

Read: Application dt.05.12.2012 by Lalbagcha Raja Sarvajanik Ganeshotsav Mandal.
Heard: Shri Ashok Pawar (President), Shri Sudhir Salvi (Secretary) and Shri Rajendra Lanjwal (Treasurer)

PROCEEDINGS

(under section 56(1) (a) and (d) of the MVAT Act, 2002)

No.DDQ/11-2012/Adm.6/30/B- 2

Mumbai, dt. 30/12/2013

The applicant, Lalbagcha Raja Sarvjanik Ganeshotsav Mandal, having address as Shree Ganesh Nagar, Dr. Ambedkar Marg, Sane Guruji Marg, Lalbaug, Mumbai-400012 seeks determination of the following :

- a. Whether the applicant is a 'dealer' for the purpose of section 2(8) of the Maharashtra Value Added Tax Act,2002?
- b. Whether the activity of the applicant to auction the gold and silver ornaments amounts to 'sale' under the Maharashtra Value Added Tax Act,2002?

02. FACTS & CONTENTION

The facts and contention as made in the application are reproduced verbatim thus :

"We here by state that, we are Lalbagcha Raja Sarvjanik Ganeshotsav Mandal, having registered office at Shree Ganesh Nagar, Dr. Ambedkar Marg, Lalbaug, Mumbai-400012, registered under the Public Trust Act, 1950 under registration number E-1652, Mumbai.

We are conducting Ganeshotsav every year by raising donation from public and its members for the expenses of the Ganeshotsav. This is a routine process for over a period of last 79 years consistently. Every year this process is followed scrupulously.

During this Ganeshotsav millions of people/devotees visit the Hon. Lalbaug Raja (Lord Ganesha) to pray and bestow their feeling and worship the deity as per their imagination. During this worship many people offer their offerings in Cash and kind to the Lord Ganesha. Many a times people offer Gold and Silver ornaments in the Hundies, these offerings are secretly offered in the Hundies by the devotees. The trust members are unaware of these offerings unless these Hundies are opened after the Ganeshotsav festival. This is purely the belief and prayer offered by individual devotee towards Lord Ganesha. When these Hundies are opened many a times we find Gold and Silver ornaments of various size and shape, to keep these ornaments till the next festival i.e. the next year is a difficult task. We don't have any separate lockers in the Banks or any other institution to deposit these offerings because every year these offerings multiply. Hence as a charitable trust for the public and by the public we are following the tradition of the Trust and we make available these Gold and Silver ornaments to the devotees at a very minimal rate, but the devotees themselves try to bid to get these ornaments for themselves as a matter of 'Holy Prasad'. The devotees make a payment by way of Cash or Cheques as a donation towards these Gold and Silver ornaments. The trust gives a receipts of these donations to the devotees who possesses these Gold and Silver ornaments after his own bid. This is a pure donation given to the charitable trust to conduct various activities throughout the year for the general public, which will be explained in the later part of this application.

It was told to us by certain people that the exchange of Gold and Silver ornaments as against cash or cheques will amount to "sale" and will attract VAT. We being a public charitable trust engaged in public service will never fall in to the category of "dealer" nor it is our business to earn any profit or gain. We the members of this trust work throughout the year honourarily. As per the definition of "dealer" under section 2(8) of MVAT Act, 2002, "dealer" means a person, society, club, association buys goods or sells goods to, its members. Since the activity conducted for giving these Gold and Silver ornaments to the devotees is a transparent and uniform process. The devotees who contribute towards these donations are not known to the trust and its members. Hence this cannot be treated as a definite sale to a specific purchaser. There is neither contract of sale nor any agreement to sale. This is purely a donation as against acquisition of the Gold and Silver ornaments.

In lieu of our contention we hereby annex the copy of receipt which is given to the devotee. We also annex all necessary documents in support of our stand.

The Gold and Silver ornaments given to the devotees and for the purpose of propagation of religious teachings and practices as per the aims and objects of such institutions are not liable to tax as given in the case of "Tirupati Temple".

