Read : Application dt.01.09.2014 by M/s. KVR & Co. holder of TIN 27460025303V.
Heard : Sh. C.B. Thakar [Advocate] and Sh. Kunal Dawda [Chartered Accountant].

PROCEEDINGS

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

No.DDQ/11-2014/Adm.6/15/B - 3 **Mumbai, dt. 28/07/2015**

M/s. KVR & Co., having address as Prabhavati Bhavan, Station Road, Thane (W), request determination of the rate of tax on the sale of "Vada Pav" evidenced by sale bill no. RFC 001384 dt.21.07.2014.

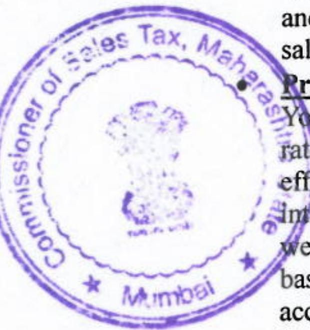
02. FACTS OF THE CASE

The applicant is having main place of business at aforementioned address. The applicant, amongst others, is running stalls at following three additional places for sale of 'Vada Pav':

i) Kunj vihar Vada Pav, Shop No.6, Daulat House, (Lake view Bldg.) Gurunanak Road, Opp. Nutan Nagar, Nr. Sahakar Bhandar, Bandra (W), Mumbai.
ii) Shop No.11, Gr. Floor, Sai Jeevan, S.V. Road, Opp. Mulund Railway Station, Mulund (W), Mumbai-400 080.
iii) Om Sai CHS Ltd., A.K. Marg, Opp. MSEB Office, Bandra (East), Mumbai- 400 051.

The application states thus -

- "In these stalls there is no arrangement for consumption of 'Vada Pav' sold to the customer. The 'Vada Pav' are delivered in the paper bag, which the customer carries with him. He may consume the same at home or at any other place. In other words, there is no sale of 'Vada Pav' by way of service for consumption. It is normal sale by way of delivery.
- The sale of above 'Vada Pav' is covered by entry C-94(b) as it is was existing upto 30.4.2011. From 1.5.2011 they are covered by entry C-94(c). The applicant has discharged liability accordingly on his sales of 'Vada Pav'. However, in the business audit, an objection was taken that the sale will be covered by determination order in case of Jumbo King (DDQ dated 24.12.2008) and will be liable to tax at higher rate. Applicant objected to same. However, assessment orders were passed following DDQ in Jumbo King. In first appeals the benefit of prospective effect was allowed as available to jumbo king. However, now there is proposal for review of the said appeal order. Therefore, for the sake of clarity and statutory order, this application is filed before your goodself for determination of rate of tax on the sale of 'Vada Pav'.



- **Prospective effect**

Your applicant further submits that if at all the rate of tax is decided in any other entry attracting higher rate of tax (than given in entry C-94) then your applicant prays that the DDQ be given prospective effect and the past liability till the date of DDQ be protected. Applicant has relied upon the statutory interpretation of the entry as per the legal position. In the market also, the other similar stall holders were paying tax at lower rate under entry C-94. In fact, the Jumbo King itself was paying lower rate based on clarification issued to it by the sales tax department and the applicant has also paid tax accordingly, at such lower rate at his stalls also. In case of Jumbo King, the liability is protected till 24.12.2008. Therefore, the sales of applicant be considered to be at par with sales in case of Jumbo King and same protection as available to them is also required to be given to the applicant.

Further, in case of applicant, the said liability be protected till 30/06/2009 or till the date of DDQ as the case may be, since when applicant started following DDQ in case of Jumbo King dated 24.12.2008. The position of Jumbo King came to the knowledge of applicant very late and there was also information that the matter may be taken further in litigation. Under above circumstances, applicant has considered rate under entry C-94 only and considered taxation accordingly in the sale price upto 30/06/2009. The tax is also discharged accordingly. Therefore, now if tax is determined at higher rate, the same will be unexpected financial burden on the applicant till 30/06/2009 or till the date of DDQ as the case may be and he will be totally ruined.

In fact, in appeals against assessment orders for the period upto 31-03-2009, the prospective effect till 24/12/2008 is granted to the applicant by the learned first appellate authority, viz Deputy

Commissioner of Sales Tax (Appeals), Thane. However, the learned Joint Commissioner of Sales Tax has now issued review notice for withdrawal of the said relief. To be on parity, the prospective effect is required to be granted to applicant also. The above litigation also shows that the position was very shaky and confusing which warrants granting of prospective effect.
Considering above fluid position, your applicant respectfully submits that his liability be protected till."

