and for matters connected there with or incidental there to.

- As per the Trust Deed, the Recovery of the Debts by the Trust would be under SARFAESI Act or through securitization and reconstruction of Stressed Assets, DRT Act or any other legal methods.
- The Trust has acquired financial assets from IDBI. The term Financial asset is defined under SARFAESI Act as follows:

Section 2 (I) Financial Asset – “Financial Asset” means debt or receivables and includes

- a claim to any debt or receivable or part thereof, whether secured or unsecured; or
- any debt or receivables secured by, mortgage of, or charge on, immovable property;
- a mortgage ,charge, hypothecation or pledge of movable property , or
- any right or interest in the security , whether full or part underlying such debt or receivables; or
- any beneficial interest in property, whether movable or immovable, or in such debt, receivables, whether such interest is existing, future, accruing, Conditional or contingent; or
- any financial assistance.

- It is thus, clear that what is acquired by SASF is a debt or receivable with the sole object of recovering the said huge debt. SASF thus acquired the Financial Asset to the tune of Rs.9000/crore. These assets were acquired by SASF in lieu of transferring non-interest bearing special securities of Government of India to IDBI.
- The Financial Assets were acquired with underlying securities by way of Transfer Deed dated 30-09-2004 which are mainly immovable property, together with plant and machinery attached thereto and forming part of the immovable property including all buildings and structures of the immovable property. The plant and machinery are attached to the earth or permanently fastened to anything attached to earth.
- Under the Companies Act 1956, the financial institutions are defined under section 4A. However, Section 4A of the Companies Act,1956 defines financial institutions for the purpose of Companies Act only. This definition of Financial Institution under the DRT Act and SARFAESI Act are different as stated in the forgoing paragraphs. SASF, the Applicant Trust is declared and notified as Financial Institution under Section 2(h) (ii) of DRT Act and not under Section 4A of Companies Act,1956, with sole object and functions defined the Trust Deed for recovery of debts acquired from IDBI.
- DRT Act and SARFAESI Act being special laws have an overriding effect. This can be confirmed by Section 34 of the DRT Act and Section 35 of the SARFAESI Act. Unlike the financial institutions governed by Companies Act, the Financial Institutions under the DRT and SARFAESI Act do not carry out the normal functions but they carry on the functions as a Recovery Officer for the Government.
- The Applicant herein thus acquired, from IDBI, the properties movable and immovable of different debtors spread all over India. In majority of the cases, there is no separate sale of movable properties. The immovable properties situated outside Maharashtra are not within the scope of inquiry by the State of Maharashtra. The Applicant therefore restricts its query to the recovery of debt out of the property situated within Maharashtra.

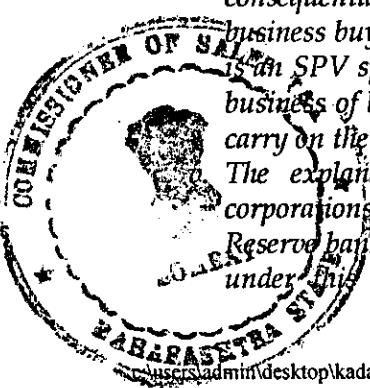
With a view to fulfill the object of the Trust, the Applicant has recovered and realized the debts through various methods as specified in clause 4 of the Trust Deed including the modes specified under SARFAESI Act and DRT Act.

- Normally, for the proceedings through SARFAESI Act, the Applicant invites tenders by Public Advertisement and holds public auctions for disposal of immovable and movable properties. The immovable and movable properties are sold together on “as is where is basis” However, separate

sale certificates are issued for accounting purpose as also for disclosing it before Stamp and registration authorities. All though separate certificates called Sales Certificates are issued for immovable and movable properties, the properties continue to be immovable in nature as the sale is on 'As is where is basis'.

- The Applicant is attaching herewith the list of the 8 debtors whose debts were recovered under SARFAESI Act for the properties located in Maharashtra. As can be seen from the list of the attached documents, the immovable and movable properties were sold on 'As is where is' basis but separate sales certificates were issued. There is no separate sale of movable properties by the Applicant except in cases of three debtor i.e. Romeda Chemicals Ltd., Santogen Exports Ltd. and Shree Vindhya Paper Mills Ltd. where the sale of movable and immovable are not severed but once the sales certificate is issued, the buyer gets rights to take away these movable properties. This will be clear from the fact that except above three cases, in all the cases the buyers of movables and immovable property are same. The issuance of separate Sale certificate for statistical purpose cannot mean separate sale of movable and immovable. In case of above three cases, a bare look at the list of movables attached to the Sales Certificates would confirm that these are parts of the plants and machinery which is attached to the land and severed by the buyer after the sale is completed by the Applicant. Further, in case of Shree Vindhya Paper Mills Ltd., due to the status quo order of Hon'ble Supreme Court, amounts were not distributed.
- The applicant is also recovering debts through SARFAESI Act from the properties situated outside Maharashtra with the same modus operandi, however, all the sales are outside the State of Maharashtra and thus beyond the jurisdiction of State of Maharashtra to levy the tax thereon, if applicable.
- On or around 10-12-2013 to 16-12-2013, the Applicant was visited by the INV branch, of Sales tax authorities in Maharashtra. The Applicant has provided all the necessary details as and when called for. The Inv Officers have not found any discriminatory material or suppression but proceeded with the detailed inquiry. As per the view of the INV officers, the Applicant is dealer and ought to have registered under the MVAT Act and paid the tax on the alleged sale of movable properties. However, the Applicant is of the firm opinion and bonafide belief that it is not dealer in term of the provisions of the MVAT Act. The Applicant is not carrying on any business of buying and selling of goods.
- The reasons for the claim by the Applicant are as follows.
 - i. Basically, as per Article 285 of Constitution of India, the property of the Union (i.e. Central Government) shall be exempt from all taxes imposed by a State or by any authority within a State. The Applicant Trust is constituted by the Government of India, for the Government of India. The settler of the Trust is Government of India, the beneficiary is also Government of India. The Applicant is only an SPV for specific purpose of realizing the debt due to the Government of India. The money realized has to be transferred to the Government. The Applicant's (A Trust) expenses are borne by IDBI. The Trust is for specific purpose for limited duration. The Trust Deed is later amended for execution of Government scheme for limited period of six months. Thus, the entire property dealt with by the applicant are Government of India properties and cannot be taxed.
 - ii. The Applicant is a Trust formed by the Central Government for the special and sole purpose of recovering the debt accumulated over years by IDBI.
 - iii. The Applicant has acquired Non Performing Assets - debt from IDBI. The function of the Applicant is recovery of debt in furtherance of the fulfillment of the object of the Trust and therefore the Applicant cannot be treated as dealer carrying on the business.
 - iv. The definition of dealer under the MVAT Act includes the person who for the purpose of or consequential to his engagement in or in connection with or incidental to or in course of his business buys and sells goods in the State. By no stretch of imagination, the Applicant who is an SPV specifically constituted by the Central Government be treated as carrying on the business of buying and selling the goods. The Trust Deed does not permit the applicant to carry on the business of buying and selling the goods.

The explanation to the definition of "dealer" under MVAT Act covers financial corporations, institutions or companies and banks included in Second schedule to the Reserve bank of India Act. The Applicant is not a financial corporations, institution falling under this sub-clause. As explained earlier, the financial institutions covered by this



explanation are the financial institutions declared as such under Section 4A of the Companies Act. The Applicant is notified as Financial Institution for the purpose of Section 2(h) (ii) of the DRT Act which is reproduced herein above. The Applicant therefore submits that the Applicant does not fall into the category of the class of persons specified by way of explanations to the definition of dealer as it is a SPV constituted for the purpose of realization and recovery of NPA - Stressed Assets acquired from IDBI.

vi. The definition of "business" in section 2(4) of MVAT Act includes trade, commerce and manufacture or any adventure or concern in the nature of service, trade, commerce or manufacture. The Applicant is not carrying on any activity of carrying on the business in terms of Section 2(4) of the MVAT Act.

vii. The definition of "Sales" under section 2(24) of the MVAT Act means a sale of goods made within the State of Maharashtra for Cash or deferred payment or other valuable consideration. The Applicant has not sold any goods within the State of Maharashtra but has discharged the functions assigned to it by the Trust. The main object of the Trust as is clear from the preamble of the Trust Deed is to acquire, by transfer, the stressed Assets of IDBI for administering and managing the stressed assets with a view to recovering the amounts due there under and for that purpose create a 'Stressed Assets Stabilization Fund' for IDBI. The Trustees have to pay the amount realized or recovered from the stressed assets to the Government of India.

viii. The phrase "stressed assets" is defined in the Trust Deed at clause 2(d). These are the NPAs or the Assets which have the potential of becoming NPA in the books of IDBI. The objects of the Trust are specified in clause 4 of the Trust Deed. The Trustees under the Trust deed are responsible for realization out of the stressed Assets of IDBI transferred under this IDBI with the help of loan given by the Government of India. As and when the Stressed Assets are realized the money would be directly transferred to Government of India. Thus, the entire activity is financed by the Government of India.

ix. Kindly refer to the Transfer Deed. All these stressed Assets are transferred by IDBI to the Applicant herein. Clause 2.1.1 of the said Transfer Deed assigns in favour of the Applicant, right, title and interest in the loan documentation and all collateral and security interest, pledges and or guarantee created to secure the repayment of loans which IDBI is entitled to. Thus, what is transferred is debt with underlying securities. The schedule attached to the Transfer Deed refers to 123 properties situated in the State of Maharashtra. The description of the properties may please be referred to. All the properties are independently described in Schedule II as immovable properties together with all buildings structure thereon or attached to the earth or permanently fastened to anything attached to the earth.

x. Out of the total 123 properties described in this transfer deed, the Applicant itself has disposed off and realized the debt of only 8 properties under SARFAESI Act. Some of the properties Debt are recovered through DRT proceedings, liquidation proceedings and other modes. In the properties where debt is realized through DRT OR liquidation proceedings, etc., the Applicant has received the proceeds which in turn are transferred to the Central Government. The Applicant submits that since the Trust is constituted only for the purpose of Government debt and the activity of the Applicant is towards the performance of the specific object for which the Trust was created, It is not correct on the part the Sales Tax Authorities to claim that the Applicant is carrying out the business of buying and selling the goods.

