**Read :** Application dt.07.06.2013 from M/s. Bharat Petroleum Corporation Ltd.
**Heard :** Shri Ghanekar (STP), Shri Kocharekar (Advocate), Shri Shreyas Gupta (CA) and Shri Thakar (Asstt. Manager Finance)

# PROCEEDINGS

**(under section 56(1)(f) of the MVAT Act, 2002 )**

**No.DDQ-11-2013/Adm-6/35/B-** 2 **Mumbai, dt.** 16/04/2014

A determination application is received from M/s. Bharat Petroleum Corporation Ltd. (BPCL) holder of TIN 27160318214V, a Public Sector Undertaking, engaged in the business of refining and marketing of various petroleum products and having Refinery in Mumbai at Mahul (Chembur). In this refinery, various petroleum products such as petrol, diesel (HSD)), Aviation Turbine Fuel (ATF) etc. are being manufactured. These manufactured products are partly sold in the State of Maharashtra and are partly stock-transferred outside the State of Maharashtra to our own Depots/Installations in other States for onward sales. The applicant has raised following questions for determination in respect of the purchase invoice No.PED/2784/MH/12-13/004 dated 15-5-2012 for Rs.1,88,85,085-80p through which certain machineries were purchased from M/s. BOC India Ltd. -

*"When the purchases of capital assets are used in the manufacture of specified petroleum products and when part of such manufactured products are stock-transferred interstate,*

*(a) whether such purchases of capital assets are subject to set-off reduction u/r 53(3)(b), or*

*(b) whether such purchases of capital assets are eligible for full set-off without any reduction u/r 53(3)(b)."*

Through submission dt.06.12.2013, the above questions were reframed thus :

- *Whether such purchases of capital assets are subject to set off reduction u/r 53(3)(b) so as to allow thereon only the proportionate set off with reference to the sales of the manufactured specified petroleum products?*
  *or*
- *Whether such purchases of capital assets are eligible for full set-off as per Rule 52 without any reduction u/r 53(3)(b)?*

**2. CONTENTION**

The applicant submits thus –

- *"In the context of manufacture of the petroleum products, they are entitled to Input Tax Credit (ITC) in the form of set off under rule 52 of the Maharashtra Value Added Tax Rules, 2005 (MVAT Rues) on the RD-purchases of corresponding inputs (other than the ineligible inputs like Crude Oil specified in Rule 54 of the MVAT Rules) as also on the RD purchases of capital assets (i.e. machinery etc.) used in such manufacture, subject to the restrictions, conditions and reductions prescribed in Rules 53, 54 and 55 of the MVAT Rules. During the period upto 15.2.2012, the set off admissible u/r.52 was liable to be reduced on account of interstate stock-transfers of manufactured petroleum products, as per sub-rule (3) of Rule 53 by an amount calculated at the applicable rate of CST against 'C' Form, with reference to the purchase-price*

*of the corresponding inputs, where the manufactured goods are stock-transferred interstate. The purchases of capital-assets were then specifically excluded for the purpose of this set off reduction. Thus, the purchases of capital assets were eligible for full set off u/r.52 without any reduction u/r 53(3), even in the event of interstate stock-transfer of part of the production. The said provisions in Rule 53(3) have recently been amended with effect from 16.2.2012. By virtue of the said amended provisions, for the period from 16.2.2012 onwards, the sub-rule (3) of Rule 53 has been bifurcated into clause (a) and clause (b). Thereby, in the context of manufacture and interstate stock-transfers of petroleum products covered by entries 5, 6, 7, 8, 9 & 10 of Schedule 'D' (hereinafter referred as 'Specified Petroleum products') a different manner for reduction of set off [i.e. @ 2% (upto 31.3.2012) and @ 4% (from 1.4.2012 onwards) of the value of the manufactured goods stock-transferred inter-state] has been introduced under clause (b). In all other contingencies (i.e. manufacture and interstate stock-transfers of other than the specified petroleum products), the reduction of set of has to be done as per clause (a) i.e. @ 2% (upto 31.3.2012) and @ 4% (from 1.4.2012 onwards) of the purchase price of the corresponding eligible inputs. The major difference in clause (a) and clause (b) is that the set off reduction under clause (a) in the context of manufacture and interstate stock-transfers of other than the specified petroleum products has to be done with reference to the purchase-price of the corresponding inputs, while the set off reduction under clause (b) in the context of manufacture and interstate stock-transfer of specified petroleum products has to be done with reference to the value of the interstate stock-transfers of the manufactured specified petroleum products. Such specified petroleum products for the purposes of the said clause (b) are,:-*

| ***Schedule Entry*** | ***Specified Petroleum Product*** |
|---|---|
| *D-5* | *High Speed Diesel Oil* |
| *D-6* | *Aviation Turbine Fuel (Duty Paid)* |
| *D-7* | *Aviation Turbine Fuel (Bonded)* |
| *D-8* | *Aviation Gasoline (Duty Paid)* |
| *D-9* | *Aviation Gasoline (Bonded)* |
| *D-10* | *Any other kind of Motor Spirit* |

- *In the aforesaid amended provisions of Rule 53(3) the purchases of capital assets are specifically excluded for the purpose of set off reduction as per clause (a), as was the position obtaining during the period prior to 16.2.2012. However, they are not so specifically excluded for the purpose of set off reduction as per clause (b).*
- *For the purpose of the determination, we enclose herewith a copy of purchase invoice No.PED/2784/MH/12-13/004 dated 15-5-2012 for Rs.1,88,85,085-80p (Gross) (VAT of Rs.12,55,240/- collected separately), through which certain machineries were purchased by us from M/s. BOC India Ltd., Mumbai (holder of TIN No.27860000154V). These machineries, the anticipated life-period whereof is 18 years, are being used and would be used in future (i.e. till around the year 2030) for the manufacture of both specified as well as non-specified petroleum products.*
- *According to us, purchases of such capital assets are not subject to any set off reduction even for the purpose of clause (b). This is so, because the said clause (b) provides for reduction in set off, and for the purpose of the set off reduction under Rule 53(3), one has to mandatorily apply the ratio as prescribed in Rule 53(9)(b)(ii) for determining the corresponding purchase price and ITC. It has to be noted that though the set-off reduction for the purpose of clause (b) of Rule 53(3) is to be done with reference to the value of interstate stock-transfers (of manufactured specified petroleum products), the ITC which is so subject to reduction, has first to be determined on the basis of the purchase-prices of the corresponding inputs. From that point of view, recourse to the ratio as per Rule 53(9)(b)(ii) is essential and unavoidable for the purpose of the set off reduction u/r.53(3)(b). In fact, the ratio provided in Rule 53(9)(b)(ii) for the purpose of set off reduction is an inseparable part of Rule 53(3), though the same happens to have been provided separately in sub-rule (9) instead of providing it in sub-rule (3) itself.*
- *In view of the provisions in Rule 53(3)(b) read with Rule 53(9)(b)(ii), the ITC on the purchases of the 'corresponding' inputs has to be determined on the basis of the prescribed ratio, and therefore the provisions of rule 53(9)(a) will come into play. The clear implication*

