
(2018) 03 BOM CK 0085

In the Bombay High Court

Case No : WRIT PETITION NO.2217 OF 2015 SALES TAX REFERENCE NO.5, 27 OF 2016

M/S RELIANCE INDUSTRIES LIMITED

APPELLANT

Vs

THE STATE OF MAHARASHTRA

RESPONDENT

Date of Decision : 22-03-2018

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11
Bombay Sales Tax Act, 1959 — Section 41, 52, 52(2), 55, 55(4)
Central Sales Tax Act, 1956 — Section 4(2)
Constitution of India, — Article 154, 166(2), 166(3)

Citation : (2018) 03 BOM CK 0085

Hon'ble Judges : S. C. DHARMADHIKARI , J, B. P. COLABAWALLA, J

Bench : Division Bench

Advocate : N. Venkatraman, Nikita Badheka, Vipin Jain, Ashwin Dave, Rafiq Dada, Vikram Nankani, Prithviraj Choudhary, Abhijeet Singh, Rajan Mishra , Sarthak Gupta, Mihir Prashant Deshmukh, V. A. Sonpal, Dushyant Kumar

Final Decision : Disposed Of

Judgement

B. P. COLABAWALLA J.

1.At the out set, we must mention that all these matters were placed on Board on 15th March, 2018 under the caption ""for directions"" simply because

after the arguments were concluded, the judgment was reserved on 8th February, 2017. Though the judgment was reserved, one of us (B. P.

Colabawalla, J.) was hospitalized and thereafter advised not to resume regular duties, but to take specified cases for some duration. It is only recently

that he has resumed his normal duties. Additionally, after resumption and being part of other Division Benches, on account of heavy workload, the

judgment could not be made ready and pronounced. In these circumstances, on 15th March, 2018, we enquired from the learned advocates appearing

for all the parties, as to whether there were any subsequent developments and/or events occurring post the matter being reserved for judgment, and whether any additional points of law are to be placed by either of them. All of them indicated that there are no changed circumstances that need to be taken into consideration. In addition thereto, all the parties also stated before us that they have no objection to the judgment being pronounced even now and after such a considerable delay.

It is in these circumstances, that we had recorded the consent of all parties by our order dated 15th March, 2018 and directed that the matter be posted for pronouncement of judgment on a later date which shall be notified to all in advance. It is in these circumstances that the judgment has been pronounced today.

2.All these matters have been filed inter alia challenging the judgment and order dated 20th January, 2015 passed by the Maharashtra Sales Tax

Tribunal (for short ""the MSTT"" or ""the Tribunal"") under the Bombay Sales Tax Act, 1959 (for short the ""BST Act""). This impugned order was passed

in Appeal No.113 of 2007 wherein the Tribunal has allowed the Appeal filed by the State Government against the determination order passed by the

Commissioner of Sales Tax under Section 52 of the BST Act (for short ""the DDQ order""). Over and above this, what has also been challenged is the

judgment and order of the MSTT dated 9th September, 2014 read with the Corrigendum dated 25th September, 2014 passed in Miscellaneous

Application No.291 of 2007. In these orders, the MSTT held that the said Appeal filed by the State of Maharashtra is maintainable and also condoned

the delay in filing the Appeal. Since common questions of fact and law arise in all the above matters, they are being disposed of by this common

judgement. For the sake of convenience, we shall refer to the facts as set out in Writ Petition No.2217 of 2015 filed by Reliance Industries Limited.

3.In Writ Petition No.2217 of 2015, the Petitioner is Reliance Industries Limited (for short ""RIL"") which is a public limited company inter alia engaged

in the manufacture of petrochemicals. Respondent No.1 is the State of Maharashtra, through its Secretary, Ministry of Finance. Respondent No.2 is

the MSTT constituted under the BST Act. Respondent No.3 is Bharat Petroleum Corporation Limited (for short ""BPCL"") which is a public sector

undertaking engaged in the business of refining and selling petroleum products

and who is the supplier of Kerosene to RIL in the present dispute.

Respondent No.4 is the Commissioner of Sales Tax functioning and discharging his duties under the provisions of the BST Act.

4.It is the case of RIL that in or around 1992, RIL had established a petrochemical plant in Patalganga for manufacturing Linear Alkyl Benzenes

("LAB"). RIL required N-Paraffin as a raw material for the manufacture of LAB. According to RIL, Kerosene also known as Paraffin, is a mixture

of Hydrocarbons in the range of C-8 to C-18. Out of such mixture, the Hydrocarbons C-8 and C-9 are known as Light Paraffin. Hydrocarbons from

C-10 to C-13 are known as N-Paraffin (which is required by RIL). The range of Hydrocarbons from C-14 to C-18 are known as Heavy Paraffin.

According to RIL, N-Paraffin itself is also Kerosene and is one of the many constituents of Kerosene.

5.According to RIL, N-Paraffin is easily obtained from kerosene by using a molecular sieve. This, according to RIL, is only a physical activity not

involving any chemical reaction. The molecular sieve would absorb the N-Paraffin only and the rest of the Kerosene would simply pass through the

said Sieve. Subsequently, the N-Paraffin is de-absorbed from the molecular Sieve.

6.According to RIL, BPCL is having a refinery at Mahul for many years prior to 1992. One of the products produced by BPCL in the said refinery is

Kerosene. Kerosene is as such sold by BPCL through the Public Distribution System (involving a dealer network) to its final consumers.

7.Be that as it may, an exclusive pipeline of approximately 56 kms was laid connecting the Mahul refinery and Petitioner's factory at Patalganga so as

to ensure continuous and constant to and fro movement of the requisite quantity of Kerosene from BPCL to RIL and from RIL to BPCL,

respectively. It is in these circumstances that RIL entered into an agreement dated 24th August, 1992 with BPCL for procurement of Superior

Kerosene Oil. As this Kerosene was required for manufacturing of LAB as Feed Stock (FS), it was described as KO (LABFS). A copy of this

agreement can be found at Exhibit "C" to the Writ Petition.

8.According to RIL, it was agreed between itself and BPCL that Kerosene would be delivered to RIL. In turn, RIL would consume the suitable

quantity of Kerosene by taking out N- Paraffin required by it and send the balance quantity of Kerosene back to BPCL as a "return stream".

According to RIL, this agreement mandatorily required the Petitioner (by way of "return stream") to return the quantity of Kerosene after extracting the N-Paraffin. According to RIL, this agreement thus provided for supply of Kerosene solely for the purposes of consuming the requisite quantity of kerosene. Thereafter, the balance quantity of Kerosene was to be returned back to BPCL.

9. According to RIL, the "return stream" is a common phrase used in the petroleum and petrochemical industry both within India as also internationally.

A petroleum product would be sent by the refinery to a petrochemical complex. The petrochemical complex would use/consume the required quantity

of item and return the balance petroleum product to the refinery as a "return stream". According to RIL, in the said trade and industry, the "return

stream" is always described by the same name as the "upstream". Some of the important clauses in this agreement read thus:-

KO (LABFS) SUPPLY AGREEMENT AN AGREEMENT made this Twenty fourth day of August, between Bharat Petroleum Corporation Ltd., a

Government of India Enterprise and a Company within the meaning of the Companies Act, 1913, having their Registered office at Bharat Bhavan,

Ballard Estate, Bombay 400038 (hereinafter called the 'Sellers' which expression shall unless it be excluded by or repugnant to the subject or context,

be deemed to include its successors and permitted assigns) of the one part and Reliance Industries Ltd., a Company registered under the Companies

Act 1956, having their Registered office at Maker Chambers IV, 3rd Floor, Nariman Point, Bombay (hereinafter called the 'Buyers' which expression

shall, unless it be excluded by or repugnant to the subject or context, be deemed to include its successors and permitted assigns) of other part.

WHEREAS the Buyers have erected at Patalganga, Raigad District, Maharashtra, a Petrochemical Plant for the manufacture of LAB, and are

desirous of entering into an agreement for the purchase from the Sellers of KO (LABS) in bulk as a feedstock, for the manufacture process of N--

Paraffin at the aforesaid Petrochemical Plant.

AND WHEREAS pipeline (hereinafter called as the said pipeline) had been laid down by Chembur Patalganga Pipelines Ltd (hereinafter called as

CPPL) between Sellers' Refinery at Mahul and the Buyers' Petrochemical Plant at Patalganga.

AND WHEREAS the Buyers have requested for supplies of KO (LABS) to be pumped to their Patalganga Plant through their pipeline.

AND WHEREAS the Buyers hereby represent, confirm and certify that

i.The aforesaid pipeline had been laid down by the said CPPL by following all Statutory provisions and Rules applicable for Such purpose.

ii.The aforesaid pipeline is good, proper and safe for transportation of the product from the Seller's Refinery at Mahul to the Buyer's Plant at

Patalganga, and from the Buyer's plant at Patalganga to the Sellers' Refinery at Mahul.

iii.The Seller's responsibility will cease as soon as the product passes the Refinery fence.

AND WHEREAS the Seller's shall have no responsibility of maintaining and/or operating the said pipeline falling outside the Seller's Refinery fence

for any reason whatsoever and all arrangements for taking delivery of the said KO (LABFS) and return of the same, after consuming the suitable

quantity through the said pipeline, will be done by the Buyers.

AND WHEREAS the title, property and risk in KO (LABFS) in each delivery hereunder shall pass to the Buyers when the said KO (LABFS)

crosses the Seller's Refinery fence at Mahul through the said pipeline.

Any damage, loss or claim arises after the product passes the Seller's Refinery fence will be on Buyer's Account and the Buyer will keep the Sellers

indemnified against any such-- loss, claim or damage.

AND WHEREAS the Buyers will take delivery of KO (LABFS) by the said pipeline from the Sellers' Refinery at Mahul to the Buyers Plant site at

Patalganga through the aforesaid pipeline of CPPL at Buyers cost.

The Buyers will also make arrangements for the delivery of the stream after consuming the suitable quantity of KO (LABFS), (hereinafter called

Return Stream) by the said pipeline from the Buyers' plant at Patalganga to the Seller's' Refinery at Mahul through the aforesaid pipeline at Buyers

Cost.

However, the responsibility of loss, damage and / or claim arising out of return of the product from the Buyers Plant to the Seller's Storage Tank will

be entirely on the Buyer 's Account, and the Buyers shall keep the Sellers indemnified in all respects.

Now therefore in consideration of the promises and the mutual covenants and undertakings hereinafter contained, IT IS HEREBY AGREED BY

AND BETWEEN THE PARTIES HERETO AS FOLLOWS:

1.SCOPE AND SUBJECT MATTER The Sellers undertake to sell and deliver to the Buyers and the Buyers undertake to purchase from the Sellers

and to take delivery of and pay on the terms and subject to the conditions hereinafter specified a quantity of KO (LABS) for the aforesaid processes.

The Buyers undertake to deliver to the Sellers Return Stream after consuming suitable quantity of KO (LABFS) supplied by Sellers, for production of LAB.

This is subject to any terms and conditions which may be imposed by Government of India and Ministry of Petroleum and Natural Gas from time to time.

3. QUANTITY

a.The Sellers undertake to supply KO (LABFS) to meet the Buyers installed production capability of LAB which is currently 100,000 Metric Tonnes per annum.

b.Save as provided in Clause hereof, the nett quantity of KO (LABFS) that the sellers shall be obliged to deliver hereunder during the continuance of

this Agreement shall be at the rate of approximately 91,000 Metric Tonnes for each twelve month period at an even rate to the extent possible,

commencing from the date of first delivery, subject to Clause (C) hereunder.

c.Notwithstanding the foregoing, it is expressly agreed by the parties hereto that the quantity of KO (LABFS) to be supplied by the Sellers shall be

restricted to meet the Buyers actual requirement to be mutually agreed between the Buyers and Sellers for manufacture currently of 100,000 Metric

Tonnes per annum of LAB, in accordance with the Buyers installed capability which is presently 100,000 Metric Tonnes per annum, subject to

licencing requirements as per the applicable law prevalent from time to time and Government of India's instruction in the matter subject to Clause (d)

hereunder.

d.Notwithstanding the foregoing, it is expressly agreed by the parties hereto that the Buyers will submit quarterly statement, duly certified by the

Buyer's Chartered Accountant showing the quantities of N--Paraffin and LAB

manufactured from KO (LABFS) supplied by the Sellers.

