

**DEPARTMENT OF STATE GOODS & SERVICE TAXES, KERALA**  
**PROCEEDINGS OF THE COMMISSIONER OF STATE TAXES**  
**U/s.94(7) OF THE KERALA VALUE ADDED TAX ACT, 2003.**

*Dr. Rajan N Khobragade IAS*

Sub:- KVAT Act, 2003 - Suo-motu Revision U/s 94 (7) - Tax liability on rent received for mounting flex boards on hoardings and amount received for undertaking wall paintings on walls taken on lease - Orders issued.

Read:- 1. Clarification Order No.C3/5401/14/CT dtd. 09.11.2015 u/s. 94 of the KVAT Act, 2003.  
2. Rectification order No. C3/5401/14/CT dtd. 03.07.2017  
2. Judgment of the Hon'ble High Court of Kerala in WP(C) No. 28382 of 2017 dtd. 22.11.2017.

**ORDER No.R1/61/18/CT DATED 19/05/2018**

1. M/s. Drisya Advertising had preferred an application U/s. 94 of the Kerala Value Added Tax Act, 2003 seeking clarification as to the tax liability on rent received for mounting flex boards on hoardings, and on the amount received for undertaking wall painting on walls taken on lease. The Authority for Clarification, vide reference cited 1<sup>st</sup>, clarified that *there is no taxable event under transfer of right to use in respect of the rent received for mounting flex boards of advertisements on the hoardings erected by the applicant and that there is no tax liability under 'works contract' in respect of the amounts received for undertaking wall paintings on the walls taken on lease by the applicant.* But, the Hon'ble High Court of Kerala, in **Delta Communications vs. State of Kerala [(2016) 24 KTR 139 (Ker)]** dtd. 31.07.2015, held that *'there is definitely a transfer of right to use of goods by transferring the hoardings to the lessee by the revision petitioner'*. But this judgment did not come to the notice of the Authority at the time of issuing the order. Hence, the facts in the above case could not be appreciated in the light of the above judgment.

2. Upon noticing the above judgment, the Authority for Clarification withdrew the clarification order dtd. 09.11.2015, vide 2<sup>nd</sup> paper read above. Aggrieved by this order, the dealer filed writ petition before the Hon'ble High Court of Kerala on the ground that the power to cancel or modify an order passed by the Authority for Clarification is conferred only on the Commissioner u/s. 94(7) of the Act. Considering the argument of the dealer, the Hon'ble High Court of Kerala, vide its judgment read 3<sup>rd</sup> above, has quashed the rectification order dtd. 03.07.2017. But, before this judgment the Division Bench of Hon'ble High Court had dismissed the writ petition filed by M/s. Vismaya Advertising in WPC No. 40312 of 2016 dtd. 02.08.2017, by observing that *'though the revenue was justified in placing reliance on the Division Bench judgment of this Court in M/s. Delta Communications v. State of Kerala (supra), the only contention raised by the assesseees to impugn the said notices is the clarification issued by the authority under section 94 of the Act. It is seen that during the pendency of these writ petitions, the authority itself has issued Order No. C3/5401/14/CT dated 03/07/2017*

*withdrawing clarification dated 09.11.2015. In such circumstances, the issue now is fully governed by the Division Bench judgment of this Court. In that view of the matter, the challenge now raised by the assessee cannot be sustained.'*

3. Since the Division Bench judgment is still binding, in the interest of revenue, it is decided to invoke the power vested in me u/s. 94(7) of the KVAT Act. Therefore, an opportunity for hearing was given to the dealer on 16.04.2018. The arguments raised by the authorised representative of the dealer is as detailed below:

(i) The dealer has argued that in the case considered by the Hon'ble High Court of Kerala in **Delta Communications case**, the petitioner firm was engaged in the business of outdoor marketing media and advertisements were displayed on hoardings for the above purpose. For this, the appellant acquired land on lease in various places in the state of Kerala and structures were erected on the property taken on lease. Thereafter, hoardings were fixed on this structure and it was let out to various companies for advertising their products for which the petitioner received rental charges for letting out hoardings.

(ii) The dealer then argued that the Hon'ble High Court came to the conclusion that the rent received in the above case was taxable u/s. 6(1)(c) of the KVAT Act in view of the specific finding of the Court that so far as the structures involved in that case was concerned, it was fastened to earth and was detachable easily and therefore was not an immovable property. There was also a finding that the structure so erected was never a complicated installation unlike a heavy machinery fitted in a factory premises by assembling various components and then attached to earth, which becomes a complicated procedure, whereas a hoarding is fastened to a concrete structure on earth with nuts and bolts the removal of which is a simple procedure which makes it a movable article under the Act. It was in the above circumstance, the Hon'ble Court in Delta Communications case held that hoardings are movable properties and therefore when they are let out for the purpose of display of advertisements, there was transfer of right to use goods attracting tax u/s. 6(1)(c) of the Act.