xi. The Applicant submits that sale as traditionally defined requires purchase of goods and the sale of very same goods. In the present case, the Applicant has not purchased any goods. It is only burdened with the responsibility of recovering the Government debt, which is discharged by the Applicant by enforcing the securities. It is pertinent to note that the function of the Applicant Trust is only to realize the debt and transfer the proceeds to the Central Government. The Trust acts as an SPV of the Central Government for specific purpose only.

xii. The termination of the Trust as per Clause 22 of the Trust Deed would be on any of the following events:

- Upon recovery in full of all the Stressed Assets transferred to it under this Deed;



- b. Expiry of the period of twenty years from the date of acquisition by transfer of the Stressed Assets;
- c. The Government having been satisfied, on the recommendation of the Trustees, that no further amount would be recoverable out of the Stressed Assets.
- xiii. Upon termination of the Trust, the Trust property shall without any further act or deed vest in the Government.
- xiv. This Clause makes it abundantly clear that Trust is not carrying on any business and therefore the Applicant bonafide believed that it is not liable for registration and has not obtained any registration under the MVAT Act. The audit of the Trust is by CAG, which confirms the say of the Applicant.
- xv. Out of the total 33 cases where the debt is realized in the State of Maharashtra by Applicant, only 8 cases are direct realization of debt by the Applicant by resorting to the provisions of SARFAESI Act. In 25 cases, the debts are realized by other institutions and the Applicant has received the proceeds from these institutions. Applicant has not sold any Assets but has only recovered the debt in these 25 cases.
- xvi. With the above background and the facts of the case, the Applicant has posed questions for Determination (as reproduced on pg.1).
- xvii. Prayer for Prospective effect - The Applicant is making this prayer by way of abundant caution. The Applicant has always treated itself as a special purpose vehicle of the Government of India, constituted for and by it and itself being the beneficiary. Till date no auditor or department has ever raised such a query. The Applicant has naturally not collected any taxes. Even if the tax is held to be payable, it would amount to putting money from one pocket to another pocket. The Applicant has got strong case on merits and in any case no one has till date advised the Applicant to pay Sales tax under MVAT Act. There is no question of evasion of any liability by the Applicant. Under the typical facts and circumstances of the cases, the Applicant prays that benefit of doubts be given to it and if the Applicant is held as dealer, the effect may please be given to the decision prospectively.

03. HEARING

It was contended thus -

- a) A detailed written submission is given in the DDQ application. A written submission is also given today i.e on dt.04.03.2014
- b) It is sought to stress on the following
 - i) Under Article 285 of the Indian constitution, no property of the Government can be taxed.
 - ii) The applicant is not carrying on business.
 - iii) The applicant has acquired non-performing assets which is a debt & the performance of the applicant is guided by trust deed which is recovery of debt.
 - iv) There are different modes of recovery such as restructuring, one time settlement, liquidation through High Court, DRT or under the SARFAESI Act. Except for the 8 transactions given in the list, all are recovery through the other modes where there is no sale involved. Out of the 8 also, there is normally a sale to one person of both movable and immovable. A separate sale certificate is issued for the purpose of payment of Stamp Duty. Even in case of movable sale, the property remains "AS IS WHERE IS" - embedded in earth as immovable.
 - v) When there are more than one debtors involved, even after auction is conducted there is no recovery as such due to disputes among debtors, court order & amount recovered is kept in Fixed Deposits without appropriation.

The applicant is notified as a financial institution only for the purpose of invoking the DRT Act & SARFAESI Act & not for business.

- d) It is tried to stress that all the properties transferred are immovable & continue to be so even after recovery.
- e) The Trust is subject to termination as per clause 25 of the Trust Act.
- f) The applicant prays for prospective effect.

During hearing, the applicant gave a Note on the enforcement of secured assets under SARFAESI Act, 2002 which is reproduced thus -

In NPA cases where enforcement of security under SARFAESI is decided upon the following procedure is followed:

- On declaration of financial asset as NPA, a Notice under section 13(2) of SARFAESI Act will be issued to the borrower/ mortgager, in writing, to discharge, in full, its liabilities to the secured creditor within 60 days from the date of the notice.
- If the borrower / mortgager fails to comply with the said Notice, the Secured creditor will exercise all or any of the right under section 13(4) of SARFAESI Act including taking possession and selling the secured assets through Authorised Officer(AO). In the case of financing of the secured assets by more than one secured creditor or joint financing, exercise of such right under section 13(4) should be agreed upon by the secured creditors representing not less than 60% (earlier 75%) in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors.
- The secured creditor taking the possession through its AO, appoints an enforcement agency/ security agency to take possession/manage the secured assets. AO takes possession of such secured assets in the presence of two witnesses after a Panchnama drawn and signed by the witnesses. After taking possession, inventory of the property is made and valuation of the secured assets is undertaken through valuer. Thereafter, in consultation with other secured creditors, the reserve price for sale of the assets is fixed. It is pertinent to note that taking possession by AO means, AO affix the possession notice on the premises of the secured assets, AO will not remove any plant and machinery from the building and land. In other words, it would be similar to the attachment of the secured asset as there is no movement of the property from where it is situated. The plant and machinery continue to be embedded with the land and building.
- The sale of such secured assets is done, as is where is basis, through public auction by inviting bids by issuing public notice in two leading newspapers (one in vernacular language) having sufficient circulation in that locality. The plant and machinery would not be severed and it would continue to be embedded with land and building while selling the same. Sale of the secured assets takes places after the expiry of 30 days from the date of publication of the notice. The sale is confirmed in favour of the purchaser offering the highest price. No sale is confirmed, if the amount offered by sale price is less than the reserve price.
- On confirmation of sale by the secured creditor and if the terms of payment have been complied with, the AO issues a certificate of sale of the assets. The certificate of sale is prima facie evidence of title in favour of the purchaser.
- If a company is having multiple plant locations, then sale certificate is issued separately for each plant.
- If the company has secured assets outside the State of Maharashtra, the same procedure as stated above would be followed for enforcement of such secured asset i.e. local valuer would value the property, inspection to the intending purchasers would be given at the place of property and the sale of the assets would be done, as is where is basis, at the same place. The sale certificate would be registered in the Office of Sub Registrar within whose jurisdiction the secured assets situate.

04. OBSERVATIONS

I have gone through the facts of the case. The applicant has raised a number of questions with regard to its activities in the State of Maharashtra. Certain documents such as formation Deed, etc. have been tendered to explain the activities carried on by the applicant. The emphasis of the arguments is that the applicant is not carrying on any business and hence would not be liable to tax under the provisions of the Maharashtra Value Added Tax Act,2002 (MVAT Act,2002). Before proceeding to appreciate the provisions as are available under the MVAT Act,2002, I would have a look at the relevant clauses from the documents with a view to ascertaining the nature of the activities of the applicant.

TRUST DEED DT.24.09.04

A Trust Deed is executed between the President of India acting through the Secretary (Financial Sector) and the Trustees of SASF wherein it is stated that -

'During the four decades of its existence, IDBI (Industrial Development Bank of India) has accumulated non-performing assets and net non-performing assets at Rs. 9000 crore approximately as on March 31, 2004. The Government, as Settlor, has decided to set up a special purpose vehicle in the form of a Trust for acquiring by transfer the Stressed Assets with a view to recovering the amounts due thereunder and for the purpose create a "Stressed Assets Stabilization Fund" (SASF) for IDBI.'

The relevant clauses of the Trust Deed are :

1. *The Government has made a provision of Rs. 9000 crore in the Budget for the financial year 2004-05 for extending a loan to the Trust.*

2. *The Trustees shall invest the loan in twenty-year non-interest bearing special securities to be issued by the Government and authorise the Government and utilize the special securities for the purpose of acquiring by transfer the stressed assets from IDBI.*

3. *The Trustees shall realise the Stressed Assets by restructuring, arriving at settlement with the borrowers, taking legal measures or adopting such measures as they may deem fit including but not limited to their recovery as arrears of land revenue.*

4. *The Trustees shall pay the amount realised or recovered from the Stressed Assets to the Government.*

5. *The Govt. at the end of February each year pay to IDBI the amount received from the Trust.*

6. *The special securities shall be redeemed to the extent of payment received from the Government.*

7. *Constitution of Fund*

The Govt. hereby constitutes a fund called the "Stressed Assets Stabilization Fund" and transfers to the Trustees a sum of Rs.100 (Rupees One Hundred Only) being the corpus to be held by the trustees by way of trust for the purpose of acquiring by transfer from IDBI the Stressed Assets of IDBI.

8. *Definition*

- *Beneficiary : Beneficiary shall mean the Government.*
- *Stressed Assets : Stressed Assets shall mean the assets financed by IDBI in the form of loans and advances, (i) in rupee or in foreign currency, including subscription to shares, stocks and debentures of industrial concerns (ii) pursuant to underwriting, rights issue, private subscription or exercise of conversion option contained in the loan documentation, which have become non-performing assets or have the potential of becoming non-performing assets in the books of IDBI.*

9. *Objects of the Trust*

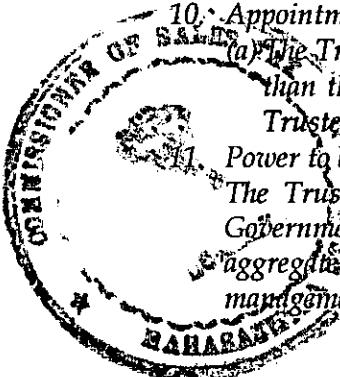
The Trust shall manage, administer and realise the Stressed Assets and for the purpose do all such acts, deeds and things as may be required including without limitation taking action for realisation and recovery of dues with or without intervention of the courts/tribunals and as if it were an arrear of land revenue, arriving at one time settlements, negotiated settlements and taking measures to enforce the available securities for effective and efficacious recovery under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act,2002 or securitisation, restructuring or reconstruction of Stressed Assets and for this purpose act as trustees, managers, administrators, receivers, valuers or otherwise and engage, appoint, discharge, remove and replace any intermediaries, agents, professionals or consultants.

10. *Appointment of Trustees*

(a) The Trust created in this Deed of Trust shall have a Board of Trustees consisting of not less than three and not more than five trustees as may be determined by the Government. The Trustees shall be appointed by the Government in writing.....