*of the provisions in Rule 53(9)(a) is that the corresponding goods on which set off is to be reduced, would not include consumables, stores and goods treated as capital assets, parts, components and accessories of capital assets. In other words, with the conjoint reading of the provisions in rule 53(3)(b), Rule 53(9)(b)(ii) and Rule 53(9)(a), there would not be any set-off reduction as per Rule 53(3)(b) on the purchases of capital assets. Thus, the purchases of capital assets are eligible for full set-off u/r 52 without any reduction u/r.53(3)(b), even though the provisions in Rule 53(3)9b) themselves do not specifically exclude capital assets for the purpose of set-off reduction.*

- *As mentioned earlier, Rule 53(3)(b) does not specifically exclude the purchases of capital assets for the purpose of set-off reduction. In our humble opinion, with the existence of Rule 53(9)(a), which specifically excludes certain purchases like those of capital assets for the purpose of set-off reduction, the Govt. may not have felt any need to again make similar provision in Rule 53(3)(b) itself. It has to be noted that when the MVAT Act and MVAT Rules were brought into force on 1-4-2005, at that time the provisions of Rule 53(9) were not in existence Thus, there were no separate provisions for exclusion of certain purchases for the purpose of set-off reduction. Therefore, provisions in Rule 53(3) itself were made to exclude capital assets and fuel for the purpose of set off reduction. It is subsequently on 1-11-2008 that sub-rule (9) was introduced in Rule 53, and thereby, separate provisions were made to exclude certain purchases such as those of capital assets for the purpose of set off reduction. With such provisions separately introduced on 1-11-2008, there was really no need for the Govt. to specifically exclude the capital assets again in Rule 53(3)(b), when it was later introduced on 16-2-2012.*
- *In view of the above, accordingly to us, the purchases of capital assets cannot be subject to set-off reduction u/r 53(3)(b) merely because the said Rule 53(3)(b) does not specifically exclude capital assets for the purpose of set off reduction. Conjoint reading of rule 53(3)(b), Rule 53(9)(b)(ii) and Rule 53(9)(a) makes amply clear that the purchases of capital assets are eligible for full set off u/r 52 without any reductions u/r 53(3)(b).*
- *It is respectfully submitted that the set off provisions have been in force in the MVAT Act/MVAT Rules right from 1-4-2005. The erstwhile sale-tax provisions in Maharashtra also provided for set-off. In the matter of grant of set-off, or rather in its reduction/denial, the Govt. has always treated the purchase of capital assets like machinery on different footing than the purchases of raw materials etc. Accordingly, the provisions regarding set-off reduction/denial in the specified contingencies, are not made applicable to capital assets in the same manner in which they are applicable to raw materials, and this is done by the Govt. not without a reason. There is a fundamental difference in the operation of the capital assets and that of raw materials in the process of bringing into being of the final product. With each use of the raw materials either in the contingency entitling the set off or in the contingency disentitling the set off, the raw materials to the extent of such use get exhausted and consumed and thus cease to exist after such use. On the other hand, the life period of a capital asset is spread over a number of years, and it does not cease to exist after the use, though its book value gets depreciated every year as per the annual depreciation rate. Unlike raw-materials, the same capital asset is normally used both for the contingency entitling the set-off as well as that disentitling the set-off, and this use is being made not only in the year of purchase, but in a number of years throughout the asset's life period. Because of this fundamental difference, the capital asset does not get contained or reflected in the final product, as the raw materials do. This is the precise reason why the capital-assets have been excluded as per Rule 53(9)(a) for the purpose of set-off reduction. In view of the peculiar nature of capital assets, as distinguished from raw-materials, it is quite a settled position of law that capital assets like machinery are not subject to any set off reduction/denial in the specified contingencies like interstate stock-transfers of manufactured goods or use in job-work etc. Some of the judicial pronouncements, holding and supporting such view are mentioned below:-*

  *a) M.S.T. Tribunal's Judgment in the case of M/s. Fertilizer Corporation of India Ltd. (S.A. 1031 of 2003 dt.18.6.2007)*

  *b) M.S.T. Tribunal's Judgment in the case of M/s. Vinayak Sahakari Sakhar Karkhana Ltd. (S.A. 1462 to 1465 of 1980 dt.18.2.1983)*

c) *M.S.T. Tribunal's Judgment in the case of M/s. Kiran Spinning (S.A.1212 of 1984 dt.10.4.1985)*

d) *M.S.T. Tribunal's Judgment in the case of M/s. Gold Mohor Mills (S.A.15 of 1994 dt.05.10.1996)*

e) *M.S.T. Tribunal's Judgment in the case of M/s. Aditi Pharmaceuticals P. Ltd. (S.A.679 of 1998 dt.10.11.2000)*

- *There are several such judgments which reflect the settled position of law that when a capital asset like machinery is used in both the contingency entitling set-off and the contingency disentitling set-off, then full set-off without any reduction is admissible. This settled position has been accepted and is being followed for the past several years by all the concerned, including the department.*
- *It is further respectfully submitted that the aforesaid judicial pronouncements are under the provisions of the erstwhile Bombay Sale Tax Act, 1959 ("BST Act")/ Bombay Sales Tax Rules, 1959 ("BST Rules"), which in fact did not contain any special provisions like those in Rule 53(9)(a) obtaining in the MVAT Rules providing for grant of full set off without any reduction in respect of purchase of capital asset, even where such capital asset is used exclusively in non-permissible contingencies (except for those such as use in job work, as specified in Rule 54). In that view of the matter, under the BST Act/BST Rules, the principle of grant of full set off without any reduction on the purchase of capital asset was applicable only where such capital asset is used in both permissible as well as non-permissible contingencies. It was not applicable where such capital asset is used exclusively in non-permissible contingencies, and therefore in such a situation, set off was not admissible on such capital asset. The position is otherwise under the MVAT Act/MVAT Rules due to the existence of Rule 53(9)(a), and therefore there is no denial/reduction of set off on the purchase of capital asset, whether such capital asset is used exclusively in non-permissible contingencies (except for those such as use in job work, as specified in Rule 54) or is used in both permissible and non-permissible contingencies. In that view of the matter, the provisions under the MVAT Act/MVAT Rules are more liberal and progressive than those under the BST Act/BST Rules, so far as grant of set off on capital asset is concerned.*
- *It may not be out of place to mention here that a different view of the matter (i.e. the capital asset's being held to be subject to set-off reduction), would certainly lead to absurd and unintended results. This can be explained with reference to the purchase – invoice in hand, dt.15.5.2012 for Rs.1,88,85,085 = 80p (Gross), in which VAT of Rs.12,55,240/- has been separately collected. The total ITC/set off available on this purchase as per Rule 52 is Rs.12,55,240/-. If this set-off is held to be subject to reduction u/r 53(3)(b) (for the reason of the asset having been used in the manufacture of specified petroleum products and part of such products having been stock-transferred interstate), then it would lead to such ridiculous results, which can certainly not be said to have been intended by the Govt. The expected life period of the capital asset in question, which is purchased on 15.5.2012, is 18 years, with its annual depreciation – rate being 5.28% Straight Line Method. This asset is presently being used and would be used for all subsequent periods upto the year 2030 or so, in the manufacture of both specified as well as non-specified petroleum products, and the products so manufactured are being and would be partly sold in Maharashtra and partly stock-transferred interstate. On these facts, the relevant ratios to be mandatorily worked out as per Rule 53(9)(b)(ii) and as obtaining in the F.Y. 2012-13 (in which the purchase falls) would be as under:-*

| | |
|---|---|
| *A Value of the interstate stock-transfers of manufactured specified petroleum products* | *24.00%* |
| *B Value of the interstate stock-transfers of manufactured non-specified petroleum products* | *5.50%* |
| *C Sale-price of all other manufactured petroleum products sold in and from Maharashtra* | *70.50%* |