(iii) The dealer further argued that it is a fact that in para 17 of the judgment the observation of the Hon'ble Court was that so far as leasing out of hoardings in that case were concerned, once it was let out by entering into an agreement or work order, the owner of the goods ceases to have any control over the same for the reason that the advertisements are affixed on the hoarding by putting up and displaying necessary materials in accordance with the directions of the lessee and he has the effective control of the hoardings throughout the contract period entered into by him with the revision petitioner. The further finding of the Court was the revision petitioner was unable to interfere with the nature of the advertisement carried out by the lessee in the hoardings as per Annexure D work order, it is his absolute right to finalize the nature of advertisement ie. put up on the hoardings and therefore according to the Hon'ble Court, the absolute control of the hoardings was transferred to the lessee attracting tax u/s. 6(1)(c) of the Act.

(iv) This dealer has submitted that the Hon'ble Supreme Court of India in State of Andhra Pradesh v/s Rashtriya Ispat Nigam Ltd. reported in (2002) 126 STC 114 held that the

determination of the question whether there is a transfer of right to use the goods involved which are the subject matter of a contract has essentially to be answered on a construction of the terms of the contract between the parties. Again the Hon'ble High Court of Meghalaya in *Tata Consultancy Services Ltd. and Another vs. State of Meghalaya and Others* reported in (2014) 69 VST 230 held that there can be no transfer of right to use goods, if there is no transfer of control and possession of goods.

(v) The dealer has then argued that as per the terms of agreements executed between the dealer and the advertiser company, advertiser provides the art work/ specimen to be advertised and informs the place where it is to be displayed, duration of advertisement and the design and color combination in which it is to be printed on flex boards and also the rate. On the basis of the terms of the agreement, the dealer does the flex printing and mounts it on iron structures which are permanently fixed at specific locations. The dealer thereafter takes photographs of such hoardings and sends it to the advertiser for approval along with bills and payment will be made by the advertiser on approval as per the terms of the agreement. One of the main conditions of the agreement for display of advertisement through hoardings is that in case of any damage to the display material or defacing of it in any manner, dealer should arrange for repair or removal of the same immediately and if the period of damage exceeds beyond three days it would be considered as non display and payment will be deducted accordingly by the advertiser.

(vi) The dealer then argued that as per the terms of agreement between the dealer and advertiser, dealer is fully responsible for the payment of rent to the land lord on time where the hoardings are installed and dealer alone is responsible for maintenance, repair of hoardings on her own cost. As per the terms of agreement the ownership of hoardings will be vested with the dealer and the advertiser has the full right to change flex any number of time by paying additional installation charges during the contract period and if the display is interrupted for more than one week time the dealer is liable to give the interrupted display period over and above the contract period. It has further been stated in the agreement that if the hoarding gets destroyed due to man-made calamity, theft, accidents or natural calamity the dealer who is called space provider in the agreement is liable to repair/reinstall the same at the dealer's cost and in case if someone/ public gets injured due to the board the dealer will be solely responsible for the same and advertiser cannot be held responsible under any circumstance.

(vii) The dealer also argued that from the above terms of the agreement it is very clear that the ownership and possession of the hoarding during the tenancy of the agreement solely vests with the dealer and it never passes on to the advertiser at any time. As per Explanation V of the definition of "sale" as per section 2(xliii) of the KVAT Act, a "transfer of right to use any goods" for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration shall be deemed to be a sale. Therefore for attracting this Explanation and for a transaction to come under this definition so that it becomes a sale attracting tax, there should be a "transfer of right to use any goods" for any purpose for cash or deferred payment or other valuable consideration

(viii) The dealer further contended that it is very clear that the facts of their case are entirely different from the case considered by the Hon'ble High Court of Kerala in Delta Communication's case reported in 24 KTR 139. In that case there was a specific finding that there was transfer of right to use goods from the lessor to the lessee. But in this case, there was no transfer of right to use of the hoardings to the lessee and at all times, the ownership and possession of the hoardings rested with them and therefore the clarificatory order issued u/s 94 of the KVAT Act by the Clarificatory Authority that there was no taxable event under "transfer of right to use" in respect of the rent received for mounting flex boards of advertisements on the hoardings erected by the applicant and also that there is no tax liability under works contract in respect of the amounts received for undertaking wall paintings on the walls taken on lease by the applicant was perfectly in order and therefore the order may not be cancelled by invoking the powers conferred upon the Commissioner u/s 94(7) of the KVAT Act.

