Saraswati Oil Mills Vs. the State of Gujarat

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Court : Gujarat

Decided On : Nov-14-1964

Reported in : [1966]18STC163(Guj)

Judge : J.M. Shelat, C.J. and; P.N. Bhagwati, J.

Acts : Bombay Sales Tax Act, 1959 - Sections 5, 6, 7, 8, 9, 10, 18 and 46

Appeal No. : Sales Tax Reference No. 20 of 1963

Appellant : Saraswati Oil Mills

Respondent : The State of Gujarat

Advocate for Def. : J.M. Thakore, Advocate-General and; M.G. Doshit, Additional Government Pleader

Advocate for Pet/Ap. : B.R. Shah, Adv.

Judgement :

Shelat, C.J.

1. The two questions referred to us in this reference for out opinion are :-

(1) Whether the proviso to rule 11(1A) of the Bombay Sales Tax (Exemptions, Set-off and Composition) Rules, 1954, in so far as it requires that the goods purchased should be used in the manufacture of goods specified in entries 19 to 80 (both inclusive) of Schedule B to the Act is in excess of the rule-making power of the Government and is to that extent ultra vires of section 18B of the Bombay Sales Tax Act, 1953

(2) Whether, on the facts and in the circumstances of the case, set-off is a admissible to the applicant-mill of the general sales tax and the purchase tax paid by the applicant-mill on the purchases of groundnuts under the provisions of rule 11(1A) read with section 18B(2) of the Bombay Sales Tax Act, 1953, irrespective of the proviso to that rule.

3. The applicants at the material time carried on the business of manufacturing edible oil from groundnuts. The period of assessment being the period from 24th October, 1957, to 25th November, 1958, it would be the Bombay Sales Tax Act, 1953, which would apply to the case and as Schedule B to that Act then stood, the rates of sales tax on sales of edible oil falling under item 14 of that Schedule were nil. During the assessment period, the applicants purchased groundnuts from registered as well as

unregistered dealers. They had to pay to the registered vendors certain sums by way of the general sales tax on their purchases under section 9 and the purchase tax on their purchases from unregistered dealers. In their returns, the applicants claimed a set-off of the amounts paid by them by way of general sales tax to the registered vendors and purchase tax in respect of their purchases from unregistered dealers. The Sales Tax Officer, by his order dated 23rd November, 1959, rejected the applicants' claim for the set-off on the ground that groundnuts purchased by the applicants were used in the manufacture of edible oil which did not fall within any of the entries 19 to 80 of Schedule B and, therefore, a claim for set-off was not admissible under the proviso to rule 11(1A) of the said Rules. The applicants thereupon filed an appeal before the Assistant Collector of Sales Tax. During the pendency of the appeal, the Act of 1953 was repealed and the Bombay Sales Tax Act, 1959, was brought into force and consequently, the appeal was heard and decided by the Assistant Commissioner of Sales Tax. By his order dated 16th June, 1960, the Assistant Commissioner rejected the appeal holding that the proviso to rule 11(1A) provided that a set-off could only be granted when the goods manufactured by the applicants were covered by any of the entries 19 to 80 of Schedule B and that, when edible oil manufactured by the applicants was covered by entry 14 of that Schedule, the set-off claimed by the applicants was not admissible by reason of the aforesaid proviso. The Assistant Commissioner rejected the applicants' contention that the right to claim set-off under section 18B(2) was absolute and that, therefore, the set-off claimed by them should be granted in respect of the tax paid by them on the purchases of groundnuts notwithstanding the fact that no sales tax was payable by them on the sales of the manufactured goods, namely, edible oil. He also rejected a further contention of the applicants that since the right to claim set-off under section 18B was an absolute right, the proviso to rule 11(1A) was invalid as being ultra vires section 18B on the ground that it placed a restriction upon the absolute right to claim set-off. The Assistant Commissioner was of the view that section 18B was enacted with a view to give relief against the imposition of tax under the Act at two points, namely, the imposition of the purchase tax and the general sales tax on the raw materials and the sales tax on the manufactured goods, namely, edible oil. But as there was no liability to pay sales tax on the sales of goods covered by entries 1 to 8 in Schedule B, in the present case entry No. 14, the Legislature did not intend to grant relief of set-off in such cases, that is to say, where goods manufactured are those which fall under any of the entries 1 to 18 of Schedule B. The applicants, aggrieved by this order, filed a revision before the Deputy Commissioner of Sales Tax who dismissed the revision. The Deputy Commissioner of Sales Tax however held, as regards the contention that the proviso to rule 11(1A) was ultra vires section 18B, that he had no jurisdiction to deal with that contention and, as aforesaid, rejected the applicants' revision. Thereupon, the applicants filed a further revision before the Sales Tax Tribunal before whom they urged the same contentions urged by them before the Deputy Commissioner and the Assistant Commissioner. The Tribunal negatived these contentions and rejected the revision. The Tribunal agreed with the Assistant Commissioner that section 18B was intended to avoid tax on the same goods at two points, as the Legislature did not consider it fair that the same goods, whether in the form of raw materials or in the ultimate form of manufactured goods, should be taxed twice in the hands of the manufacturer, first at the time of the purchase and again at the time of the sale of the manufactured goods. The Tribunal observed that therefore a provision was made for granting set-off in respect of sums paid as and by way of general sales tax and purchase tax on purchases of raw materials. But the Tribunal noted that the intention of the Legislature was not to exempt such goods from tax altogether and that the relief by way of set-off against