*As mentioned earlier, the capital asset in question is used (and would be used) in all the three contingencies at (A), (B) and (c) above. In the context of the use in the contingencies at (B) and (c), full set-off without any reduction is admissible on the said purchase of asset. However, in the context of the use in the contingency at (A), the available set-off is subject to reduction u/r 53(3)(b). At the material time of use of the asset in the contingency at (A), the asset would obviously be used fully and not proportionately in the contingency at (A). In view thereof, for*

*the purpose of the said set-off reduction u/r 53(3)(b), it is the full (and not proportionate) ITC of Rs.12,55,240/- on the said purchases of the capital purpose of the set off reduction u/r.53(3)(b), it is the full (and not proportionate) ITC of Rs.12,55,240/- on the said purchase of capital asset, which has to be considered. On that basis, the set-off reduction u/r 53(3)(b) would be as under:-*

| | | |
|---|---|---|
| | *I.T.C.* | *Rs.12,55,240/-* |
| *Less:* | *4% of the total value of the interstate stock-transfers of manufactured specified petroleum products, obtaining in the F.Y. 2012-13(i.e. 4% of Rs.15681.14 Crs.)* | *Rs.627,24,56,000/-* |
| | *Set off admissible* | *Rs.Nil* |

*On the background of the above facts, if the purchases of capital assets are held to be subject to set-off reduction u/r 53(3)(b) on account of use in the contingency (A) above, then we would be denied any set-off on the said purchase of asset, despite its being used in the permissible contingencies at (B) & (C) above This is absolutely absurd and is certainly not intended by the Legislature or the Govt.*

- *In view of the foregoings, according to us, there is really no scope to hold that the purchases of capital assets are subject to set-off reduction u/r 53(3)(b). In our humble submission, the purchases of capital assets are eligible for full set off without any reduction u/r 53(3)(b).*
- *Alternatively, it is prayed that if you are inclined to hold that the purchases of capital assets are subject to set off reduction under Rule 53(3)(b), then in exercise of the powers u/s 56(2), such decision may be given a prospective effect on consideration of the fact that the earlier judicial pronouncements on the issue, though under the BST Act, were supportive of grant of full set off on capital assets without any reduction."*

**03. HEARING**

The case was taken up for hearing on dt.26.22.2013. Shri Ghanekar (STP), Shri Kocharekar (Advocate), Shri Shreyas Gupta (CA) and Shri Thakar (Asstt. Manager Finance) attended the hearing. The issue is such that the applicant has effected purchases of capital asset 'Nitrogen Cryogenic System' through bill dt.15.5.2012 and requests to know whether set off available in respect of this purchase would be subject to reduction under rule 53(3)(b) as inserted on dt.16.02.2012. It is contended that the retention is not applicable on the grounds which have been explained in detail in the application. The argument in short is thus :

(i) *Sub-rule 9(a) of rule 53 pertaining to corresponding goods was introduced w.e.f. 1.11.2008. This rule provided for exclusion to 'capital assets, consumables and stores' so far as calculation of retention of set off was concerned.*

(ii) *Sub-rule 3 was amended w.e.f. 16.2.2012 whereby 2 clauses (a) & (b) were introduced. Clause (b) was for specified petroleum products and clause (a) for other products. The material departure while introducing the amendment was that in clause (a) the reduction was with reference to the purchase price of the inputs which in clause (b) the reduction was with regard to the value of the stock transferred goods. Even though in clause (b), there is no specific exclusion of retention not applicable to capital assets (as available in clause a), there is a specific provision in sub-rule 9(a) for no reduction in respect of purchases of capital assets, consumables, stores.*

(iii) *In view thereof, no specific provisions appear to be made in clause b of sub-rule (3) in respect of capital assets.*

(iv) *The capital asset purchased in the present case is being used in the manufacturing of specified as well as non-specified petroleum products which are sold as well as stock transferred so, machinery is being used in all permissible contingencies and will be used for 18 years.*

The applicant prays for prospective effect if the contention is not acceptable.

Through written submission dt.26.11.2013, it is submitted thus :

- *"In the course of hearing, reiterating all the contents of the determination application, we laid our main emphasis on the provisions in Rule 53(9) which were introduced on 1.11.2008. The said provisions have been reproduced in our determination application. The clear and unambiguous implication of these provisions in Rule 53(9) is that the 'corresponding goods' on which set off is to be reduced as per Rule 53(3) would not include consumables, stores and goods treated as capital assets and parts/components/accessories of capital assets. The policy of the Government to restrict any set-off reduction (on account interstate stock-transfers of goods) to only such goods which are physically contained or reflected in the stock-transferred goods and not to apply it to the consumables, stores or capital assets and their parts/components/accessories (which are not physically contained or reflected in the stock-transferred goods) is quite manifest in the said provisions in Rule 53(9). In fact, these are the general provisions which would be operative in the context of and for the purposes of each and every relevant special provision, i.e. sub-rule (1), sub-rule(1A), sub-rule (2)(a) and sub-rule (3) as specified in the said Rule 53(9). In that view of the matter, the provisions in question u/r 53(3)(b) which provide for set-off reduction on account of interstate stock-transfers of manufactured specified petroleum products would undoubtedly be governed by the aforesaid general provisions in Rule 53(9). It may kindly be noted that both the clauses (a) and (b) in the said Rule 53(9) contain a specific mention of their being for the purposes inter-alia of sub rule (3) of Rule 53. That being the position, the general provisions in Rule 53(9) would apply with full force for the purpose of set-off reduction u/r 53(3)(b), and hence this reduction would obviously be restricted to only such goods (like raw materials and packing materials) which are physically contained in the stock-transferred goods, and would not extend to capital assets.*
- *It is humbly submitted that the main set off provisions are contained in Rule 52 to 55 of the MVAT Rules.*

| Rule | Heading |
|---|---|
| 52 | Claim and grant of set-off in respect of purchases made during any period commencing on or after the appointed day (i.e. 1.4.2005) |
| 52A | Set -off in respect of goods manufactured by Mega unit. |
| 53 | Reduction in set-off as calculated as per Rule 52. |
| 54 | Non-admissibility of set off in certain contingencies. |
| 55 | Conditions for grant of set off in certain circumstances. |

