Read: 1. Revision order in the case of M/s. Narendra Solvex Pvt. Ltd. holder of Registration Certificate No. 444601/S/1951, for the period 1.4.1997 to 31.3.1998 bearing No. JCST/ND/REVN/G-I/8023, dt. 14.12.2005.
2. Notice in form 40 dt. 1.12.2008.
3. Assessment order underlying the revision order dt. 14.12.2005.
4. Written submission of the dealer dt. 13.7.2009 and dt.24.11.2010..
5. This office letters to the dealer dt. 3.7.2009, 2.3.2010, 15.3.2010, 16.6.2010, 27.7.2010, 6.8.2010, 4.9.2010, 27.10.2010.
6. Dealers letter for seeking adjournments dt. 13.7.2009,6.3.2010, 2.4.2010, 28.8.2010 & 22.10.2010.

Heard : Shri. Deepak Bapat (Advocate) and Shri. P.M.Agrawal (Advocate)

ORDER

(Under Section 57(1) of the Bombay Sales Tax Act, 1959)

No. MIA-17/2008/Rev/Adm-3/2/B-1 Mumbai, dt.10.12.10

A revision order dt.14.11.2005 was passed by the Jt. Commissioner of Sales Tax (Adm) Nagpur Division, Nagpur in the case of M/s. Narendra Solvex Pvt. Ltd., of Rallies Road, Amravati for the period 1.4.1997 to 31.3.1998 under BST Act, 1959, revising the assessment order of the Asstt. Commissioner of Sales Tax (Assessment) Amravati dt. 15.12.2000.

The revision order and the record underlying the revision order have been scrutinized and it is observed that:

1. The dealer is a manufacturer of Refined Soyabean Oil, Refined Cotton Seed Oil, Refined Kardi Oil and de-oiled cakes by solvent extraction process.
2. The dealer is holding entitlement certificate No. NATI-136-CM-788 and No. 444601/S/E-3/LM/1070 under the exemption under 1993 Package Scheme of Incentives.
3. **The Joint Commissioner i.e the revising authority has not calculated the CQB- Cumulative Quantum Benefits as per the provisions of law.** The facts are that the assessee purchases oil seeds. He manufactures both oil and deoiled cakes. Oil is covered in the list under Rule 41F which provides for full set-off but Deoiled cake is not covered by the list and therefore a normal dealer /manufacturer of oil is entitled for full set-off on his purchases. There is a proviso to 41F, that if a dealer manufactures two products and if one product falls under Rule 41F and the other does not, then the set-off shall be proportionately reduced. The current assessee is a backward area dealer. His set-off provisions & benefits are all covered under Rule 31AA which says that if the backward area dealer would have been entitled to claim set-off u/r. 41F had he been a normal dealer, then in respect of such turnover of purchases, CQB shall not be calculated. Therefore, if a backward area dealer manufactures goods falling in list of Rule 41F, then in CQB under clause (a),(b) & (c) is to be calculated. Thus if he manufactures 41F goods, then CQB on the above will not be calculated. However, said assessee partly manufactures deoiled cakes which are not 41F goods. Therefore, the CQB on those purchases under clause (a)(b)(c) in proportion to the manufacture of deoiled cake needs to be calculated.
4. The revising authority has considered only the irregularity in the assessment of provisions regarding non admissibility of deduction U/R 46A while revising the assessment order and enhanced the C.Q.B. to the extent of Rs. 89781.
5. The revising authority misinterpreted the provisions of Rule 31AA and come to an unlawful conclusion that C.Q.B. on purchases is not warranted.

6. The revising authority has misread the contents of the Circular dt. 18.8.95 which was issued to clarify the computation of cumulative quantum of benefits admissible to the units covered under 1979, 1979 amended, 1983, 1988 and 1993 Package Scheme of Incentives.
7. As a conclusion, in the revision order C.Q.B. availment has been considered short.

A notice in form 40 was, therefore, issued and served upon the dealer properly to adjudicate the illegalities, irregularities and improprieties which have occurred in the revision order dt. 14.12.2005. In response to the notice Mr. P.M. Agrawal, Advocate and authorised representative of the company filed written contention vide letter dt. 13.7.2009. The contention of the dealer is two fold which is summarised as under:

1. The dealer has contended that once revision order is passed by any subordinate officer, exercising the powers which are delegated by the Commissioner, the revision order is deemed to have been passed by the Commissioner and that power is exhausted and no further revision proceedings can be initiated by the Commissioner. The dealer , in respect of this argument, has relied on the judgment of Hon. Gujarat High Court in the case of Ashwin Industries Vs. Dy. Commissioner of Sales Tax, Baroda and others (5O STC 322) and the judgment in the case of OCL India vs. State of Orissa and others (130 STC 35).
2. Alternatively, dealer has contended that:
   (I) The company is manufacturing refined soyabean oil and deoiled cakes and for both the products the raw material is only one i.e. Soyabean Seeds. Thus, the presumption that such turnover of purchases of soyabean seeds is used in manufacturing of deoiled cakes only will not be the interpretation in true sense. The fact is that the purchase of soyabean seeds is used in the manufacture of refined oil. The dealer has further submitted that the crux of the matter is whether the dealer is entitled for the set off U/R. 41F which , otherwise he would have been entitled to if he was not holding the entitlement certificate. It is argued that the soyabean seed is used in manufacturing of Refined Soyabean Oil and deoiled cakes and thus the company is entitled to claim set off under Rule. 41 F on the manufacturing of soyabean oil, even if deoiled cakes is also manufactured out of the same turnover of purchases.
   (II) The dealer has argued that the ratio of the case of Bhagwati Refineries Pvt. Ltd. (S.A. No. 1006 of 2006, dt. 8.12.2006) is not applicable in his case as the facts in his case are not identical.
   (III) The dealer has further submitted that the MSTT in the case of Deesan Agro Tech Ltd. (S.A. No. 1051 of 2004, dt. 8.12.2006 as rectified by rectification application No. 52of 2006, dt. 2.1.2007 and further rectified by rectification application No. 11 of 2007, dt. 6.3.2007) has held that "in view of the proviso, on merit, we are inclined to accept the plea of the appellant that in respect of such turnover of purchases, no sum shall be calculated under clause (a)(b) and (c) of Rule 31AA. In view of the above finding, the matter needs to be remanded to the first appellate authority for correct calculation of the CQB". According to the dealer, this implies that if a dealer would have been entitled to claim set off U/R. 41C, 41E or 41F in respect of turnover of purchases (not set off which would have been allowed under those rules to a dealer) if he was not holding the certificate of entitlement, then in respect of such turnover no CQB is to be calculated under clause (a) (b) and (c). The phraseology used in the first and second proviso to Rule 31AA throws light on the distinction made in two contingencies by the rule making

authority. Unlike the second proviso the words "set off would have been allowed" are not used. There is a clear distinction, according to the dealer, between "entitled to claim" and "claim actually admissible".

(III) The dealer has contended that the interpretation of the judgment, as is understood by him, has to be followed by the departmental authorities. In order to prove that MSTT judgements have binding effect, the dealer has cited the following decisions:

1. M/s. Nagpur Gas and Domestic Appliances, (B.H.C.) (130 STC 377)
2. Basheshar Nath vs. Income Tax Commissioner, (S.C.), 35 ITR 1990.
3. Union of India vs. Kamalakshi Finance Corporation Ltd., (S.C.) AIR 1992 SC 711.

(IV) On 24.11.2010, the dealer has filed another written submission reiterating the contentions already submitted in his earlier letters. However, he has referred to the following observations of the Tribunal in the case of Deesan Agrotech ltd in rectification application no 172 of 2009 which are..

