An important Determination under DVAT Act-Delhi Voluntary Hospital Forum and Others Dated: 17-Mar-06

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1. The applicant hospitals namely, (a) Delhi Voluntary Hospital Forum, (b) Escorts Heart Instt. & Research Center Ltd. and (c) Indraprastha Medical Corporation Ltd. raised before hon'ble Commissioner, DVAT inter-alia the following questions for determination under the DVAT Act:-

1.1 Whether the combinations of medicines, drugs, devices, implants and consumerables devised by an expert doctor specially for treating and administering to a particular patient suffering from a disease in the hospital is a marketable commodity, and is a transaction of sale attracting tax under DVAT Act, 2004?

1.2 Whether the transaction of providing 'Diets & Foods etc.' to indoor patients on the advice of the doctors/dieticians amounts to 'sale' taxable under the DVAT Act, 2004?

1.3 Whether in the case of applicants the sale of unusable items like empty bottles, scraps & other unserviceables are exigible to tax under the DVA T Act, 2004?

2. The ARs Shri M.K.Aurora \and Shri V.K. Aggarwal, Advocates present for the applicant hospitals contended that the consumables, drugs and implants etc. are stated to be an integral part of the treatments provided to the patients solely under strict medical prescriptions and supervision of the doctors. The major part of the priced packages/treatments made available to the patients are stated to be consisting of 'fees' charged for the services of super specialist doctors attending the patients and, therefore, the use of medicines is just an incidental to provide quality health care to their patients and it is not a 'sale' of these items to their patients.

The applicant hospitals supported there above contention on the following grounds: -

2.1 The combination of medicines, implants etc..as per the expert advise of the doctors are required to be given to a particular patient for his treatment, is never a marketable commodity and hence, not the 'goods' under the DVAT Act, 2004.

2.2 Medinova Diagnostic v. CTO (Int.) IT South Zone as 112 STC 551 (Karnataka High Court) held that a Diagnostic Center preparing X-ray for the patient is not a dealer.

2.3 Dr. Golak Behari Mohanti v. State of Orissa 33 STC 514 (Orissa High Court) held that a Radiologist is not a dealer under the Orissa Sales Tax Act, 1947 because the transaction that takes place between him and the customer is essentially one of work and labour.

2.4 Dr. Hemendra Surana v. State of Rajasthan and Another 90 STC 251 (Rajasthan High Court) held that a Radiologist who takes X-ray Photographs, gives technical advise and charges the fee and therefore, he is a professional service provider and not a dealer.

2.5 Commissioner of Sales Tax v. Dr. Sukhdev Deo 23 STC 385 (Supreme Court) held that a medical practitioner dispensing medicine is not engaged in the manufacture and supply of medicine in the course of treatment of his patient and hence, not a dealer.

The AR to the applicants further submitted that their views find support from a recent judgment of the Supreme Court order rendered on 2-Mar-06 in the case of Bharat Sanchar Nigam Ltd. v. UOI (W.P.(C) No. 183/2003). The said judgment observed and stated that Gannon Dunkerley survived the 46th Constitutional Amendment Entry 54 of List II of Article 366 (29A) in two respects. First, that the meaning of the word 'goods' was not altered and secondly, with reference to the dominant nature test to be applied to a composite contract not covered by the Article i.e. of all the different kinds of composite transactions the drafters chose three specific situations, a works contract, a hire purchase contract and a catering contract to bring within the fiction of a deemed sale. The Court further stated while citing an example that the clauses of Article 366 (29A) do not covers hospital services.

3. However the DR to the revenue, Shri R.S. Gupta objected the views of the applicants by stating that the contention of the applicants appear to be some what relevant in the case of medical practitioners but in the case of hospitals like the applicants, these hardly apply.

The author is a member of the Institute. The views expressed herein are his personal views and do not necessarily represent the view of the Regional Council.