4.QUALITY The KO (LABFS) as delivered hereunder by the Sellers to the Buyers shall be a distillate from crude petroleum conforming to the

extent possible to the specification detailed in the Schedule hereto (the Schedule can be found at page of the Writ Petition).

5.PRICE

a.The Buyers agree to buy KO (LABFS) from the Sellers at a price determined by the Sellers and it is understood that this price is subject to changes

from time to time.

Moreover, the price is also subject to instructions from the Ministry of Petroleum and Natural Gas, Government of India.

The price shall include the pumping charges and other operating costs incurred by the Sellers.

b.The price to be determined being exclusive of duties, taxes and other levies as may be imposed from time to time by Central/State/Quasi Govts. and

other authorities, such charges are solely on the account of the Buyers and shall be borne by them in addition. The price as well as the other

duties/levies mentioned above are subject to revision without notice.

The basic price plus levies and duties as prevailing on the date of delivery shall be charged from the Buyers.

7. DELIVERY OF RETURN STREAM

a.The Sellers undertake that they shall accept from the Buyers Return Stream by the said pipeline after consuming suitable quantity of KO(LABS) by

the Buyers as per the terms and conditions contained in this agreement.

b.i.The Return Stream should conform to BIS:1949, Specification for superior kerosene product and should consist only of KO (LABFS).

ii.In the event of Return Stream quality not conforming to the agreed specification, as sampled and tested at the Sellers end as per laid down

procedures, the Sellers reserve the right to charge the Buyers processing cost as incurred by the Sellers to bring the Return Stream on specification

and also the right to suspend or reduce the KO (LABFS) supply as found appropriate by the Sellers.

The reprocessing charge to be made by the Sellers shall be reasonable and will be advised to the Buyers in advance to the extent possible.

9. PAYMENTS

a.The payment terms agreed by the parties hereto will be as stated hereunder.

b.The Buyer shall indicate to the Seller the estimated requirement for each month on or before the last week of the previous month.

The offtake during the month, as far as possible, will be uniformly spread over.

i.The Buyer shall make to the Seller an 'on account' payment for the supplies to be made in the first fortnight of the month (on net basis i.e. after

considering the return stream) on 8th of the month and similarly for the supplies made in the 2nd fortnight of the month payment will be on the 23rd of

the month.The aforesaid 'on account' payment for supplies made by the Seller and received by the Buyer for the fortnight 1st June, to 15th June, will

be made based on the estimated supplied for that fortnight.

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ii. The aforesaid 'on account' payment for subsequent fortnight commencing from 16th June, 1992 will be made based on actual supplies made by

the seller and received by the Buyer (on net basis i.e. after considering the Return Stream) in the previous fortnight and similarly thereafter.

iii.The payment made as stated above in each month will be adjusted to actual value of the net supplies, on the 8th of the following month.

10.PASSING OF PROPERTY AND RISK The property and risk in KO (LABFS) in each delivery hereunder shall pass to the Buyers when the said

KO (LABFS) crosses the Sellers Refinery fence at Mahul.

11.MEASUREMENT AND CERTIFICATION OF QUANTITY

a.The quantity of each delivery supplied hereunder by the Sellers to the Buyers shall be determined by the Sellers Storage Tank dip. The Sellers shall

extend to the Buyers representative all reasonable facilities to enable him to supervise any readings necessary and the calculations from which such

measurements are determined. The quantity of each delivery ascertained in accordance with the foregoing provisions shall be entered in a Certificate

of Quantity which shall be drawn up and signed jointly by the Buyers and the Sellers representatives immediately following the completion of

measurement and such quantity shall be accepted by the Buyers and the Sellers as the invoice quantity which shall be final and binding on both

parties. In the absence of Buyers representative, the Certificate of Quantity shall

be issued by the Sellers representative.

b. In the event of any dispute between the Buyers and the Sellers as to the quantity to be entered in the Certificate of Quantity, the matter shall be submitted and determined by the Arbitrator pursuant to Clause hereof.

12. SAMPLING AND CERTIFICATION OF QUALITY

a. The quality of the KO (LABFS) delivered hereunder shall be certified in a Certificate of Quality which shall be drawn up and signed by the Sellers

and submitted to the Buyers within seven days of delivery of each parcel. The quality to be certified shall be ascertained from samples drawn from

the Sellers Lankage prior to each delivery. The sample shall be drawn in accordance with the standard practice of the Sellers. The Sellers shall extend

to the Buyers representatives all reasonable facilities for being present and for witnessing the drawing of the said samples. The samples thus drawn

shall be composited and divided into three sets and sealed. One such set shall be handed to the Buyers or their representatives and two shall be

retained by the Sellers—one for their own use and one to be retained for the use of the Arbitrator in the event of any dispute.

b. Should the Buyers dispute the accuracy of the Sellers Certificate of Quality in respect of any delivery hereunder, they shall so notify the Sellers in

writing not later than seven days after the receipt of the said Certificate of Quality. Should the parties be unable to resolve such dispute, the matter

shall be submitted to and determined by the Arbitrator pursuant to Clause hereof.

c. The quality of the Return Stream received hereunder shall be certified in a Certificate of Quality which shall be drawn and signed by the Sellers and

submitted to the Buyers within seven days of receipt of each parcel. The quality to be certified shall be ascertained from the samples drawn from the

Sellers tankage. The sample shall be drawn in accordance with the standard practice of the Sellers and shall extend to the Buyers representative all

reasonable facilities for being present and for witnessing the drawing of the said samples. The sample thus drawn shall be composited and divided

into sets and sealed. One such set will be handed to the Buyers or their representatives and two shall be retained by the Sellers—one for their own

use and one to be retained by the Sellers for the use of Arbitrator in the event of any dispute.

d. Should the Buyers dispute the quality of Return Stream as ascertained by the

Sellers in respect of any delivery hereunder, they shall so notify the

Sellers in writing not later than days after the receipt of the said Certificate of Quality. Should the party be unable to resolve such dispute, the matter

shall be submitted to and determined by the Arbitrator pursuant to Clause hereof.

14.FORCE MAJEURE CLAUSE

a.....

b.....

c. The Buyers shall be free to purchase from other suppliers any deficiencies hereunder caused by the operation of this Clause. The Sellers will,

however, try to seek product assistance from other companies to the extent feasible to ensure meeting the full requirements of Buyers.

17. ASSIGNMENT This Agreement shall not be assigned or transferred by either party without the written consent of the other party, which shall not

however be unreasonably withheld.

10. In the meanwhile, on 21st April, 1992, BPCL filed a determination application under Section 52 of the BST Act before the Commissioner of

Sales Tax for determining three questions which were as follows:-

(i) Whether the sale of KO (LABFS) by BPCL to RIL (sale invoice No.000900 dated 25 th April, 1992) is liable to tax?

(ii) Whether the return stream i.e. return of kerosene by the RIL to BPCL (sales return credit note No.147857 dated May 1, 1992) would be legally

allowable as sales returns or whether that return will amount to purchase of kerosene by BPCL from RIL?

(iii) Whether subsequent sale of kerosene effected by BPCL (sale invoice No.357494 dated May 21, 1992) out of return stream is liable to tax?

11.To answer these questions, the Commissioner, Vide his letter dated 15th May, 1993, asked BPCL for details regarding the manufacturing process

of ""Kerosene Simplicitor"", Kerosene intended for the manufacture of LAB and a write up indicating the distinguishing features of Kerosene simplicitor

and Kerosene intended for manufacture of LAB. Vide its letter dated 28th June, 1993, BPCL replied to the aforesaid queries of the Commissioner. In

this letter, BPCL confirmed the manufacturing process of Kerosene oil intended for manufacture of LAB and further stated that Kerosene used for

the manufacture of LAB and Kerosene used for other purposes are meeting the

same standards, namely BIS:1459 of 1974 as amended and there are no real distinguishing features between the two. Thereafter, vide a further letter dated 8th October, 1993, the Commissioner asked for certain clarifications and inter alia queried as to why the product despatched to RIL was described as KO (LABFS). Further query put up to BPCL was that if what was returned by the purchaser was Kerosene, then, what was supplied by BPCL could not be Kerosene. The Commissioner further enquired about the process of manufacture of N-Paraffin, manner of use etc. in the form of a Written Statement from RIL and also enquired why BPCL insisted for returning the unconsumed portion. Further query put by the Commissioner, and which to our mind was quite pertinent, was whether the product returned by RIL to BPCL could be used for the manufacture/extraction of N-Paraffin. These queries were answered by BPCL by its letter dated 2nd December, 1993.

12. It is thereafter the case of RIL that vide his letter dated 28th January, 1994, the Commissioner suo motu wrote to the department of Chemical

Technology of the University of Bombay and requested for its opinion as to whether the feed stock supplied by BPCL to RIL and the returned

quantity by RIL to BPCL can be considered as the one and the same product by character or these products differ from each other. In reply to the

aforsaid letter of the Commissioner, Mr. Manmohan Sharma, a Professor in the department of Chemical Technology, University of Mumbai, vide his

letter dated 11th May, 1994, communicated his opinion to the Commissioner. In this letter, Mr. Sharma stated that it was a standard practice for the

feed stock to go from the refinery to a petrochemical plant and to receive the return stream. The feed stock under reference would be denuded with

respect to only N- Paraffin. However, the return stream would qualify as per the established practice as a blendable stock for Kerosene.

13. Vide another letter dated 17th December, 1994, one Professor K. K. Tiwari of the University Department of Chemical Technology (UDCT),

Bombay expressed his opinion to the Assistant Commissioner of Sales Tax (L.M.) about the classification of Kerosene used as feed stock for

production of LAB and the returned Kerosene. Mr. K. K. Tiwari opined that it was clear from the specification of Superior Kerosene that both

Kerosene supplied by BPCL for extraction of N-Paraffins (and which was used for

manufacture of LAB) and the return stream Kerosene sent back to BPCL (after the said extraction) met the specification of Superior Kerosene as per IS 1448 (196) and BIS 1459 of 1974. He further opined that though the N-Paraffin content of the return Kerosene would be lower than the Kerosene originally supplied by BPCL, the IS 1448 and 1459 standards do not specify the compositions of Aliphatics and Aromatics and hence as per IS specifications, the feed stock Kerosene and the return Kerosene may both be treated as a Superior Kerosene. We must mention here that heavy reliance has been placed by RIL as well as BPCL on both these opinions. Thereafter, several other queries were raised by the Commissioner to BPCL vide its letters dated 20th January, 1995 and 9th March, 1995. These were replied to by BPCL vide its letters dated 20th February, 1995 and 20th April, 1995 respectively.

14. Be that as it may, after all the aforesaid queries, the learned Commissioner of Sales Tax decided the three questions raised in BPCL's application dated 21st April, 1992 (as reproduced earlier) by passing a DDQ order dated 14th March, 1996. As far as question Nos.1 and 3 were concerned, the learned Commissioner came to the conclusion that the Kerosene KO (LABFS) sold by BPCL to RIL was nothing but Kerosene falling under Entry 26 in Part I of Schedule C of the BST Act read with the Notification Entry No.160 issued under Section 41 of the said Act. Since the transaction put for determination was dated 25th April, 1992, it would be covered by said Notification. As far as Question No.2 is concerned, namely, "whether the return of Kerosene as described in the credit note is a purchase in law or it is good returned", the Commissioner in paragraph 7 held as under:-

7. The second question posed is whether the return of kerosene is described in the credit note as a purchase in law or it is good returned. The term

'goods returned' is not defined in the Act or Rules and hence, it is to be understood as per a common parlance. Normally, goods returned would mean

goods returned are in the same form in which they were sold and without doing any thing to them which amounts or results in change of basic

characteristic and end use. The goods returned would mean goods are returned by the purchaser in the same form in which they were purchased. If

this test is applied to return stream it would not fit within the meaning of goods returned. The applicant has admitted in his letter dated 2.12.93 that one

of the components of N-Paraffin has been extracted by M/s. Reliance Industries Ltd. in their plant and balance portion is returned to the applicant.