- *The whole Rule 53 provides for reduction of set-off in certain contingencies like interstate stock-transfers of goods, manufacture of tax-free goods etc. There are thus some special provisions therein providing for the particular contingencies in which the set-off is to be reduced. Besides, there are some general provisions in the said Rule 53 which apply for operation of those special provisions. Rule 53(9) is one of such general provisions, which cannot be ignored and has necessarily to be considered in the context of operation of other special provisions like the one in question u/r 53(3)(b).*
- *The disputed provision in Rule 53(3)(b) provides for set-off reduction in the context of interstate stock-transfer of manufactured specified petroleum products. On the other hand, the provision in Rule 53(3)(a) provides for set off reduction on account of interstate stock-transfers of other manufactured products. The only material change or departure made by Rule 53(3)(b) introduced on 16.2.2012 is that the set off reduction u/r 53(3)(a) is with reference to the purchase price of the relevant inputs, while the set off reduction u/r 53(3)(b) is with reference to the value of the interstate stock-transfers of the manufactured specified petroleum products. Except for that, there is no material change or departure made with the introduction of Rule 53(3)(b) on 16.2.2012. So far as the policy of 'No set off reduction' in respect of capital assets is concerned, same is contained in Rule 53(9), and hence there is no change or departure in that policy so far as Rule 53(3)(b) as introduced on 16.2.2012, is concerned.*
- *As mentioned above, Rule 53(3) provides for set off reduction on account of interstate stock - transfers of manufactured goods. For the purposes of the set off reduction u/r 53(3) (whether under clause (a) or under clause (b) thereof), one has to mandatorily apply the ratio as prescribed in Rule 53(9)(b)(iii) for determining the corresponding purchase-price and the ITC involved therein. It has to be noted that though the set-off reduction for the purpose of Rule 53(3)(b) is to be done with reference to the value of interstate stock-transfer (of manufactured specified petroleum products), the ITC which is so subject to reduction, has first to the determined on the basis of the purchase-prices of the corresponding inputs. From that point of view, recourse to the ratio as per Rule 53(9)(b)(ii) is essential and unavoidable for the purpose of the set-off reduction*

*u/r 53(3)(b). In view of these provisions in Rule 53(3)(b) read with the aforesaid Rule 53(9)(b)(ii), the ITC on the purchases of the 'corresponding' inputs has to be determined on the basis of the prescribed ratio, and therefore the general provisions of Rule 53(9)(a) (which explain what constitutes 'corresponding goods' for the purpose of set off reduction) come into play. The clear implication of these provisions in Rule 53(9)(a) is that the corresponding goods on which set-off is to be reduced would not include consumables, stores and capital assets and parts/components/accessories of capital assets, and that they would include only such goods (like raw materials, packing materials etc) which are physically contained in the stock-transferred goods. Thus, with the conjoint harmonious reading of the provisions in Rule 53(3)(b), Rule 53(9)(b)(ii) and Rule 53(9)(a), there would not be any set off reduction as per Rule 53(3)(b) on the purchases of capital assets. In that view of the matter, the purchases of capital assets are eligible for full set off u/r 52 without any reduction u/r.53(3)(b), even though the provisions in Rule 53(3)(b) themselves do not specifically exclude capital assets for the purpose of set-off reduction, as those in Rule 53(3)(a) do.*

- *It is true that the rule 53(3)(b) itself does not specifically exclude capital assets for the purpose of set-off reduction. However, in this regard, it is humbly submitted that the whole Rule 53, which provides for 'reduction in set-off' has to be harmoniously read in its entirety. The single provision in Rule 53(3)(b) should not be torn out of context to interpret it in isolation, without adverting to other relevant provisions like Rule 53(9). As stated above, Rule 53(9) is a general provision, which applies with full force for the purpose of operation of the special provision contained in Rule 53(3)(b). In view thereof, any interpretation of Rule 53(3)(b) would be absolutely incomplete and erroneous without consideration of Rule 53(9). As mentioned earlier, the provisions in Rule 53(9) were not there in the MVAT Rules on 1.4.2005, when the MVAT Act and MVAT Rules came into force. The said Rule 53(9) was introduced later on 1.11.2008. Obviously, there would be some specific purpose of the Govt. behind it. It is our humble submission that the purpose behind introducing Rule 53(9) was to clarify in no uncertain terms, the Govt.'s policy to restrict the set-off reduction to only such goods like raw materials and packing materials which are physically contained in the stock transferred goods, and not to extend it to consumables, stores and capital assets and parts/components/accessories of capital assets. The implication of the said provision in Rule 53(9) as introduced on 1.11.2008 has been explained as follows in your Trade Circular No. 39T of 2008 dt.15.11.2008.*

  *"Paragraph (a) of sub-rule (9) provides a definition of the expression, 'corresponding goods' as the expression occurs in sub-rule (1), Clause (a) of sub-rule (2) and in sub-rule (3). The sub-rule now provides that the expression, 'corresponding goods' will not include consumable stores, capital assets, part and accessories of capital assets and goods used as fuel. The expression will include the goods which are resold or branch transferred or are used in relation to the manufacture of goods sold or dispatched and which are contained in the goods so sold or dispatched. The packing material used alongwith the goods will also be covered under the expression, 'corresponding goods'".*
  *(Emphasis supplied by us)*

- *The said provisions in Rule 53(9) within themselves alone have no relevance, unless they are applied to the specific purposes of other relevant provisions like sub-rule (3) for which they have been brought into force. According to us, the said provision in Rule 53(9) has an inescapable bearing on the interpretation of rule 53(3)(b), and hence the provision in Rule 53(3)(b) may not please be read and interpreted in isolation without considering the Rule 53(9) and the Government's purpose behind it. The provisions in Rule 53(9) are crystal clear and unambiguous to allow full set off without any reduction on the purchases of capital assets. It is prayed that full set-off without any reduction on purchases of capital assets may not be held to be inadmissible merely on the basis of the language of Rule 53(3)(b) vis-a-vis that of Rule 53(3)(a), without considering the clear and unambiguous provisions of Rule 53(9). In our humble submission, if that is done, that will lead to gross miscarriage of justice, which, we are sure, your honour will not allow to occur.*
- *Besides emphasizing the provisions in Rule 53(9), we also brought to your kind notice the material difference in the nature of raw materials on the one hand and that of capital assets on the other hand, and the different treatment given by the Legislature, Govt. and the Department to capital assets under the Sales Tax Law for the past several decades. Full set-off without any*

*reduction is being given on the purchases of capital assets, since such assets are normally being used in permissible contingencies (like sales) besides in impermissible contingencies (like interstate stock transfers of goods). In this regard, we also invited your kind attention to the fact that the life period of the capital asset purchased by BPCL is 18 years and during this period, it is used, being used and will be used in permissible contingencies as well as impermissible contingencies. The use thereof in permissible contingencies is quite substantial i.e. around 75%, which certainly entitles BPCL for set-off and the same cannot be denied by virtue of erroneous interpretation of Rule 53(3)(b). There are a catena judgments of the Courts on the admissibility of full set-off without reduction on the purchases of capital assets. A few of them have been mentioned in the Determination application.*

