Read : Application dt.28.08.2010 by M/s. Shivam Trading Company (TIN 27830157650V).
Heard : Shri V.V.Mody, Advocate.

PROCEEDINGS

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

No.DDQ-11/2010/Adm-3/40/B- | **Mumbai, dt.** 4/1/2014

The applicant, M/s. Shivam Trading Company, having address as 2, Merryland, R.G.Thadani Marg, 46, Worli Seaface, Worli, Mumbai-400 018, has sought determination of the rate of tax applicable to the product 'Guidewire' sold through tax invoice no.031 dt.28.04.2010.

02. FACTS AND CONTENTION

The applicant has charged VAT @ 12.5% in the invoice submitted for determination. It is contended that some of their customers have objected to the rate of 12.5%. The facts and contention as stated in the application are as follows :

" We are dealing in guide wire which is actually used at the time of operation of heart and it goes through the human body.

We are selling Guide Wire which is used in inserting in the artery of the heart to locate and guide the surgeon inplanting Pacemaker in the heart.....

Some of our customers have objected to the rate of 12.5%.....

It may be noted that the guide wire is inserted in the body. We are holding drug Licence and, as per the definition of the word "drug" under the Drugs Act, this is considered as a medical device and holding of Drug Licence is compulsory without which we cannot sell our goods. The details of our Drug Licence are as under : Licence No.20B/I-3/18/864 (12.01.06 to 1.01.2011)
Licence No.21B/I-3/18/864 (12.01.06 to 1.01.2011)

.....

We refer to entry No. 107(8) of Schedule C and Notification No.VA-1505/CR-233/Taxation-1 wherein at Sr. No.16, it is mentioned as under :
"Parts (not specified or included elsewhere in this Schedule) of goods mentioned in this Schedule."

It is the opinion of our users and customers that Guide Wire is a part of Pacemaker under Entry No.10 of the said Notification.

We are of the opinion that the rate of tax comes to 4% under entry 107(8) of Schedule C with effect from 1.5.2005. "

03. HEARING

The case was scheduled for hearing on dt.25.09.2012, dt.23.10.2012 and dt.11.12.2012. However, the applicant sought adjournments on all occasions. Before taking up the case for hearing, the applicant was called upon to furnish, amongst other documentary evidences, evidence as to the excise classification and the Drug Licence of the impugned product. By letter dt.23.12.2012, the applicant furnished a submission wherein an article about 'Procedure for Implantation of 'Pace Maker' is referred. With regard to the same, it is submitted thus :

" .....

You will be able to see that before the implantation of the Pace Maker, after venous access is obtained, a guide wire is advanced through the access needle, and the tip of the guide wire is positioned in the right atrium of the venacaval area under fluoroscopy. The needle is then drawn, leaving the guide wire in place. If indicated, a second access will be obtained in a similar fashion for positioning of a second guide wire.

Sometimes, a double-wire technique is used, whereby 2 guide wires are inserted through the first sheath and the sheath then withdrawn, so that 2 separate sheaths can be advanced over the 2 guide wires. This technique can cause some resistance or friction during sheath or lead of advancement. Creation of pocket: A 1.5 to 3-inch incision is made in the infraclavicular area parallel to the middle third of the clavicle, and a subcutaneous pocket is created with sharp and blunt dissection where the pacemaker generator will be implanted. Some physicians prefer to make the pocket first and obtain access later through the pocket or via venous cutdown; one access is obtained, they position the guide wires as described above. Placement of lead(s): Over the guide wire, a special peel-away sheath and dilator are advanced. The guide wire and dilator are withdrawn, leaving the sheath in place. A stylet (a thin wire) is inserted inside the center channel of the pacemaker lead to make it more rigid, and the lead-stylet combination is then inserted into the sheath and advanced under fluoroscopy to the appropriate heart chamber. Usually, the ventricular lead is positioned before the atrial lead to prevent dislodgment.

In addition to the above, we enclose herewith a pamphlet on Guide Wire. This pamphlet shows that Guide Wire is inserted first to make a passage in the heart and thereafter the pacemaker is inserted in the body of the patient. Therefore, this guide wire is a part and parcel of pacemaker. The same is covered by Entry 90('3)(3).