They have also submitted that the said returned stream does not have any further potential for manufacture of N-Paraffin. From this, it is very clear

that kerosene is not returned in the same form in which it was sold.

The goods sold were capable of being used in manufacture of Linear Alkyl Benzene but returned stream is not capable of being used for that purpose.

As such, I am of the view that returned stream is not in the same form in which goods SKO was sold. The unit price of sale and unit price of return is

the same. But this is not the deciding factor as to whether it is ""goods return"". The condition of the agreement is also not a very relevant factor to

decide the issue. It only lays down two conditions that (i) return stream should conform to BIS 1459 and (ii) refund made to buyer on the return

stream will be related to the original sale price. These two conditions are no doubt fulfilled, but they have no relevance in stream as 'goods return'. The

return stream conforms to BIS 1459 and hence, it will not go outside the meaning of kerosene but it is certainly not in the form in which it was sold.

For the purpose of kerosene it would be treated as kerosene but it has no potentiality to be used in the manufacture of N-Paraffin which SKO

(LABFS) has, I am, therefore, of the view that return stream is not a goods return of N-Paraffin which SKO (LABFS) has, I am, therefore, of the

view that return stream is not a goods return but these are a purchases of the applicant.

15. What can be seen from this DDQ order is that the Commissioner took the view that since the Kerosene supplied to RIL by BPCL was different

from the Kerosene returned back to BPCL by RIL, it could not be termed as a ""goods return"". The Commissioner held that the Kerosene supplied by

BPCL was not certainly returned in the same form in which it was sold. He held that for the purpose of Kerosene it could be treated as Kerosene but

it certainly had no potentiality to be used for the manufacture of N-Paraffin as the same was extracted by RIL. In other words, the Kerosene returned

by RIL to BPCL could not be again sent by BPCL to another Petrochemical company for extraction of N- Paraffin as the same was already

extracted by RIL. It is, in these circumstances that the Commissioner took the view that the ""return stream"" was not ""goods returned"" but was a

purchase by BPCL from RIL.

16. Being aggrieved by this DDQ order, BPCL challenged the same before the MSTT. This Appeal was rejected by the MSTT vide its order dated

21st April, 2001. However, Since RIL was not a party to the said Appeal and its rights were likely to be affected, RIL thereafter filed a rectification

application before the MSTT urging that RIL was directly affected by the aforesaid decision and therefore they should have been given notice under

Rule 62 of the Bombay Sales Tax Rules, 1959. This contention of RIL was accepted by the MSTT by its order dated 16th April, 2002 and the earlier

order passed on 21st April, 2001 was therefore recalled.

17. Being aggrieved by the above order dated 16th April, 2002 passed by the MSTT, the State of Maharashtra approached this Court by filing Writ

Petition No.2599 of 2002. BPCL also filed a Writ Petition being Writ Petition No.3198 of 2002. This Court, by its common order dated 18th February,

2003 set aside the order of the MSTT dated 21st April, 2001 as well as the order dated 16th April, 2002 and restored the matter back to the file of the

Commissioner of Sales Tax only to decide Question No.2 afresh after hearing both, BPCL as well as RIL and which question was set out in

paragraph 6 of the said order. The only question that was to be decided by the Commissioner of Sales Tax was as follows:-

2. Whether the return stream i.e. return of kerosene by RIL to BPCL (sale return credit note No.147857 dated May 1, 1992) would be legally

allowable as sales returns or whether that return will amount to purchase of kerosene by BPCL from RIL?

18. As far as Question Nos.1 and 3 were concerned, they had attained finality and were confirmed by this Court vide its order dated 18th February,

2003. For the purpose of determination of this Question No.2, the matter went back to the Commissioner of Sales Tax. After hearing the respective

parties, the Commissioner of Sales Tax proceeded to pass a fresh DDQ order dated 16th October, 2004, wherein he held that the return stream of

Kerosene by RIL to BPCL amounted to purchase of Kerosene by BPCL from RIL. In other words, Question No.2 as set out above was answered in

favour of the revenue.

19. This order dated 16th October, 2004 was challenged by RIL by filing an Appeal before the MSTT on the ground that sufficient opportunity was not

given to RIL of being heard as well as to adduce evidence as directed by this Court in its order dated 18th February, 2003. This submission of RIL

was accepted by the MSTT vide its order dated 12th August, 2005 and the matter was again remanded back to the Commissioner of Sales Tax for

passing a fresh order after giving an opportunity of being heard to RIL.

20. Thereafter, a full hearing was given to RIL as well as BPCL. After hearing all parties, and after perusing the evidence and submissions, the

Commissioner of Sales Tax, vide his order dated 11th September, 2006 inter alia held that the return stream, namely, the Kerosene returned by RIL to

BPCL (after extraction of N-Paraffin) was a "sales return" and not a purchase of Kerosene by BPCL from RIL. This of course was contrary to both

the earlier DDQ orders.

21. Being aggrieved by this DDQ order dated 11th September, 2006, the State of Maharashtra filed an Appeal before the MSTT. Along with this

Appeal, an application for condonation of delay was also filed. When this Appeal first came up before the MSTT, both BPCL and RIL contended

before the Tribunal that since the DDQ order was passed by the Commissioner of Sales Tax and who is highest executive authority of the State

Government for the purpose of sales tax, it was not permissible for the State to challenge the order of the Commissioner of Sales Tax. This submission

of BPCL as well as RIL was accepted by the MSTT and the Appeal of the State was rejected as being not maintainable.

22. Being aggrieved thereby, the State of Maharashtra approached this Court by filing Writ Petition No. 4098 of 2009. A division bench of this Court,

speaking through Dr. D. Y. Chandrachud J (as he then was), by its order dated 20th April, 2010, set aside the order of the MSTT inter alia holding

that the Commissioner of Sales Tax was acting in his quasi judicial capacity and not as a representative or agent of the Government and hence it was

permissible for the State to file an Appeal before the MSTT under Section 55 of the BST Act. On this basis, the matter was once again remanded

back to the MSTT for a decision on merits of the case. This Court, however, observed that since the Tribunal had dismissed the Appeal only on the

ground of maintainability and had not decided any other questions, including the question of limitation, it would not be either appropriate or proper to

express any view on the questions that would arise before the Tribunal including

the question of limitation. All these questions were left open to be urged before the MSTT. This order of this Court was challenged before the Supreme Court which rejected the SLP vide its order dated 17th January, 2013.

23. After the matter was remanded back to the MSTT, it was taken up firstly for deciding the question of limitation as well as the other objections. The

MSTT by its order dated 9th September, 2014 read with the Corrigendum thereto dated 25th September, 2014 condoned the delay in filing the Appeal

and also rejected the other preliminary objections of RIL.

24. Being aggrieved by this, RIL challenged the same before this Court by filing Writ Petition (L) No.2855 of 2014. This Writ Petition was disposed of

with a direction that since the Appeal was still pending before the MSTT, the matter be heard on merits by the Tribunal and if the final orders in the

Appeal were in any way adverse to RIL, then, whilst challenging the same, RIL could raise all contentions and grounds including those set out in Writ

Petition (L) No.2855 of 2014. In other words, they could also challenge the order of the MSTT whereby the delay was condoned and other

preliminary objections of RIL were rejected.

25. Thereafter, the MSTT heard the Appeal on merits. By the impugned order dated 20th January, 2015, the Tribunal allowed the Appeal filed by the

State of Maharashtra against DDQ order dated 11th September, 2006 holding that the transaction of the return stream of Kerosene by RIL to BPCL

tantamounted to purchase of Kerosene by BPCL from RIL and it was not a "sales return". The Tribunal further dismissed the Petitioner's written

application to hear the prospective effect separately. In other words, it was the contention of RIL that under Section 52 (2) prospective effect should

be given to the judgement of the MSTT and it should not affect the liability of any person in respect of any sale or purchase effected prior thereto. It is

the case of RIL as well as BPCL that the MSTT rejected the plea of prospective effect being given to the judgment of the Tribunal, without assigning

any reason or without hearing RIL or BPCL. It is in these circumstances that the present matters are before us.

26. It is on the basis of the aforesaid facts and pleadings that the learned counsels have addressed us. Mr. Venkatraman, the learned Senior counsel

appeared on behalf of RIL and Mr. Rafiq Dada, the learned Senior counsel

appeared on behalf of BPCL. As far as the Revenue is concerned, the same was represented by Mr. Sonpal (Special Counsel) for Respondent Nos.1 and 4 in the Writ Petitions and for all the Respondents in the Sales Tax

References. The contentions in a nutshell that were canvassed before us were as follows:-

(i)the MSTT grossly erred in condoning the delay and entertaining the Appeal filed by the Government of Maharashtra as there was absolutely no

justification for condoning the delay and neither any explanation was given by the State of Maharashtra for the inordinate delay in filing the Appeal;

(ii)that in any event, RIL as well as BPCL have questioned the authority of the officer on special duty (OSD) to sign the Appeal memorandum as well

as file the Appeal before the MSTT on behalf of the Government of Maharashtra. An ancillary question raised to this contention was also whether the

Appeal was maintainable when the Commissioner of Sales Tax (and whose order was challenged) was not a party to the Appeal;

(iii)the supply of Kerosene namely KO (LABFS) under the Agreement dated 24th August, 1992 from BPCL to RIL was itself not a sale in the first

place, and therefore, there was no question of there being any question of a ""sales return"" coming into a picture. We must mention here that this

argument has been canvassed only by Mr. Venkatraman on behalf of RIL. This is not an argument, and in our view correctly so, advanced by Mr.

Dada, the learned Senior counsel appearing on behalf of BPCL;

(iv)without prejudice to the aforesaid argument, it is contended that the Kerosene returned by RIL to BPCL after extraction of N-Paraffin (the ""return

stream"") is only a ""sales return"" as contemplated under the provisions of the BST Act and the Rules framed thereunder and not a sale by RIL to

BPCL; and

(v)without prejudice to the aforesaid argument, it is contended that in any event the Tribunal grossly erred in not considering to give prospective effect

to its order dated 20th January, 2015 as contemplated under Section 52 (2) of the BST Act.

These are the five contentions that were canvassed before us and which we shall advert to in detail hereinafter. Contention (i): Condonation Of

Delay.

27.Mr. Venkatraman and Mr. Dada both the learned Senior counsels submitted

before us that the MSTT had grossly erred in condoning the delay in entertaining the Appeal filed by the State of Maharashtra. They submitted that the Appeal against the DDQ order dated 11th September, 2006 was filed by the Government with a delay of 11 months and 15 days calculated from the date of the DDQ order. This, according to the learned counsel, was also evident from the order of the Tribunal dated 9th September, 2014 wherein the said fact was duly recorded in paragraph 24 thereof. According to the learned counsel, there was absolutely no explanation given in the application for condonation of delay that would have justified the Tribunal to condone the delay of 11 months and 15 days. They submitted that on this ground alone the order of the MSTT dated 9th September, 2014 and the subsequent order dated 20th January, 2015 ought to be set aside.

28. On the other hand, Mr. Sonpal, the learned counsel appearing for the State, submitted that the DDQ order passed by the Commissioner of Sales Tax under Section 52 of the BST Act is not required to be communicated to the Government of Maharashtra. Section 55 (4) of the BST Act provides for a period of limitation of 60 days from the date of the order appealed against. In the facts of the present case, the DDQ order passed under Section 52 was admittedly never communicated to the State Government, and therefore, in fact there was no delay in filing the Appeal. Without prejudice to the aforesaid argument, Mr. Sonpal submitted that considering that the DDQ order passed by the Commissioner of Sales Tax under Section 52 was highly prejudicial to the State, once this order came to the notice of the Government, it took the decision to prefer an Appeal considering the peculiar facts and circumstances of the present case. He, therefore, submitted that even if the period of limitation were to apply, the State considered the facts and circumstances of the case and then decided to prefer an Appeal. This would mean that if at all there was a delay, it would be of approximately 9 months and 15 days (excluding the period of 60 days). He submitted that whether or not to condone the delay in filing the Appeal, is purely a discretionary jurisdiction. Unless it is shown that the discretion exercised is wholly perverse or contrary to all canons of legal jurisprudence, the same ought not to be interfered by this Court either under its writ jurisdiction or under its reference jurisdiction, was the submission. Mr. Sonpal took us through this order and submitted that there is nothing in the order that can even

be remotely termed as perverse for this Court to interfere with the same. In these circumstances, Mr. Sonpal submitted that there was absolutely nothing wrong in the order dated 9th September, 2014 read with Corrigendum dated 25th September, 2014 and the same ought to be upheld by this Court.