- *We also invited your kind attention to the fact that BPCL's major input is crude oil, on which no set-off is admissible as per Rule 54(c). The purchases of other inputs including the capital assets used in the manufacture of the specified petroleum products are much less than the value of the interstate stock-transfers of such specified petroleum products, which was as high as around Rs.15681 crs. in the financial year 2012-13. With the set off reduction of 4% with reference to such high value as per Rule 53(3)(b), the volume of such reduction would invariably exceed the quantum of ITC available on the corresponding purchases of inputs including the capital assets, thereby leaving nothing for being given by way of set off. As a result, no set off would be available on the purchases of capital assets, notwithstanding their having been substantially used for permissible contingencies (like sale). As mentioned in the Determination-application, the use of the particular capital asset in the permissible contingencies is around 75%. If, notwithstanding such substantial use, set off is going to be denied on such purchases of capital asset, on an erroneous interpretation of rule 53(3)(b) made in isolation without adverting to the clear provisions of rule 53(9), it would cause grave injustice to BPCL, which is certainly not intended for contemplated by the Govt. in the relevant statutory provisions discussed above.*
- *We thus prayed before you that the questions posed in the Determination Application may please be determined to the effect that the impugned purchases of capital assets are eligible for full set off without any reduction u/r.53(3)(b). We also made an alternative prayer that if you are inclined to determine otherwise, then such determination may be made prospectively effective, because BPCL genuinely held the belief (on the basis of the Rule 53(9) as also the view followed by the department for the past several decades based on the judicial authorities to allow full set-off on purchases of capital assets) that the purchases of capital assets are eligible for full set-off without any reduction u/r 53(3)(b). It is on this genuine and bonafide belief that BPCL arranged its relevant affairs and filed the returns. Considering these circumstances, the determination, if it happens to the adverse, may be made prospectively effective."*

Yet another written submission of dt.06.12.2013 has been advanced by the applicant, the contents of which are thus -

- *"The applicant BPCL has been manufacturing at the Mahul-refinery, both the specified petroleum products (hereinafter called as 'SPPs') as well as non-specified petroleum products (hereinafter called as 'NSPPs'), and both these categories of products are partly sold in and from Maharashtra, and are partly stock-transferred interstate outside the State of Maharashtra. In the refinery, the production is done at integrated level, and hence it is practically not possible for BPCL to maintain separate record of the purchases of raw-materials, packing materials etc. used in the manufacture of SPPs. On the other hand, the purchases of capital assets, though used for manufacture of both SPPs as well as NSPPs, are identifiable on their being used in the manufacture of SPPs. In these circumstances, the purchases of raw-materials, packing materials etc. used in the manufacture of SPPs have to be ascertained on the basis of the ratio of the manufacture of SPPs in the manufacture of all petroleum products. Such ratio of the manufacture of SPPs works out to 63.82% as shown in Annexure 'A'.*
- *On the basis of this ratio of 63.82% as applied to the total purchases of raw-materials, packing-materials etc, such purchases as used in the manufacture of SPPs work out to Rs.849.57 crs. (Net) with tax amount being Rs.103.89 crs. Thus, the total purchases (including those of capital assets) used in the manufacture of SPPs work out as under, as explained in Annexure 'B'.*

| | Purchases | Tax |
|---|---|---|
| (i) Purchases of raw materials, packing materials etc used in the manufacture of SPPs. | Rs.849.57 crs. | Rs.103.89 crs, |
| (ii) Purchases of capital assets (including the one presently placed for the purpose of determination) used in the manufacture of SPPs. | Rs.403.26 crs. | Rs.36.72 crs. |
| Total purchases used in the manufacture of SPPs | Rs1252.83 crs. | Rs.140.61 crs. |

- *Since aforesaid purchases are used in the manufacture of SPPs and since part of the SPPs so manufactured are stock-transferred interstate outside Maharashtra, the question of reduction of set-off as per Rule 53(3)(b) in respect of such purchases which have been used in the manufacture of such stock-transferred SPPs has arisen. Where the manufactured SPPs are sold, BPCL is entitled to full set-off without any reduction on the corresponding purchases and tax involved. It is only where the manufactured SPPs are stock-transferred interstate that the set off on the corresponding purchases and tax-involved are liable for reduction as per Rule 53(3)(b). In view thereof, for the purpose of the said set-off reduction, the corresponding purchases and tax involved have to be worked out by application of ratio (of value of the interstate stock-transfers of SPPs and the sale-price of the SSPs sold) as per Rule 53(9)(b)(ii) Such ratio works out to 31.17% (interstate stock-transfers of SPPs) : 68.83% (Sale of SPPs) as shown in Annexure 'C'. In other words, the purchases to the extent of 68.83% as are used in the manufacture of SPPs are eligible for full set-off without any reduction as per Rule 53(3)(b). It is only the purchases to the extent of 31.17% as are used in the manufacture of SPPs that are liable for set off reduction as per Rule 53(3)(b).*
- *From the above, it would be clear that the ascertainment of the 'corresponding' purchases and tax-involved on application of the ratio as per Rule 53(9)(b)(ii) for the purpose of set off reduction u/r.53(3)9b) is a must. The 'corresponding' so appearing in Rule 53(9)(b)(ii) for the purpose of set-off reduction u/r 53(3)(b) has to be read and understood in the light of the specific provisions of rule 53(9)(a) which are explicitly designed for the purposes inter alia of Rule 53(3). As per the said Rule 53(9)(a), the 'corresponding goods' would not include capital assets (and would include only such goods which are contained in the goods stock-transferred). Thus, on the basis of the conjoint reading of Rule 53(3)(b), Rule 53(9)(b)(ii) and Rule 53(9)(a), the purchases of capital assets will not constitute 'corresponding purchases' for the purpose of set-off reduction u/r.53(3)(b). The purchases of capital assets as used in the manufacture of SPPs would therefore be eligible for full set-off without any reduction as per Rule 53(3)(b).*
- *On the footing that the purchases of capital assets used in the manufacture of SPPs are eligible for full set-off without any reduction as per Rule 53(3)(b), the set off has been worked out as shown in Annexure 'D". As mentioned in paragraph 3 above, the total purchases of capital assets used in the manufacture of SPPs are Rs.403.26 Cr and tax involved at Rs.36.72 crs. If all these purchases are held as eligible for full set off as per Rule 53(9)(a) without any reduction as per Rule 53(3)(b), then full set off in the context of the aforesaid tax-amount of Rs.36.72 crs would be admissible, as shown in the working in the Annexure 'D'.*
- *On the other hand, if the said purchases of capital assets are held as liable for set-off reduction as per Rule 53(3)(b), then the set off admissible on the said purchases of capital assets would stand reduced to Rs.25.27crs as shown in the set-off working made on that footing and given in Annexure 'E'. This set-off would be admissible only to the extent of sales of the manufactured SPPs.*
- *So far as the particular purchase (dt.15.5.2012) of capital asset placed before you for the purpose of determination is concerned, the purchase price thereof is Rs.1,88,85,085/- in which VAT of Rs.1,55,240/- has been separately collected. In view of the position explained in the earlier paragraphs, if the said purchase is held as eligible for full set-off as per Rule 52 read with Rule 53(9)(a) without any reduction as per Rule 53(3)(b), then BPCL is entitled for full set off of Rs.12,55,240/- on the said purchase. However, if the said purchase is held as liable for set off reduction as per Rule 53(3)(b), then the set off admissible thereon would stand reduced to Rs.8,63,981/- i.e. to the extent (of 68.83%) i.e. of sales of SPPs. In that view of the matter, the submission made by the applicant in para 10 of the Determination-application that he will not get any set off on the purchase of capital asset if held to be liable for set off reduction as per Rule*