" For greater understanding, we find that it would be most appropriate to refer to rule 42AC which allows set-off to a eligible unit holding Certificate of Entitlement under entry 136 or entry E3 of the Act. Such Eligible Units have been given set-off of taxes paid in full on the raw material purchases. This rule, does not provide or postulate any reduction either on account of production of de-oiled cake or branch transfers. In such circumstances, whenever the eligible units procures oil seeds or any other taxable items by paying taxes and the same when is used by such eligible unit in the manufacture of edible oil, this rule do not make any deduction of taxes paid on the raw materials. As such, comparing of this rule 42AC with rule 41F according to us becomes most essential for the purposes of harmonious integration and the judicious conclusion. On comparing the same, the result emerging shall always be that in respect of eligible unit entitled for et-off under rule 41F on the raw material purchases, no CQB shall be calculated on such purchases of such raw materials".

He argued that the decision in Deesan may be followed.

(V) Lastly, the dealer has contended that the views communicated to the Akola Industries Association vide letter dt. 23.10.2000 on the same issue cannot be withdrawn unilaterally as the trade is guided by those views and has accordingly arranged their affairs. The Commissioner, therefore, cannot detract from his earlier views.

(V) The dealer has requested that the revision proceedings be dropped.

02. HEARING

Shri. Deepak Bapat, Advocate & Shri. P.M. Agrawal, Advocate attended on behalf of the applicant. Shri. Bapat stated that he will submit a written submission in the matter. He was informed that the revision order has to be passed before 23.12.2010. He informed that the written submission will be given on or before 24.11.2010. He was informed that if the written submission is not given before the said date it will be presumed that the applicant has nothing to say in the matter.

. The applicant has objected to the proposed revision on two grounds :-

1. The first challenge is to the jurisdiction of the Commissioner u/s. 57 to pass an order of revision of a revision order passed by a subordinate officer. In this case, it is stated that the judgment of Jaya Hind Industries is not applicable because it is based on the judgment of Bombay High Court in the case of M/s. H.B. Munshi

(reported in 34 STC 113). In this case, the issue was whether u/s. 57, the C.S.T. can revise the order of appellate authority. The case of appeal, the appellate authority exercises the jurisdiction in his original capacity granted u/s. 55 and not as delegatee of the C.ST. It is argued that the fact was misplaced by the MSTT in case of Jaya Hind and in the present case the issue is whether C.S.T. can revise the order u/s. 57 which was passed by his delegate under section 57. According to the assessee, the judgment of the Supreme Court in the case of M/s. O.C.L. [130 STC 35] is directly applicable in terms of facts as well as the law laid down by the Supreme Court in para B of the judgment.

2. The law on the subject is laid down by the MSTT in the case of Dessan Agrotech Ltd. through second appeal order as well as rejection of rectification application filed by the Department through orders dt.12.8.2009 and 6.8.2010.

The assessee states that in this particular case, the point for distinction is that the assessee is manufacturer of oil for which the raw material is oilseeds. While manufacturing oil from oil seeds, deoiled cakes are generated. As deoiled cake is not mentioned in Rule 41F list, the department would be incorrect to say that in respect of manufacture of deoiled cakes, the CQB shall be calculated because the proviso to Rule 31AA clearly says that once the backward area dealer becomes eligible for Rule 41F because he manufactures oil, then it need not be seen whether he manufactures (deoiled cake) which does not fall under Rule 41F, and therefore proportionate working for calculation of CQB need not to be done.

03. OBSERVATIONS

A} I have gone through the submissions of the applicant. I will first deal with the contention of the dealer challenging the jurisdiction of the Commissioner for initiation of proceedings u/s. 57 of the BST Act, 1959. The dealer has contended that the subordinate officer has exercised the powers of the section as a delegate of the Commissioner of Sales Tax and hence these powers are exhausted and no further revision proceedings can be initiated by the Commissioner. The dealer relied on the judgment of Supreme Court in the case of OCL India vs. State of Orissa (130 STC 35) and another judgment of Gujarat High Court in the case of Ashwin Industries vs. Dy. Commissioner of Sales Tax Baroda and others (50 STC 322).

In the case of OCL India (130 STC 35) the facts were that the Commissioner exercised the powers to revise the order of the Sales Tax Officer which had already been revised before by the Asst. Commissioner. This issue is not applicable to the present case. Firstly,the proceedings in the instant case are initiated to revise the order of Jt. Commissioner who has earlier revised the order of assessing officer. The order of Jt. Commissioner and the order passed by the assessing officer are two different and distinct orders. It is not the case that the order revised by the Jt. Commissioner is again proposed to be revised. Secondly, the OCL judgement was considered by the MSTT in the case of M/s Jaya Hind Industries ((2006 -33 MTJ 253) which is in favour of the Department, and which I will discuss later in this order.

The other case on which the applicant relied on is Ashwin Industries (50 STC 322). The issue in the case of Ashwin Industries was whether Dy. Commissioner of Sales Tax can revise an order when the Asstt. Commissioner on prior occasion had exercised revisional power regarding the same subject matter. The Court held that where on the prior occasion the Asstt. Commissioner of Sales Tax has sought to revise the order, he exercised the power of the Commissioner. Thereafter, the Dy. Commissioner could not have re-invoked the same revisional power of the Commissioner on the same subject matter when the power was once exercised and was exhausted. It is true that in the above matter the decision has been taken by the Court that revisional power once exercised cannot exercised again. However, the Bombay High Court in the case of H.B.Munshi vs. Oriental Rubber Industries

(34 STC 113) has made some observations which are diametrically opposite to the one expressed above.

The Bombay High Court in the case of H.B.Munshi has observed that under section 20, the officers having specified designations have been contemplated to be appointed by the State Government for carrying out the purpose of the Act and their hierarchy has been indicated and the subordination, inter se, has also been indicated and it is in the context of the hierarchy and the subordination, inter se, of officers that the provisions of section 57 has to be understood. It observed the following:

> ….After all, the enactment with which we are concerned is a taxing statute like the Bombay Sales Tax Act, that it contains provisions indicating hierarchy of officers being appointed for carrying out the purposes of the Act, that it also contains subordination of such officers, inter se, and what is more, it contains complete code of remedies under sections 52 to 62A in Chapter VII of the Act, which are available to any person aggrieved by any order that may be passed by any officer under the Act. Such remedies lie against the order of an inferior officer to his superior in the hierarchy of officers, including revisions to the Commissioner or the Tribunal and reference to the High Court. Moreover, section 52 bars the jurisdiction of a civil court in regard to orders that might be passed by any officer under the Act, subject to the provisions of section 61. **Having regard to this scheme which is very clear on perusal of the relevant provisions contained in the Act and particularly having regard to the fact that complete code of remedies has been provided within the framework of the Act itself, it seems to us very clear that even the officers, viz., Assistant Commissioners, Sales Tax Officers and other officers, should not be held to be delegates or agents of the Commissioner from whom they derive their powers and authority to perform their functions. To hold so would render the entire scheme containing complete code of remedies nugatory**. In our view, therefore, having regard to the entire scheme of the Act and the relevant provisions, even the officers mentioned in sub-section (6) of section 20 cannot be regarded as delegates or agents of the Commissioner and if the provisions of sub-section (6) of section 20 are looked at from this angle, the argument based on the language of sub-section (6) as advanced by Mr. Chagla qua sub-section (5) of section 20 must fail. Though we are not really concerned with sub-section (6) of section 20, but are concerned with the proper construction of sub-section (5) of section 20, it has become necessary for us to express our view on the construction of sub-section (6) in order to refute Mr. Chagla's contention and, while refuting the contention of Mr. Chagla based on sub-section (6) of section 20, we would like to observe that, for the reasons indicated above, it is not possible to hold that the officers enumerated in sub-section (6) of section 20 should at any rate in regard to their judicial powers be regarded as delegates of the Commissioner in the sense that they exercise the powers of the Commissioner as his agents.