29. We have heard the learned counsel for the parties on this issue and have carefully gone through the order dated 9th September, 2014. What is

important to note is that even before us it was submitted by the learned counsel appearing for RIL as well as BPCL that this is the first time that the

Government of Maharashtra has decided to file an Appeal from a DDQ order passed by the Commissioner of Sales Tax. This fact itself would

indicate that this is a very peculiar situation. It is also not in dispute before us that the DDQ order was never communicated by the Commissioner of

Sales Tax to the Government of Maharashtra. In fact, in law there is no requirement for the Commissioner to do so. We do not think that the findings

of the MSTT in paragraph 24 of the order dated 9th September, 2014 suffers from any perversity or patent illegality that would entitle us to interfere

with the same. As correctly held by the MSTT, the existence of sufficient cause would depend upon the facts of each case and no hard and fast rule

can be applied in deciding the application for condonation of delay. Judicial discretion has to be exercised on the facts of each individual case which

may differ drastically from case to case. The MSTT held that in the facts of the present case, the DDQ order passed under Section 52 of the BST

Act, was not required to be communicated to the Government. This being the case, the running of time against the Government did not arise in the

present situation. In any event, it held that the delay for presenting the present Appeal was reasonable in the facts and circumstances of the present

case. It, therefore, went on to hold that they were inclined to exercise their discretion to condone the delay. On going through this order, we are in

entire agreement with the MSTT. As mentioned earlier, the facts of this case clearly show that it is a peculiar situation where the order passed under

Section 52 was never communicated to the Government of Maharashtra. It is only when they came to know of this order that they decided to file the

Appeal before the MSTT. Though it is true that no specific date is mentioned as to when this order came to the knowledge of the Government, that by

itself cannot be a ground for holding that they were not entitled to condonation of delay or that the findings given by the MSTT in its order dated 9th

September, 2014 either suffer from perversity or any patent illegality. If one takes into consideration the exclusion of the period of 60 days, then, there

was only a delay of 9 and months in filing the Appeal. Considering that the facts of this case were peculiar and which has not only been recorded in

the order but also admitted by RIL and BPCL, we do not think that the discretion exercised by the MSTT in condoning the delay was unjustified. We,

therefore, have no hesitation in rejecting this argument on behalf of RIL and BPCL and hold that the MSTT correctly exercised its discretion and

condoned the delay in filing the appeal.

Contention (ii):- Competency of the officer on special duty (OSD) to file an appeal on behalf of the State of Maharashtra.

30.Mr. Venkatraman as well as Mr. Dada both submitted that the Appeal also ought to have been dismissed on this ground as the OSD of the Finance

Department was not authorized to file the Appeal on behalf of the State of Maharashtra. They submitted that despite calling upon the State to produce

by way of a Resolution/order authorizing the said OSD in filing the Appeal, the same was not done. It was submitted that it was not made clear as to

how the Principal Finance Secretary had acquired the authority to authorize the OSD to sign the appeal memo. This being the case, both the learned

counsel submitted that the appeal itself was incompetent and the MSTT had gone completely wrong in holding that the appeal signed and filed by the

OSD was entertainable by the MSTT.

31.On the other hand, Mr. Sonpal, the learned counsel for the State, submitted that the executive power of the State is vested in the Governor and is

exercised by him either directly or through the officers subordinate to him. He submitted that the Governor of Maharashtra had made Rules of

Business in exercise of the powers conferred under clauses (2) and (3) of Article 166 of the Constitution of India. He submitted that the Finance

Department is transacting the business of the Government pertaining to Finance. The Secretary of the Finance Department, being the official head of

the Finance Department, was executing the decision of Government to prefer an appeal. He, in turn, had given a letter of authority to Shri Shashank

Mathane, the OSD to prepare and file the appeal which includes the signing of

the memorandum of appeal. He brought to our attention the said authority letter which states that the Government of Maharashtra had taken a decision to prefer an appeal against the DDQ order dated 11th September, 2006 passed in the case of M/s Bharat Petroleum Corporation Ltd. In this respect, Shri Shashank D. Mathane, officer on Special Duty, Finance Department, Government of Maharashtra was authorized to prepare and file the appeal memo before the MSTT. This authority letter is signed by Mr. Subodh Kumar, Principal Secretary (Finance), Government of Maharashtra. Looking to all this material, Mr. Sonpal submitted that there was absolutely no merit in the aforesaid contention and the appeal filed by the State before the MSTT and which was signed by the said Mr. Shashank Mathane (OSD), was competent and entertainable by the MSTT.

32. We have heard the respective counsel on this issue. Firstly, at the outset, we must state that though a feeble ground was raised that the appeal is not maintainable because the Commissioner of Sales Tax was not joined as a party, we find this objection to be wholly unmeritorious. The Commissioner of Sales Tax, while determining the DDQ application under the provisions of the BST Act, is a quasi judicial authority and is not a representative of the Government. The Commissioner, being a quasi judicial authority, speaks through his DDQ order passed under Section 52 of the BST Act. This being the case, he is neither a necessary nor a proper party to the appeal. His order is only under scrutiny and examination of the MSTT and beyond that the Commissioner is not required to and nor can he state anything more than what has already been stated by him in his DDQ order. We, therefore, find that the MSTT correctly held that the Commissioner of Sales Tax who passed the DDQ order and which was impugned before the MSTT, was neither a necessary nor a proper party to the appeal.

Having said this, we shall now turn our attention to the competency of the appeal on the ground that the same could not have been filed by the officer on special duty (OSD) on behalf of the State of Maharashtra. The MSTT itself has recorded in the order dated 9th September, 2014 that the Rules of Business have been produced on record which would show that the Secretary of the Finance Department is the head of the said department. He is authorized to sign the order of the Government. The decision of the Government to prefer an appeal is informed by the Principal Secretary of the

Finance Department vide his letter of authority and to which we have referred to earlier. The said communication is an authentication of the fact that the Government had decided to prefer an appeal against the DDQ order dated 11th September, 2006. This authority letter and which has been reproduced in paragraph 14 of the order dated 9th September, 2014, clearly states that Shri Shashank Mathane, officer on Special Duty, Finance Department, Government of Maharashtra is authorized to prepare and file the appeal memo before the MSTT. This being the case, we do not find that the MSTT was at all wrong when it came to the conclusion that it was competent to entertain the appeal filed by the State of Maharashtra through its Principal Secretary (Finance) through Shri Shashank D. Mathane, officer on Special Duty, Finance Department, Government of Maharashtra. We must also note that Article 154 of the Constitution of India clearly stipulates that the executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. When one reads Article 154 with the Rules of Business made by the Governor of Maharashtra along with the decision of the Government of Maharashtra to prefer the Appeal, we are left with no doubt that the MSTT was fully justified in entertaining the Appeal filed by the State of Maharashtra. In any event, on going through the order passed by the MSTT dated 9th September, 2014 on this issue, we do not think that the same suffers from any perversity or patent illegality that would entitle us to interfere with the same either in our writ jurisdiction or reference jurisdiction. This being the case, we do not find any merit in this contention also and hold that the appeal filed by the State of Maharashtra through the Principal Secretary, Finance Department and which was signed by Shri Shashank D. Mathane (OSD) was competent and correctly entertainable by the MSTT. Contention (iii):- The supply of Superior Kerosene [KO (LABFS)] by BPCL to RIL under the Agreement dated 24th August, 1992 itself was not a sale, and therefore, there was no question of there being a "sales return

34.As mentioned earlier, this argument was only canvassed by Mr. Venkatraman on behalf of RIL. Mr. Venkatraman submitted that when the first DDQ application was filed on 21st April, 1992 by BPCL, RIL was not a party to the said proceeding. This is an admitted fact. He, therefore,

submitted that RIL cannot be precluded from contending that the supply of Kerosene by BPCL to RIL, itself was not a sale. In this regard he brought to our attention several different entries of Schedule-C of the Bombay Sales Tax Act, 1959 (Entries 26, 6, 56, 160). Relying upon these entries, Mr. Venkatraman submitted that all these entries would indicate that the sale of Kerosene, whether for the purpose other than for household purpose or for public distribution remained completely exempted from tax till 1st October, 1995. After this date, sale of Kerosene under the public distribution system continued to remain exempted whereas the sale of Kerosene for other purposes became taxable with effect from 1st October, 1995. The reason why Mr. Venkatraman placed reliance on this was that when BPCL filed its DDQ application dated 21st April, 1992, the sale of Kerosene, whether through PDS or non-PDS, was exempted from sale tax. This being the case, Mr. Venkatraman submitted there was no occasion or reason for BPCL to contend that the supply of kerosene from BPCL to RIL was not a sale. Further, as there was no tax liability on BPCL under the DDQ order, BPCL did not have any reason to challenge the same on the ground that the supply of kerosene from BPCL to RIL was a sale. Mr. Venkatraman submitted that RIL was not a party to these proceedings and they came into the picture for the first time only when they filed a rectification application on 26th July, 2001 to implead themselves in the matter. He submitted that RIL has never conceded that the supply of Kerosene by BPCL to RIL is a sale. According to Mr. Venkatraman, the transaction is not a contract of sale but is merely a contract of bailment. He submitted that the MSTT had completely gone wrong in not deciding this issue at all. He submitted that the question whether the supply of Kerosene by BPCL to RIL was in fact a sale or not remained an active issue for consideration, and therefore, RIL was entitled to seek a decision on this issue before us.

35. On the other hand, Mr. Sonpal submitted that this argument canvassed by Mr. Venkatraman cannot be entertained by us at all. In this regard, he brought to our attention the order passed by this Court on 18th February, 2003 which set aside the order of the MSTT dated 21st April, 2001 as well as the order dated 16th April, 2002 and restored the matter back to the file of the Commissioner of Sales Tax only to decide Question No.2 afresh. As

far as Question Nos.1 and 3 are concerned, Mr. Sonpal submitted that the same had attained finality and there was no question of allowing Mr.

Venkatraman to now canvass that the first leg of the transaction (namely the supply of Kerosene by BPCL to RIL), was not a sale but was only a

contract of bailment. Mr. Sonpal further submitted that this contention cannot be allowed to be raised by RIL in view of the fact that BPCL itself has

treated the first leg of this transaction as a sale, and therefore, Question No.2 arose as to whether the return of Kerosene by the RIL to BPCL would

amount to a "sales return" or whether it would be a sale by RIL to BPCL. He submitted that in fact if the first leg of this transaction was not a sale of

Kerosene by BPCL to RIL, there would have been no question of framing Question No.2 at all in the DDQ application filed by BPCL in April, 1992.

It was on this ground alone that Mr. Sonpal submitted that this argument ought not to be entertained.

36. Without prejudice to the aforesaid argument, Mr. Sonpal submitted that in any event, reading the agreement dated 24th August, 1992 as a whole, it

was abundantly clear that the first leg of the transaction, namely supply of Kerosene by BPCL to RIL was clearly a sale and not contract of bailment,

as was sought to be contended by Mr. Venkatraman. On all these counts, he submitted that there was no merit in the arguments canvassed by Mr.

Venkatraman and the same ought not to be entertained by this Court or in any event answered in favour of the Revenue.