*53(3)(b), does not seem to be realistic. That submission seems to have been made on the premise that the capital asset is used fully, and not proportionately in the manufacture of SPPs and hence may be disentitled to any set off. In any case, I feel that it is not the correct perception of the provision and therefore even with the application of Rule 53(3)(b), the set off on the purchase of capital asset would not be fully deniable, but would be reduced so as to be allowable to the extent of the sales of SPPs. In view thereof, the submission made in para 10 of the determination application regarding full denial of set off may please be taken as appropriately modified.*

- *In the light of what is stated above, the questions posed in para-4 of the Determination-application dt.7.6.2013 may please be allowed to be slightly reframed as under to bring out the dispute correctly on the backdrop of the particular facts obtaining in the case:-*
  - *a) Whether such purchases of capital assets are subject to set off reduction u/r 53(3)(b) so as to allow thereon only the proportionate set off with reference to the sales of the manufactured specified petroleum products? or*
  - *b) Whether such purchases of capital assets are eligible for full set-off as per Rule 52 without any reduction u/r 53(3)(b)?"*

## 04. OBSERVATIONS

I have gone through the elaborate arguments in the matter as put on record by the applicant. The issue before me is the eligibility of set off on a transaction of purchase. I proceed with the information, as given by the applicant, that the transaction evidences a purchase of certain machineries. As per the scheme of the MVAT Act,2002, set-off is available subject to certain conditions and restrictions as provided. Rule 52 of the MVAT Rules,2005 pertains to the claim and grant of set off in respect of purchases whereas Rule 53 provides for retention from the amount of set-off available in respect of a purchase. The present proceedings are concerned with the retention provision as appearing in rule 53(3)(b) which reads thus –

*"If the claimant dealer manufactures the goods covered under entries 5, 6, 7, 8, 9 and 10 of Schedule "D" appended to the Act and dispatches the said goods not by reason of sale, outside the State to any place within India to his own place of business, or the place of business of his agent or where the claimant dealer is a commission agent, to the place of business of his principal, then an amount equal to four per cent. of the value of the goods so dispatched shall be reduced from the amount of the set-off otherwise available in respect of the aforesaid manufactured goods."*

The reduction in set-off as per the above rule is applicable when :

1. *The claimant dealer is a manufacturer.*
2. *The goods manufactured are covered by entries 5 [High Speed Diesel Oil], 6 [ATF(Duty paid) other than C-8],7 [ATF(Bonded)], 8 [Aviation Gasoline(Duty paid)], 9 [Aviation Gasoline(Bonded)] and 10 [Any other kind of Motor Spirit] of schedule 'D'.*
3. *The manufactured goods are dispatched not by reason of sale, outside the State to any place within India -*
   - *a. to his own pace of business, or*
   - *b. the place of business of his agent, or*
   - *c. to the place of business of his principal (where the claimant dealer is a commission agent).*

If the above conditions are satisfied, then 4% of the value of the goods so dispatched shall be reduced from the amount of the set-off otherwise available in respect of the aforesaid manufactured goods. ***What it means is that 4% of the value of the goods so***

***dispatched is to be reduced from the total set-off available to the dealer in respect of the aforesaid manufactured goods.*** In the present case, by the applicant's own admission, all the above conditions are satisfied and therefore, the applicability of the provisions of this rule cannot be escaped. This is the inevitable observation which comes from a plain reading of the aforesaid provision. The retention is to be made from the total set-off otherwise available to the applicant in respect of the specified manufactured goods. This set off would include the set off on capital assets too. The retention would be applicable to the total set-off which includes the set-off on capital assets too. Therefore, the set off on capital assets would be subject to retention under sub rule (3)(b) of rule 53.

Now, the applicant has argued at length that the retention, as specifically spelt out in the aforesaid rule, would not be applicable. I have gone through these arguments. I find that the applicant themselves are aware of the position and have in clear words stated so – *"In the aforesaid amended provisions of Rule 53(3) the purchases of capital assets are specifically excluded for the purpose of set off reduction as per clause (a), as was the position obtaining during the period prior to 16.2.2012.* ***However, they are not so specifically excluded for the purpose of set off reduction as per clause (b)"***. Inspite of the same, the applicant is trying to bring home a point that the retention would not be applicable when seen in the light of the rules 53(3)(a) and 53(9). Further, it is also tried to stress that the above provision was introduced as an amendment and the position as available prior to the above amendment helps to appreciate that there would be no retention from the set-off. With regard to this, I have to observe that a determination is in interpretation of a provision as appears on the date of the transaction posed and there is no reason for any *'ifs'* and *'buts'*. Nevertheless I would deal with the above arguments with due respect to the extensive submission made in this regard. Having gone through the submission, I have to observe that the other arguments put forth by the applicant as well as the reliance on case laws are not in interpretation of the available provisions and therefore, I decline to comment on them. Before I proceed to deal with the arguments, I would, at the cost of repetition, reproduce the relevant arguments that I have preferred to deal with –

- *According to us, purchases of such capital assets are not subject to any set off reduction even for the purpose of clause (b). This is so, because the said clause (b) provides for reduction in set off and for the purpose of the set off reduction under Rule 53(3), one has to mandatorily apply the ratio as prescribed in Rule 53(9)(b)(ii) for determining the corresponding purchase price and ITC. It has to be noted that though the set-off reduction for the purpose of clause (b) of Rule 53(3) is to be done with reference to the value of interstate stock-transfers (of manufactured specified petroleum products), the ITC which is so subject to reduction, has first to be determined on the basis of the purchase-prices of the corresponding inputs. From that point of view, recourse to the ratio as per Rule 53(9)(b)(ii) is essential and unavoidable for the purpose of the set off reduction u/r.53(3)(b). In fact, the ratio provided in Rule 53(9)(b)(ii) for the purpose of set off reduction is an inseparable part of Rule 53(3), though the same happens to have been provided separately in sub-rule (9) instead of providing it in sub-rule (3) itself.*

- *As mentioned earlier, Rule 53(3)(b) does not specifically exclude the purchases of capital assets for the purpose of set-off reduction. In our humble opinion, with the existence of Rule 53(9)(a), which specifically excludes certain purchases like those of capital assets for the purpose of set-off reduction, the Govt. may not have felt any need to again make similar provision in Rule 53(3)(b) itself. It has to be noted that when the MVAT Act and MVAT Rules were brought into force on 1-4-2005, at that time the provisions of Rule 53(9) were not in existence. Thus, there were no separate provisions for exclusion of certain purchases for the purpose of set-off reduction. Therefore, provisions in Rule 53(3) itself were made to exclude capital assets and fuel for the purpose of set off reduction. It is subsequently on 1-11-2008 that sub-rule (9) was introduced in Rule 53, and thereby, separate provisions were made to exclude certain purchases such as those of capital assets for the purpose of set off reduction. With such provisions separately introduced on 1-11-2008, there was really no need for the Govt. to specifically exclude the capital assets again in Rule 53(3)(b), when it was later introduced on 16-2-2012.*
- *The material departure while introducing the amendment was that in clause (a) the reduction was with reference to the purchase price of the inputs which in clause (b) the reduction was with regard to the value of the stock transferred goods. Even though in clause (b), there is no specific exclusion of retention not applicable to capital assets (as available in clause a), there is a specific provision in sub-rule 9(a) for no reduction in respect of purchases of capital assets, consumables, stores.*
- *In view thereof, no specific provisions appears to be made in clause b of sub-rule (3) in respect of capital assets.*