The above guide wire is a part of pacemaker stimulating heart muscles.

.....

Please note that under the Central Excise, Entry for pacemakers for stimulating heart muscles is given at Serial 9021.50 under the Central Excise Tariff showing 'NIL' Excise Duty. Parts and accessories of all the goods mentioned in Chapter 90 of the Central Excise Act are classified as last residual Entry No.90(3)(3) on which there is Central Excise Duty of 16%.

We refer to the similar notification issued in the State of Gujarat according to which, the parts are classified as medical equipment, devices, and implants for the purpose of Entry 28A, Schedule 3. "

When the case was scheduled for hearing on dt.15.01.2013, Sh. Mody (Adv.) attended and requested for adjournment of 2-3 weeks so as to enable the applicant to submit further technical data with the help of dictionary meaning and Central Excise Tariff. Thereafter, the case was fixed for hearing on dt.05.02.2013 when Sh. Mody (Adv.) attended alongwith Sh.Ravi Batra (Manager). During hearing, it was contended thus :

- The product is a part of a Pacemaker. It is contended to be a medical device. The claim of the applicable schedule entry being C-107(8), the applicant sought to invite attention to the following description for the purposes of the notification under the above entry :

9021 50 00	Pacemakers for stimulating heart muscles, excluding parts and accessories
9033 00 00	Parts (not specified or included elsewhere in this Schedule) of goods mentioned in this Schedule

- Since Pacemaker parts are not notified in 9021 50 00, it is contended that they are covered in sr. no.6 - 9033 00 00 which covers parts of goods mentioned in the Schedule. It is informed that there is no customs duty on pacemakers.
- Since it was claimed that the product is a part of Pacemaker and covered by Central Excise Tariff Heading 9033 00 00, the applicant was asked to submit the proof of the

same. To this, it was submitted that the applicant is not a manufacturer and is not registered under Central Excise. The applicant was informed that the necessary proof would be required to allow any claim under the notification.

- It was argued that guide wire is a part of the pacemaker and to support the same, a copy of a Certificate by a Doctor stating so was furnished.
- The applicant's attention was invited to the definition of guide wire and also to the fact that conventionally a part of a product is accompanied by the product and stays as a part of the product. Whereas in the case of the guide wire which is claimed to be a part of the pacemaker, the pacemaker is inserted after the guide wire finds out the position of insertion and thereafter the guide wire is removed and the pacemaker is inserted. To this, it was argued that as understood in the medical world, a guide wire is a part of the pacemaker.
- The applicant requested to give a written submission in the matter as well as proof of the Central Excise Tariff Heading applicable to the product.

By letter dt.15.02.2013, it was informed that the applicant is making separate application u/s 56(2) for giving prospective effect to the DDQ if the same is decided adversely in his case.

By submission dt.26.02.2013, the following arguments are placed :

" ... ...

Similar Entry in Gujarat: Under the Gujarat Value Added Tax Act, a similar notification has been issued wherein the parts of medical devices are subject to tax at 5%. In the State of Gujarat, the tax is being levied on our product at the rate of 5%.

.....

According to the various judgments of the Supreme Court and High Court, the interpretation as regards the rate of tax on any commodity is not to be made on the basis of dictionary meaning or technical meaning but as per popular meaning and parlance as assigned by the trade as well as by users.

In this respect, we refer to the judgment of the Bombay High Court in the case of Commissioner of Sales Tax v/s. Amar Radio Cabinet Works (22.STC.63) wherein it is held that in interpreting an entry, we must give to the words occurring in an entry the meaning that can be attributed to that in common parlance and in common usage.

We also refer to the judgment of the Supreme Court in the case of Ramavatar Bhdhaiprasad v/s. Assistant Sales Tax Officer, Akola (12.STC.Pae 286 and 288) wherein it is held that the popular meaning should be adopted for interpretation. It is also held that a word of every ay use must be construed in its popular sense, meaning "that sense which people conversant with the subject-matter with which the statue is dealing would attribute to it".