03. HEARING

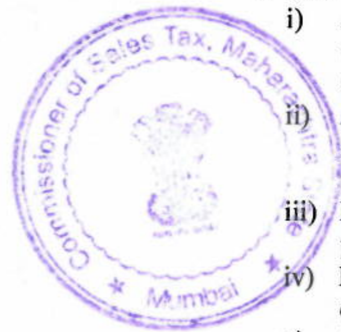
Sh. C.B. Thakar [Advocate] and Sh. Kunal Dawda [Chartered Accountant] attended the hearing on dt.13.05.2105. It was submitted thus -

1. The application was filed for determination of rate of tax. However, in light of the DDQ in the case of Jumbo King dt.24.12.2008, the applicant does not wish to contest the case on merits about rate of tax.
2. However, it is pointed out that in case of Jumbo King, prospective effect is given to the DDQ read with Hon. MSTT decision dt.28.07.2010. By this judgment, the DDQ in the case of Jumbo king is made effective from 28.12.2008 i.e. date of order.
3. DDQ is also cited in the case of sunglasses dt.25.02.2010 wherein even if the DDQ application was held non-maintainable as per section 56(4), prospective effect was granted following the earlier judgments.
4. In fact, in appeal for the period upto 2008-09 (upto 24.12.2008) benefit of prospective effect is given. However, the higher authority is now contemplating to withdraw the same by review. The reviewing authority says that appellate authority is not entitled to give prospective effect. Hence this application to request for prospective effect upto 24.12.2008 at par with other dealers for e.g. Jumbo King etc.

To the above submission, it was pointed out to the applicant that the case of Jumbo King is different as there the applicant was clarified earlier about rate of tax being 5%. To this it was argued that Jumbo King is a leader in the market and the present applicant was charging lower rate following the said clarification. It was requested that a written submission would be given in the matter within 2 weeks. Accordingly, submission dt.25.06.2015 was tendered to state thus -

"We refer to hearing completed in above matter. We briefly reiterate our submission as under;

1. The background about filing the DDQ is already mentioned in the application. Kindly consider the same.
2. In respect of prospective effect, we mention following facts and circumstances;
   i) Appellant has relied upon clarification letter issued to Jumbo King as the said party is relative of the applicant, as well as being in the same market had knowledge of the said letter. Accordingly, appellant has dischrged liability at 4%.
   ii) Appellant was assessed at higher rate for period upto 31.3.2009. In the first appeal, the learned first appellate authority considering the prospective effect given to Jumbo King, also has given protection to applicant.
   iii) In case of Jumbo King (DDQ dated 24.12.2008) though the rate was decided at higher rate, prospective effect was granted till 10.4.2007.
   iv) In VAT Appeal 5 of 2009 dated 28.7.2010 in case of said M/s. Jumboking, Hon'ble Tribunal extended the date of prospective effect till 24.12.2008.
   v) Applicant came to know about above position subsequently and started discharging tax at higher rate from 1.7.2009. Upto June 2009 he has dischaged liability under entry C-94.
   vi) Applicant deserves prospective effect as given in case of Jumboking and further upto 30.6.2009 on the principal of parity.
   vii) Applicant also draws kind attention of your goodself to the DDQ in case of Skylark Optical Company & Others dated 25.02.2010. The rate on sunglasses was already determined earlier vide DDQ in case of Chheda Marketing dated 29.8.2009. In view of above, the issue of rate of tax was not decided in above DDQs. However, the applications were maintained for the limited purpose of prospective effect and the then learned Commissioner of Sales Tax granted prospective effect to above applicants also u/s 56(2). It is observed that prospective effect should be granted to all the persons similarly situated. The said principle applies in case of present applicant also and therefore prospective effected be granted.



viii) Even recently also your goodself have granted prospective effect on the ground of parity, though main ground of rate of tax was not decided in case of Quality Tissue Converting Co. Pvt. Ltd. (DDQ-11-2014/Adm-6/18/B-2, dated 14.11.2014). The same principle will apply in our case and we request to grant above relief and oblige."

