

DEPARTMENT OF COMMERCIAL TAXES, KERALA
PROCEEDINGS OF THE AUTHORITY FOR CLARIFICATION
U/s.94 OF THE KERALA VALUE ADDED TAX ACT, 2003.

Members present are:

1. *T.V. Kamala Bai, Joint Commissioner (Law), O/o.CCT, Tvpm.*
2. *Abdul Jabbar.V.K, Joint Commissioner (Audit & Inspection), O/o.CCT, Tvpm.*
3. *A. Asok Kumar, Deputy Commissioner (Internal Audit), O/o.CCT, Tvpm.*

Sub:- KVAT Act, 2003- Clarification U/s. 94 - Tax Liability under the Act -
Orders issued.

Read:- Application from M/s. AGS Info Tech Private Ltd., Kochi dtd. 29/3/2010.

ORDER No.C3/11634/10/CT DATED 5/4/2011.

(01) The applicant M/s AGS Infotech Pvt. Ltd, is a company having its principal place of business at Mumbai and having branches in Pondicherry and Kerala. The petitioner is engaged in the business of supply of various Electronic Industrial Inputs for Petroleum Industry. The petitioner is registered as a dealer under the Value Added Tax Act and also under the provisions of the Central Sales Tax Act, 1956 in the respective States.

(02) Hindustan Petroleum Corporation Ltd., Mumbai, placed orders with the petitioner at its principal place of business at Mumbai for the supply of various electronic items to its various retail outlets. Based on the said order, the applicant has been supplying the goods from its Pondicherry branch to the various retail outlets of Hindustan Petroleum Corporation Ltd. Invoices were also raised charging tax under the CST Act. Supply of goods as per the purchase order is being continued in the same manner as in the invoices.

(03) Various components supplied by the applicant are Density Probe, LED Density Display, Core Automation, Magnetic Level Probes, Outdoor Payment Terminal and Controlling Office Software, for the automation of its Retail outlets.

(04) The following are the steps taken by the applicant after it receives the purchase order in its office at Mumbai from Hindustan Petroleum Corporation Ltd, Mumbai.

1. *To obtain the site details with regard to the number of tanks and the makes of dispensers available on each site.*
2. *To prepare a BOM based on the above information.*
3. *Order with the Principals for equipments in line with the above information.*
4. *Receipt of equipment from the OEM/Principal Vendors at AGS Central facility (Pondicherry)*
5. *Ascertaining readiness of Hindustan Petroleum Corporation Ltd with regard to the completion of pre installation activities at their end like conduiting, civil works etc. done by Hindustan Petroleum Corporation Ltd.*
6. *Dispatch of equipments to site.*
7. *Scheduling engineer visits to carry out physical installation of equipments at site.*

8. *Connecting the various components (as specified above) together and then to Core Automation system.*
9. *Testing the system after installation and commission.*
10. *Training the operators at site with regard to the equipment operations.*
11. *Supplying the Controlling Office software at the Head Office.*
12. *Showing connectivity and transfer of data to the controlling office from all the sites.*
13. *On-site warranty and AMC services for all the equipments installed.*

(05) The applicant contends that from the above procedure, it can be seen that the procedure adopted by the applicant is just the same as a supplier of Computer hardware and software.

(06) The applicant has referred the judgment of the Hon'ble Supreme Court in State of Andhra Pradesh Vs. Kone Elevator India Ltd. (AIR 2005 SC 1581; 140 STC 22), Kone Elevator India (P) Ltd. Vs. State of Tamil Nadu & Others (2008) 15 VST 457 (SC), and contends that in the case of the supply of the materials by the applicant, the purchase order is for standard items, the goods move from places outside the State in pursuance of the orders received from Hindustan Petroleum Corporation Ltd Mumbai to the Head Office of the applicant in Mumbai, in pursuance of the said order goods move from Pondicherry or other places outside the State of Kerala to Hindustan Petroleum Corporation Ltd in Kerala, equipments are plugged to the points provided by the Hindustan Petroleum Corporation Ltd, ensures that the equipments are in working condition and trains the operating and the management staff to operate the systems. So in view of the decision in Kone Elevators' case, the transaction is one of sale and not works contract.

(07) The applicant would further contend that even assuming that the transaction is one of works contract, the applicant does not procure any item in relation to the transaction in question from Kerala. The order placed by Hindustan Petroleum Corporation Ltd contemplates movement of the entire materials required for the purpose from places outside the State of Kerala and in fact they move from places outside Kerala to Kerala and Hindustan Petroleum Corporation Ltd issues Declaration in Form C for the transactions.

(08) The applicant has referred Sub-section (1) of Section 3 of the Central Sales Tax Act, 1956 and also the judgment in Oil India Corporation Ltd. Vs. Superintendent of Taxes (1975) 35 STC 445 (SC) and also in English Electric Corporation of India Ltd. Vs. Dy. CTO 38 STC 475 (SC) and contends that it was held that it was **immaterial in which the property (i.e., ownership)** of goods passes to the buyer. So, in the light of the aforesaid provision, where the goods covered by the purchase order has moved from Pondicherry to Kerala, they are interstate sales from Pondicherry.

(09) The applicant has referred Sub-Section (1) of Sec.9 of the CST Act, and contends that in respect of the sales involved in relation to the aforesaid purchase order and invoices, where the goods are moved from Pondicherry to Kerala, only Pondicherry has jurisdiction to levy tax under the CST Act.