11. *Power to borrow monies*

The Trustees shall have the power to borrow monies with or without securities from the Government or Industrial Development Bank of India or its successor, from time to time, an aggregate amount not exceeding Rs.9000 crore for meeting the expenses in connection with the management, administration or realisation of the assets transferred to the Trust and repay the



amount from the recovery or realisation of the Stressed Assets prior to transferring the amount to the Government.

12. *Investment of fund monies*

The Trustees shall have the power to open and operate bank account or account in a post office. All investible monies arising out of the realisation or recovery from the Stressed Assets or accruing by way of interest or otherwise to the Fund shall be held by the Trust in an account opened with IDBI Bank Ltd. or its successor Bank.

13. *Accounts*

(a) The accounts of the Fund shall be maintained and audited by the Comptroller and Auditor General of India.

(b) The Trustees shall keep all books of accounts showing the receipts and disposal of amounts received or accrued to the fund from time to time and investments or payments made out of the Fund in respect of the trust property.

14. *Termination of the Trust*

The Trust shall stand terminated in any of the following events :

(a) Upon recovery in full of all the Stressed Assets transferred to it under this Deed.

(b) Expiry of the period of twenty years from the date of acquisition by transfer of the Stressed Assets.

(c) The Government having been satisfied, on the recommendation of the Trustees, that no further amount would be recoverable out of the Stressed Assets.

Upon termination of the Trust, the trust property shall, without any further act or deed, vest in the Government.

LOAN AGREEMENT DT.28.09.04

This is executed between the above parties and the terms are :

1. The Government agrees to lend and advance and the Trustees agree to borrow from the Government a sum of Rs.9,000 crore (rupees nine thousand crore only) by way of loan.....
2. The loan shall be free of interest.
3. The loan is for a period of 20 years from the date of its drawl.
4. The Trustees shall immediately on borrowing the loan utilise the entire loan for the purposes of making investment in the Special Securities to be issued by the Government.
5. The Trustees shall immediately after execution of this Agreement, acquire by transfer the stressed assets from IDBI and pay the consideration therefor by transferring and delivering the Special Securities to IDBI.
6. The Trustees shall administer, manage, or realize the stressed assets consistent with the objects of the Trust.
7. The Trustees shall pay to the Government at the end of January every year the amount recovered or realized by the administration, management of the stressed assets. The liability of the Trustees shall stand reduced to the extent of payment received by the Government from the Trustees.
8. The loan granted is unsecured.

TRANSFER DEED DT.30.09.2004 - FOR PROPERTIES IN MAHARASHTRA

It is executed between IDBI and SASF, the important terms of which are :

- And Whereas the Trust has been set up with the object of acquiring by transfer the stressed assets of the Transferor for the purpose of acquiring by transfer the stressed assets of the Transferor for the purpose of recovering the amounts due thereunder in consideration of the transfer of the securities to IDBI.
- And Whereas the Transferee in furtherance of the objects of the Trust has agreed to acquire the stressed assets of the Transferor.
- 'Borrower' shall mean the industrial concern to which the Transferor has lent and advanced term loan or other form of financial assistance under the Loan Agreement or other agreement and "Borrowers" means collectively the Borrowers whose names are appearing in the Schedule I to this Deed.
- 'Loan Documentation' shall mean the Loan Agreements, deed and/or documents executed in favour of the Transferor and/or entered into between the Transferor and the Borrower and/or any third party, inter alia, setting out the terms and conditions on which the Transferor has agreed to

provide financial assistance to the Borrower(s) including any writings creating/evidencing a Security Interest, pledge and/or guarantee in favour of the Transferor and any undertakings by any person on the basis of which the Transferor disbursed or made available such financial assistance to the Borrower(s). The description of immovable properties forming part of the Security Interest is set out in Schedule II to this Presents.

- 'Loans' shall mean
 - (i) the principal amount constituting the Loans presently outstanding and payable by the Borrowers to the Transferor under the Loan Documentation;
 - (ii) the interest payable by the Borrowers to the Transferor under the Loan Documentation;
 - (iii) all other amounts which are payable by the Borrowers to the Transferor under the Loan Documentation;
 - (iv) all other amounts which may at any time hereafter become payable by the Borrowers under the Loan Documentation (and which would, but for the transfer under this Presents, have been payable by the Borrowers to the Transferor and which shall, consequent to the transfer under this Presents, be payable by the Borrower to the Transferee).
- "Security Interest" shall mean the right, title and interest to any kind whatsoever upon property, created in favour of the Transferor and includes any mortgage, charge, hypothecation, assignment, pledge, guarantee and third party security.

- Transfer

In consideration of the Transferee transferring and delivering to the transferor special securities equivalent to Rs.2914 crore (Rupees Two Thousand Nine Hundred Fourteen crore only) being the aggregate value of net Loans transferred by the Transferor, the Transferor as true, legal and beneficial owner of the Loans in the ordinary course of business, hereby unconditionally and irrevocably sells, assigns, transfers and releases to and unto to the Transferee all the Loan forever to the end and intent that the Transferee shall hereby be deemed to be the full and absolute legal owner, and the only person legally entitled to the Loans or any part thereof, free from any or all encumbrances and to recover and receive all the amounts due, including right to file a suit or institute such other recovery proceedings and take such other action as may be required for the purpose of recovery of the Loans in its own name and right as a assignee and to exercise all other rights and as a assignee and to exercise all other rights of the Transferor in relation thereto.

The Transferor hereby further assigns in favour of the Transferee all its rights, title and interest in the Loan Documentation and all collateral and underlying Security Interest, pledges, and/or guarantees created to secure the repayment of the Loans, which the Transferor is entitled to. The Transferee shall have the right to enforce the Security Interest, pledges, and/or guarantees and appropriate the amounts realised therefrom towards the repayment of the Loans and to exercise all other rights of the Transferor in relation to such Security Interest, pledges, and/or guarantees. The Transferor shall transfer/deliver or cause to be transferred or delivered or holding for and on behalf of the Transferee, all such original documents, deeds and/or writings including but not limited to the Loan Documentation and produce the same promptly upon the request of the Transferor.

The Transferor hereby agrees that it shall execute all documents as may be necessary or required for the purpose of further perfecting the Transferee's right, title and interest in the Loans, the Loan Documentation and/or any underlying Security Interest, pledges, and/or guarantees as the case may be and to and to the use of the Transferee in the manner aforesaid determined by the Transferee in its sole discretion and do all acts, deeds and things as may be necessary in this regard.

On and from the date of this Presents, the Transferee shall be:

- entitled to receive the Loans;
- entitled to exercise all the rights of the Transferor in respect of the Loans and under the Loan Documentation, save and except such rights that are personal in nature or special or statutorily conferred upon or available to the Transferor;
- entitled to demand, sue for and recover the Loans;

The Transferee shall from the date of this Presents secure all rights in relation to the Loans, the Loan Documents and the Security Interest and shall be deemed to be the lender and all the rights of the Transferor shall vest in the Transferee.

All contracts, deeds, bonds, agreements, power of attorneys, grant of legal representations, permission, approvals, consents or no objections under any law or otherwise and other instruments of whatsoever nature which relate to the Loans, the Loan Documents and the Security Interest and which are subsisting or having effect immediately before the acquisition shall after the acquisition of the same by the Transferee be of as full force and effect against or in favour of the Transferee and may be enforced or acted upon as fully and effectively as if in the place of the Transferor, the Transferee had been a party thereto.

- Transfer - Without Recourse

Notwithstanding anything contained herein, the transfer by Transferor to the Transferee under this deed is on a "without recourse" basis i.e. the Transferor does not guarantee the future payment of any amount of Loans or the performance of any obligation by the Borrowers or the solvency or creditworthiness of the Borrowers and the Transferor shall not be liable for any default or breach by the Borrowers (including any non-creation deficiency in value or non-realisation of the Underlying Security).

The applicant has given a copy of a gazette dt.29.09.2004 wherein it is notified thus-

"In exercise of the powers conferred by sub-clause (ii) of clause (h) of section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993), the Central Government, having regard to the business activities and the area of operations in India of the Stressed Assets Stabilization Fund, Mumbai, hereby specifies the Stressed Assets Stabilization Fund, Mumbai, to be a financial institution for the purposes of the said clause."

The aforesaid Act provides for the establishment of Tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions and for matters connected therewith or incidental thereto. Under section 3 of the said Act, the Central Government establishes 'Debt Recovery Tribunals'. Clause (h) of section 2 of the aforesaid Act gives the definition of financial institution thus :

"financial institution" means –

- (i) *a public financial institution within the meaning of Section 4A of the Companies Act, 1956 (1 of 1956);*
- (ii) *such other institution as the Central Government may, having regard to its business activity and the area of its operation in India by notification, specify;*

Thus, the applicant is a 'financial institution' for the purposes of the Debt Recovery Tribunals. Section 25 of the aforesaid Recovery of Debts Due to Banks and Financial Institutions Act, 1993 provides for modes of recovery of debts. One of these modes is the *attachment and sale of the movable or immovable property.*

From the clauses reproduced above, it is seen that the objects of the applicant Trust refer to recovery under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act,2002 (SARFAESI Act). I have referred to the provisions of the SARFAESI Act which was enacted to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. Section 3 of this Act provides that no securitisation company or reconstruction company shall commence or carry on the business of securitisation or asset reconstruction without obtaining a certificate of registration granted under the said section and such other conditions. The Act defines a "financial institution" thus--

- (i) a public financial institution within the meaning of section 4A of the Companies Act, 1956 (1 of 1956);
- (ii) any institution specified by the Central Government under sub-clause (ii) of clause (h) of section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993);
- (iii) the International Finance Corporation established under the International Finance Corporation (Status, Immunities and Privileges) Act, 1958 (42 of 1958);
- (iv) any other institution or non-banking financial company as defined in clause (f) of section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934), which the Central Government may, by notification, specify as financial institution for the purposes of this Act;

Thus, a financial institution under the Debt Recovery Tribunals is recognised as a financial institution under the SARFAESI Act. Section 9 of the SARFAESI Act provides for the measures for assets reconstruction. One of these measures is *the sale or lease of a part or whole of the business of the borrower*. The Rules for the purposes of the SARFAESI Act have specific provisions for sale of immovable secured assets, inventory, valuation and sale of movable secured assets, etc. The Act has also prescribed in the Rules, a Certificate of Sale of movable property.

