

Read : Application dt.9.7.2008 filed by UltraTech Cement Limited.

Heard : Shri Vinayak Patkar, Advocate.

PROCEEDINGS

(under Section 56(1)(f) and (2) of The Maharashtra Value Added Tax Act,2002)

No. DDQ-11-2008/Adm-3/36/B-]

Mumbai, dt. 21 | 03 | 2014

An application is received from UltraTech Cement Limited, holder of TIN 27710299627V, situated at Ahura Centre, B-Wing, 1st floor, Mahakali Caves Road, Andheri (E), Mumbai - 400 093, seeking determination of the following question -

"Whether set-off can be claimed on purchases of HSD-EURO III purchased vide Invoice No. 20083227B020427 dated 25th September, 2007 for Rs.3,98,725/- and if it can be claimed, what are the conditions and restrictions subject to which such set-off can be claimed ?"

02. FACTS & CONTENTION

The application states thus -

- *"The applicant has purchased HSD-EURO III worth Rs.3,98,725/- from Indian Oil Corporation Limited vide their Invoice No. 20083227B020427 dated 25th September, 2007. The applicant uses the same as fuel in his business. The applicant has claimed set-off of the VAT paid on such purchases u/r. 52(1)(a) read with Rule 53(1) of the MVAT Rules, 2005. Such set-off has also been claimed during the assessment year from 1-4-2005 to 31-3-2006."*

The applicant informs that the assessing authority has communicated that the goods being Motor Spirit those are covered by the provision of Rule 54 of the MVAT Rules,2005 and therefore no set-off is available. This communication has given rise to the dispute. It is prayed that the Hon. Commissioner may kindly direct that his determination shall not affect the liability under this Act of the applicant as respect the purchases effected prior to his determination.

03. HEARING

A hearing was held in the matter on dt.04.10.2011. Shri Vinayak Patkar, Advocate attended on behalf of the applicant. It was contended that the motor spirit purchased is eligible for set-off despite rule 54(a) because of Hon. MSTT judgment in M/s. Gupta Metallics & Power Ltd.(dt.02.12.2010) where set-off is allowed to purchase of motor spirit used as fuel.

A re-hearing in the matter was fixed on dt.25.02.2014 when Shri Vinayak Patkar, Advocate attended and requested for adjournment. On dt.04.03.2014, Shri Vinayak Patkar, Advocate attended. Since the application for determination is of dt.09.07.2008 and bill is of dt.25.09.2007, he was asked regarding assessment of the period in which the bill presented for determination falls. He submitted that the same would be clarified within a week's time. As regards the merits of the case, he was aware that the decision of the Hon. MSTT in

M/s. Gupta Metallics & Power Ltd on the present issue has been set aside by the Hon. Bombay High Court. Hence, arguments were placed as regards prospective effect thus :

- *The issue was decided in favour of the applicant in the case of M/s. Gupta Metallics by the Hon. MSTT on dt.02.02.2010.*
- *The law has been amended in the year 2012 so it is requested that the liability till the date of the determination order be protected.*

By letter dt.10.03.2014, it was informed by the applicant that they have not received any notice for the period 2007-08 under section 23 of the MVAT Act,2002.

04. OBSERVATIONS

The issue before me pertains to a question about the eligibility of set-off on a transaction of purchase of HSD-EURO III (High Speed Diesel). To address the issue, I would first enlist the relevant rules as are available under the Maharashtra Value Added Tax Rules,2005 (MVAT Rules,2005) with regard to the claim of set-off :

52	Claim and grant of set-off in respect of purchases made in the periods commencing on or after the appointed day
53	Reduction in set-off
54	Non-admissibility of set-off
55	Condition for grant of set-off or refund and adjustment of draw-back, set-off in certain circumstances

The above TABLE helps us to know that the MVAT Rules provide a scheme for the grant, reduction and non-admissibility of set-off while at the same time prescribing the conditions subject to which a set-off is to be granted. Therefore, one has to go through these provisions to ascertain if a set-off is permissible. With regard to the issue in the present proceedings about the eligibility of set-off on purchase of HSD, there is a provision under rule 54 of the MVAT Rules which reads thus -

Rule 54: No set-off under any rule shall be admissible in respect of:-

(b) **purchases of the High Speed Diesel Oil, Aviation Turbine Fuel (Duty paid), Aviation Turbine Fuel (Bonded), Aviation Gasoline (Duty paid), Aviation Gasoline (Bonded) and Petrol unless such motor spirits are resold or sold in the course of inter-State trade or commerce or in the course of export out of the territory of India or are sent, not by reason of sale, outside the State to any place within India by the claimant dealer to his own place of business, or the place of business of an agent or where the claimant dealer is a commission agent, to the place of business of his principal;**"

The words in bold were substituted for the words "purchases of motor spirits as notified under sub-section (4) of section 41 unless such motor spirits" w.e.f.1st April 2005 by notification dt.16.02.2012. It can be seen from the above that clause (b) of the rule 54 specifically mentions the purchase of HSD as not being eligible for set-off. The set-off is allowable only if such purchases are *resold or sold in the course of inter-State trade or commerce or in the course of export out of the territory of India or are sent, not by reason of sale, outside the State to any place within India by the claimant dealer to his own place of business, or the place*

of business of an agent or where the claimant dealer is a commission agent, to the place of business of his principal. The applicant has informed that the impugned purchase is used as a fuel in the business. The clause (b) expressly states that no set-off is available on purchases of HSD and it is allowable only if the HSD is disposed off in the manner stated therein. The use of HSD as a fuel does not fall in the conditions laid out in the said clause. In view of the specific provision, I have to observe that set-off would not be available on impugned purchases of HSD used as fuel.