Thus, the High Court has observed that the belief that once revision is done by an officer subordinate to the Commissioner, the power is exhausted and the same order cannot be revised again goes against the entire scheme of the Act which provided for an elaborate hierarchy and the hierarchy itself testifies to the fact that the Officers exercise their powers independently.

It was argued before the Court that following the interpretation of the High Court there would be repeated revisions, to which the Court replied the following:

> " But, considering the argument presented by Mr. Chagla by itself, we do not think that it would be right to say that our interpretation would lend to repeated interference by way of revision forever as contended for by him. In view of the

hierarchy of officers and their subordination, inter se, to which we have already referred, it seems to us clear that such interference by way of exercising revisional jurisdiction would be limited and not repeated forever as suggested by Mr. Chagla and we do not think that such limited interference by way of revision under section 57(1)(a) of the Act would be either incongruous or anomalous to the detriment of an assessee. In fact, it would be to his advantage, for, if it were the Deputy Commissioner who was exercising the revisional jurisdiction, in the first instance, against an order which has been passed in favour of an assessee previously, the assessee would be enabled to bring the injustice caused to him to the notice of the Additional Commissioner and, similarly, if the Additional Commissioner's orders were against the assessee, he would be again entitled to bring the injustice caused to him to the notice of the Commissioner himself and get injustice rectified. Exercise of revisional jurisdiction in the aforesaid manner would be preferable to a situation where no exercise of revisional jurisdiction at all would be possible if Mr. Chagla's contention that all these officers should be regarded as delegates or agents of the Commissioner were to be accepted. **If the theory that Deputy or Additional Commissioners are acting as delegates or agents of the Commissioners were to be accepted, the entire revisional jurisdiction contemplated under section 57 of the Act would be rendered nugatory and it is difficult to hold that such a result was at all contemplated or intended by the legislature".**

It is seen from the above that the High Court has held that the provision for revision does not contemplate that it be done only once and once done, any further revisions are debarred.

The above views have been followed by the MSTT in deciding the case of Jaya Hind Industries Ltd Vs State of Maharashtra (2006 -33 MTJ 253), wherein the Additional Commissioner of Sales Tax Pune Zone, Pune, had revised the revision order passed by the Dy. Commissioner of Sales Tax (Adm)-2,Pune, Division Pune and the **MSTT unequivocally held that the Additional Commissioner was empowered to revise the revision order passed by the Deputy Commissioner of Sales Tax.** The Tribunal, before arriving to the said conclusion, has considered and discussed both the cases- M/s OCL Ltd and M/s Ashwin Industries, on which the dealer has relied on in the instant case. Thus, the MSTT has comprehensively held that revision can be effected twice.

Further, it is argued by the dealer that the decision of the Tribunal in Jaya Hinds' case on the basis of M/s H.B. Munshi (34 STC 113) was not proper. I would just say that this is not the proper forum for such an argument. Moreover the said argument was also made advanced before the MSTT in Jaya Hind Industries. However, the Tribunal considered the issue and decided in favour of the Revenue. The observations of the MSTT in this regard are reproduced,"

…" The learned advocate submitted that this decision (H.B.Munshi) is not applicable to the present case because the facts of that case and this case are different. In that case, initially there was First Appeal and subsequently there was Second Appeal. The Order of Second Appeal was revised by the Commissioner. There was only one Revision Order whereas in the instant case there are two Revision Orders, one passed by the Deputy Commissioner, which is revised by the Additional Commissioner. **However, this decision being under 1959 Act with which we are concerned and the provisions of Section 57, Section 20 of the Act being same as in that case, this decision is binding on us. In view of the mandate of Hon'ble High Court, we are not required to add anything more of our own. Following this decision, we hold that Additional Commissioner**

was empowered to revise the Revision Order passed by Deputy Commissioner of Sales Tax under Section 57 of the Act."

In this context reference can also be made to the judgment of Kerala High Court in the case of M/s. Tescum Rubber Products v. Commissioner of Commercial Tax, Thiruvananthapuram (16 VST 10). The High Court has held that the first revision order passed by Dy. Commissioner had suffered from loss of revenue; therefore, the Commissioner was right in revising the earlier order of revision passed by the Dy. Commissioner. Thus, the contention of the dealer that Commissioner of Sales Tax has no jurisdiction to revise the revision order of Jt.Commissioner of Sales Tax, Nagpur, is not tenable.

B} While going through the revision order of the Joint Commr. of Sales Tax, it was found that the order suffered from certain infirmities in the sense that the CQB calculations were not as per the provisions of law. The dealer had purchased oilseeds and manufactured both oil and deoiled cakes. While calculating set-off u/r 41F read with rule 31 AA of the BST Rules, the set-off need to be apportioned as only sale of oil was eligible for set-off under rule 41F while purchases gone into deoiled cakes were not eligible for set-off under Rule 41F as the list of eligible goods manufactured under Rule 41 F does not include deoiled cakes. However, the dealer has contended that they have manufactured refined Soyabean Oil and Deoiled cakes and both the products are manufactured from only one raw material i.e. Soyabean seed. Therefore, no apportionment can be done for calculation of set off u/r. 41F read with rule 31AA(a)(b)(c). He has relied on the decision of Maharashtra Sales Tax Tribunal in the case of M/s. Deesan Agro Tech Ltd. v. State of Maharashtra, S.A. No.1051 of 2004 dt.8.12.2006 (35 MTJ 618)and subsequent decisions on rectification applications. The MSTT has held that the set off u/r. 41F in respect of the turnover of purchases shall not be calculated under clause (a)(b)(c) under rule 31AA(2). The case was remanded back for correct calculation of Commutative Quantum of Benefit.

I have gone through all the judgement given by the MSTT in the case of M/s Deesan Agrotech. However, it will be pertinent to refer to the judgment in the case of M/s Bhagwati Refineries V State of Maharashtra, decided on 18.12.2006 by the Maharashtra Sales tax Tribunal in S.A. no1006 of 2006 (35 MTJ 154) . The issue before the MSTT was the quantum of set-off u/r 41 F to a PSI dealer who had transferred goods to his branches outside the State. Set-off u/r 41F was admissible to the dealer as his finished product-refined oil fell under schedule entry C-1-7 which was mentioned in the Column 3 of schedule to Rule 41-F i.e it was eligible for set-off u/r 41-F. Hence the appellant was otherwise entitled to set-off like a normal dealer on his local purchases provided the finished goods are sold in the State of Maharashtra. The appellant had however effected branch transfers to the extent of 45% and therefore to that extent the set-off would not have been admissible for the reason of the manufactured goods having not been sold in the State of Maharashtra. The MSTT upheld this position and observed the following

> " if the unit is otherwise entitled to the set-off u/r. 41F on the purchases as a normal dealer (i.e. without having held the Eligibility/Entitlement Certificate), then no CQB is to be calculated in respect of such purchases. In the present case, the Appellant's manufactured products (i.e. Refined Edible Oils) befall Schedule Entry C-I-7, which is mentioned in column 3 of the Statement to rule 41F, and hence the Appellant was otherwise entitled as a normal dealer to the set-off u/r. 41F on his local RD Purchases of inputs (except Furnace Oil, Capital Assets and Parts/Components/Accessories thereof), which have been used within the State in the manufacture of Edible Oils, provided of course that the manufactured goods are sold in or from Maharashtra. In view of this position, the Assessing Authority, having regard to the aforesaid proviso to sub-rule (2) of rule 31AA, did not calculate any CQB in the context of the BC Form purchases of Oils. This fact has been

clearly mentioned in his CQB Order dated 16.7.2003. However, as mentioned above, the extent of the stock-transfers of the manufactured goods was around 45.5%, and therefore to that extent set-off u/r. 41F was not admissible for the reason of the manufactured goods having been not sold in Maharashtra. In other words, the Appellant as a normal dealer would not have been entitled to the set-off u/r. 41F to that extent. In that view of the matter, the action of the Assessing Authority **not to calculate CQB in respect of all of the BC Form Purchases of oils was not proper**. **In respect of 45.5% of such BC Form purchases, he ought to have calculated the CQB so as to reduce the monetary ceiling.**