Having regard to all above, I find that the following inferences about the activities of the applicant could be gathered :

1. *The applicant is a special purpose vehicle in the form of a Trust formed by the Government of India.*
2. *It is formed for the purpose of acquiring by transfer, the Stressed Assets of IDBI.*
3. *IDBI (the 'Transferor'), as true, legal and beneficial owner of the Loans unconditionally and irrevocably sells, assigns, transfers and releases to the applicant (the Transferee) all the Loan.*

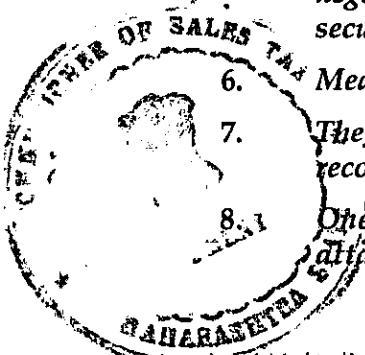
Thus, the applicant is deemed to be the full and absolute legal owner, and the only person legally entitled to the Loans or any part thereof, free from any or all encumbrances and to recover and receive all the amounts due, including right to file a suit or institute such other recovery proceedings and take such other action as may be required for the purpose of recovery of the Loans in its own name and right as a assignee and to exercise all other rights and as a assignee and to exercise all other rights of the Transferor in relation thereto.

4. *The object of the Trust is to manage, administer and realise the Stressed Assets.*
5. *The objects of the Trust explicitly provide for taking action for realisation and recovery of dues with or without intervention of the courts/tribunals and as if it were an arrear of land revenue, arriving at one time settlements, negotiated settlements and taking measures to enforce the available securities for effective and efficacious recovery under the SARFAESI Act.*

Measures for recovery under the SARFAESI Act include 'sale or lease'.

The applicant is declared as a financial institution for the purposes of recovery under the Debt Recovery Tribunals.

One of the modes for recovery of debts by the Debt Recovery Tribunals is the attachment and sale of the movable or immovable property.



The task before me now is to interpret the above conclusions about the activities of the applicant *vis-à-vis* the provisions under the MVAT Act,2002. From a perusal of the questions reproduced on page 1, the applicant, it is seen, is seeking to claim non-applicability of the provisions pertaining to 'business', 'dealer', 'sale' as are available under the MVAT Act,2002. I would reproduce the relevant provisions thus :

Clause (4) of section 2 - "“business” includes, -

- (a) any service;
- (b) any trade, commerce or manufacture;
- (c) any adventure or concern in the nature of service, trade, commerce or manufacture;

whether or not the engagement in such service, trade, commerce, manufacture, adventure or concern is with a motive to make gain or profit and whether or not any gain or profit accrues from such service, trade, commerce, manufacture, adventure or concern.

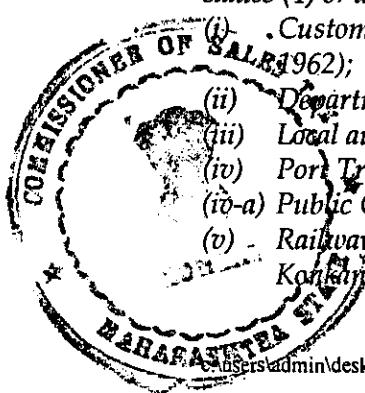
Explanation.- For the purpose of this clause,-

- (i) the activity of raising of man-made forest or rearing of seedlings or plants shall be deemed to be business;
- (ii) any transaction of sale or purchase of capital assets pertaining to such service, trade, commerce, manufacture, adventure or concern shall be deemed to be a transaction comprised in business;
- (iii) sale or purchase of any goods, the price of which would be credited or, as the case may be, debited to the profit and loss account of the business under the double entry system of accounting shall be deemed to be transactions comprised in business;
- (iv) any transaction in connection with the commencement or closure of business shall be deemed to be a transaction comprised in business;"

Clause (8) of section 2 - "“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.”

Clause (24) of section 2 - ““sale” means a sale of goods made within the State for cash or deferred payment or other valuable consideration but does not include a mortgage, hypothecation, charge or pledge; and the words ‘sell’, ‘buy’ and ‘purchase’, with all their grammatical variations and cognate expressions, shall be construed accordingly;

Explanation. - For the purposes of this clause,-

- (a) a sale within the State includes a sale determined to be inside the State in accordance with the principles formulated in section 4 of the Central Sales Tax Act, 1956 (74 of 1956);
- (b)(i) the transfer of property in any goods, otherwise than in pursuance of a contract, for cash, deferred payment or other valuable consideration;
- (ii) the transfer of property in goods (whether as goods or in some other form) involved in the execution of a 13[14]works contract including, an agreement for carrying out for cash, deferred payment or other valuable consideration, the building, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property;]
- (iii) a delivery of goods on hire-purchase or any system of payment by instalments;
- (iv) the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
- (v) the supply of goods by any association or body of persons incorporated or not, to a member thereof for cash, deferred payment or other valuable consideration;
- (vi) the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service is made or given for cash, deferred payment or other valuable consideration;

shall be deemed to be a sale.”

Even as I have reproduced the definitions of ‘business’ and ‘sale’ alongwith the definition of ‘dealer’, I find 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’. 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."

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. 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 ascertain whether the said category could be termed as a dealer. 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. Pretexts such as non-business or non-dealer, no profit, etc. cannot be entertained. The Explanation in clear terms provides that the enumerated categories would be 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.

Of the categories enumerated under the Explanation to the clause (8) of the definition of 'dealer', I would invite attention to the following sub-clause :

(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"*

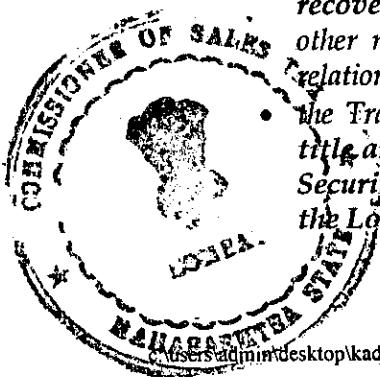
It is seen that the sub-clause expressly covers *any other corporation, company, body or authority owned or constituted by, or subject to administrative control, of the Central Government, any State Government or any local authority*. The facts of the present case are that the applicant is specially constituted by the Government of India. 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. Therefore, this fact calls for a direct application of the above provision. The applicant would not dispute this fact as the facts

are clear beyond doubt. In fact, the website of the applicant itself says so in very clear words - '*Stressed Assets Stabilization Fund (SASF) was constituted by the Govt. of India pursuant to a provision in the Union Budget 2004-05, a Special Purpose Vehicle(SPV) Trust for acquiring stressed and non-performing assets of erstwhile Industrial Development Bank of India.*'. Therefore, I have to conclude that the facts of the present case squarely fit into the aforesaid sub-clause (x).

Thus, it can be seen that the applicant qualifies as a 'deemed dealer' under the above sub-clause (x). The applicant has placed arguments with regard to sub-clause (vii) in the application for determination as well as by a written submission dt.25.03.2014. Since I have observed that the applicant falls in sub-clause (x) and not in sub-clause (vii), there arises no need to deal with these set of arguments. Further, since the applicant now 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 and so with regard to the facts of the present case, this aspect comes for appreciation now. I need to satisfy myself about the following - *whether the activities carried on by the applicant could be said to mean a sale of any goods?*

The applicant informs that it conducts sale of the goods to recover the stressed assets. Even the clauses in the Transfer Deed convey that the applicant is in a position to sell the goods in view of obtaining all rights and interests in respect of the same. At the cost of repetition, I would reproduce herein the relevant clauses from the Transfer Deed which places the applicant in the position of an owner of the Stressed Assets and pursuant thereto, to take action in respect of them and such action includes sale of the properties for recovery of the Loans.

- *the Transferor as true, legal and beneficial owner of the Loans in the ordinary course of business, hereby unconditionally and irrevocably sells, assigns, transfers and releases to and unto to the Transferee all the Loan forever to the end and intent that the Transferee shall hereby be deemed to be the full and absolute legal owner, and the only person legally entitled to the Loans or any part thereof, free from any or all encumbrances and to recover and receive all the amounts due, including right to file a suit or institute such other recovery proceedings and take such other action as may be required for the purpose of recovery of the Loans in its own name and right as a assignee and to exercise all other rights and as a assignee and to exercise all other rights of the Transferor in relation thereto.*
- *the Transferor hereby further assigns in favour of the Transferee all its rights, title and interest in the Loan Documentation and all collateral and underlying Security Interest, pledges, and/or guarantees created to secure the repayment of the Loans, which the Transferor is entitled to.*



What the above conveys is that the applicant is entitled to take action in respect of the Stressed Assets as an owner and it is in this capacity that the applicant is authorised to sell the properties for the purposes of recovery of the stressed assets. The sale effected by the applicant is for the recovery of the Stressed Assets and it is of the goods, movable as well as immovable, given as security for the Loans. The sale is for a valid consideration too.

In the case of M/s. ICICI Bank Ltd., Appellant V. The State Of Maharashtra (Second Appeal Nos. 752 and 755 of 2010, decided on November 24, 2012), the Hon. Maharashtra Sales Tax Tribunal has upheld the levy of VAT on the sale of repossessed vehicles by the Bank.

In the decision in the case of 1. Tata Motors Finance Ltd., 2. M/s. Icici Bank Ltd., 3. M/s. Family Credit Ltd. & Anr. V. Asst. Commissioner Of Sales Tax, Central Section, Investigation Wing, Kolkata & Ors. (W.P.T.T. No. 6 of 2011, 24 of 2010, 4 of 2011, decided on October 8, 2013), the Hon. Calcutta High Court has held that the following conclusion arrived at by the learned Tribunal is unexceptionable and therefore affirmed :

"In view of the discussions contained hereinabove we hold that ICICI Bank is a dealer and covered by main part of the definition of the 'dealer' in the VAT Act, as the disputed sales are in course of its banking business and such sales were/are effected in exercise of its statutory right under the Banking Companies Regulations Act. Judgment of the Supreme Court in Federal Bank (supra) has practically settled the issue.