04. OBSERVATIONS

I have gone through the facts of the case. The applicant doesn't wish to pursue the question about rate of tax in view of the same having been answered in an earlier determination order no.DDQ/11-2006/Adm.5/54/B-2 dt.24.12.2008 However, the issue of prospective effect is requested to be determined. The applicant need not take pains to point to any case law to prod me into giving a decision on prospective effect owing to the belief that if one of the issues about rate of tax as posed in the determination application not being decided on merits, the other issue, in his application, about prospective effect may not be decided. I would definitely go through determining the issue of prospective effect. For favourable consideration of the request for prospective effect, reliance is sought to be placed on the order determining prospective effect in the case of M/s. Jumbo King Foods Pvt. Ltd. and the decision by the Hon. Maharashtra Sales Tax Tribunal (Hon. MSTT) in the very same case as delivered in VAT Appeal Nos. 5 of 2009 & 3 of 2010 decided on dt.28.7.2010.

The issue on merits as involved in the determination order in the case of M/s. Jumbo King Foods Pvt. Ltd. as decided on dt.24.12.2008 was whether 'Vada Pav' sold by the applicant is an item of 'farsan' for the purposes of the notification issued under schedule entry C-94 of the MVAT Act,2002. There is an exclusion clause in the said notification whereby 'farsan' items served for consumption in any restaurant including any eating house, hotel, refreshment room or boarding establishment or in part thereof or in any club or by a caterer get excluded from the benefit extended by the notification. Therefore, the issue to be decided was - *whether the Jumbo King Outlet is covered by the scope of a 'restaurant including eating house, hotel, refreshment room etc?* On detailed deliberations, in the determination order dt.24.12.2008, it was held that the Jumbo King Vada-pav out lets would be covered by the term 'eating house'.

M/s. Jumboking Foods Pvt. Ltd. had requested for prospective effect in case their contention was not acceptable. However, the said request remained to be decided upon in the determination order dt.24.12.2008. On request for rectification, the issue of prospective effect was decided by the determination order no.DDQ-11/2009/Adm-3/07/B-2 Mumbai, dt.08.12.09 passed in their case. The then Commissioner took cognizance of the various communications as follows as made to the said applicant by the Sales Tax Department :

1. By letter dt.20.01.2006, the applicant was informed that "vadapav" being an item of 'farsan' would be covered by the notification issued under schedule entry C-94 of the MVAT Act dt.01.06.2005.
2. By letter dt.10.04.2007, the applicant was asked to take note that the clarification dt.20.01.2006 was based on facts as disclosed in the communication of the applicant. It was also informed that whether any of the outlets can be classified for the purposes of Maharashtra Value Added Tax Act, 2002 as restaurant, eating house, etc. shall always be a question of fact i.e. to be examined at the

time of assessment and/or during scrutiny of return/refund claims.

3. By letter dt.11.6.2007, the applicant was sent a copy of the DDQ dt.31.5.2007 in the case of M/s. Parampara Foods Products informing the applicant to arrange his affairs accordingly.

The then Commissioner on the above facts held that the liability of the applicant is protected for the period from dt.20.01.2006 till dt.10/4/07 [from the date of issue of the first clarification upto the date on which the applicant was communicated about the misclassification]. The reasons to hold so were observed as follows :

a. *"The case of the applicant falls under the category of misclassification by both the applicant himself as well as the departmental authorities..... In the present case, it is seen that the clarification is issued on dt.20.01.2006. However by letter dt.10.04.2007, the applicant was informed that whether any of the outlets can be classified for the purposes of MVAT Act, 2002 as restaurant, eating house, etc. shall always be a question of fact i.e. to be examined at the time of assessment and/or during scrutiny of return/refund claims. This shows that the applicant was made aware that the rate of tax in the case of the applicant depended on the fact whether the applicant was an 'eating house' or otherwise. The clarification expressed a prima facie view that the 'vada pav' sold through the outlets would be 'farsan' for the purposes of the schedule entry C-94. I am inclined to accept the prayer of the applicant that, prospective effect may be granted in view of the specific clarification issued to them.*

b. *However, it is seen that a separate letter was issued to the applicant making him aware of the peculiarity of the question posed for clarification by him. All the facts of the case were not taken into consideration before expressing the view. Hence, the same was sought to be amended by making the applicant aware that the classification rested on examination of facts.*