Thus, the Tribunal in Bhagwati Refineries (supra) has interpreted the provision of rule 41F read with rule 31AA that a unit in PSI scheme, if as a normal dealer, would not have been entitled to set off u/r 41 F to the extent of its branch transfer, then one ought to have calculated CQB on the purchase price representing the amount not available for set off u/r 41 F, so as to reduce the monetary ceiling. **This ratio of Bhagwatis's case is squarely applicable to the case in hand.**

Despite this MSTT judgement, I feel that the issue also merits a detailed discussion on certain other aspects. In this respect, it would also be useful to refer to a brief background relating to calculation of CQB as the entire issue rests on what the correct calculation of CQB should be

a) What is CQBA?

The Government of Maharashtra to encourage and induce entrepreneurs to establish industrial units in undeveloped and under-developed areas, had been giving incentives under Package Scheme of Incentives since 1964. In the initial stages the incentives like special capital incentive, octroi incentive, subsidy, sales tax incentive etc. were given in the form of grants. In the process, an eligible unit was required to pay the tax and claim the refund of the same from the Government.In the year 1979, for the first time the Government thought of giving benefit directly under the Sales Tax Act. Accordingly, the Government passed a Resolution on 5th January, 1980 which was revised on 1982 over a period. The new schemes were introduced in the year 1983, 1988 and again a new scheme was introduced in 1993. These schemes are called as 1979 Scheme, 1983 Scheme, 1988 Scheme and 1993 Scheme respectively. Under all these schemes, the Eligible Unit was entitled to sales tax incentive. However, under this scheme, the choice was given to the entrepreneur to choose the benefit of incentives in any of two forms i.e. to claim an incentive either by way of exemption from tax or by way of deferment of tax.

Under the deferment of tax option, the Eligible Unit is treated as a normal unit and is entitled to collect the tax and was also entitled to necessary set-off. The tax is required to be assessed in the hands of Certificate of Entitlement Holder, as the normal dealer. The tax so assessed is allowed to be retained with the Entitlement Holder and thereafter is required to be repaid in certain yearly installments after 10 or more than 10 years. However, under the exemption option by the Entitlement Holder, sales are not liable to tax, so also on purchases, the tax is not required to be paid and whatever taxes are paid on purchases are given as a set-off. Under all schemes (except 1979 Scheme), incentives were given subject to a certain ceiling, mainly in terms of a period and certain percentage of Fixed Capital Investment. In order to avail the incentive, a Certificate of Eligibility and a Certificate of Entitlement are being issued. Both these certificates carry a condition to read as "makes entitlement of Sales Tax Incentive by way of exemption/deferment not to exceed Rs... i.e. ..... % of Fixed Capital Investment."

All certificates also carry a condition that the Certificate of Entitlement will stand automatically cancelled from the point of time when the Sale Tax Incentives admissible under the scheme exceed the limit or the period, for which it is issued, whichever is earlier. Thus, it becomes clear that for availing the incentive under both the options, some ceiling is

made applicable. Besides, the same conditions are also made applicable to the units whose activities do not amount to manufacture and to whom the interest-free loan equal to Sales Tax is admissible. This ceiling in terms of Sales Tax Law is being called as Cumulative Quantum of Benefits Availed (CQBA). As stated above, the term 'CQBA' is required to be considered for the purpose of calculation of ceiling of incentive availed so as to monitor that the incentives are not given more than what is sanctioned. Thereafter, the question arises as to how to calculate the CQBA. The term 'CQBA' was for the first time, found by insertion of Section 41B by Maharashtra Act No. 22 of 1994 w.e.f. 1.5.1994 to the Bombay Sales Tax Act, 1959. Prior to that, this term was known as 'Notional Sales Tax Liability' (NSTL). The term 'NSTL' is also used in the 1983, 1988 and 1993 Schemes. There again, the purpose was to calculate and determine amount of benefits availed.

The Hon'ble Bombay High Court in case of M/s. Varun Polymol Organics Ltd. and Another v. State of Maharashtra (1995) 11 MTJ 1 while examining the issue regarding calculation of Notional Sales Tax Liability, pointed out certain infirmities. In the said judgment it was specifically held that -

> "The Notional Sales Tax Liability required to be computed for purpose of ascertaining the quantum of tax benefit availed of by the unit so as to keep the unit within the ceiling limit of tax exemption, cannot be more than the actual sales tax liability which would have been incurred by the Eligible Unit but for the tax exemption."

. After the decision of the Hon'ble Bombay High Court in case of M/s. Varun Polymol Organics Ltd. (cited supra) a specific Section 41B was introduced under the Bombay Act giving retrospective effect from 1.1.1980. Before the introduction of the Section 41B, assessing authority was not legally equipped to check the progressive availment of the benefit on account of sales tax at any time. The section now enables the assessing authority to calculate the CQB availed by the Eligible Unit under all Package Schemes of Incentives during the period covered by Eligibility Certificate. If it is found that CQB so calculated has exceeded relevant monetary ceiling, authorized by the Implementing Agency, then the assessee may be required to pay tax alongwith the penalty and interest on the transaction of sales effected thereafter.

Considering the infirmities brought to the notice in view of decision in case of M/s. Varun Polymol Organics Ltd. (cited supra) and also considering the dispute arising out of calculation of "Notional Sales Tax Liability", the Government thought it necessary to regulate the method of calculation of NSTL by introducing rule 31AA on 24.3.1995 with retrospective effect from 1.1.1980. Now CQB is required to be calculated in accordance with rule 31AA.

Provisions of rule 31AA appear as follows:

> "**31AA. Calculation of the Cumulative Quantum of Benefit** - (1) The Cumulative Quantum of Benefits received by a dealer (hereinafter referred to as "the said dealer") to whom a Certificate of Entitlement has been granted by the Commissioner under Entry 136 or Entry 3 or Entry 12 or Entry 13 in Group E of the Government Notification, Finance Department, No. STA-1095/37/Taxation-2, dated the 22nd September, 1995, as a case may be, of the Schedule to the notification issued under Section 41 shall be calculated by the Commissioner in respect of any period commencing on or after the 1st January, 1980 in the manner prescribed herein.
>
> (2) The Cumulative Quantum of Benefits received by the said dealer to whom the said certificate has been granted under the 1979 Package Scheme of Incentives including the amended 1979 Package Scheme of Incentives and the 1983 Package Scheme of Incentives shall be the aggregate of the following sums, that is to say -

(a) a sum equal to the amount of Purchase Tax which would have been payable on the purchases of raw materials to the Government by the said dealer under any of the provisions of the Act and the amount of Additional Tax or Surcharge in relation to such purchase tax which would have been payable to the Government if the exemption granted under the said entry was not available;
(b) a sum equal to the amount of Sales Tax, Surcharge and Turnover Tax which would have been payable by a selling dealer not holding a Certificate of Entitlement on the sale of raw materials to the said dealer if the set-off under rule 42AC is not admissible to the said dealer in respect of such purchases :
Provided that during the period from 15th April, 1994 to 30th November, 1994, the calculation shall be made at the rate of tax applicable to such goods as reduced by 4% from the applicable rate of tax;
(c) a sum equal to the amount granted as drawback, set-off or, as the case may be, refund under rule 42AC to the said dealer;
(d) a sum equal to 4 per cent of the turnover of inter-State sales of finished products manufactured by the said dealer in the Eligible Unit and specified in the Eligibility Certificate granted to him by the Implementing Agency and if the inter-State sales of such products are generally liable for Central Sales Tax at a rate less than 4 per cent then a sum calculated at such lower rate on the said turnover.
(e) a sum equal to the amount of tax (including sales tax, additional tax, surcharge and turnover tax) which would have been payable to Government on any sales of products manufactured by the said dealer in the Eligible Unit and specified in the Eligibility Certificate granted to him by the implementing agency if the said dealer was not holding the said Certificate of Entitlement and no regard was had or any deduction from the said turnover or full or partial exemption from payment of tax on any account of any sale made against any declaration or certificate prescribed under the Act, rules or any notification issued under the Act or Rules.