3.1 The revenue supported its contention as observed by the hon'ble Kerala High Court in the case of Malankara Orthodox Syrian Church v. Sales Tax Officer and Another, 135 STC 224, in which the Court held that the running of hospitals and providing of health care is an organized activity involving engagement of doctors and staff for treatment and supply of the medicines to their patients. The hospital provides its services as a 'business' rather than a 'profession' as in the case of a doctor. The volume, frequency and continuity or regularity of transaction in regard to purchase and sale of medicine by a hospital will be such that it will answer the definition of 'dealer' under the Act beyond any doubt. While arriving at the conclusion, the hon'ble Kerala High Court was pleased to rely upon the authority of the hon'ble Apex Court in the case of M/s Raipur Manufacturing Co. Ltd. 19 STC 1 in terms of that the hospitals independently bill and charge for the medicines supplied and going by the value of medicines involved in treatment, it is the main components of cost to the patient and it is not an incidental transactions at all. Therefore, such hospitals are liable to be registered under the Act.

3.2 In reply to the BSNL case the revenue observed that the point of taxability of hospital services was not before the hon'ble Apex Court for adjudication and the Court gave its observations merely the passing one example and moreover the Court used the term 'fee' paid by a patient to a doctor or a litigant to his lawyer etc. Therefore, the facts and circumstances of the present case are not similar to the one before us. The DR further stated that in the case of the applicant hospitals they make separate contracts for the services of the doctors and for the supply of drugs and medicines etc. and therefore, the saving clause in Gannon Dunkerley case with respect to composite contract in the amended Article 366 (29A) does not apply.

4. Conclusion :

Hon'ble Commissioner heard both the sides and concluded as under:

4.1. That the Kerala High Court in the cited case by the DR appears to the more relevant where in the Court stated that the scope of exemption does not cover an organized activity of running a hospital, even if, the owners of such hospitals are doctors. The supply of medicines in a hospital is not merely incidental, it is as important as medical consultation or other services in the hospital.

4.2. The volume, frequency and continuity or regularity of transactions in regard to purchase and sale of medicine by a hospital will be such that it will answer the definition of 'dealer' under the Act beyond any doubt.

4.3 The supply of drugs and medicines in hospitals against charges recovered by the hospitals from their patients clearly fall within the meaning of clause (vii) of section 2(zc) defining 'sale', attracting tax at the applicable rates under the DVAT Act and by virtue of the 46th amendment of the Constitution, the 'cost' charged for such suppliers is separable from the complete 'priced packages'.

4.4 Therefore, in view of the detailed discussion made above, the legal position prevailed and the provisions of law as they stand on date, this Court is of the considered opinion that the applicant Hospitals are "dealers" within the term used in section 2(j) of the DVAT Act, 2004 and the 'costs' recovered by them from the patients in respect of medicines, drugs, implants and medical devices supplied/administered or fitted to the bodies of the patients respectively during tests and the treatments which invariably are goods, are liable to tax at 4% under Entries Nos. 16 and 92 reading as "Drugs and medicines including vaccines, syringes and dressings, medicated ointments produced under a drug licence, light liquid paraffin of IP grade" and "Medical equipments/devices and implants" respectively of the Third Schedule of the Act. Likewise, the 'costs' of supplies of diets, food and beverages made by the Hospitals to their indoor patients against payments and also the 'proceeds' recovered by the Hospitals by way of sale of unusables and unserviceable goods and the stores too are exigible to tax at the applicable rates under the DVAT Act, 2004. it is, therefore, so held and the applications stand disposed of in these terms.

Remarks :

The impact of the above determination would be far reaching and all the hospitals as such would be liable for DVAT w.e.f. 01-Apr-05. It is however, will remain still a moot point as to how to differentiate between a medical practitioner and a hospital. ■

OBITUARY

CA. B.L. Chawla, FCA (M.No.03715), Past Chairman, NIRC of the ICAI [1967-1968], and Past Central Council Member, ICAI, from the Northern India Region [1976-79 and 1982-1985] passed away on April 11, 2006.

May his soul rest in peace !