The Lalbagcha Raja Sarojanik Ganeshotsav Mandal, is conducting following various activities throughout the year:

1. **Medical Aids:** Donation is given to individual Patients upto the 10% of the total cost of surgery/treatment. The total expenses of the trust under this head is approximately Rs.4 crore per year.
2. **Dialysis centre:** The Trust has started dialysis centre keeping in the view that the common man cannot afford the process of dialysis which is life supporting as it costs about Rs.1500 and above in private Hospitals. We provide the same facilities just for Rs.100. Dr. Bicchu the leading Nephrologist in Mumbai is looking after this Dialysis Centre. 240 patients are taking benefit of this centre permanently throughout the year. At present approximately 30,000 dialysis have been conducted till date.
3. **Computer Centre:** The trust is conducting various computer courses such as Office Automation, Tally ERP 9, C++, MSCIT etc. throughout the year. The trust is charging just Rs.500 for each course and over 700 students are taking benefit of our Computer Centre.
4. **Swatantraveer Sawarkar Library:** The trust is running library of literature and educational books. Above 60 thousands live members are taking benefit of this library which contain, above one lakh books. The library is running fully free of cost. There is neither any fees nor any deposit.
5. **Reference books:** The trust having reference book bank. Various educational books are provided to be students from SSC to all faculties for various types of higher education. (Degree and Diploma courses) which includes Medical and Engineering faculties. The beneficiaries of this reference library are above 5000 students at free of cost.
6. **Scholarship:** The students throughout Maharashtra State, who have obtained above 60% of marks, the Trust gives scholarship to such students for further education and spends every year about Rs.70 lakhs for this scheme.
7. **Study Room:** Our Trust is located in the area having economically weaker families who are staying in chawls, where there is insufficient space and lack of academic atmosphere. Hence, the Trust has provided well equipped study rooms having academic environment. About 1000 students are enrolled with the Trust, who are getting benefitted for last so many years.
8. **Re-habilitation:** During the flood occurred during 26th July 2005, the 'JUI Village' from Mahad Taluka was re-habilitated by the Trust. In all 66 houses were constructed and given free of cost to the natives of which keys were handed over by the then Hon. Chief Minister Late Shri Vilasrao Deshmukh.
9. **Yoga Kendra:** The Trust has started Yoga Kendra to benefit the common people of the surrounding area and to make them health conscious, free of cost. 200 women and 150 men take benefit of this Yoga Kendra.
10. **Classes for Competitive Exam:** The trust conducts vocational guidance for students appearing for competitive exams such as MPSC, UPSC, Banking Services, Railway Recruitments, and other various States and Central competitive exams for free of cost. Learned counsel provide these vocational guidance on a very minimal honourarium. We also provide important books for these vocational guidance to the students free of cost.

As discussed above we are a Charitable Trust, serve the society and the state, by emphasising on good human values to create betterment in life of a mankind and to develop the society. Considering all these aspects and various activities for the public we never intend to do any business, because we believe in social cause for the society. Over and above if any VAT is attracted towards our activities mentioned above, we request Your honour to please levy tax, if any prospectively."

The applicant has submitted the following documents alongwith the application :

1. Certificate of Registration of Public Trust
2. Trust Deed
3. Final Accounts of the Trust from 1.4.2005 to 31.3.2011

4. Court fee Stamp of Rs.100/-
5. Photocopy of receipt given to devotees for donation (given to bidder of article)
6. Copy of PAN Card

03. HEARING

Shri Ashok Pawar (President), Shri Sudhir Salvi (Secretary) and Shri Rajendra Lanjwal (Treasurer) attended the hearing. The facts and contention as submitted are :

1. The applicant does not effect any purchases.
2. (a) The articles (donation in kind) deposited in the Hundi by the devotees during the Ganeshotsav period are put for auction.
(b) The date of auction is mentioned in the souvenir published by the applicant during the Ganeshotsav period and it is distributed to devotees, celebrities, advertisers, persons giving donations, etc. Date of auction is also mentioned on the notice boards put up at prominent places in the premises during the Ganeshotsav period.
(c) There is no outside value but some estimate about the weight/purity check is got done through the applicant's Goldsmith.
(d) The article is given to the highest bidder. The consideration is received in cash or cheque. The receipt is issued as 'donation received'.
(e) The donation in cash/cheque/articles are used for charitable purposes.
3. Hence, it is contended that,-
 - (i) the applicant is not a dealer;
 - (ii) the applicant is not doing any business in the form of transactions of sale or purchase.
4. The applicant requests for prospective effect to the determination order if the request is not acceptable.