37. We find considerable force in the arguments canvassed by Mr. Sonpal on this issue. When the first DDQ order was passed by the Commissioner

of Sales Tax dated 14th March, 1996, Question Nos.1 and 3 were answered in favour of BPCL, namely that there was no liability of sales tax on the

supply of Kerosene by BPCL to RIL on the ground that they were exempted from tax by virtue of Entry No.26 under paragraph 1 of Schedule C of

the BST Act read with Notification Entry No.160 issued under Section 41 of the said Act. On the same parity of reasoning, Question No.3 was also

answered in favour of BPCL. As far as Question No.2 was concerned, it was answered against BPCL and it was held that the return stream (namely

the return of Kerosene by RIL to BPCL) was not a "sales return" but a purchase by BPCL from RIL. This DDQ order was challenged before the

MSTT. This appeal of BPCL was rejected by the MSTT vide its order dated 21st April, 2001. This order was subsequently recalled by the MSTT

itself vide its order dated 16th April, 2002, in view of the fact that the MSTT was of the opinion that RIL was not a party to the said Appeal and its rights were likely to be affected. Being aggrieved by this order dated 16th April, 2002, the State of Maharashtra approached this Court by filing a Writ Petition, being Writ Petition No. 2599 of 2002. BPCL also filed a Writ Petition, being Writ Petition No.3198 of 2002. Both these Writ Petitions were disposed of by a common order dated 18th February, 2003 which set aside the order of the MSTT dated 21st April, 2001 as well as the order dated 16th April, 2002 and restored the matter back to the file of the Commissioner of Sales Tax only to decide Question No.2 afresh after hearing both BPCL as well as RIL. This is absolutely clear on an ex-facie reading of the order dated 18th February, 2003. What is important to note is that in paragraph 6 of this order, this Court has set out three questions that were for determination before the Commissioner of Sales Tax in the DDQ application filed by BPCL. The answers to these questions, as given by the Commissioner of Sales Tax, have been set out in paragraph 7 of the order. Thereafter, this Court has specifically recorded that the Commissioner held that all the above three transactions were sale transactions but the sale of Kerosene being exempted under Entry No.160 of Notification issued under Section 41 of the BST Act, there would be no requirement to pay sales tax. It is in these circumstances that decision of the Commissioner on Question Nos.1 and 3 had become final and the same could not be disturbed, was the finding. However, this Court set aside the order of the Tribunal dated April 21, 2001 as well as 16th April, 2002 and restored the matter to the file of the Commissioner of Sales Tax only to decide Question No.2, namely, "whether the return stream i.e. return of Kerosene by RIL to BPCL (sales return credit note no.147857 dated May 1, 1992) would be legally allowable as sales return or whether that return will amount to purchase of Kerosene by BPCL from RIL?".

38.What is important to note is that for the purpose of determination of this Question No.2, the matter was restored back to the file of the Commissioner of Sales Tax. He was not to decide Question Nos.1 and 3 as the same had already attained finality as recorded in the order of this Court dated 18th February, 2003. This being the case, we find considerable force in the argument canvassed by Mr. Sonpal that RIL today cannot be

allowed to re- open Question No.1 and contend that the first leg of the transaction was not a sale but was only a contract of bailment.

39.What is also important is that RIL was a party Respondent not only to Writ Petition No.2599 of 2002 (filed by the State of Maharashtra) but also to

Writ Petition No.3198 of 2002 (filed by BPCL). Both these Writ Petitions, as mentioned earlier, were disposed of by a common judgment and order

dated 18th February, 2003 wherein this Court held that Question Nos.1 and 3 had attained finality. RIL, though being a party Respondent to these Writ

Petitions and being represented by advocates (as is clear from the copy of the order), never took any objection regarding the finality about Question

Nos.1 and 3 respectively. Further, the order dated 18th February, 2003 (to which RIL was a party) was never challenged by RIL before the Supreme

Court. This being the case, we cannot today allow Mr. Venkatraman on behalf of RIL to contend otherwise and now seek to argue that the first leg of

the transaction, namely the supply of Kerosene by BPCL to RIL, was not a sale but was only a contract of bailment.

40.Even otherwise, from the record also we find that Mr. Venkatraman's argument on this issue is not well founded. After the DDQ application was

filed by BPCL on 21st April, 1992, the Commissioner of Sales Tax, by his letter dated 20th February, 1995, asked for a clarification from BPCL as to

whether KO (LABFS) is sold as Kerosene to their distributor or agent and if so, then at what rate it was sold. The second question asked was the

rate at which normal Kerosene was sold by BPCL. In reply to these questions, the advocate for BPCL stated as under:-

There are two questions which you have posed and they are replied as under:-

Question 1: Whether SKO (LABFS) is sold as 'kerosene' by you, to your distributor or agent if so then at which rate it is sold.

Answer: That which is sold to Reliance and sold to the dealer is the same kerosene. We have stated in paragraph 12 of our letter dt.2.12.93 that the

term LABFS has been used for easy identification when sold to Reliance. The same kerosene from the same tank is sold to the dealers by our clients

and also to Reliance.

Question 2: The rate at which normal kerosene is sold by you.

Answer:- The price of kerosene sold to dealers is fixed by the Central Government and is sold at that price. We enclose an invoice for sale of the

kerosene to the dealers. The rate at which kerosene is sold to Reliance is higher because it is based on demand and supply. The price here is not controlled by the Government. The control rate is applied when sold to the dealers. Price is controlled by ""Kerosene (Restriction on use and fixation of Ceiling Price) Order, 1993"", a copy of the order is enclosed herewith for ready reference. Could I request you to be good enough to make order at a very early date.

(emphasis supplied)

41. What can be seen from this letter is that the BPCL itself treated the supply of Kerosene to RIL as a sale and not as a contract of bailment. In fact, the price for the sale was Rs.4368.22 per Kilo liter. This has also been categorically stated in the DDQ Aswale 46/86 WP 2217 OF 2015.docx application filed by BPCL dated 21st April, 1992 (page 115 of Writ Petition No.2217 of 2015). It is in this light that Mr. Dada, the learned Senior counsel appearing on behalf of BPCL in fact never even canvassed this point before us, and rightly so. Whether the first leg of the transaction was a sale or not is not an issue that was to be decided by the Commissioner of Sales Tax when the matter was remanded back by this Court. Only Question No.2 was to be decided and which has been reproduced by us earlier. We would therefore be fully justified not to entertain the submission of Mr. Venkatraman that the first leg of the transaction, namely the supply of Kerosene by BPCL to RIL was not a sale but was in fact only a contract of bailment.

42. Alternatively and, in any event, on going through the agreement dated 24th August, 1992, we are satisfied that in fact the supply of Kerosene by BPCL to RIL was a sale and not a contract of bailment. What can be seen from this agreement and the relevant clauses which have been reproduced earlier, is that BPCL is described as the ""Sellers"" and RIL is described as the ""Buyers"" in the said agreement. The agreement further records that the Buyers have erected a petrochemical plant at Patalganga for manufacturing LAB and are desirous of entering into an Aswale 47/86 WP 2217 OF 2015.docx agreement for purchase from the Sellers KO (LABFS) in bulk as a feedstock for the manufacturing process of N-Paraffin. The agreement further records that the title, property and risk in KO (LABFS) in each delivery shall pass to the Buyers when the said KO (LABFS) crosses the

Sellers' refinery fence at Mahul through the said pipeline. Any damage, loss or claim arising out of the return of the product from the Buyers' plant to

the Sellers' storage tank would be entirely on the Buyers' account and the Buyers shall keep the Sellers indemnified in all respects against any such

loss, damage or claim. The agreement further records that the Sellers' responsibility will cease as soon as the product passes the refinery fence. Even

in Clause (1) of this agreement, it is categorically stated that the sellers undertake to sell and deliver to the Buyers and the Buyers undertake to

purchase from the Sellers and to take delivery of and pay on the terms and subject to the conditions a specified quantity of KO (LABFS) for the

processes mentioned thereunder. In fact how the sale price was to be determined is set out in Clause (5) and how payment is to be made is also

stated in clause (9) thereof. Looking to these clauses and reading the agreement as a whole, we have no hesitation in holding that the first leg of the

transaction was clearly a sale of Kerosene, namely KO (LABFS), by the BPCL to RIL. Having come to this conclusion, we therefore do not feel it

necessary to elaborate any further and burden this judgment with the submissions of RIL as more particularly set out in paragraphs 7,8 and 9 of the

Written Submissions dated 8th February, 2017. This issue also therefore is answered against RIL and in favour of the Revenue.

Contention (iv):- the ""return stream"" of Kerosene (from RIL to BPCL) is only a ""sales return"" as contemplated under the provisions of the BST Act

and not a sale from RIL to BPCL.

43.Mr. Venkatraman submitted that even if it was to be assumed that the first leg of the transaction between BPCL and RIL was a sale and not a

contract of bailment, the delivery of the ""return stream"" (namely the return of Kerosene by RIL to BPCL) be construed as a ""sales return"" only and

not a sale by RIL to BPCL. On this aspect, Mr. Venkatraman as well as Mr. Dada both submitted that the important criteria that needs to be fulfilled

for a transaction to be termed as a ""sales return"" is that the goods supplied and delivered in the first instance, and delivery of the Aswale 49/86 WP

2217 OF 2015.docx return stream in the second instance, should be the same goods. Both counsels submitted that in the facts of the present case,

there is no dispute that the goods supplied in the first leg of the transaction as well as the return stream both met with BIS:1459 specifications meant

for Superior Kerosene. It was the contention of the counsel that in fact the Commissioner of Sales Tax had addressed a letter dated 28th January,

1994 to the Registrar, University of Bombay, Department of Chemical Technology, seeking a specific clarification as to whether the supply of

Superior Kerosene by BPCL to RIL and the delivery of the return stream by RIL to BPCL, are one and the same product. The counsel submitted that

in response to this communication, one Professor Manmohan Sharma, Department of Chemical Technology, vide its letter dated 11th May, 1994 had

stated that it was a standard practice for a feedstock to go from the refinery to a petrochemical plant and to receive the return stream. The feedstock

under reference would be denuded with respect to only the N-Paraffin. However, the return stream would qualify as per the established practice as a

blendable stock for Kerosene. They also placed reliance on the letter dated 17th December, 1994 addressed by Professor K. K. Tiwari, University

Department of Chemical Technology, Mumbai. Mr. Tiwari opined that although the N-Paraffin content of the returned Kerosene is expected to be

lower than LAB feedstock Kerosene, the IS 1448 and 1459 do not specify the composition of aliphatics and aromatics. Hence, as per the IS

specifications, the feedstock Kerosene and the return Kerosene may be treated as Superior Kerosene. Placing heavy reliance on these letters, both

the counsels submitted that the return stream, namely the Kerosene redelivered by RIL to BPCL, was the same Kerosene that was supplied by

BPCL to RIL in the first leg of the transaction. Both counsels submitted that apart from these two opinions, it was also a common fact that the return

stream Kerosene taken by BPCL from RIL was mixed in the original tank of BPCL containing Superior Kerosene and then was sold under the public

distribution system. They submitted that when experts confirm that post the denudation of N-Paraffin, the return stream Kerosene retains the name,

character and use as Superior Kerosene which was supplied by BPCL in the first leg of the transaction, the Revenue had not led any evidence to

discredit or disprove this position. Looking to this, Mr. Venkatraman as well as Mr. Dada submitted that what was explicitly clear was that the

Kerosene supplied by BPCL to RIL in the first leg of the transaction as well as the return stream of Kerosene supplied by RIL to BPCL were one

and the same product, and therefore, the return stream certainly qualified as a ""sales return"" and not a purchase of Kerosene by BPCL from RIL.

44.Mr. Venkatraman as well as Mr. Dada submitted that even though the return stream was subjected to some processes, the same made no difference as long as goods received by RIL in the first instance and the processed goods returned by RIL to BPCL retained the same name, character and use. They submitted that Kerosene is a mixture of various Paraffins. Paraffins are straight chain chemical compounds. Kerosene also known as Paraffin, is a mixture of Hydrocarbons ranging from C8 to C18. C8 and C9 are known as light Paraffin, C10 to C13 are known as normal Paraffin (N-Paraffin), and C14 to C18 are known as heavy Paraffin. The entire Hydrocarbons range from C8 to C18 is Kerosene and the independent range of Hydrocarbons Supra are also known as Kerosene, according to the learned counsel. Without undergoing any chemical treatment or reaction but applying the process of separation, one can isolate or remove C9 to C14 separately as N-Paraffin and leave rest of the mixtures of Paraffin also as Kerosene. The process that was applied in the facts of the present case, according to the learned counsel, was a sieving process which is purely physical and nothing else. This being the case, it was submitted that looking to the totality of the facts of the case, it was amply clear that the return stream of Kerosene was the same as the Kerosene supplied by BPCL to RIL in the first leg of the transaction. In these circumstances it was submitted that the return stream would squarely fall within the concept of a "sales return" and not a sale/purchase of the return stream.