The relevant rules 53(3)(a) and 53(9) may be seen thus :

**Rule 53(3)(a)**

Clause (a) of rule 53(3) was renumbered as clause (a) by the notification dt.16.02.2012 by which the clause (b), as reproduced and interpreted earlier, was introduced. The clause (a) reads thus -

*"(3) (a) If the claimant dealer dispatches any taxable goods outside the State, to any place within India, not by reason of sale, to his own place of business or of his agent or where the claimant dealer is a commission agent, to the place of business of his principal, then an amount equal to four per cent. of the purchase price of the corresponding taxable goods (not being goods treated as capital assets or used as fuel and natural gas) shall be deducted from the amount of set-off otherwise available in respect of the said purchases.*

*Provided that, if the taxable goods are dispatched outside the state and the rate of tax specified in the SCHEDULE against the corresponding taxable goods purchased is less than four per cent., then the reduction from set-off under this clause shall be calculated at such lower rate of tax specified in the SCHEDULE against the corresponding goods.*

*Provided further that the deduction provided in this sub-rule shall not apply if the goods dispatched are brought back to the State within six months of the date of dispatch whether after processing or otherwise.*

*Provided also that, the provisions of this clause shall not be applicable in respect of the contingencies specified in clause (b)"*

A perusal of the above rule reveals thus -

1. It provides for retention when taxable goods are dispatched outside the State, to any place within India, not by reason of sale, to own place of business or of agent or where the claimant dealer is a commission agent, to the place of business of his principal.
2. The retention amount is 4% of the purchase price of the corresponding taxable goods.
3. The corresponding taxable goods would not include goods treated as capital

assets or used as fuel and natural gas.

4. The retention so calculated is to be deducted from the amount of set-off otherwise available in respect of the said purchases.

**Rule 53(9)**

Sub-rule (9) was introduced from dt.01.11.2008 by Notification dt.23.10.2008 and reads thus -

*(9)(a) For the purposes of sub-rule (1), sub-rule (1A), clause (a) of sub-rule (2) and sub-rule (3), any reference to the corresponding goods on the purchase of which set-off is claimed, shall be construed in relation to any period starting on or after the 1st April 2005, as a reference to the corresponding goods (not being consumable, stores, or goods treated as capital assets, parts, components and accessories of capital assets) which are resold or are so dispatched outside the State or are used in or relation to the manufacture of goods so sold or dispatched and are contained in the goods so sold, resold or dispatched and the packing material used along with the goods so sold, resold or dispatched. Any reference to the corresponding purchase price, corresponding taxable goods or corresponding purchases of packing material shall be construed accordingly.*

*(b) While reducing set-off under, –*

*(i) sub-rule (2), for the purpose of determining the purchase price of the corresponding taxable goods, where it is not possible to ascertain the purchase price by reference to the books of account, the ratio of the sale price of the taxable goods and tax free goods or where there is no sale price, the value of the taxable goods and tax free goods shall be applied; and*

*(ii) sub-rule (3), the ratio of the value of the goods inclusive of any duty of Excise as it appears in the books of account of the goods dispatched as aforesaid and the sale price of other goods shall be applied for deciding the corresponding purchase price.*

A perusal of the above rule reveals thus –

1. Though the rule was introduced in 2008, it lays down the law for periods starting on or after the 1st April 2005.

2. The basic purpose of the rule is laid down in the initial words itself. It prescribes the parameters in which the word 'corresponding' is to be construed – ***corresponding purchase price, corresponding taxable goods or corresponding purchases of packing material***

3. Consumable, stores, or goods treated as capital assets, parts, components and accessories of capital assets would not be covered under the term 'corresponding goods'.

4. The term 'corresponding goods' will include the goods which are resold or are so dispatched outside the State or are used in or relation to the manufacture of goods so sold or dispatched and are contained in the goods so sold, resold or dispatched and the packing material used along with the goods so sold, resold or dispatched.

5. It specifically mentions that *the meaning as ascribed to the words 'corresponding goods' would be for the purposes of sub-rule (1), sub-rule (1A), clause (a) of sub-rule (2) and sub-rule (3) of rule 53.*

6. The words used by the legislature are very significant. It says *any reference to the corresponding goods in the sub-rules (1), (1A), clause (a) of sub-rule (2) and sub-rule (3)* would be interpreted as per the meaning given in the said sub-rule.

7. Sub-clauses (i) and (ii) of clause (b) of sub-rule (9) are about retention under sub-rule (2) and (3) respectively. Sub-clause (ii) of clause (b) of sub-rule (9) also prescribes a method for calculating the corresponding purchase price.

After seeing both the above rules, I find the following -

i. *The incidence of retention is the same in both clause (a) and (b) of sub-rule (3) and which is goods are dispatched outside the State, to any place within India, not by reason of sale, to own place of business or of agent or where the claimant dealer is a commission agent, to the place of business of his principal.*

ii. *For the purposes of clause (b) of sub-rule (3), the above incidence is in respect of the goods of Schedule D as specified therein. Therefore clause (a) would cover the other taxable goods. Thus clause (b) is a provision specifically carved out for the specified goods.*

iii. *Though incidence remains the same, the clauses of sub-rule (3) differ in terms of the method of calculation of retention as prescribed for both.*

iv. *For the purposes of clause (a) of sub-rule (3), the retention is calculated at 4% of the purchase price of the corresponding taxable goods (not being goods treated as capital assets or used as fuel and natural gas) whereas for clause (b) of sub-rule (3), it is 4% of the value of the goods so dispatched.*

v. *The legislature has by conscious thought determined the method of retention in both the clauses of sub-rule (3). The retention in clause (a) of sub-rule (3) is linked to the purchases of the corresponding taxable goods. The retention under clause (b) of sub-rule (3) is very clear and simple at a % of the value of the goods so transferred.*

vi. *Sub-rule (9) is about the meaning to be attributed to the words 'corresponding goods' when they are used for the purposes of sub-rule (1), sub-rule (1A), clause (a) of sub-rule (2) and sub-rule (3) of rule 53.*

vii. *By virtue of sub-rule (9), for the purposes of clause (a) of sub-rule (3), no retention is applicable on consumable, stores, or goods treated as capital assets, parts, components and accessories of capital assets.*

viii. *Clause (b) of sub-rule (3) does not make any reference to 'corresponding goods' and therefore the meaning of the same and thereby the non-applicability of retention to capital assets cannot be imported into clause (b) of sub-rule (3).*