c. *As mentioned earlier, relying on the ratios laid down by the various decisions in this regard, the applicant is expected to understand the view expressed in the second clarification issued. The applicant has counter argued that he had written a letter to the Department after the receipt of the third letter from the Department. The non-reply by the Department led him to believe that that the stand taken by him was correct. I am not convinced by this argument of the applicant. The second clarification had expressed the view in clear terms and the applicant should have arranged his affairs accordingly. Ignorance of the law cannot be claimed as an excuse for non-compliance with the provisions. The applicant would have made a point if there was no effort on the Department to amend the wrong view expressed in the first clarification issued to the applicant. The second clarification issued to the applicant sought to make matters clear by advising the applicant to ascertain the possibility of the applicant being an 'eating house'. The applicant became aware or was made aware of the misclassification by the letter dt.10/4/07. Hence, the request of the applicant to protect his liability till the date of the determination order is not found acceptable.*

d. *In view of the statutory misguidance, the applicant deserves to be given benefit of doubt, by way of protecting the liability up to the date on which the applicant was communicated about the misclassification. The applicant's request to grant prospective effect for reason of the clarification issued to him is found justified only for the period from the issue of the first clarification till the date of the second clarification i.e from dt.20.01.2006 till dt.10/4/07.*

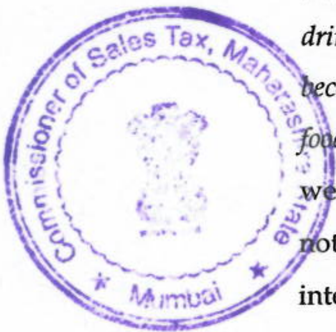
e. *The applicant has cited a few cases in support of his request for prospective effect to the determination order passed in his case. I have gone through the judgments and it is clear that grant of prospective effect to determination order depends on the facts & circumstances of each case. The applicant has pleaded that the applicant being a market leader in the Trade, the clarification given to him was followed by the Trade. As mentioned earlier, I am in agreement with the applicant when the applicant drives home a point that his liability be protected. However, the period for protection sought by the applicant is not acceptable. In the present case, the misguidance to the applicant was cured by making aware of misclassification by the letter dt.10/4/07. Hence, I have come to the conclusion that the question of protecting the liability arises for the period from the issue of the first clarification till the issue of the second clarification."*

M/s. Jumboking Foods Pvt. Ltd. preferred an appeal against both the above determination orders i.e the one on merits as well as the one deciding the prospective effect. Both

the appeals came to be decided by the Hon. MSTT in a common order in Vat Appeal Nos. 5 of 2009 & 3 of 2010 dt.28.07.2010. Hon. MSTT upheld the determination order. However, the request for prospective effect was accepted and the order was made effective from the date of the determination order of dt.24.12.2008. The consideration for so granting prospective effect, as observed by the Tribunal, was that no particular rate of tax was conveyed to the applicant. Further, the Hon. MSTT observed that the letter informing about determination order in the case of M/s. Parampara Food Products (DDQ dt.31.05.2007) was not applicable to the facts of M/s. Jumboking Foods Pvt. Ltd. as question of serving food articles in a 'eating house' or Restaurant was not an issue in M/s. Parampara Food Products (cited supra).

Having seen the circumstances under which the request for prospective effect was granted in the case of M/s. Jumboking Foods Pvt. Ltd., I turn to the circumstances in the present case. And my immediate observations are -

1. There was no communication by any authority of the Department conveying to the present applicant about a lower rate of tax. Therefore, no direct case of a statutory misguidance can be made out.
2. The case laws as elaborately discussed and deliberated upon by both the then Commissioner as well as by the Hon. MSTT were in existence for a period since long. The preceding observation of mine would be explained hereinbelow. To cite only an instance of the preceding statement would be the very historical decision of the Hon. Bombay High Court way back in the year 1976 in the case of M/s. Mangharam & Company (47 STC 595). The Hon. Court had observed then that *though normally a hotel or a restaurant or a refreshment-room might have sitting arrangement for their customers to consume food and drinks purchased by them, this is not necessary, and nowadays we have quite a few snack-bars becoming fashionable where people stand at the counter and eat. It is also not necessary that the food purchased must be consumed inside any such hotel, restaurant or eating-house.* Thus, there were case laws wherein even hand-carts were held as eating houses. Ignorance of law is not an excuse. Therefore, no case of uncertain position of law or any ambiguity about interpretation can be made out.