45.Over and above this, Mr. Venkatraman as well as Mr. Dada submitted that in the present case the business prudence test ought to be applied.

They both submitted that the supply agreement envisages delivery of the return stream since RIL do not have any commercial use of retaining the balance quantities of Superior Kerosene. RIL are neither dealers nor Government companies nor parallel marketers to stock, sell, distribute or divert the balance quantities of Kerosene. Even the pipeline infrastructure is a single loop ensured to hand over the return stream to BPCL. RIL can neither commercially nor in the light of the statutory prohibition in the Kerosene Control Order retain the balance quantities of Superior Kerosene. It makes no business or commercial sense to attribute an empty sale followed by a mechanical re-sale, was the submission.

46.In support of their submissions the learned counsel placed reliance upon a decision of the Supreme Court in the case of United Breweries Ltd v/s

State of Andhra Pradesh reported in (1997) 3 SCC 530. Reliance was also placed on a decision of the Supreme Court in the case of Citibank, N. A.

v/s TLC Marketing PLC and Another reported in (2008) 1 SCC 481 and more particularly paragraph 52 thereof. Further, reliance was also placed on

a decision of the Supreme Court in the case of Bharat Sanchar Nigam Ltd and Anr. Vs. Union of India & Ors reported in (2006) 3 SCC 1 and more

particularly paragraph 50 thereof. Placing reliance on these decisions, it was submitted that when one reads the agreement as a whole even if there

was a transfer of title in the Kerosene from BPCL to RIL, the true nature of the transaction was only one whereby sale by BPCL to RIL was of a

net quantity, namely the quantity retained by RIL before returning balance. It was submitted that RIL has no option but to return the balance

Kerosene under the contract. This being the case, it was abundantly clear that this particular transaction and namely the return stream would clearly

fall within the concept of a "sales return" rather than a sale by RIL to BPCL.

47. On the other hand, Mr. Sonpal, the learned counsel appearing on behalf of the Revenue, submitted that the submissions made on behalf of RIL and

BPCL are wholly misconceived. He submitted that N-Paraffins are used primarily as a raw material to produce Linear Alkyl Benzene (LAB), which

is then used to produce surfactants. The method used is a simulated- moving-bed technique to recover high purity paraffins by continuous absorptive

separation. This technique is similar in concept to liquid chromatography, but done on a very large commercial scale. In an N-Paraffin complex, the

feed to the unit is generally hydro-treated in a unionfining unit which, along with UOP's hydro-treating catalyst, ensures trouble-free production of top

quality N-Paraffins. He submitted that Paraffin Wax is used for making candles, Vaseline, ointments and wax paper whereas on the other hand,

Kerosene oil is used as household oil (cooking/lighting). N-Paraffins are used as a raw material to manufacture LAB, which in turn is used in the

manufacture of Surfactants which is a raw material for detergents. The counsel further submitted that there is no standard prohibition of content of N-

Paraffin in Superior Kerosene Oil (SKO). It is neither prohibited nor an essential standard for SKO. Even if the SKO is containing N-Paraffin or not,

it would still meet the standards. He, therefore, submitted that placing reliance upon the standards to show that the goods supplied in the first leg of the

transaction and the goods returned in the second leg of the transaction were one and the same, is of no assistance to RIL or BPCL. He submitted that

even a special grade of Kerosene oil known as Aviation Turbine fuel used as fuel in airplanes and which has ISI No. 1571:2008, has its own standards

for various uses and there are no standards for SKO (LABFS) fixed by BIS. He therefore submitted that merely to say that Kerosene remains

Kerosene is not the same thing as saying that the supplied product is the same as the returned product.

48.Mr. Sonpal submitted that BIS is a body which fixes standards for the purposes of uniformity and as a mandatory condition for being present in the

product to conform to the standards to claim the ISI mark and nothing more. There are no standards fixed by BIS for SKO (LABFS) and hence the

standards of Kerosene cannot be compared with the standards of SKO (LABFS). He submitted that in the facts of the present case, it is undisputed

that the Kerosene supplied by BPCL to RIL in the first leg of the transaction is rich in N-Paraffin. Once it is supplied, RIL then extracts the N-

Paraffin from the Kerosene and then returns the same to BPCL. The product that is returned to BPCL, though as per the BIS Standards is also

known as Kerosene, is denuded of the N-Paraffin. It can therefore never be termed as the same product that was supplied by BPCL to RIL in the

first leg of the transaction, was the submission.

49.To further fortify this argument, Mr. Sonpal submitted that the return stream Kerosene (from RIL to BPCL) could never be given/sold by BPCL to

another Petrochemical plant for the purposes of extraction of N-Paraffin. This clearly shows that the product that was supplied by BPCL to RIL in

the first leg of the transaction was different from the return stream that was given back by RIL to BPCL. If this be the case, Mr. Sonpal submitted

that there was no question of then the return stream being classified as a "sales return". He submitted that even according to Mr. Venkatraman and

Mr. Dada the concept of a "sales return" would arise only when the goods returned were the same in character and use as the goods originally sold.

In the facts of the present case, it is amply clear that the Kerosene returned by RIL to BPCL in the return stream were different in character as well

as use and therefore could never be termed as a sales return, was the submission. To put it differently, Mr. Sonpal submitted that in fact if the

Kerosene returned by RIL to BPCL were one and the same as the original goods supplied by BPCL to RIL, then, there would have been no impediment on BPCL for supplying return stream back to RIL for the purposes of extraction of N-Paraffins. Admittedly that could never have been done as the N-Paraffins were already extracted by RIL from the Kerosene that was already supplied by BPCL to RIL, in the first leg of the transaction. He, therefore, submitted that merely because the so called experts, on the basis of BIS standards, had opined that the Kerosene supplied by BPCL and the return stream, both could be classified as Kerosene, would not carry the case of RIL or BPCL any further. It may be true that the return stream also could be used as Kerosene for several other purposes but that alone would not classify the return stream as a sales return, as clearly the returned Kerosene was different in character and use. For all the aforesaid reasons, Mr. Sonpal submitted that the findings given by the MSTT on this aspect of the matter were wholly justified and required no interference by us either in our writ jurisdiction or in our reference jurisdiction.

50. Having heard the learned counsel for the parties, we find considerable force in the arguments canvassed by Mr. Sonpal. The word ""manufacture has been defined in Section 2(17) of the BST Act which reads as under:-

2(17) ""manufacture"", with all its grammatical variations and cognate expressions, includes:-

(a) producing, making, extracting, altering, ornamenting, finishing or otherwise processing treating or adapting any goods, or using or applying any such

process, as the State Government may, having regard to the impact thereof of any goods or to the extent of alteration in the nature, character or utility

of any goods brought about by such process, by notification in the Official Gazette specify

(b) cutting, sawing, shaping, sizing or hewing of timber; and

(c) refining of oil;

(d) Lacquering of polyester film but does not include such manufacture or manufacturing processes as may be prescribed.

(emphasis supplied)

51. The word ""sale"" has been defined in Section 2(28) to mean a Sale of goods made within the State for cash or deferred payment or other valuable

consideration, and include any supply by a society or club or an association to its members on payment of a price or of fees or subscription, but does not include a mortgage, hypothecation, charge or pledge, and the words "sell" "buy" and "purchase" with all its grammatical variations and cognate expressions, shall be construed accordingly. The definition of word "sale" reads thus:-

2(28) "sale" means a sale of goods made within the State for cash or deferred payment or other valuable consideration, and includes any supply by a society or club or an association to its members on payment of a price or of fees or subscription, but does not include a mortgage, hypothecation, charge or pledge; and the words "sell", "buy" and "purchase", with all its grammatical variations and cognate expressions, shall be construed accordingly.

Explanation : For the purpose of this clause -

(a) a sale within the State includes a sale determined to be inside the State in accordance with the principles formulated in sub-section (2) of section 4 of the Central Sales Tax Act, 1956 (LXXIV of 1956).

(b)(i) every disposal of goods referred to in the Explanation to clause (11):

(ii) a delivery of goods on hire purchase or any system of payment by installments;

(iii) the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human

consumption or any drinks (whether or not intoxicating), where such supply or service is made or is given on or after the 2nd day of February 1983,

for cash deferred payment or other valuable consideration;

(iv) the transfer, otherwise than in pursuance of a contract of property in any goods for cash, deferred payment or other valuable consideration;

(v) the supply of goods by any unincorporated association or body of persons, to a member thereof for cash, deferred payment or other valuable consideration;

shall be deemed to be a sale;

52. In turn, the word "re-sale" has been defined in Section 2(26) inter alia to mean the sale of purchased goods

(i) in the same form in which they were purchased or

(ii) without doing anything to them which amounts, or results in a manufacture and the word "re-sale" shall be construed accordingly. Section 2 (35)

defines the words "turnover of purchases" and Section 2 (36) defines the words "turnover of sales". They read thus:-

2(35) "turnover of purchases" means the aggregate of the amounts of purchase price paid and payable by a dealer in respect of any purchase of goods made by him during a given period, after deducting the amount of purchase price, if any, refunded to the dealer by the seller in respect of any goods purchased from the seller and returned to him within the prescribed period;

2(36) "turnover of sales" means the aggregate of the amounts of sale price received and receivable by a dealer in respect of any sale of goods made

during a given period after deducting the amount of sale price; if any, refunded by the dealer to a purchaser, in respect of any goods purchased and

returned by the purchaser within the prescribed period and includes -

(i) the amounts received or receivable during the given period, in respect of goods delivered on or after the commencement of the Bombay Sales Tax

(Amendment and Validating Provisions) Act, 1985 on hire purchase or any system of payment by installments; and

(ii) where the registration certificate is cancelled, the amounts, in respect of sales made before the date on which the cancellation becomes effective,

received or receivable after such date, and;

53. What can be discerned from the aforesaid definitions and as even correctly submitted by Mr. Venkatraman as well as Mr. Dada is that for there to

be a sales return, the goods originally supplied and the delivery of the return stream should be one and the same goods. If the goods that are sought to

be returned are a product which is different from the one that was originally supplied, the same can never be termed as a sales return.

54. In the facts of the present case, we are clearly of the view that the product that was supplied by BPCL to RIL in the first leg of the transaction

was different from the return stream that was supplied/returned by RIL to BPCL. As mentioned earlier, the Kerosene that was supplied by BPCL to

RIL was rich in N-Paraffin. It comprises of Hydrocarbons C9 to C14. The Kerosene that was sought to be returned by RIL to BPCL was after the

extraction of N-Paraffin. In other words, Hydrocarbons C9 to C14 were

specifically denuded from the Kerosene that was returned by RIL to BPCL.

In fact, it is not in dispute that the returned Kerosene is denuded by more than 50% of N-Paraffin. The Kerosene that was supplied by BPCL also

known as SKO (LABFS) which contains N- Paraffins was viable for commercial extraction of N-Paraffin whereas the product given by the RIL to

BPCL after extracting the N-Paraffin is not viable for extraction of N-Paraffin due to the fact that the return stream does not contain the extractable

quantity. At least to our mind, therefore, it is clear that the product supplied by the BPCL to RIL is very different from the product that is returned by

RIL to BPCL. To put it in other words, the Kerosene supplied by the BPCL to RIL is pre-processed and the Kerosene returned by RIL to BPCL is a

processed product and hence are two different commercial products. It is true that even the returned Kerosene meets the BIS standards to be termed

and used as Kerosene, but that alone cannot be the test to come to the conclusion that the product returned by RIL is one and the same as was

supplied by BPCL to RIL in the first leg of the transaction. It is an admitted fact before us, at least across the bar, that the Kerosene supplied by

BPCL to RIL can be used for extraction of N- Paraffins whereas the Kerosene returned by RIL to BPCL cannot be used for the same purpose. The

process of extraction carried out by RIL is thus a manufacture within the meaning of the said expression as defined in the BST Act and the kerosene

is therefore not returned to BPCL in the same form. In other words, BPCL cannot use the Kerosene returned by RIL to be supplied to another

Petrochemical plant for extraction of N-Paraffin. This, to our mind, would clearly go to establish that the Kerosene supplied by BPCL to RIL in the

first leg of the transaction and the product returned by RIL to BPCL in the second leg of the transaction, at least for the purposes of sales tax, are two

different products. It cannot be disputed that the two products are different in character and use. This being the case, it is quite clear that the return

stream of Kerosene and which was sought to be returned by RIL to BPCL can never be termed as a sales return but in fact a sale by RIL to BPCL.