We also hold that other Non-Banking Financing Companies were/are dealers within the ambit of Clause (d) of Section - 2(11) as according to them, those were arranging sales of hypothecated vehicles on the strength and authority derived from the hypothecation agreements and the irrevocable power of attorneys executed by the borrowers. If these Non-banking Finance Companies were exercising hypothecatees' contractual right to sell pledged goods for realization of unpaid loan these Companies came within the scope of the main part of the definition of 'dealer'."

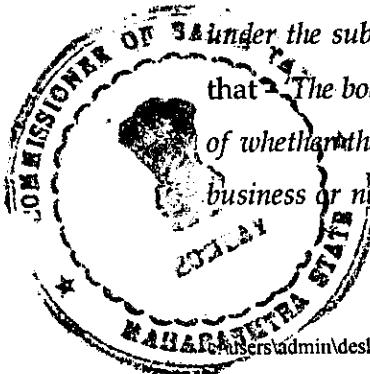
The clause for interpretation before the Hon. Court was thus -

"'dealer' means any person who carries on the business of selling or purchasing goods in West Bengal or any person making sales under section 14, and includes -

(b) Government, a local authority, a statutory body, a trust or other body corporate which, or a liquidator or receiver appointed by a court in respect of a person, being a dealer as defined in this clause, who, whether or not in the course of business, sells, supplies or distributes directly or otherwise goods for cash or for deferred payment or for commission, remuneration or other valuable consideration,

Here the argument tendered before the Hon. Court was that - *'The opening part of the definition only covers persons who deal with the goods as owners i.e. persons who purchase goods in their own right and sell them as owners. Non-owners have been brought in by way of expansion*

under the sub-clauses appearing after the expression "and includes".' The Hon. Court observed that - The bodies and organizations indicated in Clause - (b) were sought to be roped in irrespective of whether they sell or supply or distribute goods directly or otherwise whether in the course of business or not. Neither a liquidator nor a receiver can be expected to sell any goods as the owner



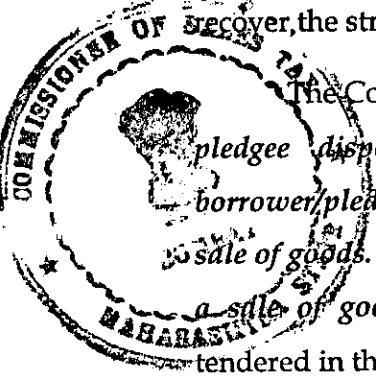
thereof. The distinction sought to be made by the learned Counsel as regards the owner and non-owner of the goods was, according to us, not contemplated by the legislature.'

With regard to the submission that the government or a local authority or a statutory body or a trust does not normally carry on business, the Hon. Court observed that *Article 289 of the Constitution of India contemplates both trading and business activities by the government. The local authority or a statutory body or a trust cannot as such be under any disability from carrying on business.* In the present proceedings too, the applicant has put forth the argument that levying tax on the activities of the applicant would amount to taxing the properties of the Government. We have seen above that the applicant assumes ownership in the goods and is entitled to sell the goods. Therefore, if there is a transaction of sale of movable goods, then the same would attract a tax under the provisions of the MVAT Act,2002 and this would not, by any means, amount to taxing the properties of the Government. To attribute the status of 'property of the Government' to the properties offered as securities for the loans is inherently fallacious.

In Federal Bank Ltd. And Others, Appellants V. State Of Kerala And Others(2007- (035)-MTJ -0832 -SC), the Hon Court had observed thus -

"When a bank sells the pledged ornaments it is not acting as an agent of the borrower even under the 1949 Act. When the bank sells the goods pledged with them they do not act as the agents of the borrower. As pledgees, the banks, acting under Section 176 of the Contract Act, 1872 have a right to sell the goods. That sale is not as agents but that sale is in exercise of the statutory power under the 1949 Act. No doubt the sale is on behalf of the pledgor, however, the sale is in exercise of the statutory power (Dy. CCT v. A.R.S. Thirumeninatha Nadar Firm ((1968) 21 STC 184 (Mad)))."

In the case of State Bank Of Travancore V. Commercial Tax Officer, First Circle, Trivandrum And Another. And Indian Bank V. State Of Kerala And Others (13 VST 562), the Hon. Kerala High Court had upheld the challenge to the definition of 'dealer' in interpretation of which the Hon. Supreme Court delivered the judgment in Federal Bank Ltd. And Others (cited supra). The Hon. Kerala High Court observed that *it is not open to the petitioner/appellant to contend that when the pledged articles are sold by the banks, it is not in the course of banking business as sale of pledged goods is not prohibited under section 8 of the Banking Regulation Act.* In the present case, the applicant Trust is specifically formed to recover the stressed assets and therefore, it is the business of the applicant to sell goods.

The Court further observed that - "*there is no merit in the contention that when the pledgee disposes of the pledged articles on default being committed by the borrower/pledgor, it only amounts to realisation of security and it cannot be treated as the sale of goods. In our view, while it amounts to realisation of the security, it is nonetheless a sale of goods.*" The aforesaid observations should answer similar such arguments tendered in the present proceedings.

The Hon. Court also observed thus -

"When goods are sold in public auction by the bank of pledged articles, it cannot be said that there is no contract between the bank and the buyer. As already noticed, the definition of the word "seller" in the Sale of Goods Act only means the person who actually sells the property. When the bank as pledgee sells the property, the bank would be a seller within the meaning of the Sale of Goods Act, as it is the bank which sells the goods. We are therefore not at all impressed by the contention that there is no sale of goods within the meaning of the Sale of Goods Act for the reason that what is transferred is only a special right and no general property of goods is transferred. We are therefore not impressed by the argument that there is no sale for the reason that there is no contract between the parties."

What transpires from the above is that if selling of goods is an integral part of the activities then nothing would render the provisions of 'dealer' being inapplicable to such facts. In the present case, the transactions carried on by the applicant do qualify to be termed as activity of 'sale' and thereby a 'deemed dealer' for the purposes of the MVAT Act,2002.

In fact, there should not be any dispute as to the activity of 'sale' carried on by the applicant. The applicant himself admits to effecting the same. We have seen that the applicant Trust has been constituted for the purpose of administering and realising the Stressed Assets and for that purpose, the applicant is authorised, amongst other things, to recover the dues. In furtherance of the said object, the applicant is entitled to sell the assets under the recovery mechanism available under the DRT's and the SARFAESI Act and for which purposes, it has been termed as a 'financial institution'. Now, the applicant has conducted a sale of the movable and immovable properties as is evident from the following list furnished by the applicant, of cases of sale effected by the applicant under the SARFAESI Act in respect of units located in the State of Maharashtra -

List of cases under SARFAESI Sale done by SASF – Unit located in Maharashtra					Sale (Rs. Lakh)		Date of Sale Certificate
Sr. no.	Name of Company	Gross O/s	Net O/s	Scheme	Movable property	Immovable Property	
1	Wood Resorts Limited	512	224	SARFAESI sale	45.00	560.00	7/9/09
2	Kalyani Fashions Limited	187	131	SARFAESI sale	0.50	1221.00	
3	Bhavri Starch Limited	1656	1325	SARFAESI sale	75.00	100.00	29/3/06
4	Usha Ispat Ltd	45971	32180	SARFAESI	4476.00	7800.00	21/3/06, 9/9/08, 20/01/06, 30/3/07
5	Romeda Chemicals Ltd	675	472.5	SARFAESI sale	32.00	521.50	21/3/07
6	Magnum Intermediates Ltd	751.06	525.74	SARFAESI sale	44.04	121.27	30/6/2010
7	Sentogen Exports Ltd	2107.97	1053.98	SARFAESI sale	282.00	0.00	14/6/2013
8	Shree Vindhya Paper Mills Ltd	1407.2	985.04	SARFAESI sale	1270.00	0.00	06/08/2011
	Total				6224.54	10323.77	
	@ Sale stayed by Supreme Court						

What I can deduce from the above is that the applicant admits to invoking the recovery provisions under the SARFAESI Act when it is carrying out the sale of the assets. Further, the applicant has himself given a bifurcation of the recovery in terms of the proceeds of sale of movable and immovable properties. Since the applicant has informed that he has received notices for assessment of the periods from 2005-06 to 2009-10, I would have a look at the transaction in respect of sale of movable property effected in the year 2010 at sr. no. 6 of the above Table.

DESCRIPTION OF THE PROPERTY IN THE TRANSFER DEED

MAGNUM INTERMEDIATES LIMITED

- i) ALL THOSE piece and parcels of land bearing Plot No. N-175, admeasuring 1000 sq mtrs or thereabouts in the Tarapur Industrial Areawithin the village limits of pamtembhi and outside the limits of Municipal Council, Taluka and Registration sub-dist. Palghar, Dist And Registration District Thane in the state of Maharashtra;
- ii) ALL THOSE piece and parcels of land bearing Plot No. N-178, admeasuring 1000 sq mtrs or thereabouts in the Tarapur Industrial Areawithin the village limits of pamtembhi and outside the limits of Municipal Council, Taluka and Registration sub-dist. Palghar, Dist And Registration District Thane in the state of Maharashtra;and
- iii) ALL THOSE piece and parcels of land bearing Gat No(s) 130 & 131 admeasuring in aggregate 5800 se mtrs or thereabouts within the village limits of Gonde Taluka and Registration Sub-District Igatpuri, District and Registration District Thane in the state of Maharashtra.

together with all buildings and structures thereon all plant and machinery attached to the earth or permanently fastened to anything attached to the earth.

VALUATION REPORT

.....In view of all above we are of the opinion that sale of above machinery lying at Plot No.175 is possible @60% of its Fair Market Value as discussed above I.E. 60% of Rs.17.73 Lacs = Rs.10.63 Lacs is assessed as realizable sale value of machinery and machinery lying at Plot No.178 is possible @80% of its Fair Market Value as discussed above I.E. 80% of Rs.41.45 Lacs = Rs.33.16Lacs is assessed as realizable sale value of machinery. 50% of Rs.17.73 Lacs = Rs. 8.86 Lacs is assessed as distress sale value of machinery lying at Plot No.175 and 70% of Rs.41.45 Lacs = Rs.29.01 Lacs is assessed as distress sale value of machinery lying at Plot No.175.

Item wise valuation of the Machinery is give in Annexure I attached with this Report.