Provided that if the said dealer would have been entitled to claim setoff drawback or, as the case may be, refund under rule 41C, 41E, or as the case may be, rule 41F, if he was not holding the said Certificate of Entitlement in respect of his turnover of purchases, then in respect of such turnover of purchases, no sum shall be calculated under clauses (a), (b) and (c);

From the above detailed discussion, it is amply clear that CQB availment is required to be calculated as if the dealer is not covered under the package scheme of incentives or in other words CQB availment should be calculated equal to the tax liability of the normal dealer.

b) Calculation of CQBA in different scenarios with respect to the above propositions

I will now demonstrate the calculation by taking three different illustrations i.e., i) in a case of normal dealer ii) Calculation of set off u/r 41 F and notional sales tax liability by apportionment of purchase price (such turn over of purchase) in proportion of sale price of Refined oil and deoiled cakes iii) as argued by the present dealer. It will be fair to consider the figures of the present case for this demonstration.

a) Total production	Rs. 41, 55, 40,067.00	
b) Total sale of manufactured Oil	Rs. 19, 18, 59,510.00	46.18% of total production
c) De Oil Cake produced	Rs. 22, 36, 80, 557.00	53.82%
e) Purchases of Oil seed	Rs. 25, 91, 07, 734.00	

Illustration –I:

Calculation of set off u/r 41 F and tax liability **in the case of a normal dealer**,	
i) Sales tax on sale of Oil @ 2% [on figs. Shown at (a)]	38, 37,190.00
ii) Sales tax on sale of De Oil Cake [on figs. Shown at (b)]	00
iii) Purchase tax on Oil seed @2% when purchased from URD [on figs. Shown at (e)]	51, 82, 154.00
iv) Total tax [i+ii+iii]	90,19,344.00 -- (I)
Set off u/r 41-F:	
Purchase tax on 25, 91, 07, 734.00 @ 2%	51, 82, 154.00
Qualifying purchases for set off =46.18% i.e. = 11, 96, 55, 952.00 Set off admissible is 2% on 11, 96, 55, 952	23, 93,119.00 -- (II)
Tax payable (I)-(II)	**66, 26,225.00 -- (A)**
Illustration –II:	
Calculation of notional sales tax liability **by apportionment of purchase price (such turn over of purchase) in proportion of sale price of refined oil and deoiled cake**	
i) Sales tax on sale of Oil @ 2% [on figs. Shown at (a)]	38, 37,190.00
ii) Sales tax on sale of De Oil Cake [on figs. Shown at (b)]	00
iii) CQBA on purchase price not representing Set off u/r 41 F @ 53.82% of 25, 91, 07, 734 ie 13, 94, 51,782 * 2%	27, 89, 035.00
Notional Tax payable by PSI dealer (I)-(II)	**66,26,225.00 (exemption) -- [B]**
Illustration –III: **Calculation of set off u/r 41 F and tax liability as per the theory of dealer,**	
i) Sales tax on sale of Oil @ 2% [on figs. Shown at (a)]	38, 37,190.00
ii) Sales tax on sale of De Oil Cake [on figs. Shown at (b)]	00
iii) Purchase tax on Oil seed @2% when purchased from URD [on figs. Shown at (e)]	exempted=00
iv) Total tax [i+ii+iii]	38,37,190.00-- (I)
Set off u/r 41-F:	= 00
Not to be calculated	= 00 -- (II)
Tax payable (I)-(II)	**38,37,190.00. [Exemption] -- (C)**

It seen from the above illustration that tax implications in first two cases are the same while in the third case the CQBA/tax suffered will be short by Rs.24,27,190. In the second and third illustration both the dealers are units enjoying exemption benefits, however the CQBA/tax suffered in the second case will be much higher than that of the third case. If the CQBA is calculated as per rule 42AC on tax paid by the entitlement certificate holder as illustrated in the later part of this order then the CQB will come to Rs.

90, 19, 344 Thus the theory argued by the dealer is fallacious and produces unworkable results.

The Hon. High Court, in the case of M/s. Polymer Organics Ltd. ((1995) 11 MTJ 1: 97 STC 55), specifically held that the Notional Sales Tax Liability is required to be computed for the purpose of ascertaining quantum of tax benefit availed by the unit so as to keep the unit within the purview of tax exemption cannot be more than the actual sales tax liability which may have been incurred by Eligible Unit but, for tax exemption. Intention of the Legislature in providing rule 31AA was to bring a normal dealer and dealer covered by Package Scheme on same footing for discharging tax liability. In case of exempted unit only, it would be measured by CQBA provided in rule 31AA.The rule is to be read as a whole, if so read, it would be evident that it is the intention of the Government to treat both type of the dealers, one enjoying the exemption and the other not enjoying the exemption, at par.

c) Set-off always has nexus with purchases

The dealer has vehemently argued that in the case of Deesan Agro Tech Ltd.. in the second rectification order of Maharashtra Sales Tax Tribunal, it has been observed that in case where set off u/r. 41F is admissible to a normal dealer in respect of such turnover of purchases, no sum shall be calculated under clauses (a) (b) and (c) in respect of PSI (exemption) unit to whom set off u/r. 41F is available otherwise. According to the dealer this implies that if a dealer would have been entitled to claim set off U/R. 41C, 41E or 41F in respect of turnover of purchases (not set off which would have been allowed under those rules to a dealer) if he was not holding the certificate of entitlement, then in respect of such turnover no CQB is to be calculated under clause (a)(b) and (c). I have already reproduced the Rule 31AA and the rule related to set off i.e. 41F is reproduced hereunder:-

> **Rule 41F -**[R.41F.Draw-back, set-off, etc., of tax paid by a manufacturer of certain goods].-In assessing the amount of tax payable in respect of any period by a registered dealer (hereinafter in this rule referred to as "the claimant dealer") the Commissioner shall, in respect of the purchases made by the claimant dealer of goods specified in column 2 of the Statement below, which are [used by him within the state] in the manufacture of goods specified against them in column 3 of the said Statement, for sale by him or for export by him, grant him a draw-back, set-off or as the case may be a refund of the aggregate of the sum determined in accordance with the provisions of rule 44D.]
>
> Explanation,-For the purposes of this rule the expression "export" shall have the same meaning as assigned to it in sub-rule (2) of rule 41D."

S.N	Goods Purchased	Goods Manufactured
(1)	All the goods (excluding furnace oil covered by entry 76 of Part II of Schedule C and those which are treated as capital assets and parts, components and accessories of such (capital assets) purchased on or after 1st April 1998 and which are used by the claimant dealer within the State in the manufacture of goods specified in column 3, which have in fact been sold or used in the packing of the goods so manufactured. (a) Cotton thread covered by entry 14 of Part I of Schedule C.	…… (b) Such oils and Oil Cakes not being deoiled Cakes which are notified by the State Government in the Official Gazette for the purposes of this rule. …….