55. We find that the heavy reliance placed on the two expert opinions of Professor Manmohan Sharma as well as Mr K. K. Tiwari is wholly

misplaced. Both these opinions only state that the return stream of Kerosene also meets the standards of the Kerosene that was originally supplied by

BPCL to RIL. It is one thing to say that the two products meet the same standard and wholly another to say that they are one and the same product.

In fact, Professor K. K. Tiwari's opinion clearly states that although the N-Paraffin content of the returned Kerosene is expected to be lower than

LAB feedstock Kerosene, the IS 1448 and 1459 do not specify the composition of aliphatics and aromatics. Hence, as per IS specifications, the

feedstock Kerosene and return Kerosene may be treated as Superior Kerosene.

56. On going through these two opinions carefully, we do not find that these opinions would in any way support the contentions canvassed by Mr.

Venkatraman as well as Mr. Dada. Though in common parlance the two products may be termed as Kerosene and may have many common uses,

what is clear is that the product that is supplied by BPCL to RIL can be used for extraction of N-Paraffin whereas the Kerosene returned by RIL to

BPCL cannot be used for the same purpose. Therefore, there is clearly a change in the character and use of the Kerosene supplied by BPCL to RIL

on the one hand and the return stream (from RIL to BPCL) on the other.

57. We are also unable to accept the argument of Mr. Venkatraman and Mr. Dada that the business prudence test ought to be applied in the facts and

of the present case. We do not know, and would be in the realm of conjecture, as to what business or commercial sense it would make to attribute a

sale followed by a mechanical resale. If that is the bargain that was struck by the parties, then so be it. It is true that in a sale transaction the seller

and a purchaser would have to be ad-idem as to the subject matter of sale/purchase. The Court would have to arrive at a conclusion as to what the

parties had intended when they entered into a particular transaction of sale as being the subject matter of the sale or purchase. In the facts of the

present case, and as discussed earlier, it is quite clear that in the first leg of the transaction, BPCL had sold the Kerosene to RIL. This was the clear

stand taken by BPCL itself as can be seen from Question No.1 that was decided by the Commissioner of Sales Tax way back on 14th March, 1996.

As recorded by this Court vide its order dated 18th February, 2003, this Question No.1 had attained finality. Both BPCL as well as RIL were parties

when the said order was passed and were in fact represented by the advocates, as is clear from an ex-facie reading the said order. It is only in this

light that the matter was remanded back to the Commissioner of Sales Tax to

determine whether the return stream of Kerosene (from RIL to BPCL) was a sales return or whether the same was a sale by RIL to BPCL. We are therefore convinced that as far as the first leg of the transaction is concerned, it was clearly a sale and that is even how the parties understood it. It is in these circumstances that the order of this Court passed on 18th February, 2003 was never challenged before the Supreme Court and the only issue that was left to be decided was Question No.2 regarding whether the return stream was a sales return or a sale. We, therefore, find that the arguments canvassed by Mr. Venkatraman as well as Mr. Dada on the business prudence test is wholly misconceived.

58. There is yet another reason for taking this view. As mentioned earlier, Section 2(17) defines the words "manufacture" and with all its grammatical variations and cognate expressions, includes producing, making, extracting, altering, ornamenting, finishing or otherwise processing treating or adapting any goods, or using or applying any such process, as the State Government may, having regard to the impact thereof of any goods or to the extent of alteration in the nature, character or utility of any goods brought about by such process, by notification in the Official Gazette specify. From this definition, it is clear that at least for the purposes of the BST Act, the return stream of Kerosene had undergone the process of manufacture which will clearly again go to show that the Kerosene returned by RIL to BPCL was a different product than the one supplied by BPCL to RIL in the first leg of the transaction. We, therefore, have no hesitation in answering Question No.2 as decided by MSTT in favour of the Revenue and against RIL and BPCL. We find that not only was the MSTT justified in coming to the conclusion that it did on this issue, but we certainly do not find any perversity and/or patent illegality in the order which would entitle us to interfere with the same in our writ or reference jurisdiction.

4. Having said this, we shall now deal the judgements relied upon by RIL and BPCL. The reliance placed by Mr. Venkatraman as well as Mr. Dada on the decision of the Supreme Court in the case of United Breweries (supra) (for short "UB") is wholly misconceived. The facts of this case would reveal that UB supplied two brands of beer at Hyderabad. The dispute between UB and the Andhra Pradesh Sales Tax Authority was as regards the crates and bottles in which the beer was supplied. The case of UB was that when

beer was sold, the bottles and crates were not sold to the customers. The sale price of the Export Lager was Rs. 43.18 and Sun Lager Rs. 48.75 per dozen. The supplies were made to selling agents who deposited security of Rs. 4.80 for the bottles and Rs. 5.00 for the crates. These deposits were returned to the selling agents when the bottles and the crates were returned. This was the method of carrying on the trade by the assessee and the assessee had issued two circulars to explain the scheme to their customers. It was stated in the two circulars as to how payments for the two brands of the beer were to be made. Additionally, it was stated that the vendees were to return the bottles and crates so that the customers are assured of better supply. This scheme was explained to the taxing authorities. The Commercial Tax Officer verified the scheme and held that the customers did not always return the bottles and crates. The sale of beer included sale of the crates and the bottles. The Commercial Tax Officer was also of the view that the bottles and crates were higher in value than the amounts deposited as security. For these two reasons, it was held that the scheme was not genuine. The Commercial Tax Officer, therefore, came to the conclusion that the taxable turnover had to be computed not only by into account the sale price but also the value of the bottles. It is in these facts the Supreme Court held that an out and out sale of the bottles did not take place when beer was supplied in the bottles by UB to its customers against the deposits which had to be refunded when the bottles were returned. Having regard to the scheme and the nature of the transaction, the Supreme Court was of the view that the High Court was in error in holding that when beer was sold in bottles, not only beer but also the bottles were sold and the price of beer along with the deposits became exigible to sales tax. Looking to the scheme and the nature of the transaction before it, the Supreme Court came to a categorical finding that the terms and conditions under which the beer was sold, it did not appear that UB also intended to sell the crates and bottles to the customers. The Supreme Court found that on the contrary, UB was very anxious to get back these crates and bottles in order to use them again for further supply. The fact that UB advised their customers to charge similar deposits from their customers and get back the bottles from them goes to show that an out and out sale of the bottles had not taken place. By taking the deposits, UB

merely ensured the return of the bottles and crates. It was in these circumstances, that the Supreme Court came to the conclusion that the intention of

UB did not appear to have been to sell the beer bottles along with the beer.

60. We find that this decision of the Supreme Court is wholly inapplicable to the facts of the present case. Looking to the scheme and the nature of the

transaction before the Supreme Court and considering that it was the case of UB throughout, that it never sold the bottles to its customers in the first

place that the Supreme Court came to the conclusion that there was no sale of the bottles or the crates. The facts before us are in fact quite different.

Before us, it is clear that BPCL had sold the Kerosene to RIL in the first leg of the transaction. This fact has not even been disputed by BPCL. For

the first time, it was only before us that RIL sought to contend that the first leg of the transaction was not a sale but in fact a contract of bailment.

Even though this litigation has been going on from 1992 onwards, this contention is raised for the first time only before us. In fact, Mr. Dada, the

learned Senior counsel appearing on behalf of BPCL did not even contend before us that the first leg of the transaction, (namely the supply of

Kerosene by BPCL to RIL), was not a sale and was a contract of bailment. This being the case, we find that the reliance placed on the decision of

the Supreme Court in the case of United Breweries (*supra*), is wholly misplaced.

61. Even the decision of the Supreme Court in the case of CITIBANK, N.A. (*supra*) is wholly inapplicable to the facts of the present case. Firstly, this

was the decision by a Single Judge of the Supreme Court hearing an application filed under Section 11 of the Arbitration and Conciliation Act, 1996. A

Single Judge hearing this matter was a designate of the Chief Justice of India as contemplated under Section 11 of the Arbitration and Conciliation

Act, 1996 (before its amendment in 2015). We, therefore, doubt whether this decision will be binding upon us. Be that as it may, there is no dispute

about the proposition laid down in paragraph 52 of this decision. The learned Judge of the Supreme Court has held that the contract in that case was a

commercial document and must be interpreted in a manner to give efficacy to the contract rather than to invalidate it. It was held that a narrow and

technical approach is not proper. It is on this basis that the learned Judge of the Supreme Court held that Clause 10 which was the arbitration

agreement between the parties imported in itself all the disputes and the arbitration agreement could not be said to be vague or uncertain so as to be unenforceable. We fail to see how this decision can be of any assistance to RIL as well as BPCL in the facts and circumstances of the present case.

As held earlier, it is not in dispute that the first leg of the transaction (namely the supply of Kerosene by BPCL to RIL) was a sale. This is ex-facie

clear from the answer given to Question No.1 that was posed by BPCL to the Commissioner of Sales Tax and answered accordingly. Furthermore,

as held by this Court vide its order dated 18th February, 2003, this Question No.1 had attained finality. RIL as well as BPCL were both parties to the

order passed by this Court on 18th February, 2003. Despite this, the said order was not challenged by either party before the Supreme Court. This

being the case, we find that the factual matrix before us is totally and entirely different from the one before the Learned Judge of the Supreme Court

in the case of CITIBANK, N. A. (supra). There can be no dispute with reference to the proposition laid down in the aforesaid decision. However, we

find that in the present factual matrix, the same is wholly inapplicable. Hence, the reliance placed on this decision is also of no assistance to RIL or

BPCL.

62. Even the reliance placed on the decision of the Supreme Court in the case of BSNL (supra) is wholly misplaced. Paragraph 50 of this decision and

on which reliance was placed, states that what are 'goods' in a sales transaction, remains primarily a matter of contract and intention. The seller and

purchaser would have to be ad-idem as to the subject matter of sale or purchase. The Court would have to arrive at the conclusion as to what the

parties had intended when they entered into a particular transaction of sale, as being the subject matter of sale or purchase. In arriving at a conclusion

the Court would have to approach the matter from the point of view of a reasonable person of average intelligence. What the Supreme Court in this

decision was called upon to decide was the nature of the transaction by which mobile phone connections were enjoyed by the customers. Was it a

sale or a service or was it both. Whilst deciding this question and after an elaborate discussion, the Supreme Court in paragraph 50 held what we have

stated earlier. This decision also, we find on facts to be wholly inapplicable to the factual matrix before us. At the risk of repetition, we may again

state that the first leg of the transaction namely, supply of Kerosene by BPCL to RIL was held to be a sale and which had attained finality. The only

question that had to be decided when the matter was remanded back to the Commissioner of Sales Tax was Question No.2 viz. "whether the return

stream i.e. return of Kerosene by RIL to BPCL (sales return Credit note No. 147857 dated May 1, 1992) would be legally allowable as sales return or

whether that return will amount to purchase of Kerosene by BPCL from RIL." To only decide this question, the matter was remanded back to the

Commissioner of Sales Tax. We find that all the aforesaid three decisions that were relied upon by RIL and BPCL would be of no assistance to them

for deciding this question. We, therefore, find that all these three decisions relied upon by them including the decision in the case of BSNL (supra) are

wholly inapplicable to the facts and circumstances of the present case. Contention (v):- Prospective Effect

63.This now leaves us only to decide whether the MSTT ought to have given prospective effect to its judgment as contemplated under section 52(2)

of the BST Act. In this regard Mr Venkatraman and Mr. Dada both submitted that under Section 52(2) of the BST Act, the Commissioner has the

power to give prospective effect to the DDQ order passed by the Commissioner under Section 52 (2) of the BST Act. They both submitted that in the

present case, the Commissioner had in fact passed the DDQ order dated 11th September, 2006 in favour of RIL and BPCL. The said DDQ order has

thereafter been reversed by the MSTT by its impugned order dated 20th January, 2015. This reversal has taken place at the instance of the State

Government. According to Mr. Dada as well as Mr. Venkatraman, this is the only case in the history of Sales Tax Law in the State where the State

has filed an appeal against a DDQ order passed by the Commissioner under Section 52. Since the DDQ order was in favour of RIL and BPCL, there

was no question of them asking the Commissioner to give prospective effect to the order passed by him. It is in these circumstances that they both

submitted that since the DDQ order of the Commissioner has been reversed by the Tribunal, prospective effect ought to be given from the date of the

judgment of the Tribunal.