3. Besides the very glaring thing which should not be missed is the scheme of things at the applicant's outlets selling the vada pav. As in the case of M/s. Jumboking Foods Pvt. Ltd., here too, the outlets of the applicant have arrangements to enable people to consume the vada pav at the outlet, if they desire to. And it is generally known that the applicant's outlets also do provide the same set of facilities as are available at the Jumbo King outlets. These are facts which the applicant is well aware of. It is also the reason as

to the applicant not contesting the issue on merits as on similar set of facts, the determination order in Jumbo King (cited supra) exists. When there are judgments of the Hon. Courts and Tribunals holding even sales on carts and vending machines to be sales at 'eating houses', such arrangements as at the applicant's outlet were way ahead. The preceding observation of mine would be explained hereinbelow. And hence, the outlets, with no second thoughts, should have been understood to function as eating houses.

My observations at point no. 2 above would be understood if I reproduce herein the portion from the determination order dt.24.12.2008 in M/s. Jumboking Foods Pvt. Ltd. elaborately dealing with the case laws on the issue of 'eating houses'.

a. "The decision that started it all was the Bombay High Court decision in the case of M/s Mangharam & Company (47 STC 595). The facts in this case were that the respondent sold ice-cream at their place of business in a cabin where people bought it for consumption. There was no arrangement for the customers to sit and consume the ice-cream purchased by them. The High Court observed that, though normally the hotel or the restaurant might have sitting arrangement for their customers for consumption of food, this is not necessary and already we have quite a few snack bars becoming fashionable where people stand and eat. It is also not necessary that the food purchased must be consumed inside any hotels, restaurant or eating house. Therefore, the High Court also making allowance for the changing scene, deigned to extend the meaning and the perspective of a hotel by including such a place as a cabin, and also holding forth the principle that food is not necessarily consumed by sitting inside the hotel and more so a hotel need not be one where there would be sitting arrangement. In short, way back in 1976, the High Court had chosen to get away from the conventional mode of defining things and opted instead for taking an expanded view by respecting the fact that concepts are bound to undergo a change.

b. Following the above judgement, the MSTT in the case Leo Ice-cream (Appeal No.111 of 1991) decided on 31.12.1992) held that sale of ice cream through a handcart is sale by an 'eating house.

c. Further, in the case of Railway Refreshment Room v. the State of Maharashtra, S.A. No.425 of 1987 decided on 4.12.1987, the MSTT took its cue from the above referred MSTT decision and held that a wider meaning should be given to the word 'eating house' in order to extend the scope to small vendors of articles of food and it held that food served by the appellant to the passengers in the train is sale by an 'eating house.'. The Tribunal concluded that, from 1.7.1983 to 31.3.1984, entry C-II-22 covered only service of food and non alcoholic drinks inside any eating house. After 1.4.1984 the entry amended the word 'inside' by the word 'in' and the 'service for consumption' was to be 'in any eating house' or any part thereof. Therefore, the amendment intended to apply to the sale not only inside the restaurant but to its other area of operation which can be outside the restaurant. Then again the Tribunal here observed that giving a restrictive meaning to the word 'eating house' would result in defeating the object of the legislature. The object of the legislature seems to be to extend the area of the operation of the hotel. Thus the decision seems to be entirely based on the purpose behind the amendment of the entry.

d. In the MSTT judgement in the case of Sterung Horticulture Research Pvt. Ltd which gives a similar decision, although on different grounds. In this case, the applicant was engaged in the sale of Tea, Coffee through vending machines. The machines are installed on Railway Station and the applicant gave commission to the Railway on such sale. The machines were also installed at hotels and restaurants. It was the contention of the applicant that the sales by such vending machines installed in hotel and restaurant and Railway Stations should be held as sales covered by schedule entry C-II-16 (Food and non alcoholic drinks served for consumption at any place other than the public restaurant by a caterer) or are covered by schedule entry C-II-14 (Food and non-alcoholic drinks, not being food or drinks to which entry 15 of this part applies, served for consumption at or in the immediate vicinity of any public restaurant or in any club, or supplied by such public restaurant or club). The Tribunal observed that, in common parlance, a caterer is understood as a person who supplies food at functions such as marriage, thread ceremony etc. and therefore the applicant cannot be called as a 'caterer'. In reply to the second question as to whether such sales are covered by

schedule entry C-II-14, the Tribunal referred to the definition of eating house given in the case of Pure Ice-cream and Mangaram & Company. The Tribunal observed the following... "In view of the above trend set by our High Court in the case of Commissioner of Sales Tax v. Mangaram & Company and adopted by the Tribunal in the case of Railway Refreshment Rooms, we have no hesitation in coming to the conclusion that for the said reasons sale of liquid tea and coffee will be covered by Entry C-II-14."