Provided that where the process of manufacturing results in the production of goods specified in column 3 of the above statements as well as goods other than those specified in column 3 of the said statement, then such drawback, set-off or as the case may be, the refund shall be apportioned as between goods specified in column 3 of the said statement and goods other than those specified in column 3 of the said statement on the basis of the sale prices of such manufactured goods and shall be allowed only to the extent that it pertains to the manufactured goods specified in column 3 of the statement.

Proviso to Rule 41F provides to apportion the refund between the goods specified in column No. 3 of the statement and the goods other than those specified in column No. 3 of the said statement. On the basis of sale price of such manufacture goods and to the extent of the manufacture goods specified in column No. 3 set off shall be allowed.

.Rule 44D provides to compute aggregate sum for the purpose of drawback, set off etc.

44D – "For the purpose of rule 41F the drawback, set off, refund or as the case may be, reimbursement shall be aggregate of the following sums that is to say a sum collected separately from a claimant dealer by the other register dealer by way of sales tax on the purchases made by him from such registered dealer of any goods, referred into the relevant rule, where the claimant dealer effected the purchases …..

(b) a sum paid or payable as purchase tax on the purchases of any goods referred to in the relevant rule, u/s……

As per the provisions of rule 44D sum of set off is to be calculated on purchases from another registered dealer or purchases on which purchase tax is paid or payable. **Thus this rule provides nexus of purchases with calculation of set off.** What transpires from the provisions of rule 41 F that on manufactured goods which are not specified in the said statement, no set off u/r. 41F is admissible. Now the goods manufactured have a nexus with the 'raw material' used for manufacture. The set off is available on taxes legally paid/payable on the purchase price representing the sale of goods. Refund is the result of tax payable/paid and set off. **Thus, apportionment of refund has a direct nexus to the purchase price representing the set off.** So in true sense what is apportioned is purchase price, to derive the admissible or as the case may be -non admissible set off.

We have seen earlier in the illustrations that if the words " such turnover of purchases" are interpreted as per the theory of the dealer, then the tax liability of normal dealer in illustration I and a unit under PSI , who purchases goods from URDs' in Illustration II will suffer tax or CQBA more than that of the dealer in Illustration III (calculation as per dealers Theory) In the similarly place situation while deciding the case of M/s. VIP Industries v. State of Maharashtra (S.A. No. 23 of 2004 dated 26.10.2009) on the same disputed issue regarding calculation of CQB, illustrative example was cited which is as follows :

"We are unable to agree with this argument, considering following example. When a normal dealer has effected sales of say Rs. 1,00,000/- in respect of the product where schedule rate of tax applicable is 13% then he would incur liability of Rs. 1,300/- if the sales are effected against declaration in Form - H. If the industrial unit covered by the Package Scheme of Incentives (sales tax benefit by way of deferment) effect the sale of Rs. 1,00,000/- against declaration in Form - H then also his CQB will be Rs. 1,300/- although schedule rate is 13%. However, if industrial unit covered by Package Scheme of Incentives covered by exemption mode, effect the sale of Rs. 1,00,000/- against declaration in Form - H then it would be unfair, unjust to calculate CQB at Rs. 13,000/- @ 13%."

Incidentally, one of us was party to this judgment. Industrial Unit exercising exemption mode cannot be put to disadvantageous position in respect of

transactions effected against declaration in Form H as it is not the intention of Legislature.

The reference is also made to situation where the dealer covered by Package Scheme of Incentive eligible for the exemption from tax effect sales on declarations in Form BC another dealer covered by the Package Scheme of Incentive. If the CQB is calculated at full rate, according to Revenue, on sales effected against Form BC then it would not be in consonance with the provisions of rule 31AA. In this case, the CQB would be calculated at full rate on the sale price of a seller u/r. 31AA(2)(e) and in case of purchaser since he has issued declarations in Form BC, then it would be calculated at applicable rate as reduced by the set-off u/r. 31AA(2)(b). **So, on the same transactions in the hands of two dealers, Revenue will be calculating CQB in two different manners and this certainly is not acceptable and it is not the intention of the Legislature in framing such rule.**

It is in the backdrop of such facts, specific provisions u/r. 31AA provides that these declarations provided in Exemption Scheme should not be considered for calculating CQB and the CQB is required to be calculated at rates applicable after considering the reduction if any in view of declaration issued. It is in this context, the specific term has been used "No regard was had or any deduction from the said turnover or full or partial exemption from payment of tax of any account of any sale made against any declarations or Certificate prescribed under the Act/Rules or any inclusion issued under the Act or rules". (Emphasis provided)

In light of the observations of the Maharashtra Sales Tax Tribunal, in case in hand, on the same transactions in the hands of two dealers, CQB cannot be calculated in two different manners. **Thus the correct and true interpretation of the words "such turnover of purchases" is the turnover which qualifies for the allowance of set off u/r 41 F.**

d) Discussion on Deesan Agrotech

The dealer has relied on the decision of the Deesan's case in support of his contention. The Maharashtra Sales Tax Tribunal in the series of judgement in the Deesan's case has observed as under:-

1) In original Second Appeal filed by M/s Deesan Agrotech Pvt. Ltd., S.A. No. 1051 of 2004 decided on 18.12.2006, The Tribunal has not made any observations in respect of the issue regarding availability of CQBA under rule 31AA and has decided only the issue in the matter of P.T. u/s. 13AA and Addl. Tax u/s. 15-I-A.

2) Deesan Agrotech Pvt. Ltd., filed rectification application No. 52 of 2006 in the order of M.S.T.T. and prayed that the Ground No. 4 in the original appeal petition in respect of calculation of CQBA as per the provisions of rule 31AA (2)(a)(b)(c) remained to be decided by the Tribunal.

   The M.S.T.T. allowed the rectification application u/s62 of the Act and passed rectification order on 02/01/2007, observing that, "9. In view of the above on merit, we are in plan to plea of the appellant that the set off under rule 41F in respect of turnover of purchase shall not be calculated under clause (a), (b) and (c) under rule 31AA (2). In view of the above findings, the matter needs to be remanded to first appellate authority for correct calculation of CQB" .

3) M/s Deesan Agrotech Ltd., again not satisfied by order of M.S.T.T. in S.A. No. 1051 of 2004 preferred another rectification application No. 11 of 2007 and while deciding the first rectification application, the Tribunal while reproducing rule 31AA observed that **set off under rule 41F in respect of turnover of purchases shall not be calculated.** However, rule 31AA says that the set off u/r. 41F in respect of **such** turnover of purchases shall not be calculated under clause (a), (b) & (c) of Rule 31AA (2). Thus, the word 'such' was missing in first rectification order. On an

application by the applicant the Tribunal therefore passed another rectification order dt.3.3.2007 rectifying the first rectification order.

This rectification order was passed on Maharashtra Sales Tax Tribunal on 6.3.2007.

4) In the rectification order of M.S.T.T. dt. 6.3.2007, the Department has preferred rectification application No. 114 of 2008, requesting for correction of mistake which had occurred in the issue of purchase tax u/s. 13AA, Addl. Tax u/s 15-I-A and calculation of CQB under rule 31AA in order of Tribunal in S.A. No. 1051 of 2004 dt. 8.12.2006, in judgement delivered on 02.01.2007, in rectification application No. 52 of 2006 and rectification application No. 11 of 2007 decided on 6.3.2007.