64.Mr. Venkatraman as well as Mr. Dada both submitted that this is more so in the facts of the present case considering that there has been a long

and checkered litigation with reference to this issue that started way back in 1992 and was finally resolved by the decision of the Tribunal in 2015.

Both counsels were at pains to point out that there was no delay either by RIL or BPCL. Both of them have acted as per statutory guidance under the

Central Excise Act and the established trade practice including the practice by the Gujarat Sales Tax Authority on an identical transaction between

Indian Oil Corporation Limited and Indian Petrochemical Limited. Both parties, namely RIL and BPCL entered into this commercial agreement based

on the established trade practices and considering that the supplier, namely BPCL, is a Government of India undertaking, this would be a fit case to

exercise power to grant prospective effect to the judgment of the Tribunal.

65.Mr. Venkatraman and Mr. Dada both submitted that not granting prospective effect would result in reopening of all the past assessments and

would result in a huge liability not only to the Government undertaking namely BPCL, but also to RIL. The Assessing Officer has also passed orders

following the DDQ order passed by the Commissioner. The assessment for the year for which the application was made is concluded long back.

Refusal to grant prospective effect would amount to gross injustice to RIL and BPCL and against public interest and trade practice, was the

submission. It would result in an unfair and unjust situation for the entire trade resulting in miscarriage of justice, was the submission of the learned

counsel. It is in these circumstances that both counsel requested us to consider the plea for grant of prospective effect to the decision of the Tribunal.

Mr. Venkatraman also placed reliance on certain other orders passed by the Tribunal in other matters to bolster his argument that in many cases the

Commissioner has exercised his discretion under Section 52 (2) and granted prospective effect to the DDQ order. In the facts of the present case,

Mr. Venkatraman was at pains to point out that all the way from 1992 till 2005, for all the assessment years, sales return were allowed with reference

to the Kerosene returned by RIL to BPCL (second leg of the transaction) in the assessments filed by RIL. This itself goes to show that the Sales Tax

Authorities themselves for a long period of time and until the order of the Tribunal, were also proceeding on the basis that the return stream of

Kerosene from RIL to BPCL was nothing but a goods return / sales return, was the submission. For all the aforesaid reasons, the learned counsel

prayed that prospective effect be given to the order of the Tribunal.

66. Without prejudice to the aforesaid argument, both Mr Venkatraman and Mr. Dada submitted that RIL had prayed before the Tribunal that the issue

of prospective effect be heard separately. However, no hearing was given to RIL on this issue by the Tribunal and no arguments were allowed to be

advanced. This, according to the learned counsel, was ex-facie clear from a plain reading of the impugned order. They both submitted that the order

of the Tribunal in this regard is in violation of the principles of natural justice and ought to be set aside on this ground alone.

67. On the other hand, Mr. Sonpal, the learned counsel appearing on behalf of the Revenue, submitted that no case whatsoever was made out for

granting prospective effect. The counsel submitted that in the application dated 21st April, 1992, and which was the DDQ application filed by BPCL,

there is no prayer for prospective effect. He submitted that moreover, in the two DDQ orders dated 14th March, 1996 as well as 16th October, 2004

the Commissioner has with elaborate reasons held that the goods return claim/ sales return claim is not allowable. He submitted that in the facts of the

present case there is no statutory misguidance and ambiguity of law to give room for misinterpretation of the law. He submitted that the character of

the goods supplied to RIL and the returned goods by RIL to BPCL are different in its composition though both may be termed as Kerosene. The

supplied Kerosene is rich in N-Paraffin capable of being extracted whereas the return stream Kerosene is denuded by more than 50% of N- Paraffin,

and therefore, cannot be said to be same goods since no person intending to extract N-Paraffin will purchase such Kerosene which has been denuded

of N-Paraffin. It is in these circumstances that Mr. Sonpal submitted that there was no merit in the arguments of Mr. Dada as well as Mr.

Venkatraman that prospective effect ought to be given to the impugned order of the Tribunal dated 20th January, 2015.

68. We have heard the learned counsel for the parties at some length on this issue. Section 52 of the BST Act reads as under:-

S.52. Determination of disputed questions.- (1) If any question arises, otherwise than in proceedings before a Court, or before the Commissioner has

commenced assessment or re-assessment of a dealer under section 33 or 35, whether, for the purposes of this Act;

(a)any person, society, club or association or any firm or any branch or department of any firm, is a dealer, or

(b)any particular thing done to any goods amounts to or results in the manufacture of goods, within the meaning of that term, or

(c)any transaction is a sale or purchase, or where it is a sale or a purchase the sale price or the purchase price, as the case may be, therefor, or

(d)any particular dealer is required to be registered, or

(e)in the case of any person or dealer liable to pay tax, any tax is payable by such person or dealer] in respect of any particular sale or purchase, or if

tax is payable the rate thereof, the Commissioner shall, subject to rules, make an order determining such question.

Explanation- For the purposes of this sub-section, the Commissioner shall be deemed to have commenced assessment or re-assessment of dealer

under section 33 or 35, when the dealer is served with any notice by the Commissioner under section 33 or 35, as the case may be.

(2)The Commissioner may direct that the determination or, as the case may be, review shall not affect the liability of any person under this Act, as

respects any sale or purchase effected prior to the determination or, as the case may be, review.

(2A) The Commissioner, for the reasons to be record in writing may, on his own motion, review the order passed by him under sub-section (1) or (2),

and pass such order thereon as he thinks just and proper. The order of review shall not affect the liability of any person under this Act, in respect of

any sale or purchase effected prior to the review:

Provided that, no order shall be passed under this sub- section unless the dealer or the person in whose case the order is proposed to be reviewed, has

been given a reasonable opportunity of being heard: Provided further that, before initiating any action under sub-section (2A) the Commissioner shall

obtain prior permission of the Government.

(3) If any such question arises from any order already passed under this Act or any earlier law, no such question shall be entertained for determination

under this section; but such question may be raised in appeal against, or by way of revision of, such order.

69.From the scheme of Section 52, what is ex-facie clear is that if any question arises, otherwise than in proceedings before a Court, or before the

Commissioner has commenced assessment or re-assessment of a dealer under Section 33 or 35, any person, as listed in Section 52(1) can make an application to the Commissioner for determining the disputed question. On hearing such a party, the Commissioner shall, subject to rules, make an order determining such question. Section 52 (2) clearly stipulates that the Commissioner may direct that the determination or as the case may be, review shall not affect the liability of any person under this Act, in respect of any sale or purchase effected prior to the determination or, as the case may be, review. Sub-section 2(A) of Section 52 further stipulates that the Commissioner, for reasons to be record in writing may, on his own motion, review the order passed by him under sub-section (1) or (2), and pass such order thereon as he thinks just and proper. This sub-section further states that the order of review shall not affect the liability of any person under this Act, in respect of any sale or purchase effected prior to the review.

70. What is ex-facie clear from reading the provisions of Section 52 is that the Commissioner, in the given facts and circumstances of the case,

certainly has the power to exercise his discretion and give prospective effect to the DDQ order passed by him under Section 52(1). As correctly

submitted by Mr. Venkatraman as well as Mr. Dada, in the facts of the present case, since the DDQ order dated 11th September, 2006 was passed in

favour of the assessee, there was no occasion nor any reason to request the Commissioner to grant prospective effect to his order. The question of

prospective effect would only arise when the order of the Commissioner was reversed by the Tribunal vide the impugned order dated 20th January,

2015. Further, it is not in dispute before us that it is for the first time in the history of the Bombay Sales Tax Act that the DDQ order passed by the

Commissioner under Section 52 (1) was challenged by the State of Maharashtra before the MSTT. From the facts narrated in this judgment, it is also

clear that bonafide litigation between the parties has gone on right from the year 1992 till 2015. Further, right from the assessment years 1988-1989 till

2004-2005, the assessments have been allowed in favour of the assessee, namely RIL on the basis that the return stream of Kerosene was a "goods

return". If prospective effect is not given to the order of the Tribunal it would effectively lead to a situation that all past assessments would have to be

reopened and which would be highly unfair and prejudicial not only to RIL but also to BPCL.

71. Furthermore, we find that the Tribunal has brushed aside this issue in just one paragraph of the impugned order. It is also not in dispute that no hearing was given to RIL on this issue at all which would clearly be in breach of the principles of natural justice. On this ground alone, we would be justified in setting aside the impugned order on this issue and remand the matter back to the MSTT. However, considering that there has been a long and checkered history between the parties, we think that it would be in the fitness of things, if the same was decided by us in the present proceedings especially when both parties have addressed us extensively on this issue.

72. Looking to the totality of the facts of the case and as narrated earlier, we think that the MSTT was unjustified in not granting the prospective effect to its judgment and order dated 20th January, 2015. Considering the long checkered history of the litigation between the parties, the assessment orders allowed earlier on the basis that the return stream Kerosene was a sales return/ goods return and the DDQ order passed in favour of the assessee dated 11th September, 2006, we feel that this was a fit case where the MSTT ought to have exercised its discretion and granted prospective effect to its judgment and order. We order accordingly and set aside the order of the MSTT only to this extent. For the foregoing reasons, the Writ Petitions are partly allowed as indicated herein.

73. As far as the Sales Tax References are concerned, RIL had filed Reference Application No.53 of 2015 and BPCL has filed Reference Application No.58 of 2015 before the MSTT. Both these Reference Applications were disposed of by a common judgment dated 19th October, 2015.

The questions that were referred to us for our decision and our findings thereon (based on what is discussed by us earlier) are as follows:-

Questions Findings

(i) Whether in the facts and circumstances of the In the affirmative and in case, the Sales Tax Tribunal was correct in holding favour of the Revenue.

that the return stream of KO(LABFS) between the Applicants and M/s Reliance Industries Limited, did not constitute sales return within Section

2(36), 2(35) of the Bombay Sales Tax Act and rule 4 of the Bombay Sales Tax Rules?

(ii) Whether, in the facts and circumstances of the In the affirmative, and in case, the tribunal was correct in holding that the favour of the Revenue.

return KO(LABFS) as stipulated for by the Memorandum of Agreement, dated 24.08.1992, will amount to purchase of KO(LABFS) by the

Applicants?

(iii)Whether, in the facts and circumstances, the Does not arise. Tribunal ought to have held that the sale, if any, pertained to the quantum of

KO(LABFS), consumed by Reliance Industries Limited?

(iv)Whether, in the facts and circumstances of the In the negative and in case, the Tribunal erred in condoning the delay in favour of the Revenue.

filing the appeal No.113 of 2007 by State of Maharashtra?

(v)Whether, in the facts and circumstances of the In the affirmative and in case, the Tribunal ought to have given prospective favour of RIL and

BPCL. effect to its order dated 20.01.2015?

(vi)Whether, in the facts and circumstances of the In the negative and in case, the Tribunal erred in not holding that the favour of the Revenue. appeal

is defective, incompetent and hence, ought to have been rejected on the ground that the State Government was incompetent to authorize the officer

on Special Duty, Finance Department, Government of Maharashtra to file an appeal against the order of the Commissioner of Sales Tax?

74.All the Writ Petitions, Sales Tax References as well as the Sales Tax Application are disposed of accordingly.