(ix) Also, once hoardings are erected on top of buildings or on land taken on lease for this purpose, the dealer pay municipal tax or corporation tax in the name of Drishya Advertising itself for erection of hoardings and also for display of advertisements. From the payment of corporation tax and municipal tax for hoardings in the name of Drishya Advertising itself it is evident that ownership of hoardings at all times vest with Drishya Advertising and it does not pass to the persons whose advertisements are displayed. If there was transfer of possession of hoardings to the persons whose advertisements are displayed, the liability to pay the corporation tax and municipal tax should have been on them. Therefore, it is evident that there was no transfer of hoardings to such persons and in such a situation no tax under Section 6(1)(c) of the KVAT Act can be levied on the dealer. This aspect was not considered and argued before the Division Bench of the Hon'ble High Court of Kerala in Delta Communications Vs. State of Kerala reported in( 2016) 24KTR 139 and therefore the dictum laid down in this decision cannot be blindly applied in this case.

(x) The dealer further argued that the Hon'ble High Court never gave a direction to the Commissioner of Commerical Taxes to exercise the power conferred upon him u/s. 94(7) of the KVAT Act to cancel the order issued by the clarificatory authority u/s. 94(1) of the Act. The Hon'ble Court observed that the proper remedy is to approach a judicial forum. Also, the Kerala Value Added Tax, 2003 under which the present notice was issued was repealed w.e.f 01-07-2017 and in its place Goods and Services Tax Acts, 2017 came into force w.e.f the above date. There are no provisions in the Goods and Services Tax Act enabling the authorities to invoke the provisions of the repealed Act. In such a situation the present notice issued u/s 94(7) of the Act to cancel the clarification issued by the Clarificatory Authority u/s 94(1) of the Act is highly unjust and illegal and it is also not legally sustainable.

4. The contentions raised were examined in detail.

5. The Hon'ble High Court quashed the clarification order read 1<sup>st</sup> above holding that the Authority for clarification has no power to review its own earlier order. Sec. 94(7) of the KVAT Act empowers the Commissioner to cancel or amend such order if it is found to be

prejudicial to revenue. Even though the KVAT Act, 2003 has been repealed consequent upon the roll out of GST w.e.f. 01.07.2017, the present proceedings is saved by virtue of sec. 174(2) (e) of the Kerala State GST Act, 2017.

6. With regard to the taxability on rent received for mounting flex boards on hoardings, there is an agreement between advertiser and advertising agency for providing space for displaying the advertisement provided by the advertiser for a specific period. During this tenure the advertiser has full right to change the content of advertisement, change the colour of advertisement etc. The advertiser making payments to advertising agency/space provider towards cost of material, installation cost; space rent, tax etc. It is the responsibility of space provider to pay rent, electricity charges, taxes etc incurred for the period for which the advertiser bought the space for displaying his advertisement. Once the agreement is executed the advertiser has the absolute right over the space and he can change the flex or content at any number of time within the time frame of agreement. If the flex or content is changed, additional expense incurred for installation will be met by the advertiser. The advertiser has right even to keep the space blank, if he desires. Hence there is an absolute right to the advertiser to use the space procured. Once the agreement is executed between the parties, deemed delivery of space to the advertiser for the stipulated period is happened. It is the responsibility of the advertising agency to ensure availability of hoarding till the tenure of the contract. Even if the advertisement is designed by advertising agency, it would be based on the art work specimen approved by the advertiser. If the hoarding is damaged due to any accident, it is the responsibility of advertising agency to erect fresh one so as to display the advertisement of advertiser without any interruption. Likewise if the place where hoarding was erected was acquired by government or landlord wants to shift it from his property, the space provider is responsible to re-allocate the location with his own cost and with the consensus of advertiser. It means that the advertiser has absolute right over the space.

7. Next issue to be considered is whether the space is allotted on movable property or immovable property. With regard to wall writing is concerned, it is a right to use the space of immovable property and hence excluded from the purview of VAT. But hoarding is a movable article which is possible for dismantling and the structure can easily shifted from one location to another by simple procedure, without any damage to fixtures. Therefore the hoarding space transferred to advertiser for a specified period, enabling the advertiser to display his advertisement according to his wishes and imaginations is taxable under KVAT Act.

The clarification order read above is modified to the above extent.

To

M/s. Drisya Advertising,  
VI-104, Savithri Nivas,  
Near Thuruthy Temple,  
Maradu.P.O., Ernakulam



  
Commissioner