e. In the MSTT decision in the case of M/s Jagat Enterprises (025)-MTJ -0808) 'Shamiyana' or 'Pandal' erected for the purpose of doing the business at Legislative Assembly Council Premises was held as an 'eating house'. The Tribunal observed thus *"From the aforesaid discussion, it is emerged that in order to get benefit of concession under Entry 22 of Schedule C, Part II, read with Entry 191 of notification and issued under Section 41 of the Bombay Act, there must be premises in which business of supply of meal or refreshment to the public in class for consumption is carried out. Such premises may be open or closed one, may be a building of permanent construction or may be a temporary erection like tent. Such business may be found carried out even on Hand Cart. It is not necessary that it must be owned by the owner of the business, but the owner or the conductor of such business must have control over such premises during the period when he is carrying out such activity of running an 'Eating House'. Catering contracts for serving and supplying food, snacks etc. on occasion of functions such as wedding, thread ceremony etc. or in some other parties, cannot be termed as an 'Eating House'. Holding the licence to run an 'Eating House' indicates the nature of activity, but this itself cannot be decisive test to treat the premises referred to in the licence as an 'Eating House', unless other conditions are found fulfilled. In nutshell, whatever may be nature of the premises, in order to get the benefit of impugned entry, it must be shown that such premises, wholly or partially, the business of supply of meal or refreshment to the public or class of public for consumption in the premises is being carried out. Turning to the facts of the impugned case, there is material on record to show that during the Winter Session of Legislative Assembly, certain premises were made available to the Appellant in the premises of Nagpur Council Hall to serve and supply foods. It appears that Shamiyana (Pandal) was erected for the said purpose, wherein Appellant was carrying out the activity of serving food to the customers i.e. particularly the persons who used to visit the Council Hall during the said Winter Session. It is certain that during the said period Appellant was carrying on business of supply of meal or refreshment to the public for consumption at said premises. The Appellant was having control over the said premises. It is true that there is no material on record whether the Appellant was holding licence for running 'Eating House' or not. It is urged by Shri Bagri, learned Chartered Accountant for the Appellant, that this activity was carried out by the Appellant in January 1986, and after lapse of about more than 17 years, it is not possible for him to produce any evidence in that behalf or he is not in position to make any statement either he was holding such licence or not. But according to him as the Government had given him permission to carry on such activities, he must be holding the requisite licence. Of course it may not be safe to presume that he was holding licence only because such permission was given to him by the concerned Authority, and no any positive finding as to factual aspect of holding licence or not, can be recorded at this stage. However, want of evidence in that behalf would not be sufficient to discard the other evidence indicating that the activity was of running an 'Eating House' The activity of the Appellant of supplying food and refreshment to the visitors during the Winter Session cannot be equated with the activity of Catering Contract to supply food occasionally on functions of wedding, thread ceremony etc. or on parties. It is needless to say that the Appellant was carrying on business of supply of food, refreshment etc. regularly on restricted place during the said Winter Session, and certainly it fulfilled all the necessary conditions and criteria laid down above to hold that said activity is nothing but running 'Eating House'..."*

Thus, on the basis of detailed deliberations, it was observed in the aforesaid determination order that *when depots, cabins and kiosks having been held as 'eating house' and 'restaurant' in the pronounced and glaring absence of any sitting arrangements as also the absence of the aspect of 'service' which characterizes a 'hotel'- as the common man understands it, then I should also hold the outlets as 'hotels'*. In the present proceedings, the applicant has conceded to the merits of the case and only the issue of prospective effect is being argued which means the position is also acceptable to the applicant. So the issue which is to be decided is prospective effect. I proceed with the same thus -

A request for prospective effect is decided in terms of a number of criteria such as the facts of the case, the attending circumstances, the provisions as available and any ambiguity surrounding thereto, any statutory mis-guidance, etc. There can be no finite case law as every case has to be analyzed with regard to the aforelisted criteria. The reasons for request of prospective effect are stated thus -