A perusal of the above prompts me to observe that other than the incidence and the rate of retention, I do not find any similarity in the two clauses (a) and (b) of sub-rule (3). Even without referring to the other rule i.e rule 53(9)(a), I find that the argument to take recourse to the retention as per clause (a) does not hold merit. There is no parity in the method of calculating the retention under both the clauses (a) and (b) of sub-rule (3). And as regards sub-rule (9) then it comes into picture only when the sub-rules for which it has been made applicable make a reference to the words 'corresponding goods'. The clause (b) of sub-rule (3) makes no reference to the words 'corresponding goods'. Therefore, even though the sub-rule (9) says that 'it is for the purposes of the sub-rule (1), sub-rule (1A), clause (a) of sub-rule (2) and sub-rule (3)', it would be too hasty to conclude that the sub-rule (9) applies to clause (b) of sub-rule (3) without appreciating the fact that sub rule (9) becomes applicable only when the sub-rules specified therein make a reference to the words 'corresponding goods'. The whole thrust of the argument of the applicant rests on

the belief that the meaning accorded to 'corresponding goods' under sub-rule (9) would apply to retention as per clause (b) of sub-rule (3) and by virtue thereof, retention would not be made on purchases of capital assets. However, the position is such that since clause (b) of sub-rule (3) of rule 53 does not make any reference to the words 'corresponding goods', the exclusion to goods treated as capital assets, parts, components and accessories of capital assets as provided in sub-rule (9) would not be applicable to the retention as provided in clause (b) of sub-rule (3) of rule 53. The applicant has engaged in much talk about how set off was available on capital assets under the Bombay Sales Tax Act,1959 [BST Act,1959] and citing cases in interpretation of provisions as appearing therein. It has also been argued that the intention of the legislature, though not expressly mentioned in words, should be gathered from the related clauses. I must observe herein that a determination is based on interpretation of a provision as appears in the law and it cannot be left to surmises and conjectures. Once the Legislature has put in place a provision providing a mechanism which expressly provides proportional credit to a class of transactions, it is not permissible for me to read into the statute another such proportional rule, without statutory sanction. Therefore the arguments such as *"with the existence of Rule 53(9)(a), which specifically excludes certain purchases like those of capital assets for the purpose of set-off reduction, the Govt. may not have felt any need to again make similar provision in Rule 53(3)(b) itself"* are very immature.

In view of the very clear and unambiguous provisions as appearing, I refrain from deliberating any further. The conclusion as reached by me before embarking on the discussion on the above rules stands confirmed. The retention as provided in clause (b) of sub-rule (3) of rule 53 would be applicable since the applicant is a manufacturer of goods covered by the entries 5, 6, 7, 8, 9 and 10 of Schedule D which are stock-transferred interstate. As regards the argument about calculation of set-off, I have already observed that the retention on account of rule 53(3)(b) is to be made from the total set off available to the applicant in respect of the manufactured goods as specified in the said rule. The retention is certainly not to be made from the amount of the tax portion of the bill presented for determination which if done is bound to present negative results.

It is seen that the applicant has placed one more argument about there being manufacture of both the petroleum products as specified in rule 53(3)(b) as well as other non-specified petroleum products. This is made in view of the position that the impugned rule 53(3)(b) contains the words *'set-off otherwise available in respect of the aforesaid manufactured goods'*. The words *'aforesaid'* in the impugned rule applies to the goods covered by the entries of schedule 'D'mentioned in the said rule and which are *entry 5 [High Speed Diesel Oil], entry 6 [ATF(Duty paid) other than C-8], entry 7 [ATF(Bonded)], entry 8*

*[Aviation Gasoline(Duty paid)], entry 9 [Aviation Gasoline(Bonded)] and entry 10 [Any other kind of Motor Spirit].* In view of the same, the applicant has placed some ratios which would help arrive at the amount of *'set-off otherwise available in respect of the aforesaid manufactured goods'* from which the retention is to be made. The applicant has queried as to *whether the purchases of capital assets are subject to set off reduction u/r 53(3)(b) so as to allow thereon only the proportionate set off with reference to the sales of the manufactured specified petroleum products.* With this regard, I have to observe that the method of calculation or arriving at the figures would be based on verification of the facts and accounts of the applicant. This would be done during assessment or audit or, as the case may be, any proceeding before the field officers. As far as the applicant is concerned, then it is provided in rule 53(8) that *the claimant dealer shall deduct the amount required to be reduced under this rule from the amount of set-off available in respect of the period in which the contingencies specified in this rule occur and claim only the balance amount as set-off and when the amount so required to be deducted exceeds the said amount of set-off available in respect of that period, he shall pay an amount equal to the excess at the time when he is required to pay the tax in respect of the said period.* It is not for me to decide the method. As per the clear words of rule 53(3)(b), when the specified goods are stock transferred, retention is to be made at 4% of the goods so transferred from the amount of set off available in respect of the specified manufactured goods. I have observed earlier also that the retention is not to be made on the individual purchases but from the aggregate of set off otherwise available to the applicant in respect of the specified manufactured goods. In the present proceedings, my determination would be restricted to the question as to whether any retention from set-off is applicable or not. Accordingly, I have determined that retention under the impugned rule 53(3)(b) would be applicable to the purchases of capital assets too.

05. PROSPECTIVE EFFECT

The applicant has prayed for prospective effect in case it is held that the retention would be applicable to the purchase of capital assets. With regard to this request, I have to observe that the circumstances as available in the present proceedings do not make a case for favourable consideration of the request. To treat the interpretation applicable to other rules as being applicable to the rule under which the available facts fall is an inherently erroneous way to interpret provisions. We have seen above that the provisions were clear and devoid of any ambiguity. Neither was there any mis-guidance of any kind. A request for prospective effect is to be seen in the light of the circumstances surrounding the dispute. In the present case, I have to observe that, in the first place, there was no dispute as the provision was clear and unmistakable and further that, there existed no confusion as to its applicability. The applicant has engaged in arguments as regards how provisions

existing under the repealed BST Act allowed set off on capital assets and also in establishing a non-existent correlation between two independent provisions. Therefore, the request of the applicant is not found worthy of consideration.

06. In the circumstances, I pass an order thus –

## ORDER

**(under section 56(1)(f) of the MVAT Act, 2002 )**

**No.DDQ-11-2013/Adm-6/35/B- 2** **Mumbai, dt.** 16/04/2014

A. The questions posed for determination are answered thus -

*Q.1 Whether such purchases of capital assets are subject to set off reduction u/r 53(3)(b) so as to allow thereon only the proportionate set off with reference to the sales of the manufactured specified petroleum products?*

*A. Yes, the purchases of capital assets are subject to set off reduction u/r 53(3)(b). The retention is to be made from the total set-off otherwise available to the applicant in respect of the specified manufactured goods.*

*Q.2 Whether such purchases of capital assets are eligible for full set-off as per Rule 52 without any reduction u/r 53(3)(b)?*

*In view of reply to question 1 above, this question becomes infructuous.*

B. The request for prospective effect is rejected.

(DR. NITIN KAREER)

COMMISSIONER OF SALES TAX,
MAHARASHTRA STATE, MUMBAI