As regards the common parlance and common usage, we rely upon the following certificates:

1. *Letter from Dr. Sahu of Vockhardt Hospital wherein it is mentioned that the Guide Wire is a part of the Pace Maker. This is a letter from the Doctor.*
2. *Letter from Axel Connection Pvt. Ltd. This is a letter from the trading community who are dealing in the goods.*
3. *Letter from Om Surgical Ltd. This is a letter from the trading community who are dealing in the goods.*

According to the above, the Guide Wire is treated as a part of Pace Maker and sold as medical devices.

We also refer to the judgment in the case of Vithal Chhagan & Sons (17.STC – Page 96) wherein it is held that the Wrist Watch could not be complete as a commercial article without the watch case.

We also refer to the judgment of the Gujarat High Court in the case of State of Gujarat v/s. B.G. Batwara & Co. decided on 19th June 1968 wherein the matter was for interpretation of Bullock Cart Parts wherein it is held that a sales tax statute, being one levying a tax on goods, must be presumed to have used an ordinary term according to the meaning ascribed to it in common parlance.

From the above description, it is clear that the item need not be integral part of the main item. It can have a separate entity and still it is considered as a part of the main item.

In our case, our item is sold along with Pace Maker as well as separately. It may be noted that when Guide Wire is used upon a patient and second test is required to be made, then extra Guide Wire is used by the doctors. Therefore, it becomes a part. In this case, we refer to the Ball Pen where refills are also sold separately and also along with the main Ball Pen.

We have already placed on record the meaning of the word "Guide Wire" as described in foreign journals.

Please note that in the hospitals, including Government hospitals, Guide Wire is used as a part of the Pace Maker.

Reference to the medical dictionary cannot be made as the popular meaning. Interpretation to the word "Part" should be given with reference to common usage and popular parlance and in common usage, we further submit that the literal meaning is not relevant in our case. "

A re-hearing in the matter was held on dt.03.09.2013 when Sh. Mody attended along with Smt. Dipti Batra, proprietor. The arguments made earlier were reiterated. A submission dt.02.09.2013 was tendered which states thus :

" According to the Supreme Court, interpretation of entry must be made on the basis of popular meaning and not in accordance with the technical meaning. Our article can be regarded as part of the Principal object only if the latter is incomplete without the former, and the former is capable of identification either visually or through chemical or other test as a distinguishable part of the finished product. Therefore guide wire is a part of the pace maker. In other words, part of the item will be considered as additional or adjunct. The guide wire is used prior to insertion of the pace makers in the location in place of suitable placement. "

During hearing, it was informed that the impugned product is imported by other dealers. Hence, the applicant was asked to submit the Customs Heading under which the impugned products are cleared. However, the applicant expressed inability to submit the same. By letter dt.28.09.2013, it was submitted that a copy of the bill issued by a Gujarat dealer is being submitted. However, the same was not attached with the communication. It was further stated thus -

" We are of the view that if once guide wire is included in the said bill of the pace maker, it may be noted that some times in the first attempt may be a surgeon using the guide wire may not be successful. In the 2nd and 3rd attempt guide wire is required, and hence guide wire is available separately. In view of the above, we request you to treat guide wire as part of pace maker and allow our application. "

04. OBSERVATIONS

I have gone through the facts of the case and the contention of the applicant. The product herein is a guide wire and the applicant has laid claim to a schedule entry for the purposes of which a notification has been issued. The schedule entry C-107(8) reads thus :

"Medical devices and implants as may be notified from time to time by the State Government in the Official Gazette;"

The description notified in the notification for the purposes of the above entry makes a reference to the classification of the goods under the Central Excise Act. Hence, the applicant was called upon to furnish evidence as to the excise classification of the impugned product. However, no evidence in respect of the same has been furnished by the applicant till date. Now, the applicant claims that a 'Guide wire' is a part of a Pacemaker and 'Pacemaker' and its parts have been notified for the purposes of the aforesaid schedule entry thus :

NOTIFICATION

Sr. no. 13	9021 50 00	Pacemakers for stimulating heart muscles, excluding parts and accessories
Sr. no. 6	9033 00 00	Parts (not specified or included elsewhere in this Schedule) of goods mentioned in this Schedule

It can be seen from the above that entry no.13 of the notification covers 'Pacemakers for stimulating heart muscles'. Entry no.6 covers parts (not specified or included elsewhere in the Schedule) of the goods mentioned in the notification. With regard to the above entries in the notification, it is the claim of the applicant that the impugned product is a part of the 'pacemaker' and since the same is not specified elsewhere in the Schedule, the same would be covered by the entry at sr. no.6.