Since the applicant has argued that the set-off is available under rule 52, I would refer to the said rule which begins with the following words -

"(1) In assessing the amount of tax payable in respect of any period starting on or after the appointed day, by a registered dealer (hereinafter, in this rule, referred to as "the claimant dealer") the Commissioner shall subject to the provisions of rules 53, 54, 55 and 55B in respect of the purchases of goods made by the claimant dealer on or after the appointed day, grant him a set-off"

By the notification dt.16.02.2012, the words and figures '*subject to the provisions of rules 53, 54 and 55*' were deemed to have been inserted w.e.f 1st April 2005. The word, figures and letter '*rule 55B*' were added w.e.f 15.10.2011 by the notification dt.16.05.2013. The applicant has argued that set-off would be available under the above rule 52. With regard to the same, I have to observe that the wording of rule 54 is clear in its import that no set-off under any rule shall be admissible in respect of the contingencies mentioned therein. The insertion of the words '*subject to the provisions of rules 53, 54, 55*' does not in any way mean that the same became applicable from the date of the notification. This argument of the applicant is not acceptable as rule 54, in clear words, makes it known that no set-off under any rule would be admissible in respect of the contingencies enumerated therein. A rule granting a set-off and a rule disentitling the same cannot be read in isolation. It always needs to be seen as to on which purchases, a set-off availment is allowable and subject to which conditions is the same eligible as also the quantum allowable from the eligible amount. Therefore, rule 54 cannot escape attention. Though the amendment was made effective retrospectively, it is only to make certain things which were already present as more evident. To interpret the same as a new amendment bringing about a new provision would render the provision contained in rule 54 as redundant. No words of a statute can be termed as superfluous and there are pronouncements to this effect by the Hon. Courts. In view thereof, the applicant would not be eligible to claim set-off on the purchase of HSD.

The applicant finds support in his argument that set-off in his case would be eligible owing to the decision of the Hon. Maharashtra Sales Tax Tribunal (Hon. MSTT) in M/s. Gupta Metallics & Power Ltd.(VAT S.A Nos.55 and 56 of 2010 dt.02.12.2010) wherein the very issue in respect of purchase of HSD was decided as being eligible to claim set-off.

However, the decision of the Hon. MSTT has been set aside by the Hon. Bombay High Court, in the very above case, in its decision dt.17.08.2012 in Sales Tax Appeal No.11 and 13 of 2011. The view expressed by me finds support from the ruling by the Hon. Court that *rule 54(b) creates an embargo as regards claiming set off except in the cases mentioned in rule 54(b) of said rule*. The Hon. Court observed that the use of HSD Oil i.e motor spirit as a fuel does not fall within the aforesaid provisions for the purpose of claiming set off. It was thus observed that *on account of specific provision which permits claiming of set-off under peculiar circumstances mentioned in rule 54(b), the provisions of rule 52 and 53 cannot be applied*. In view of the Hon. Court having validated my observations, I need not dwell anymore on the issue.

05. PROSPECTIVE EFFECT

The applicant has prayed that the determination order be made effective prospectively as the law was amended in the year 2012. I have already observed that the scheme of the MVAT Rules,2005 is such that rule 52 and rule 55 cannot be read in isolation. Even though a purchase is eligible for set-off under rule 52, the purchases on which set-off would not be admissible have to be referred to. This is the very reason that the insertion of the words '*subject to the provisions of rules 53, 54 and 55*' was made effective from 1st April 2005. Besides this, I have already reproduced above that the Hon. Bombay High Court has categorically interpreted that *rule 54(b) creates an embargo as regards claiming set off except in the cases mentioned in rule 54(b) of said rule*. In view thereof, the request of the applicant is not found convincing and does not deserve consideration.

In view of the discussion held hereinabove, I pass an order as follows -

ORDER

(under Section 56(1)(f) and (2) of The Maharashtra Value Added Tax Act,2002)

No. DDQ-11-2008/Adm-3/36/B- 1

Mumbai, dt. 21/03/2014

It is determined thus -

1. *In view of the specific provision in rule 54(b) of the Maharashtra Value Added Tax Rules,2005, purchases of HSD-EURO III by Invoice No. 20083227B020427 dated 25th September, 2007 for Rs.3,98,725/- would not be eligible for set-off.*
2. *For reasons as discussed in the body of the order, the request for prospective effect is rejected.*


(DR. NITIN KARÉER)

COMMISSIONER OF SALES TAX,
MAHARASHTRA STATE, MUMBAI