In case in hand, there is no issue of P.T. u/s. 13AA and Addl. Tax u/s. 15-I-A before me. The observations of the Tribunal in this regard, in its order dt. 12.08.2009 has no concern. The Tribunal in respect of the issue regarding calculation of CQBA under rule 31AA which is the subject matter before me has observed in the judgement dt. 12.08.2009,that "this being a plain proposition that emerges on plain reading of rule 41F and rule 31AA, we are of confirmed view that the appellant would not be required to calculated CQB in respect of deoiled cake production.In this view of matter, there is no mistake in the judgement arrived at the Tribunal and more so on an apparent mistake that have crept in the judgement that and such there is no case for undertaking any rectification either on merit or on interpretation of provisions of law". The Tribunal has accordingly rejected rectification application No. 114 of 2008.

5) During the pendency of this proceeding, the dealer M/s. Narendra Solvex Pvt. Ltd., has brought on record one more order in the case of M/s Deecan Agrotech Pvt. Ltd., decided by the M.S.T.T. on 6.8.2010 on a rectification application filed by the Department . In this order, the issue regarding P.T. u/s. 13AA and Addl. Tax u/s. 15-I-A has been discussed in para 2 to 8 and in para 9 the MSTT has discussed the issue regarding CQB in respect of rule 41F and 31AA.

Now it will be pertinent to see the judgment by judgment views of the Tribunal and the decision thereon

i. In decision in S.A. No.1051 of 2004 dt. 8.12.2006, the Hon. Tribunal has not made any observations and has not decided the issue pertaining to calculation of CQB as per rule 31AA with reference to rule 41F for grant of set off etc.. Thus, this judgment is not useful in the present case.

While deciding the first rectification application filed by the dealer No. 52 of 2006 decided on 02.01.2007, the Hon. Tribunal rectified the mistake crept in the original order that the 4th ground of the appellant in S.A. No. 1051 of 2004 was not considered in the order and has pleased to rectify the order. While doing so, it has observed that the set off under rule 41F <u>in respect of turnover of purchases</u> shall not be calculated under clause (a), (b), (c) under rule 31AA (2)

ii. The applicant in rectification application No. 52 of 2006 pointed out the typographical mistake in the decision dt. 02.01.2007, through second rectification application No. 11 of 2007 that the word 'such' is missing. While deciding the second rectification order through order dt.6.3.2007, Hon Tribunal has observed that to avoid confusion and for the sake of clarity, the paragraph of first rectification order is modified and substituted and the words "the setoff under rule 41F in respect of turnover of purchases shall not be calculated" are substituted by the words "in respect of such turnover

of purchases, no sum shall be calculated". Thus it emerges from the modification or substitution that the word "the set off u/r 41F in respect of turnover of purchases shall not be calculated and the words "in respect of such turnover of purchases, no sum shall be calculated" has one and the same legal meaning. If the meanings of these words are different in legal sense then the decision delivered in first rectification order will alter the legal findings by substitution or modification in second rectification order. If the ratio of judgment changes by an act of modification, such mistake could not have been said to be crept, is apparent on the record. What emerges from the plain reading of the modification or substitution is both the set of 'words' have same legal meaning.

Here it will be necessary to refer to the case of States of Punjab vs. Darshan singh [(2004) 1 SCC 328] and Jaylakshmi Coelho vs. Oswald Joseph Coelho [(2001) 4 SCC 181] where in the court has observed that, an unintentional mistake of the court/tribunal which may prejudice the cause of any party must, and alone, be rectified. No new arguments or rearguments on merits can be entertained to facilitate such rectification of mistakes. The provision of rectification cannot be invoked to modify, alter or add to the terms of the original order. In another case Dwarkadas vs. State of Madhya Pradesh [(1993) 3 SCC 500] court has observed that, the corrections contemplated are of correcting only accidental omissions or mistakes and not all omissions and mistakes which might have been committed by the Tribunal/quasi-judicial authority while passing the order. The omission sought to be corrected which goes to the merits of the case is beyond scope of Rule for rectification, and it cannot be passed into service to correct an omission which is intentional however erroneous that may be. In Jayalakshmis' case (supra) the court has observed further that, the power of rectification of clerical or arithmetical errors does not empower the quasi-judicial authority to have a second thought over the matter, and to find that a better order could or should be passed.

What emerges from these various decisions on the issue and the rectification order passed by the tribunal is that the meaning of the substituted words and words which are substituted are one and the same. That is to say that the words such turn over of purchases means set off U/R. 41F in respect of turnover of purchases, if not then the mistake cannot be rectifiable as per the decisions cited supra.

iii. In the judgment against the third rectification in rectification application No. 114/2008 decided on 12.08.2009, the Tribunal has expressed views to substantiate that the earlier rectification order, in earlier rectification application No. 11 of 2007 decided on 6.3.2007 does not suffer from any apparent mistake. The Tribunal after its view has stated that "In this view of matter there is no mistake in the judgment arrived at by the Tribunal and more so there is no mistake that have crept in the judgment and as such there is no case for undertaking any rectification either on merit or on interpretation of provisions of law." What is gathered from the above view of the Tribunal is that the views in earlier part of the decision of the Tribunal are not an interpretation of the provisions of law neither there was any merit in the application of rectification as was no apparent mistake in the earlier Tribunal's order. The Tribunal has expressly mentioned that 'more so' there

is no mistake crept in the judgment. Thus the rectification is not rejected because of the views of the Tribunal, but because of there being no apparent mistake.

iv. In deciding 4th Rectification application No. 172 of 2009 on 6.8.2010, Tribunal has refused to rectify the earlier order and maintained that there is no apparent mistake in the order.

However, in the above order, the MSTT compared the Rule 42AC with that of Rule 41 F .The MSTT observed that ," when we examined the issue, further for greater understanding, we find that it would be most appropriate to refer to rule 42AC which allows set off to a eligible unit holding certificate of entitlement under entry 136 or E3 of the Act. Such eligible unit have been given set off of taxes paid in full on the raw material purchases. This rule does not provide or postulate any reduction either on account of production of deoiled cake or branch transfer. In such circumstances, whenever the eligible unit procures oil seeds or any other taxable items by paying taxes and the same when is used by eligible unit in the manufacture of edible oil, this rule do not make any deduction of taxes on raw materials. As such comparing of this rule 42AC with rule 41F, according to us, becomes most essentials for the purposes of harmonious interpretation and judicious conclusion. On comparing the same, the result emerging shall always be that in respect of a eligible unit entitled for set off under rule 41F on the raw material purchases, no CQB shall be calculated on such purchases on raw materials.

However, it is felt by me that a comparison of Rule 42AC with Rule 41F is not proper. Let me reproduce relevant part of the provisions of rule 42AC, Rule 41F, and rule 31AA.

> **Rule 42AC** ------- a drawback, set off or as the case may be refund of the aggregate of the sum determined in accordance with the provisions of clause (a) and (c) of rule 44D."
>
> This provision shows that 42AC can be calculated read with clause (a) and clause (c) of Rule 44D, but not to be calculated when the dealer falls under clause (b) of Rule 44D i.e. set off under rule 42AC is admissible to a entitlement certification holder who purchases raw material for used in manufacture by paying tax separately or the purchases which are inclusive of tax.
>
> **Rule 41F** ------- provided also that, where the process of manufacturing results in the production of goods specified in Column (3) of the statement which are taxable as well as other than taxable, then such drawback set off or as the case may be refund shall be apportioned between the goods which are taxable and other than taxable on the basis of sale price of such manufactured goods and shall be allowed only to the extend that it pertains to taxable manufactured goods specified in column (3) of the said statement and for the purpose of this provisions, goods other than taxable goods shall include goods, the sale or, as the case may be, <u>purchases of which are exempted from payment of sales tax or as the case may be, purchases tax by virtue of any entry in the Notification issued under sec. 41 of the Act</u>."(Under line provided)

This being the position of law, no set off under rule 41F shall be available on goods manufactured which appear in the statement in column (3) and are exempted from payment of sales tax by virtue of Notification issued under section 41 of the Act. Exemption under P.S.I. has been granted under the Notification issued under section 41- thus normally, set off under rule 41F would not have been admissible. However, as per rule 31AA (2) set off under rule 41 has been made available to the E.C. holder as if he is not holding the

Entitlement Certificate. This shows that this is an additional concession granted to the unit holding Entitlement Certificate so as to bring PSI unit at par with normal dealer.