With regard to the aforementioned Central Excise Tariff Headings (CETH's), I would ascertain herein as to the similarity or, as the case may be, difference in the description as notified for the purposes of the aforementioned schedule entry and as appearing under the Central Excise Tariff thus :

CENTRAL EXCISE

9021 50 00	Pacemakers for stimulating heart muscles, excluding parts and accessories
9033 00 00	Parts and accessories (not specified or included elsewhere in this Chapter) for machines, appliances, instruments or apparatus of Chapter 90

The description against the CETH 9021 50 00 as notified for the purposes of the aforementioned schedule entry is the same as appearing under Central Excise. However, the CETH 9033 00 00 is not verbatim the same. The immediate difference for this CETH, as can be seen, is that the notification does not cover accessories. Besides this, the entry at sr. no.6 covers 'parts' of **only** the goods which are mentioned in the notification and excluding, of course, 'parts' which have been specified or included elsewhere in the notification. Whereas the description under Central Excise covers 'parts' of the goods which are mentioned in the Chapter 90 with the exclusion to 'parts' which have been specified or included elsewhere in the Chapter 90 .

At the outset, I have to state that the notification is based on the classification under the Central Excise Act. Hence, the applicant was asked to furnish the excise classification

applicable to the product. However, the applicant has not produced any evidence therefor. Now since, the applicant has laid claim to the product being a part of the 'pacemaker', I would have to ascertain whether the impugned product, 'guide wire', could be said to be a part of a 'pacemaker'. I proceed thus :

PACEMAKER

- *A pacemaker is a small device that's placed in the chest or abdomen to help control abnormal heart rhythms. This device uses electrical pulses to prompt the heart to beat at a normal rate. It is a small, battery-operated device that senses when your heart is beating irregularly or too slowly. Newer pacemakers weigh as little as 1 ounce.*
- *This small electronic device is composed of three parts : a generator, one or more leads, and an electrode on each lead. The generator contains the battery and the information to control the heartbeat. The leads are wires that connect the heart to the generator and carry the electrical messages to the heart.*
- *A pacemaker must be implanted under the skin. A small incision (cut) is made, usually on the left side of the chest below your collarbone. The pacemaker generator is then placed under the skin at this location. Using live x-rays to see the area, the doctor puts the leads through the incision, into a vein, and then into the heart. The leads are connected to the generator. The skin is closed with stitches.*

GUIDE WIRE

- *a thin, usually flexible wire that can be inserted into a confined or tortuous space to act as a guide for subsequent insertion of a stiffer or bulkier instrument.*
- *a device used to position an IV catheter, endotracheal tube, central venous line, or gastric feeding tube or to localize a tumor during open breast biopsy.*
- *a wire or spring used as a guide for placement of a larger device or prosthesis, such as a catheter or intramedullary pin.*
- *a long and flexible fine spring used to introduce and position an intravascular angiographic catheter.*
- *are indicated for use to facilitate the placement of catheters within the coronary arteries and/or to facilitate placement of catheters within the cerebrovasculature for imaging the vasculature or for the delivery of approved embolisation agents such as coils, PVA or silicone spheres;*
- *to provide a pathway within the vessel structure, facilitate the substitution of one diagnostic or interventional device for another, and to distinguish the vasculature.*

As can be seen from the above, a guide wire and pacemaker are two separate items. As soon as the intended result is obtained 'Guidewire' is removed/withdrawn. It does not stay positioned permanently into the location nor is it attached to a 'Pacemaker' in such a way that without it the 'Pacemaker' would stop working. It would not require an immense insight to deduce that the former is certainly not a part of the latter. However, I find that the applicant has argued that the conventional meaning of a 'part' may not be followed. I am certainly appreciative of this argument. However, the facts of the present case do not support the proposition being advanced. The evidence given by the applicant himself speaks a different language. Like the Certificate by Dr. Ashutosh Sahu, D.M. (Cardiology), M.B.B.S., Interventional Cardiology of Wockhardt Hospitals on the subject 'Permanent Pacemaker Implantation'. This Certificate while enumerating the equipments used and procedure followed in 'Permanent Pacemaker Implantation' makes a remark thus - *"It concludes that guide wire is important part of this procedure"*. The equipments used for the