(10) The applicant contends that in Gannon Dunkerley & Corporation Vs. State of Rajasthan (1993) 88 STC 204 (SC), the Hon'ble Supreme Court, after elaborately analyzing the constitutional provisions, had inter alia, laid down the following principles to be followed by

the State legislatures while imposing tax on the goods transferred in the execution of works contract:

“(1) In exercise of its legislature power to impose tax on sale or purchase of goods under entry 54 of the State List read with article 366 (29-A) (b), the State Legislature while imposing a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract is not competent to impose a tax on such a transfer (deemed sale) which constitutes a sale in the course of interstate trade or commerce or a sale outside the State or a sale in the course of import or export.

(2) The provisions of Section 3, 4, 5 and Sections 14 and 15 of the Central Sales Tax Act, 1956 are applicable to a transfer of property in goods involved in the execution of a works contract covered by Article 366 (29-A)(b).”

(11) The CST Act specifically provide for the levy for tax on transfer of goods involved in the execution of works contract where the transfer takes place in the course of interstate trade. So, whether the transaction is one of sale simplicitor or of works contract, the transfer of goods takes place in the course of interstate sale.

(12) As per section 6 of the KVAT Act, liability to pay tax under the Act is only on the taxable turnover. Since the applicant is not having any sale in the State of Kerala, there is no turnover and hence no taxable turnover liable to tax under section 6 of the Act. Section 10 of the KVAT Act casts a liability on the awarder to make a deduction from the payments made to a works contractor only if the contractor is liable to pay any tax under section 6 of the Act. In the present case, the applicant is not liable to pay any tax under section 6 of the Act in respect of the transaction in question and therefore Hindustan Petroleum Corporation Ltd is not liable under section 10 of the Act to make any deduction from the payments due to the applicant towards the interstate sale of the goods covered by the supply order mentioned above.

(13) The applicant has also referred the Purchase Order and contends that the items to be supplied are both hardware and software. The software items are referred to by the word service. The applicant would further contend that coming to the notes / terms / conditions of the purchase order, sub para (1) speaks about Purchase Order and not a Work Order and sub para (2) speaks about delivery period and not the period for completing any work. These two sub paragraphs read together also support the contention that the contract is one of Supply and not one of Work. Sub para 4 speaks about milestones of payment terms and not scope of work. In sub clause (ii) of sub para 4 there is a reference to acceptance of material by Hindustan Petroleum Corporation Ltd. MRR (Material Receipt Report). Thus materials are supplied to Hindustan Petroleum Corporation Ltd. and received by them. Sub para 3 speaks about 25% of the order price to be paid after successful installation and commissioning, training at site, user acceptance test of entire solution etc.

(14) The applicant has also detailed the installation, commissioning in the context of the purchase order.

(15) The applicant has requested to clarify whether any tax under KVAT Act is payable by the applicant in respect of the supplies made by them from its Pondicherry Branch suffering CST at 1% to various retail outlets of Hindustan Petroleum Corporation Ltd in Kerala

as per the purchase order and whether any Works Contract Tax is to be deducted by Hindustan Petroleum Corporation Ltd.

(16) The authorised representative of the applicant was heard and the contentions raised were examined.

(17) An agreement is entered in Mumbai between AGS Infotech Pvt. Ltd, Pondichery and Hindustan Petroleum Corporation Ltd. Pursuant to the said agreement, goods moved from AGS Infotech Pvt. Ltd, Pondicherry to various Hindustan Petroleum Corporation Ltd. outlets in Kerala as an interstate sale and CST was also deducted. Invoice is raised by AGS Infotech Pvt. Ltd, Pondicherry to Hindustan Petroleum Corporation Ltd., Mumbai Head Office and for delivery at 44 sites in Kerala. The lorry receipts would show that the goods were actually consigned from AGS Infotech Pvt. Ltd, Pondicherry to individual Hindustan Petroleum Corporation Ltd. outlets in Kerala.

(18) As per para 1.5.2 of the tender enquiry document, the broad chronology of the work execution in receipt of material at site is a major chronological milestone of the contract. As per para 1.5.4, purchase orders will be placed and payment will be made as per the actual quantity. Clause 1.2.4 provides for factory test for individual components to ensure quality prior to dispatch of equipments from applicants factory outside the State to the buyers premises in Kerala. And the purchase orders placed by Hindustan Petroleum Corporation Ltd. is for the actual quantity of the materials. Hence, as per the contract, supply and installation part are discernable.

(19) Hence, AGS Infotech Pvt. Ltd, Kerala works on the goods of Hindustan Petroleum Corporation Ltd., Kerala inside the State, installs and assembles the goods for automation of the retail outlets, as per the scope of the agreement.

(20) So, AGS Infotech Pvt. Ltd, Kerala can be termed as a works contractor for the installation part of the contract and are liable to pay tax for any material portion involved in such installation. The materials involved in the transaction between AGS Infotech Pvt. Ltd, Pondicherry and Hindustan Petroleum Corporation Ltd., Mumbai will not form the part of turnover of AGS Infotech Pvt. Ltd., Kerala for the purpose of Kerala Value Added Tax.

(21) From the facts detailed above, it is clear that the material supplied by M/s AGS Infotech Pvt. Ltd is on the basis of supply contract which is clearly divisible and on the same no tax on works contract can be levied in Kerala, since it acquires the quality of awarders materials except for those materials used at the time of installation.

The issues raised above are clarified accordingly.

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O/o CCT

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Joint Commissioner (A&I)
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A. Asok Kumar
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To

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