04. OBSERVATIONS

I have gone through the facts and documents of the case. The applicant is registered as a Public Charitable Trust. For the purposes of these proceedings, the applicant has posed a question with regard to its activity of conducting an auction of the articles, ornaments & offerings of Gold & Silver to Lord Ganesha during the Ganeshotsav festival. The applicant has given a copy of an order dt.17.02.2010 by the Deputy Charity Commissioner which refers to the modified scheme as per the provisions of which the day-day management of the trust would be governed ('Annexure A'). In point no.13 of this scheme about the 'Powers and Functions of the Managing Committee (कार्यकारी मंडळाचे अधिकार व कार्य), in clause (3), it is mentioned that *there would be a public auction of the articles received by the Trust by way of deposits in the Box or by any other modes alongwith articles received in offerings to the Lord.* In the Final Accounts for the periods 2006-07 to 2010-11, there is a remark of the Auditor that *'In respect of Donation In Kind representing the offerings of Gold & Silver Ornaments by the devotees, the valuation thereof is taken as per valuation report while incorporating the same in accounts.'* In the Final Accounts for the periods 2005-06 to 2010-11, there is a remark that *'Receipts in Box and Sales proceeds of offerings in kind are taken as*

per Certificate of Trustees. The Schedule about 'Income from Other Sources' as found in the Accounts enlists the following :

Sales Proceeds of: (Referred so in years 2005-06 to 2007-08)

Coconuts

Photos

Auction Sale of Articles & Offerings to Lord Ganesh Murti (in some years mentioned as 'Auction Sale of Articles & Offerings to God & Goddess during festivals')

And others.....

Donation in the form of: (Referred so in years 2008-09 to 2010-11)

Coconuts

Photos of Lord Ganesh

Articles & Offerings to God & Goddess during festivals

Scrap (2009-10, 2010-11)

And others

Thus, it can be deduced from the above that the activity of conducting an auction of the valuables is a regular one after the Ganeshotsav festival and it is in the normal course of performing the functions of the Trust. Now, the applicant has claimed that it is neither a dealer nor is the auction, a transaction of 'sale' for the purposes of the MVAT Act, 2002. I would now refer to the definition of 'dealer' under clause (S) of section 2 of the Act thus :

"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

It can be seen from the above that a 'Public Charitable Trust' is deemed to be a dealer for the purposes of the MVAT Act, 2002. The *Explanation* itself states that the fiction 'deemed dealers' would operate notwithstanding anything contained in clause (4). This clause (4) pertains to the definition of 'business'. When a deeming fiction is made applicable, one has not to ascertain whether the deemed category carries on any business or not. Therefore, pretexts such as non-business or non-dealer cannot be entertained. Thus, in view of the deeming fiction, it is well beyond doubts that the applicant is a 'dealer' for the purposes of the MVAT Act, 2002.

A perusal of the *Explanation* for 'deemed dealer' reveals that persons, bodies and entities, as have been enumerated thereafter, 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 are deemed to be dealers. Thus, the definition itself specifies that a sale of goods, whether it is by auction or otherwise would render the persons, bodies and entities enlisted in the clause to be a dealer. In an auction, there is exchange of goods for consideration. It is significant to note that the *Explanation* itself refers to the transaction of disposal of goods in an auction as 'sale of goods'. Thus by virtue of the activity of 'sale' by auction or otherwise, these persons, bodies and entities are deemed to be a 'dealer'. An activity amounting to a transaction of 'sale by auction' is the very situation being placed before me in the present proceeding. In view of the explicit wording of the clause, a

transaction of auction amounts to a sale of goods and a 'Public Charitable Trust' engaging in such a transaction would be deemed to be a dealer.

Though the applicant seeks to know the coverage of the activity of 'auction' under the definition of 'sale', I feel it necessary to dwell on yet another aspect as I observe that the applicant has effected sale of other items as well such as coconuts, photos, scrap, etc. It should be noted here that the *Explanation* refers to sale of goods by auction or otherwise. This *Explanation* is very broad and covers disposal of goods even other than by way of auction. Needless to say that the *Explanation* is applicable to the persons, bodies and entities as have been enumerated in the clause. Therefore, the applicant would be deemed to be a dealer for the purposes of the MVAT Act, 2002 for engaging in activities of sale of goods by auction or otherwise.