Now coming back to the grant of set off under rule 42AC it has been provided that, amount of set off granted under rule 42AC will be considered as CQB. If set off under rule 41F and under rule 42AC has to be compared with each other, then the important factor which is required to be looked into is calculation of CQB in considering the provisions of rule 41F read with 31AA.In the first case, the corresponding purchases representing the set off u/r 41F are not to be considered for calculation of CQB and in the later case, amount equal to set off granted under rule 42AC is required to be calculated as CQBA as per rule 31AA (2) (c). The Tribunal observed that as rule 42 AC provides to calculate set off on full amount of purchase price of the manufactured goods , the rule 41 F should also be read in that spirit. But if the above is accepted and if no CQB is calculated on the purchases representing set off u/r 41F, then it misses the important difference that if set off u/r 42AC is allowed to a PSI unit then an amount equal to set off is required to be calculated as CQB. This can be demonstrated by the following illustration.

Earlier I have demonstrated CQBA in illustration No. 3 where in CQBA is calculated as considering the total purchases on which set off u/rule 41 is to be allowable is not considered for CQBA. And the CQBA comes on that transaction at Rs. 3837198/-. Now I will considered the theory viewed by the Tribunal in its order dt. 12.08.2010. The figures are taken for this illustration, same as taken for the earlier illustration.

a) Total production - Rs. 41, 55, 40,067.00
b) Total sale of manufactured Oil - Rs. 19, 18, 59,510.00 = 46.18% of total production
c) De Oil Cake produced - Rs. 22, 36, 80, 557.00 = 53.82% --- do ---
e) Purchases of Oil seed - Rs. 25, 91, 07, 734.00

Illustration IV :

1	Sales Tax on sale of oil @ 2% (on figures shown at (a))	3837190/-	-
2	Sales tax on sale of deoiled cake (on figures shown at (b)).	00	-
3	Tax suffered on purchases of raw material	00	5182154/-
4	Total tax suffered on the transaction	3837190/-	5182154/-
5	Set off under rule 42AC = Tax paid on purchase tax	-	5182154/-
6	CQBA = set off under rule 42AC	5182154/-	-
7	Total CQBA	9019344/-	Nil

Thus it can be seen that this CQBA will be much higher than the tax liability in case of normal dealer (Illustration I) and also as per the calculated in Illustration-III. Hence if the PSI unit purchases raw material by paying tax separately, the CQBA will not be equal to the benefit to a normal dealer and even for the two PSI units- one who purchases raw material, by paying tax separately and another whose purchases are exempted -the CQBA if calculated as per the claim by the dealer will be different

In sum, the Tribunal in comparing rule 42 AC with rule 41 F read with rule 31 AA has not appreciated the following:

I. (a) A unit holding Entitlement Certificate, eligible for set off under rule 42 AC, do get full set off refund, however **a sum equal to set off u/r 42 AC is required to be calculated as CQBA.**

(b) An Entitlement Certificate holder unit who is eligible for set off u/r 41 F needs no calculation of CQB equal to set off u/r 41 F.

II. (a) Set off u/r 42 AC is not admissible to a PSI unit on purchases, which falls under sub clause (b) of clause (D) of rule 44.

(b) No such restrictions are imposed for eligibility of set off u/r 41 F.

III. (a) An eligible unit under PSI scheme who is entitled to set off u/r 42 AC, the calculation of CQBA as per Illustration (IV) will be Rs. 90,19, 344/-

(b) A PSI unit who is eligible for set off u/r 41 F, in that case CQBA will be Rs.. 66, 26, 225/- as shown in illustration II.

Thus, a comparison between rule 42 AC and rule 41 F will not be rational.

Also, the applicant has argued that the judgement is not applicable to the present case. The reason given by the applicant in the case of Bhagwati, the applicant was running a refinery until and crude oil was the raw material which was used in the manufacture of refined oil. There was no other finished product and once the said refined oil is sold on the consignment basis then the applicant would not have been entitled any set-off under Rule 41F if he was not holding the entitlement certificate. I wish to say that in the case of Bhagwati Refinery, the dealer was entitled to set-off u/r 41-F, but the Tribunal has gone further than mere entitlement to set-off u/r 41-F and has gone into whether the goods are sold or not- which alone entitles then to set-off and in case of manufactured goods are partly sold then set-off under rule 41-F is allowed in proportion of goods sold. Thus, tribunal has gone beyond mere entitlement to disposal of goods.

I have discussed the interpretation of the words 'such turnover of purchases' extensively. I have also discussed that the ratio of series of judgment in the case of Dessan Agro tech Pvt Ltd., is not applicable in this case. Thus it is observed that the Revision order passed by The Joint Commissioner of Sales Tax (Adm) Nagpur, bearing No. JCST/ND/REVN/G-I/8023 dt. 14.12.2005 resulted in short calculation of CQBA. As per Section 41B, it is required to calculate total CQBA of a dealer, holding EC and thus cumulative calculation may result in excess availment of CQB and accordingly there will be a loss of revenue.

In view of the detailed deliberation above, facts, provisions of law and the submission of the learned Advocate, the revision order dt.14.12.2005 on the issue of CQBA is revised as under:

Sr. No.	Description	Turnover of purchases on which CQB is remained to be calculated	CQBA
A	URD Purchases of oil seeds 25,91,07,734.00 x 53.82 used in mfg of deoiled cake	13, 94, 51, 782	27, 89, 035
B	Purchases on BC Forms (Chemicals) used in mfg. of deoiled cake(53.82% of2,80,000.00)	1,50,690	3,013
C	Oil Seeds Purchases on BC Forms used in mfg. of deoiled cake(53.82% of 3,72,24,921 =20034452)	2, 00, 34, 452	4,00,689
D	Set-off u/r. 42AC allowed at Rs. 10,02,371.00 * 53.82% used in mfg. of deoiled cake	-	5,39,476
E	**Total enhancement of CQBA**		**37, 32, 213**

In light if the above, I, SANJAY BHATIA, Commissioner of Sales Tax, Maharashtra State, Mumbai, in exercise of the powers conferred under Section 57(1) of the B.S.T.Act,1959, revises the order of the Jt. Commissioner of Sales Tax(ADM), Nagpur,

dt.14.12.2005 by enhancing The CQBA at Rs.37,32,213.00, as mentioned in the above chart, which remained to be calculated in the revision order of the Jt. Commissioner of Sales Tax (Adm) Nagpur dated14.12. 2005. The assessing authority is directed to adjust the same, against the available CQB as per the monetary ceiling, as provided by the provisions of law. If the CQB enhanced or part thereof could not be adjusted due to non availability of monetary ceiling then such amount, if remained unadjusted, shall be recovered from the dealer as per the provisions of law and on such recoverable amount the issue of levy of interest /penalty is kept open.

(SANJAY BHATIA)
COMMISSIONER OF SALES TAX
MAHARASHTRA STATE, MUMBAI.

Place: Mumbai.
Date:
Seal.

Copy to,

1. M/s Narendra Solvex Pvt Ltd.,Rallies Road Amravati.
2. Jt. Commissioner of Sales Tax (Adm),Nagpur, along with revision file of his office.
3. Asstt. Commissioner of Sales Tax (Assessment) Amravati, for necessary action, along with assessment record.