process are listed as - *'Puncture needle, sheath, guide wire, pacing lead, lead stylets, pulse generator and screw driver'. **Could each of the aforementioned items be said to be a part of the pacemaker?*** The applicant himself answers this question in the negative as a claim is made only in respect of guide wire. The point to be noted is that the Certificate makes a claim ***not as to the impugned product being a part of the 'pacemaker'*** but ***as an important part of the procedure of implantation of pacemaker.*** The applicant has preferred to give the example of a ball pen and refills. I, too, would illustrate my point with an example. A motor car, though complete in itself, cannot run without petrol or diesel or LPG. *Does this mean that the fuel is a part of the motor car?* A gas stove or cooking range cannot run unless supplied with LPG. *Does this mean that LPG or the LPG cylinder is a part of the gas stove or cooking range?* There are numerous such cases which would throw up examples wherein a product, though complete in itself, cannot be put to use or function without the use of some other product. This situation doesn't translate to mean that the latter is a part of the former.

My observations find support in the decision of the Hon. Supreme Court in State of Uttar Pradesh And Another V. Kores (India) Ltd.(1977-(039)-STC -0008 -SC), it was held that *just as aviation petrol is not a part of the aeroplane nor diesel is a part of a bus in the same way, ribbon is not a part of the typewriter though it may not be possible to type out any matter without it.*

The Hon. Allahabad High Court in Commissioner of Sales Tax, U.P. V. Punjab Gramophone House(1979-(043)-STC -0141 -ALL) observed thus -

"One of the simple tests to be applied in order to determine whether a particular part is a "component part" of the complete machine is to see as to whether in case the machine is disassembled, the part in question would be one of the parts found on disassembling."

The Hon. Kerala High Court in The Deputy Commissioner of Agricultural Income-tax And Sales Tax (Law), Board Of Revenue (Taxes), Ernakulam V. Union Carbide India Limited, Madras-2(1976-(038)-STC -0198 -KER) observed thus :

"7. To restate the principle : A thing is a part of the other, if the other is incomplete without it. A thing is not an accessory of the other, if the other, although complete in itself, cannot function without the thing.

8. Looking at the leakproof batteries or the carbons, one is not likely to say that they are either parts or accessories. A transistor is complete without the battery; but, unless the transistor can be connected to the mains, it cannot function without the battery. The batteries are indispensable for the functioning of the transistors. They are not accessories for they do not merely add to the convenience or effectiveness of the transistors, but they make them work. Nevertheless they are not parts of the transistors, for the transistors are complete without them. Same is the position with the arc carbons vis-a-vis the cinematographic equipments."

Applying the logic as stated in the very case above, in the present case too, *a guide wire is not a part of the pacemaker, for a pacemaker is complete without it.* A pacemaker is a product functioning without a guide wire. After identification of the position by the guide wire, the same is removed and thereafter the pacemaker is inserted. It is just for positioning purposes that a guide wire is used but the pacemaker's functioning is not dependent on the

said product. In view thereof, I am of the opinion that the applicant fails to succeed with any of the arguments made with regard to the proposition that the conventional meaning of a 'part' may not be followed.

Further, it is not the case that the impugned product is used for implantation of a 'pacemaker' alone. I do not dispute the fact that a guide wire is necessary for implantation of the pacemaker but it certainly cannot be said to be a part of the pacemaker. A guide wire is used for various purposes, other than implanting of a pacemaker, as reproduced hereinearlier - *position an IV catheter, endotracheal tube, central venous line, or gastric feeding tube, facilitate the placement of balloon dilatation catheters during percutaneous transluminal coronary angioplasty (PTCA) and percutaneous transluminal angioplasty (PTA), etc.* Guidewires are used for advancement of rigid and balloon dilators, stents, manometry catheters, feeding tubes; for foreign-body removal; and during transmucosal pseudocyst drainage. Thus, Guidewires are used to maintain access to cavity and to facilitate advancement of dilators, stents, or other devices. Further the compatibility of the guide wire with the catheters to be used during the applicable procedure whether coronary and/or neuro-radiological use has to be checked. The medical fraternity considers these as indispensable tools in diagnostic and therapeutic endoscopy. Applying the applicant's logic would mean that the impugned product is a part of each and every equipment, for the implantation of which a guide wire is used. ***But would this be realistic?*** I am convinced that the impugned product is neither a part of a pacemaker nor is it indispensable for a pacemakers' functioning but is only used along with other equipment in its implantation.