VALUATION REPORT - MAGNUM INTERMEDIATES LTD				
SR. NO.	BRIEF DESCRIPTION	FAIR MARKET VALUE (RS IN LACS)	REALISABLE VALUE (RS IN LACS)	DISTRESS SALE VALUE (RS IN LACS)
Plant & Machinery (Lying uninstalled)				
1	SS RECTORS 500 LITRES WITH ACCESSORIES	1	0.6	0.5
2	SSFRACTIONATING COLUMN ,CONDENSER RECEVIER ETC-1SET	1	0.6	0.5
3	WATER JET EJECTOR VACCUM UNIT- 4SET	0.6	0.36	0.3
4	STEAM BOILER WATER SOFTNER ETC-1 SET	0.5	0.3	0.25
5	BRNEPLANT -20 TR WITH ACCESSORIES	2	1.2	1
6	HDPE QUENCH TANK 7500 UTRES WITH COOLING OIL	1.5	0.9	0.75
7	200 U' HOT OIL THERMOPAC UNIT WITH ACCESSORIES 1 UNIT	0.8	0.48	0.4
8	SERUBBER SYSTEM PRP WITH PUMP - 1 SET	0.3	0.18	0.15
9	AIR COMPRESSOR -100 CRM	0.7	0.42	0.35
10	COOLING TOWERS 100 TR WITH ACCESSORIES PUMPSETS ETC -2 SETS	1	0.6	0.5
11	MOTOR CONTROL PANEL & ACCESSORIES COMPLETE UNIT	1.5	0.9	0.75
	TOTAL	64.11	57.02	55.25

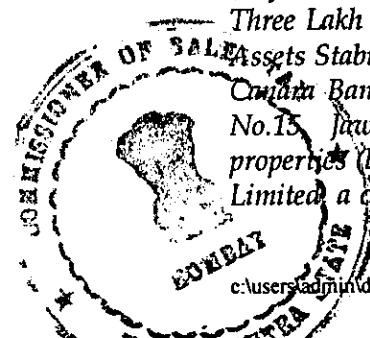
SR. NO.	BRIEF DESCRIPTION	FAIR MARKET VALUE (RS IN LACS)	REALISABLE VALUE (RS IN LACS)	DISTRESS SALE VALUE (RS IN LACS)
1	Plot no.178-MIDC, TARAPUR Plant & Machinery			
1	SS 316 PRESSURE REACTION UNITS WITH COLUMN, CONDENSERS, RECEIVERS, CHARGERS ETC 3500 LITRES	2.75	2.2	1.93
2	SS 316 PRESSURE REACTION UNITS WITH COLUMN, CONDENSERS, RECEIVERS, CHARGERS ETC 3500 LITRES	2.75	2.2	1.93
3	SS 316 REACTION - CUM-DISTILLATION UNITS 8" SS COLUMN X 18 FT HEIGHT PACKED ,CONDENSER ,ROBVERS ETC-1800 LITRES	2.75	2.2	1.93
4	SS 316 JACKETD REBOILER WITH PACKED FRACTIONATING COLUMN X 30 FT HT, CONDENSER, REFLUX SYSTEM ETC- 1000 LITRES	2	1.6	1.4
5	SS 316 ORYSTALUZER WITH AGITATOR SLURRY PUMP ETC 2000 LITRES -2 NO.S	5	4	3.5
6	M.S.GLASS LINED REACTOR WITH ACCESSORIES 3500 LITRES	4.75	3.8	3.33
7	M.S.GLASS LINED REACTOR WITH ACCESSORIES 1600LITRES	2.75	2.2	1.93
8	M.S.GLASS LINED REACTOR WITH ACCESSORIES 2500 LITRES	3.5	2.8	2.45
9	SCHARGERS ETC -3 NO.S (1000 LITRES EACH)	0.7	0.56	0.49
10	M.S.RUBBER LINED CENTRIFUGE ,FLAME PROOF MOTOR ETC -36" -3 NO.S	4	3.2	2.8
11	WATER AND STEAM JET HIGH VACCUM EJECTOR SYSTEM ,TANK ETC	0.35	0.28	0.25
12	BROIL CHILLING PLANT -20 TRALONG WITH ACCESSORIES	0.35	0.28	0.25
13	OIL SEALED VACUUM PUMPS WITH TRAPS -3 NO.S	0.65	0.52	0.46
14	THERMAX "ELITE" STEAM BOILER 600 KG/HR WITH ACCESSORIES -2 SETS	2	1.6	1.4
15	THERMOPAC - OIL HEATING UNIT , CIRCULATION SYSTEM 200U MODEL	1	0.8	0.7
16	FRP COOLING TOWER -150 TR CIRCULATION PUMPS SYSTEM ETC	0.55	0.44	0.39
17	LABY -LIQUID CHROMOTOGRAF UNIT	0.55	0.44	0.39
18	M.S.STRONGE TANK 15 KL WITH PUMP AND SYSTEM	0.35	0.28	0.25
19	S.S. NUTSOHERLTER 1250 LITRES	2.5	2	1.75
20	SINTEX TANKS 500 LITRES CAP- 2 NOS	0.3	0.24	0.21
21	PLATFORM SCALE 300 KG	0.25	0.2	0.18
22	ELECRONIC TRANSFER -165 KVA & ACCESSORIES	1	0.8	0.7
23	SCRUBBER TANK PUMPSETC- 1000 LITRES	0.35	0.28	0.25
24	FLAME PROOF ELECTRIC HOIST	0.3	0.24	0.21
	TOTAL	91.97	83.68	79.54

CERTIFICATE OF SALE

CERTIFICATE OF SALE (FOR MOVABLE PROPERTIES)

Whereas

The undersigned being the Authorised Officer of the Stressed Assets Stabilization Fund, 10th Floor, IDBI Tower, WTC Complex, Cuffe Parade, Mumbai- 400 005 under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and in exercise of the powers conferred under sub-section 12 of Section 13 read with rule 7 of the Security Interest (Enforcement) Rules,2002 has in consideration of the payment of Rs.33,00,353/- (Rupees Thirty Three Lakh Three Hundred and Fifty Three only) sold on behalf of secured Creditors viz. Stressed Assets Stabilization Fund(SASF), Janata Sahakari Bank Ltd.(JSB), Central Bank of India(CBI) and Canara Bank (CB) in favour of Samrudh Healthcare Pvt.Ltd., A/101, Prathana Apartment, Plot No.15, Jawahar Nagar, S.V.Road, Goregoan(W),Mumbai 400062 (Purchaser), the movable properties (list enclosed) secured in favour of the Secured Creditors by M/s. Magnum Intermediates Limited a company registered under the companies Act, 1956 having its Registered Office at 203,



Standard Hose, 83, M.K.Road, Marine Lines, Mumbai-400 002 and towards the financial facilities extended by Secured Creditors of which outstanding amount is as indicated below:

Total outstanding amount as on May 31, 2009 of-

Stressed Assets Stabilisation Fund (SASF)	: Rs. 4242 lakhs
Janata Shakari Bank Ltd	: Rs. 410 lakhs
Central Bank of India (Debenture Trustee)	: Rs. 2845 lakh
Canara Bank	Rs. 2934 lakh

Total	Rs. 10431 lakhs
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The undersigned acknowledges the receipt of the sale price of Rs. 33,00,353/- (Rupees Thirty Three Lakh Three Hundred and Fifty Three only) in full and has handed over the delivery and possession of the items as listed to the above said purchaser.

Description of the Movable Properties :
[As per list enclosed]

(J.G.KHAN)

Authorised Officer

Stressed Assets Stabilization Fund

Date: 30.06.2010

Place: Mumbai

Magnum Intermediates Limited

List of Movable Properties

(Same as reproduced above)

There is one more Certificate of Sale issued to Magnum Intermediates Limited for sale of Movable Properties (Plant & Machinery at Plot No.175-MIDC, Tarapur) at an amount of Rs.11,04,923/-. The applicant has also given copies of Certificate of Sale issued for sale of Immovable Properties as well as the Valuation Reports therefor. The above shows that the applicant maintains a proper account of the movable properties. A valuation report ensures having a prior estimate of the minimum realisable value. The Certificate of Sale also reproduces the details of the movable properties sold. Thus, there is a proper sale of goods, movable goods.

Herein, I would like to deal with the argument that the applicant transfers the proceeds realised from the sale of the properties to the Central Government. With regard to this, I have to observe that these are arrangements which take place after the incidence of sale has occurred and therefore, would not add any colour to the acts preceding such transfer of funds. The sharing of funds by secured creditors (in case a charge on a property is had by more than one secured creditors) or the transferring of proceeds would not alter the nature of the transaction which is -

There are two parties to the transaction i.e a seller and a buyer.

There is a contract for sale of movable goods and an ensuing transfer of rights in the property from the seller to the buyer.

The transaction is for a consideration.

would refer now to one argument put forth by the applicant and which is that though separate certificates called Sales Certificates are issued for immovable and movable

properties, the properties continue to be immovable in nature as the sale is on 'As is where is basis'.