- Applicant has relied upon the statutory interpretation of the entry as per the legal position.
- In the market also, the other similar stall holders were paying tax at lower rate under entry C-94.
- In fact, the Jumbo King itself was paying lower rate based on clarification issued to it.
- The sales of applicant be considered to be at par with sales in case of Jumbo King and same protection as available to them is also required to be given to the applicant.
- Further, in case of applicant, the said liability be protected till 30/06/2009 or till the date of DDQ as the case may be, since when applicant started following DDQ in case of Jumbo King dated 24.12.2008.
- The position of Jumbo King came to the knowledge of applicant very late and there was also information that the matter may be taken further in litigation. Under above circumstances, applicant has considered rate under entry C-94 only and considered taxation accordingly in the sale price upto 30/06/2009. The tax is also discharged accordingly. Therefore, now if tax is determined at higher rate, the same will be unexpected financial burden on the applicant till 30/06/2009 or till the date of DDQ as the case may be and he will be totally ruined.
- Applicant has relied upon clarification letter issued to Jumbo King as the said party is relative of the applicant, as well as being in the same market had knowledge of the said letter. Accordingly, appellant has discharged liability at 4%.
- Applicant was assessed at higher rate for period upto 31.3.2009. In the first appeal, the learned first appellate authority considering the prospective effect given to Jumbo King, also has given protection to applicant.

From a look at the grounds as at above, it can be seen that the applicant wishes to be treated at par with M/s. Jumboking Foods Pvt. Ltd. The applicant requests for protection of liability up to the date of the determination order to be passed in his case or till 30.06.2009, the date from when the applicant started following the determination order in the case of M/s. Jumboking Foods Pvt. Ltd. One amusing thing which I need to mention is that when a clarification about lower rate of tax was issued, the same was instantaneously followed but when the determination order was passed, the decision therein was followed late as it came to the knowledge of the applicant at a later date. And the later situation when the applicant states that the Jumbo King dealer is a relative of the applicant. Nevertheless, I deal with each of the grounds thus :

It is stated that the applicant has relied upon the statutory interpretation of the entry as per the legal position. This is an incorrect statement as we have seen the legal position surrounding the interpretation of eating houses. The determination order on merits was confirmed by the Hon. MSTT by referring to the very case laws as discussed in the determination order. Thus, this particular argument in favour of grant of prospective effect lacks considerably in merits.

Then the applicant states that similar stall holders in the market were also paying tax at a

lower rate under schedule entry C-94. To this, I have to put it very vehemently that the rate at which tax is to be discharged is not governed by such factors. It has a basis in the provisions as are available in the statute. At times it is also based on the interpretation of the provisions as is evolved by the Hon. Courts and Tribunals. But at no point of time could a tax rate be said to be governed by factors such as tax discharge by similar dealers. If that would be so, it would not be necessary to have statutes or even if statutes are allowed to be kept, the provisions therein would be mere paper statements. Further, it would also mean that the decisions of the Hon. Courts and Tribunals assume no significance in terms of case laws, ratios or precedents set by them. We have seen above that the Hon. Courts and Tribunals have from time and again given decisions, holding even hand carts as 'eating houses', which were way ahead of the times. And as would not be disputed, ignorance of case laws should not be an excuse. When the applicant is in the same nature of business as was dealt with in the different case laws, the tendency to be unawares of the case laws but being aware of the traders in the market does not make out a good picture. In view thereof, this ground for prospective effect does not find favour with me.

To request a similar treatment as accorded to M/s. Jumboking Foods Pvt. Ltd. in the matter of prospective effect would be incorrect as we have seen that the applicant did not suffer from any statutory mis-guidance from the Department. However, the applicant stresses that the clarification given to M/s. Jumboking Foods Pvt. Ltd. was followed by the applicant, being related to the said dealer. Before dealing with this argument, the thing which needs to be categorically made very clear is that the grant of prospective effect in M/s. Jumboking Foods Pvt. Ltd. was governed by the sole concern of a mis-clarification made earlier to the very dealer. During hearing, it was submitted by the applicant that Jumbo King is a leader in the market. However, the facts belie the said observation. I have referred to the website of Jumboking Foods wherein it is stated thus - "*BACK in August 2001, in a small suburb of Mumbai, an experiment to wrap and serve the vada pav began. The kitchen was modernized, electric friers with timers were installed and a standardized product was served to the millions of railway commuters that dot the metropolis of Mumbai. A franchising program, now hugely successful, was built around the product. Stores were opened in bustling locations away from railway stations too.*" Thus, Jumbo King outlets are in the scene around 2001 whereas, as admitted during hearing, the present applicant has been around long before 2001. The applicant had an established business even before Jumbo King outlets were opened. Thus, the claim that Jumbo King is the market leader and hence, was followed cannot be accepted. Even before Jumbo King came into picture, there were decisions as far long back as the year 1976 which have held hand carts to be eating houses.

