

Read : Application dt.03.02.2011 filed by PBA Infrastructure Ltd., holder of TIN 27810409085V.
Heard : Sh. Vinayak Patkar, Advocate.

PROCEEDINGS

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

No. DDQ-11-2011/Adm-3/6/B-1

Mumbai, dt. 7/7/2015

An application is received from PBA Infrastructure Ltd., situated at 611/3, V. N. Purav Marg, Chembur, Mumbai - 400 071, seeking determination of the following question - *Whether the applicant is entitled to claim set-off on the purchase of HSD (EURO III) purchased vide invoice No.1423211751 dt.14.12.2012?*

02. FACTS & CONTENTION

The application states thus -

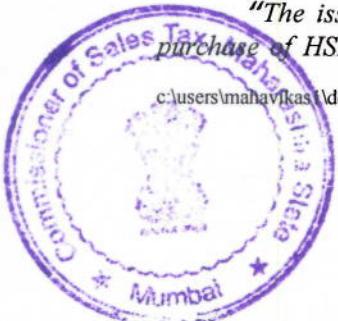
"The PBA Infrastructure Ltd., (the applicant) is the Public Limited Company engaged in the construction of roads, bridges, culverts etc. The applicant has been claiming the ITC U/R 52 of the MVAT Rules,2005 on the VAT paid on the purchases of High Speed Diesel (HSD). The applicant does not purchase HSD from Retail outlets. They purchase the same directly from the Refineries. Further the HSD so purchased is used in running the machineries which are in turn used for production/construction. The applicant is therefore of the opinion that they are not hit by Rule 54(b) of the MVAT Rules which makes the set-off inadmissible."

It is informed that the above view is disputed by the departmental authority who had visited the applicant's place of business. It is prayed that in case of adverse determination, it should be directed that the Determination should not affect the liability of the applicant prior to the date of application.

03. OBSERVATIONS

I have gone through the facts of the case. The issue is admissibility of set-off on the purchase of High Speed Diesel (HSD). On the very issue, a Determination Order No. DDQ-11-2008/Adm-3/36/B-1 dt.21.03.2014 under section 56(1)(f) and (2) of the Maharashtra Value Added Tax Act,2002 (MVAT Act,2002) was passed in the case of UltraTech Cement Limited. The issue pertains to the interpretation of the set-off rules, more specifically rule 54(b) of the Maharashtra Value Added Tax Rules,2005 (MVAT Rules,2005). The rule denies set-off in respect of the purchase of HSD unless the same is disposed off in the manner as specified therein. As in the present case, in the aforesaid Determination Order too, it was informed that the purchase of High Speed Diesel (HSD) was used as a fuel in the business and therefore, it did not qualify the test of eligibility for set-off. Therefore, the aforesaid Determination Order applies to the present facts too. The relevant portion from the aforesaid order as would bring out the determination in respect of the issue under consideration calls for a reproduction herein :

"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."

Thus, it can be seen that in view of the provisions as available, it was held in the aforesaid Determination Order that the use of HSD in any manner otherwise than as specified in rule 54(b) of the MVAT Rules disentitles the eligibility to set-off. As mentioned earlier, in the present case too, the HSD is used in running the machineries used for production/construction and thereby, not used in the manner as specified in rule 54(b). Therefore, the aforesaid Determination Order dealing with use of HSD which is otherwise than as specified in rule 54(b) of the MVAT Rules,2005 is fully applicable to the facts of the instant case. I also find that the same argument as tendered in the aforesaid Determination Order as regards the applicant being entitled for set-off under rule 52 of the MVAT Rules,2005 is made in the present application too. The aforesaid Determination Order dealt with the argument thus :

"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."

In view of above, it can be seen that the issue as in the present proceedings has been elaborately dealt with in the aforesaid Determination Order dt.21.03.2014 and the argument as made in the present application for determination has been dealt and decided in the said Determination Order. The issue of purchase of HSD for use otherwise than as specified in rule 54(b) of the MVAT Rules,2005 and therefore, non-admissibility of set-off in respect of the said purchase of HSD stands decided by the aforesaid Determination Order. The view taken in this Determination Order is also confirmed by the decision dt.17.08.2012 of the Hon. Bombay High Court in Sales Tax Appeal No.11 and 13 of 2011 in the case of M/s. Gupta Metallics & Power Ltd. wherein it was held that rule 54(b) creates an embargo as regards claiming set off except in the cases mentioned in rule 54(b) of said rule and further 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. In view of all above, I would not enter into any further deliberations with regard to the issue at hand. It is herewith determined that the use of HSD as fuel and not in the manner as specified in rule 54(b) of the MVAT Rules,2005 will disentitle the applicant from claiming set-off in respect of the said purchase of HSD.

The aforesated view was communicated to the applicant by communication dt.09.09.2014. The aforesaid Determination Order in UltraTech (cited supra) as well as the decision of the Hon. Bombay High Court (cited supra) was brought to the notice of the applicant and he was asked to arrange his affairs accordingly. However, the applicant by communications of dt.14.10.2014 and dt.04.12.2014 stated that HSD as purchased and consumed by the applicant is a deemed use as a raw material and as such full set off is admissible. It was further stated that the view as expressed is not acceptable to the applicant and a hearing was insisted upon when further submission would be made.

Accordingly, the case was taken up for hearing on various dates. The hearing finally took place on dt.17.06.2015 when Sh. Vinayak Patkar, Advocate attended the hearing. It was stated that they have gone through the Determination Order dt.21.03.2014. It was contended that the same arguments on merits as well as prospective effect are sought to be made in the present proceedings too. During hearing, the applicant's attention was invited to the communications of the applicant wherein the applicant has admitted that HSD as purchased is used as a raw material and therefore, the contingencies as specified in the rule 54(b) [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] were not fulfilled. To this, it was submitted that the same arguments as made in the aforesaid Determination Order in Ultra Tech (cited supra) would be made herein too. Since an assessment order under the MVAT Act,2002 was passed in respect of the period in which the invoice presented for determination fell, the applicant offered to submit a purchase bill of an unassessed period and it was so duly tendered after the hearing.

As mentioned earlier, the applicant has used the HSD in running the machineries used for production/construction and thereby, not used in the manner as specified in rule 54(b), the applicant would not be entitled for set-off on the purchase of HSD used as raw material. Since the provisions are clear and the view is confirmed by the Hon. Bombay High Court, no arguments would sustain in the matter. The applicant has submitted that they rely on the same set of arguments as were tendered in the Determination Order in UltraTech (cited supra). These arguments having been dealt with in the said Determination Order, there arises no occasion to deal with the same herein again.

As regards prospective effect too, the applicant seeks to rely on the same set of arguments. Again this issue having been dealt with in the aforesaid Determination Order (cited supra), I would not embark on dealing with the same herein again. The relevant portion from the said Determination Order (cited supra) dealing with the request for prospective effect could be reproduced thus -

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"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."

Thus, it can be seen that upon considering the provisions and attending circumstances, it was held in the aforesaid Determination Order (cited supra) that the applicant is not entitled to prospective effect. The same set of provisions and circumstances exist herein too. In view thereof, I am not inclined to accept the request for prospective effect.

04. 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-11-2011/Adm-3/6/B-1

Mumbai, dt. 7/7/2015

It is determined thus -



1. In view of the specific provision contained in rule 54(b) of the Maharashtra Value Added Tax Rules,2005, purchase of HSD-EURO III by Invoice No.1423211751 dt 14.12.2012 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.


(RAJIV JALOTA)

COMMISSIONER OF SALES TAX,
MAHARASHTRA STATE, MUMBAI