Now, the incidence of tax under the MVAT Act,2002 is on the sale of movable goods only and therefore, whenever, the applicant, effects a sale of movable properties, the provisions of the MVAT Act,2002 would come into play. As regards claim of plant & machinery and other movable goods being immovable properties, I would like to invite the attention of the applicant to the observations of the Hon. Supreme Court in the case of Commissioner of Central Excise, Ahmedabad v. Solid and Correct Engineering Works [(2010) 5 SCC 122] while faced with the question of what constitutes movable and immovable property. The Hon. Court has very elaborately dealt with the issue and it would be useful to go through the observations -

"18. It is not the case of the respondents that plants in question are per se immoveable property. What is argued is that they become immovable as they are permanently imbedded in earth in as much as they are fixed to a foundation imbedded in earth no matter only 1= feet deep. That argument needs to be tested on the touch stone of the provisions referred to above. Section 3(26) of the General Clauses Act includes within the definition of the term "immovable property" things attached to the earth or permanently fastened to anything attached to the earth. The term "attached to the earth"; has not been defined in the General Clauses Act, 1897. Section 3 of the Transfer of Property Act, however, gives the following meaning to the expression "attached to the earth":

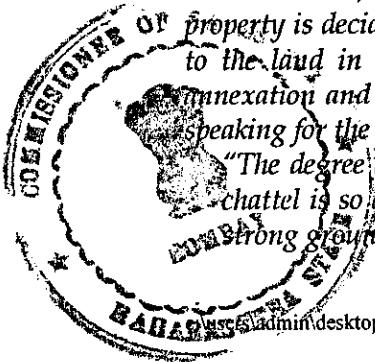
- (a) rooted in the earth, as in the case of trees and shrubs;*
- (b) imbedded in the earth, as in the case of walls and buildings;*
- (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached."*

19. It is evident from the above that the expression "attached to the earth" has three distinct dimensions, viz. (a) rooted in the earth as in the case of trees and shrubs (b) imbedded in the earth as in the case of walls or buildings or (c) attached to what is imbedded for the permanent beneficial enjoyment of that to which it is attached. Attachment of the plant in question with the help of nuts and bolts to a foundation not more than 1= feet deep intended to provide stability to the working of the plant and prevent vibration/wobble free operation does not qualify for being described as attached to the earth under any one of the three clauses extracted above. That is because attachment of the plant to the foundation is not comparable or synonymous to trees and shrubs rooted in earth. It is also not synonymous to imbedding in earth of the plant as in the case of walls and buildings, for the obvious reason that a building imbedded in the earth is permanent and cannot be detached without demolition. Imbedding of a wall in the earth is also in no way comparable to attachment of a plant to a foundation meant only to provide stability to the plant especially because the attachment is not permanent and what is attached can be easily detached from the foundation. So also the attachment of the plant to the foundation at which it rests does not fall in the third category, for an attachment to fall in that category it must be for permanent beneficial enjoyment of that to which the plant is attached.

20. It is nobody's case that the attachment of the plant to the foundation is meant for permanent beneficial enjoyment of either the foundation or the land in which the same is imbedded.

21. In English law the general rule is that what is annexed to the freehold becomes part of the realty under the maxim *quidquid plantatur solo, solo credit*. This maxim, however, has no application in India. Even so, the question whether a chattel is imbedded in the earth so as to become immovable property is decided on the same principles as those which determine what constitutes an annexation to the land in English law. The English law has evolved the twin tests of degree or mode of annexation and the object of annexation. In *Wake V. Halt* (1883) 8 App Cas 195 Lord Blackburn speaking for the Court of Appeal observed:

"The degree and nature of annexation is an important element for consideration; for where a chattel is so annexed that it cannot be removed without great damage to the land, it affords a strong ground for thinking that it was intended to be annexed in perpetuity to the land."



22. The English law attaches greater importance to the object of annexation which is determined by the circumstances of each case. One of the important considerations is founded on the interest in the land wherein the person who causes the annexation possesses articles that may be removed without structural damage and even articles merely resting on their own weight are fixtures only if they are attached with the intention of permanently improving the premises. The Indian law has developed on similar lines and the mode of annexation and object of annexation have been applied as relevant test in this country also. There are cases where machinery installed by monthly tenant was held to be moveable property as in cases where the lease itself contemplated the removal of the machinery by the tenant at the end of the tenancy. The mode of annexation has been similarly given considerable significance by the courts in this country in order to be treated as fixture. Attachment to the earth must be as defined in Section 3 of the Transfer of Property Act. For instance a hut is an immovable property, even if it is sold with the option to pull it down. A mortgage of the super structure of a house though expressed to be exclusive of the land beneath, creates an interest in immovable property, for it is permanently attached to the ground on which it is built.

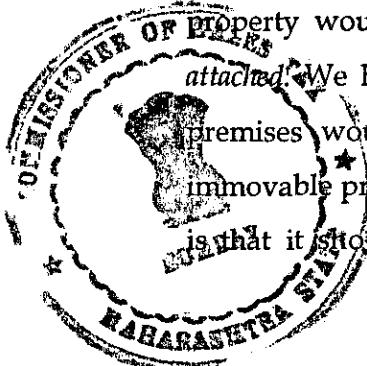
23. The courts in this country have applied the test whether the annexation is with the object of permanent beneficial enjoyment of the land or building. Machinery for metal-shaping and electro-plating which was attached by bolts to special concrete bases and could not be easily removed, was not treated to be a part of structure or the soil beneath it, as the attachment was not for more beneficial enjoyment of either the soil or concrete. Attachment in order to qualify the expression attached to the earth, must be for the beneficial attachment of that to which it is attached. Doors, windows and shutters of a house are attached to the house, which is imbedded in the earth. They are attached to the house which is imbedded in the earth for the beneficial enjoyment of the house. They have no separate existence from the house. Articles attached that do not form part of the house such as window blinds, and sashes, and ornamental articles such as glasses and tapestry fixed by tenant, are not affixtures.

24. Applying the above tests to the case at hand, we have no difficulty in holding that the manufacture of the plants in question do not constitute annexation hence cannot be termed as immovable property for the following reasons:

- (i) The plants in question are not *per se* immovable property.
- (ii) Such plants cannot be said to be "attached to the earth" within the meaning of that expression as defined in Section 3 of the Transfer of Property Act.
- (iii) The fixing of the plants to a foundation is meant only to give stability to the plant and keep its operation vibration free.
- (iv) The setting up of the plant itself is not intended to be permanent at a given place. The plant can be moved and is indeed moved after the road construction or repair project for which it is set up is completed."

The above observations were reproduced to bring to notice the principles to be followed in the matter of ascertaining the nature of a property, whether movable or immovable. I have to observe that the decision as regards movable or immovable property would rest on the facts of each case. It is for the field officers dealing with the assessment, audit or investigation matters to ascertain the facts. In these proceedings, I have only to say that the incidence of tax under the MVAT Act,2002 is on the sale of movable goods. Going by the principles as laid down by the Hon. Apex court, it is known that immovable

property would mean for the permanent beneficial enjoyment of that to which the plant is attached. We have seen that plant & machinery attached to a foundation erected in the premises would not be termed as immovable property. The principle remains that immovable property is such that it is embedded, rooted to the earth. The distinctive aspect is that it should be for 'permanent beneficial enjoyment'. Thus, any goods which can be

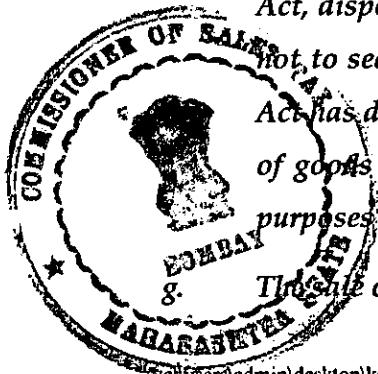


detached and are not for the permanent beneficial enjoyment of the thing to which they are attached would not be 'immovable property'. In fact, the above interpretation would leave not much for coverage under 'immovable property', other than immovable property *per se* as in land & building, plots, etc. As for the present case, it is seen that the applicant has made a proper valuation of the movable goods. The fact that the valuation report presents an itemised realisable value speaks of the nature of the goods. With such a constricting meaning as to what constitutes immovable property and further thereto, the applicant himself giving a list alongwith Certificate of Sale, of the movable properties, nothing should preclude me to conclude that the applicant, wherever applicable, has rightly accorded the treatment as 'movable' and 'immovable' property and is therefore liable for levy of tax on the movable aspect. I need to hasten here to observe that the bifurcation of goods as movable and immovable needs to be properly ascertained by the field officers. With the guidelines as are found in the above decision of the Hon. Supreme Court, I rest my decision on this point to the ascertainment of facts at the appropriate stage where the question of levy of tax would come up. I would restrict my observations to the liability of tax under the MVAT Act,2002 being on movable goods only.

Thus, the transactions of the applicant, of sale of goods, could be interpreted thus :

- a. *The applicant has been specially formed to recover the Stressed Assets and one of the modes of recovery is 'sale of the properties'.*
- b. *The applicant is entitled to deal with the properties which would include sale of the said properties, having assumed all rights in respect of the same.*
- c. *The selling of properties is an integral part of the activities carried out by the applicant.*
- d. *The applicant has effected a sale of both movable and immovable properties for consideration.*
- e. *The sale of movable properties is in pursuance of the objects for which the applicant has come into existence.*
- f. *The deeming fiction comes into play when the applicant, a Trust constituted by the Government of India and a financial institution for the purposes of the SARFAESI Act, disposes the goods, the movable goods. In view of the deeming fiction, one has not to see whether the applicant is a dealer or whether he carries on business. The Act has defined the category and the fiction becomes active when there is a disposal of goods by the defined category. Thus, the applicant is a deemed dealer for the purposes of the MVAT Act,2002.*

g. *The sale of movable goods would attract levy of tax under the MVAT Act,2002.*



Having formed a broad idea of the nature of the activities carried on by the applicant, I now move on to the questions put forth by the applicant. The determination thereof would be thus –

Q.1. Whether the applicant, which is an SPV specifically, constituted by the Central Government is a 'dealer' in terms of the provisions of the MVAT Act?

A. I have observed above that the applicant is a 'deemed dealer' as understood under sub-clause (x) as appearing in the Explanation to clause 8 of section 2 of the MVAT Act,2002.

Q.2. Whether the Applicant Trust is discharging the functions as per the Trust Deed settled by the Central Government and carrying on the functions assigned in the Trust Deed can be said to be carrying on business of buying and selling goods in terms of the provisions of the MVAT Act?

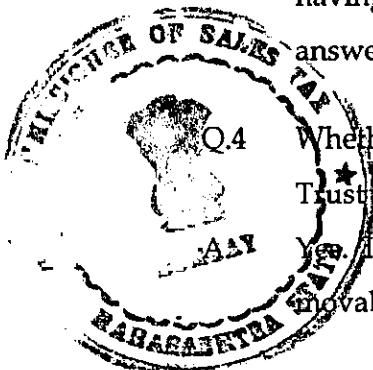
A. On a perusal of the facts of the present case, I have held hereinabove that the applicant is a deemed dealer, more specifically under sub-clause (x) as appearing in the Explanation to clause 8 of section 2, for the purposes of the MVAT Act,2002. I have also observed that the deeming fiction, by express provision, does away with the ascertainment of the fulfilment of other provisions of the MVAT Act,2002. In fact, the *non-obstante* clause specifically mentions that fulfilment of the definition of 'business' would not apply to the entities enumerated thereunder. The only aspect to be ascertained is whether the deemed dealer sells any goods by auction or otherwise and I am convinced that there is a sale of movable goods carried on by the applicant. Therefore, having held that the applicant is a 'deemed dealer', there does not arise any need to answer or determine this question.