The provision being so unambiguous, I assume that all doubts should be laid to rest. Nevertheless, I would deal with the arguments made by the applicant in support of his claim that the applicant is not a dealer and further that the transaction is not a 'sale'.

- It has been argued that the receipt of money from the bidder is a pure donation given to the charitable trust. In this regard, I have to say that it should not be a point of dispute that the applicant conducts an auction. Even the documents submitted by the applicant highlight the said activity. Such disposal of goods in an auction is a 'sale'. Now, the deeming fiction itself treats a 'Public Charitable Trust' a 'deemed dealer' for engaging in such transactions of sale of goods by auction. The terminology used for the receipt on account of such 'sale' would not alter the nature of the transaction.
- It has been argued that the applicant, a public charitable trust engaged in public service will never fall in to the category of "dealer" nor it is their business to earn any profit or gain. With regard to this argument, I have already observed above that when a deeming fiction is made applicable, one has not to look for fulfillment of conditions of 'dealer' or 'business'. Besides the clause is a non-obstante clause and therefore, has rendered it redundant to look for the existence of any transactions in the nature of 'business'.

It has been argued that -

The activity conducted for giving these Gold and Silver ornaments to the devotees is a transparent and uniform process. The devotees who contribute towards these donations are not known to the trust and its members. Hence this cannot be treated as a definite sale to a specific purchaser. There is neither contract of sale nor any agreement to sale. This is purely a donation as against acquisition of the Gold and Silver ornaments. The Gold and Silver ornaments given to the devotees and for the purpose of propagation of

religious teachings and practices as per the aims and objects of such institutions are not liable to tax as given in the case of "Tirupati Temple"

I have already dealt with this aspect above. An auction is a process of buying and selling goods by offering them up for bid, taking bids, and then selling the item to the highest bidder. The Sale of Goods Act, 1930 recognizes a 'sale by auction'. Besides this, the clause (8) deems the persons, bodies and entities as enumerated therein to be a 'dealer' for the activity of sale of goods, whether by auction or otherwise. When the deeming fiction assumes a transaction of sale in auction, I need not even deal with the argument that the applicant does not effect any purchases. Nevertheless, I have to bring to the notice of the applicant that the offerings received are the property of the applicant and the disposal of the same is at the sole discretion of the applicant.

Thus, none of the arguments of the applicant help in advancing the proposition that the applicant is not a 'dealer' and the transaction of auction is not a 'sale'.

05. PROSPECTIVE EFFECT

The applicant has prayed for prospective effect to the determination order. We have seen above that the provision was very unambiguous. The facts of the case were clear such that the applicant is a registered as a Public Charitable Trust conducting auction of the articles, ornaments & offerings of Gold & Silver. In view of the specific inclusion of a 'public charitable trust' in the definition of 'deemed dealer', there should not have been any scope for confusion or any interpretation issues.

A request for prospective effect is to be weighed with regard to the facts of each case. Any ambiguity or scope for mis-interpretation is to be ascertained from the prevailing provisions. Also, it needs to be seen whether there was any statutory misguidance. I find none such contingencies in the present case. I have, therefore, to observe that the request for prospective effect is not well supported by available provisions and existing facts. In the event, I am not inclined to accept the same.

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

ORDER

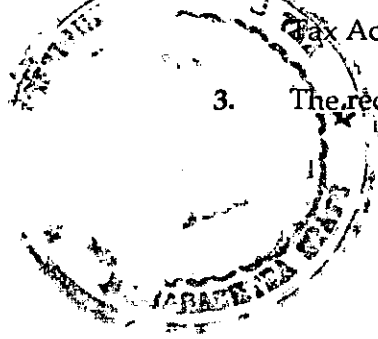
(under section 56(1) (a) and (d) of the MVAT Act, 2002)

No. DDQ/11-2012/Adm.6/30/B- 2

Mumbai, dt. 30/12/2013

It is herewith determined thus :

1. The applicant is a 'dealer' for the purpose of section 2(8) of the Maharashtra Value Added Tax Act,2002.
2. The activity of the applicant to auction the articles, ornaments & offerings of Gold & Silver amounts to 'sale' under the Maharashtra Value Added Tax Act,2002.
3. The request for prospective effect is rejected.




20/11/13

(DR. NITIN KAREER)

COMMISSIONER OF SALES TAX,
MAHARASHTRA STATE, MUMBAI