Commissioner of Sales Tax, Maharashtra State, Mumbai

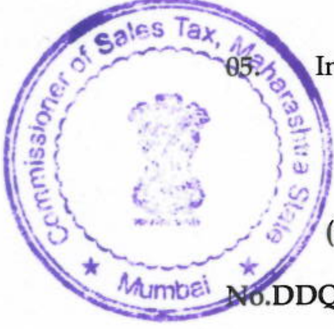
The first communication about rate of tax issued to Jumbo King had not been given after examining the circumstances in which the sale was taking place at the outlets. Hence, the second communication issued to Jumbo King emphatically sought to clear that *whether the outlets could be*

classified as eating houses shall always be a question of fact i.e. to be examined at the time of assessment and/or during scrutiny of return/refund claims. Thus, it was categorically clarified that the clarification would depend on whether the outlet is an eating house. In the present case, the applicant is aware of the facts of his case and there are case laws on eating houses. Therefore, reliance on a communication issued to a new entrant in the field cannot be justified in circumstances when the applicant has knowledge of the facts of his case alongwith knowledge of existing case laws. Therefore, resort to any other means to decide his tax discharge is not warranted. In fact, not following the decisions would mean a disregard of the interpretations as propounded by the Hon. Courts of Law. There was no statutory mis-guidance or any ambiguity of provisions. The various case laws have held that railway platforms, hand carts, ice-cream depots are 'eating houses'. The element of service was not emphasized upon while defining an "eating house". The Hon. Bombay High Court's observations thereto have been reproduced hereinearlier that *sitting arrangement for customers to consume food and drinks is not necessary, and nowadays we have quite a few snack-bars becoming fashionable where people stand at the counter and eat.* Thus, it could be very rightly said that, in fact, there existed a pronounced clarity through case laws and principles as evolved in the matter. Therefore, I am not convinced by the arguments of the applicant about being guided by the communication issued to Jumbo King.

The applicant has sought to place reliance on a few decisions to advance his case. The DDQ in the case of sunglasses dt.25.02.2010 wherein even if the DDQ application was held non-maintainable as per section 56(4), prospective effect was granted following the earlier judgments. Since I am deciding the issue of prospective effect, reliance on this case law won't be needed. As regards reliance on the determination order in the case of Quality Tissue Converting Co. Pvt. Ltd. (cited supra), I have to state that the facts of the present case are not the same as in that case. In the said case, by way of a Trade Circular, certain products were clarified as being covered by a particular schedule entry. Such are not the circumstances of the present case. As has been oft repeated by me in these proceedings, there were case laws which have discussed as to what are 'eating houses/restaurants'. The applicant was aware of the facts of his case which when seen in the light of the existing case laws should have been interpreted accordingly. Hence, reliance on the determination order in Quality Tissue Converting Co. Pvt. Ltd. (cited supra) is not found justified.

In view of all the above discussion, I am not inclined to accept the request for grant of prospective effect. The law has been prevailing since long. The notification under schedule entry C-94(b) provides for a concessional rate of tax in respect of the items as enlisted thereunder. The concessional rate is, however, subject to conditions as mentioned therein. The benefit under the notifications is not available when the items enumerated as being 'farsan' are *served for consumption in any restaurant, including any eating house, hotel, refreshment room or boarding*

establishment or any part thereof or in any club or by a caterer, The applicant does not satisfy the said condition. The Hon. Courts have in more than number of cases held that *while the taxing provision has to be liberally construed in favour of the subject, the same principle is not applicable in construing an exemption*. Here, I am faced with interpretation of a provision which has the effect of a concessional tax rate. Therefore, when the provision bars an eating house to be eligible to a concessional rate of tax, to allow the benefit of the same by means of a prospective effect even when circumstances do not warrant so would be incorrect. In the circumstances, I am constrained to reject the request for grant of prospective effect.



05. In view of the deliberations held hereinabove, it is determined thus -

ORDER

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

No.DDQ/11-2014/Adm.6/15/B - 3 **Mumbai, dt.** 28/07/2015

For reasons as discussed in the body of the order, the request for grant for prospective is herewith rejected.

(RAJIV JALOTA)

COMMISSIONER OF SALES TAX,
MAHARASHTRA STATE, MUMBAI