Having seen as above, all arguments tendered in favour of the proposition that a guidewire is a part of a pacemaker should stand answered. I find that the applicant has cited a couple of case laws. I refrain from discussing these as I find that the facts in the present case stand on a different footing. The case laws about reliance on popular meaning and parlance and not on dictionary meaning or technical meaning would not be applicable here as both the dictionary and popular meaning boil down to the same thing. The applicant has produced Certificates from two dealers which say that - *"We are dealing in Guide wire, Pacemaker and other medical Devices and we are selling the said Guide wire as a part of Pacemaker"* ***Could these Certificates be more authentic than the actual fact and an opinion coming from the expertise of a doctor.*** The answer would be a 'No'. I am fortified in my this view by the observations of the Hon. Delhi High Court in the case of Televista Electronics (P) Ltd. [87 STC 410] that *"It is true that ordinarily the trade parlance test may be relevant, while deciding the classification in respect to commercial goods but it cannot be a determining factor. When terms of science or technology are used, then the scientific and technical meaning has to take precedence over the common parlance test. It is only when trade names or*

common nomenclatures are employed, that this could be pressed into aid for interpretation of an entry."

Further, the 'wrist watch-case', in consideration in State of Gujarat v/s. B.G. Batwara & Co. (cited supra), is about the 'case' which houses the mechanism of the watch and it is not a carrying case. The Hon. Court rightly observed that - *The wrist watch would of course show the time even without the watch-case but it would not be possible to use it as a wrist watch unless the mechanism is fitted in the watch-case.* In the present case, I have not touched the aspect of the meaning of a 'part' for the simple reason that both the products are exclusive and as in the example of a motor car, mere use as an equipment would not render a product to be termed as a part of the product for which it is used. Thus, no parallels can be drawn with regard to the facts in the present case and as found in the cases cited by the applicant.

The applicant had made claim about the product being a 'medical device' but failed to produce a copy of a valid drug licence issued by the competent authority. There is no other description in the notification for the purposes of the schedule entry C-107(8) for *'Medical devices and implants as may be notified from time to time by the State Government'* under which the impugned product could be said to be classified. There is no other specific entry which could be said to be applicable to the impugned product. In view thereof, the product gets placed in the residuary entry, thereby taxable @12.5%.

05. **PROSPECTIVE EFFECT**

The applicant has prayed for prospective effect to the determination order in case his view was not acceptable. As has been stressed time and again that a prayer for prospective effect is to be weighed in the light of the available provisions and the circumstances surrounding the case. In the present case, a claim has been laid with regard to an entry which is referential to the position as appearing in Central Excise. However, the applicant was not able to produce the required documentation in respect of the same. Nevertheless, the applicant's claim was examined with regard to his contention that the impugned product is a part of the pacemaker. I have deliberated as to how the impugned product cannot, in any case, be said to be a part of a 'pacemaker'. In fact, without going in to much details too, even a *prima-facie* view would have delivered the same finding. The contention of the applicant was inherently fallacious and there should not have been any difficulty in not knowing the same. There was neither any mis-classification nor statutory misguidance. In view thereof, the request for prospective effect cannot be accepted.

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

ORDER

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

No.DDQ-11/2010/Adm-3/40/B- I **Mumbai, dt.** 4/1/2014

1. *The 'Guidewire' sold through invoice no.031 dt.28.04.2010 is not a part of 'Pacemakers' and therefore, is not covered by the description against Excise Tariff Item No.9033 00 00 of the notification dt.23rd November 2005 issued for the purpose of the schedule entry C-107(8).*

2. *The product gets covered by the residuary entry E-1, thereby taxable @ 12.5%.*

3. *The request for prospective effect is rejected.*

4/1/14

(DR. NITIN KAREER)

COMMISSIONER OF SALES TAX,
MAHARASHTRA STATE, MUMBAI