Q.3 Whether transfer of Stressed Assets to the Applicant Trust under a Transfer Deed amounts to purchase by the Applicant in terms of the provisions of MVAT Act.

A. As observed in the previous question, I have held that the applicant is a deemed dealer and therefore, I have only to satisfy myself that the applicant effects any sale of goods. I have satisfied myself that the applicant effects sale of goods. Therefore, having held that the applicant is a 'deemed dealer', there does not arise any need to answer or determine this question.

Q.4 Whether realization of debt by enforcing the underlying security by the applicant Trust amounts to sale of Assets by the Applicant Trust?

Yes. To recover the Stressed Assets, the applicant is authorised to sell the goods, movable and immovable. And the applicant has accordingly invoked the provisions



of the SARFAESI Act which provide for valuation and sale of movable goods. I have elaborately discussed hereinabove that the disposal of movable goods which were offered as Security for the Loans amounts to sale under the provisions of the MVAT Act,2002.

Q.5 Whether realization of debt by the Applicant in the eight cases specified in Annexure 3 herein amounts of Sale by the Applicant in terms of the provisions of MVAT Act.

A. Same as answer to question 4.

Q.6 If the answer to the above question is yes, whether the sale of immovable property can be taxed by the State of Maharashtra and whether there is any independent sale of movable property by the Applicant.

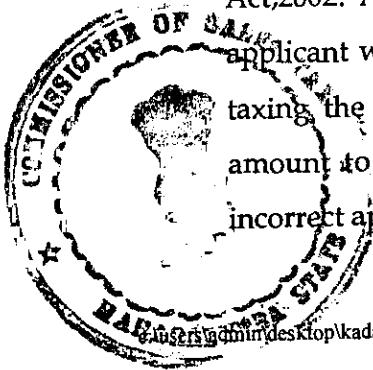
A. The sale of immovable property is not liable to tax under the provisions of the MVAT Act,2002 as applicable in the State of Maharashtra. The liability of tax under the MVAT Act,2002 is on movable goods only. Therefore, all the movable goods sold by the applicant would be liable to tax. The applicant has issued a Certificate of Sale for the sale of movable goods. Therefore, it is herewith determined that the proceeds from sale of movable goods would be liable to tax under the provisions of the MVAT Act,2002.

Q.7 Whether the recovery of debt by the other institutions for 25 cases of debt for the property situated in the State of Maharashtra and where the Applicant has received only the proceeds, amounts to sale of assets by the Applicant.

A. The sale would be in the hands of the person or dealer who effects the transaction of sale of goods and accordingly transfers the title in the property to the purchaser.

Q.8 Whether the Applicant can be treated as dealer in view of Article 285 of the Constitution of India as the Applicant has only discharged the functions of the Central Government as per the directives of Central Government as stated in the Trust Deed where the Settlor and Beneficiary are the Central Government.

A. I have observed above that the applicant is a 'deemed dealer' as understood under sub-clause (x) as appearing in the Explanation to clause 8 of section 2 of the MVAT Act,2002. As discussed earlier, the transaction of sale of movable goods by the applicant would be liable to tax under the MVAT Act,2002. It does not amount to taxing the properties of the Central Government. To say that such levy would amount to disregard of Article 285 of the Constitution of India amounts to an incorrect appreciation of the said Article which reads thus :



285. Exemption of property of the Union from State taxation

(1) The property of the Union shall, save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a State

(2) Nothing in clause (1) shall, until Parliament by law otherwise provides, prevent any authority within a State from levying any tax on any property of the Union to which such property was immediately before the commencement of this Constitution liable or treated as liable, so long as that tax continues to be levied in that State

SASF is an independent entity formed by the Government and has acquired, by transfer, all rights in respect of the Stressed Assets. The transaction of sale is effected by SASF as a true, legal owner and subsequent to sale, the applicant is in a position to transfer the title in the goods. Therefore, it is the property of SASF which is liable to tax. The funding pattern and subsequent transfer of sale consideration would not alter the nature of the transaction which fulfils the criteria of a 'sale' under the MVAT Act,2002. Further, it should be noted that even Departments of Union Government and any Department of any State Government are also deemed to be dealers for the purposes of the MVAT Act,2002.

Q.9 Whether the applicant is required to take registration under the MVAT Act,2002?

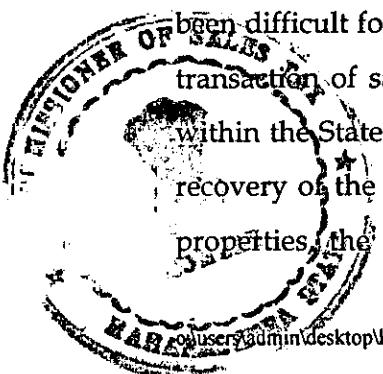
A. Yes, the applicant is required to take registration under the MVAT Act,2002 as it is seen that the applicant is a 'dealer for the purposes of the MVAT Act,2002 and has effected transactions of sale of movable goods' within the State of Maharashtra which are liable to tax under the MVAT Act,2002.

Having seen thus, I move on to deal with the request for prospective effect as made by the applicant.

05. PROSPECTIVE EFFECT

A consideration for prospective effect would always be governed by the facts and circumstances and the available provisions under the applicable statute. In the present case, the applicant is himself aware that it is effecting a sale of movable and immovable goods. The recovery of the Stressed Assets is made by the applicant under the SARFAESI Act. In fact, for the purposes of invoking the relevant provisions, the applicant was declared as a 'financial institution'. The applicant is issuing a Certificate of Sale as per the provisions of the said Act. Further, the applicant was also issuing separate Certificates of Sale for immovable and movable properties. Under such circumstances, it should not have

been difficult for the applicant to understand the liability on account of the effecting of the transaction of sale. The essence of the MVAT Act, 2002 is a tax on the incidence of sale within the State of Maharashtra. Therefore, when the applicant is aware that it is effecting recovery of the Stressed Assets by adopting one of the modes of recovery namely sale of properties, the liability on account of the said sale under the provisions of the MVAT



Act,2002 should not have lost sight of. Ignorance of law is not an excuse. Further, there is no case of ambiguity of provisions. We have seen earlier as to how the applicant gets covered by the definition of dealer under the MVAT Act,2002. In view of all such reasons, I do not find any merits in the prayer for prospective effect.

06. In view of the detailed deliberations, it is ordered thus -

ORDER

(under section 56(1) & (2) of the MVAT Act, 2002)

No.DDQ-11-2014/Adm-6/1/B- 2

Mumbai, dt. 28/03/2014

1. The questions posed for determination are answered thus :

Q.1. *Whether the applicant, which is an SPV specifically, constituted by the Central Government is a 'dealer' in terms of the provisions of the MVAT Act?*

A. *Yes. The applicant is a 'deemed dealer' as understood under sub-clause (x) as appearing in the Explanation to clause 8 of section 2 of the MVAT Act,2002.*

Q.2. *Whether the Applicant Trust is discharging the functions as per the Trust Deed settled by the Central Government and carrying on the functions assigned in the Trust Deed can be said to be carrying on business of buying and selling goods in terms of the provisions of the MVAT Act?*

A. *For reasons as discussed in the body of the order, I determine thus -*

Having held that the applicant is a 'deemed dealer' under sub-clause (x) as appearing in the Explanation to clause 8 of section 2 of the MVAT Act,2002, there does not arise any need to answer this question.

Q.3 *Whether transfer of Stressed Assets to the Applicant Trust under a Transfer Deed amounts to purchase by the Applicant in terms of the provisions of MVAT Act.*

A. *For reasons as discussed in the body of the order, I determine thus -*

Having held that the applicant is a 'deemed dealer' under sub-clause (x) as appearing in the Explanation to clause 8 of section 2 of the MVAT Act,2002, there does not arise any need to answer this question.

Q.4 *Whether realization of debt by enforcing the underlying security by the applicant Trust amounts to sale of Assets by the Applicant Trust?*

A. *Yes. The disposal of movable goods to recover the Stressed Assets amounts to 'sale' under the provisions of the MVAT Act,2002.*

Whether realization of debt by the Applicant in the eight cases specified in Annexure 3 herein amounts of Sale by the Applicant in terms of the provisions of MVAT Act.

Same as answer to question 4.

Q.6 *If the answer to the above question is yes, whether the sale of immovable property can be taxed by the State of Maharashtra and whether there is any independent sale of movable property by the Applicant.*

A. *The sale of immovable property is not liable to tax under the provisions of the MVAT Act,2002 as applicable in the State of Maharashtra. The liability of tax under the MVAT Act,2002 is on movable goods only. The proceeds from sale of movable goods would be liable to tax under the provisions of the MVAT Act,2002.*

Q.7 *Whether the recovery of debt by the other institutions for 25 cases of debt for the property situated in the State of Maharashtra and where the Applicant has received only the proceeds, amounts to sale of assets by the Applicant.*

A. *The sale would be in the hands of the person or dealer who effects the transaction of sale of goods and accordingly transfers the title in the property to the purchaser.*

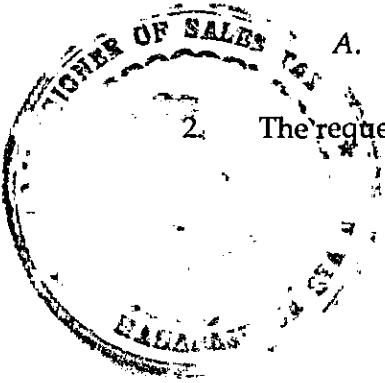
Q.8 *Whether the Applicant can be treated as dealer in view of Article 285 of the Constitution of India as the Applicant has only discharged the functions of the Central Government as per the directives of Central Government as stated in the Trust Deed where the Settlor and Beneficiary are the Central Government.*

A. *Yes. The applicant is a 'deemed dealer' as understood under sub-clause (x) as appearing in the Explanation to clause 8 of section 2 of the MVAT Act,2002.*

Q.9 *Whether the applicant is required to take registration under the MVAT Act,2002?*

A. *Yes, the applicant is required to take registration under the MVAT Act,2002.*

2. The request for prospective effect is rejected.



[Signature]
(DR. NITIN KAREER)

COMMISSIONER OF SALES TAX,
MAHARASHTRA STATE, MUMBAI