such taxation at two points could be granted only to the extent permitted by the Legislature. The Tribunal was of the view that section 18B(2) prescribed the extent of the relief which should be granted and authorised the grant of set-off only against the sales tax payable by a dealer under section 8, and therefore, if the manufactured product was not liable to sales tax, there was nothing against which set-off could be granted. The Tribunal also observed that the grant of what would virtually amount to refund of the general sales tax and the purchase tax in cases where the dealer was not liable to pay the sales tax under section 8, would be in effect to confer a total exemption from tax on the raw materials and would introduce discrimination between manufacturers of goods who are not liable to sales tax and manufacturers of goods liable to sales tax. The manufacturers of goods not liable to sales tax would not pay any sales tax on the sales of goods and would also have refunded to them the general sales tax and the purchase tax paid on the purchase of raw materials and would enjoy total exemption from taxes if the claim of the applicants were to be accepted, while the manufacturers of goods liable to sales tax would have to pay the sales tax on the sale of manufactured goods subject to only the set-off in respect of the general sales tax and the purchase tax paid by them on the purchase of raw materials. Such discrimination, according to the Tribunal, could not have been intended by the Legislature while enacting section 18B(2). According to the Tribunal, a rule which denies the grant of set-off in respect of goods which are used in the manufacture of goods not liable to sales tax under section 8 would be in conformity with the scheme of section 18B(2) and did not introduce any conflict with that sub-section. The Tribunal also held that apart from the proviso to rule 11(A), under the very terms of section 18B(2), a dealer could claim set-off only against the sales tax payable by him under section 8 and edible oil manufactured by the applicants falling under entry 14 of Schedule B not being liable to sales tax, the applicants' claim for set-off in any event had to be rejected. It is this order of the Tribunal which has been challenged in this reference.

4. Mr. Shah for the applicants contended that the proviso to rule 11(1A) of the side rules was in conflict with the provisions of section 18B(2) and was in excess of the rule-making power granted to the State Government under section 18B(2) and that, therefore, the proviso, on the strength of which the said orders were passed, should be held invalid. The argument was that sub-section (2) of section 18B made it mandatory on the State Government making rules under sub-section (1), to provide for set-off in the case of a registered dealer who manufactured or processed any goods for sale against sales tax payable by him under section 8 of the sums recovered from him by other registered dealers by way of general sales tax on the purchase of goods set out in entries 1 to 18 of Schedule B, sales tax on purchases of goods specified in entries 19 to 22 and 25 to 80 of that Schedule and purchase tax under section 10A on purchases of goods by such a dealer. It was urged that the right to claim set-off these amounts under sub-section (2) of section 18B was a general right which could not be restricted by the rules made by the State Government under sub-section (1) and that, therefore, the proviso limiting the set-off only to cases where the goods manufactured were the goods falling under entries 19 to 22 and 25 to 80 of Schedule B for sale, was bad. Two questions would, therefore, arise on this contention, (1) whether section 18B(2) makes it mandatory to provide in the rules for set-off irrespective of whether the goods fall under entries 19 to 80, i.e., irrespective of what the goods manufactured are, and (2) whether on a proper construction of section 18B(2), the proviso to rule 11(1A) is in conflict with the provisions of sub-section (2). If the answer to the first question is in the negative, it would not become necessary for us to go into the second question and consider the vires of the rule.

5. In order to appreciate the contention urged by Mr. Shah, it would be necessary first to consider the scheme of the Act and, in particular, of section 18B. Chapter III deals with the incidence and levy of tax. Section 5 therein provides for the liability of a dealer to pay tax on the turnover of his sales and purchases made on and after the appointed dates if such turnovers are in excess of those prescribed therein. Section 6 provides that subject to any rules made under section 18B, a dealer shall be liable to pay the taxes therein set out. Section 7 exempts payments of any tax in respect of sales or purchases of goods specified in column 1 of Schedule A to the Act subject to the conditions or exceptions, if any, set out in the corresponding entry in column 2 thereof. Section 8 provides that subject to the provisions of section 7, a sales tax shall be levied on the turnover of sales and purchases specified in column 1 of Schedule B upon rate, if any, specified against them in column 2 of that Schedule after deducting from such turnover sales of goods which have been purchased from a registered dealer on or after the appointed day, or on the purchase of which the dealer has paid or was liable to pay the purchase tax, provided that the goods have not been processed or altered in any manner after such purchase, and sales of goods to a dealer who holds an authorisation and furnishes to the selling dealer a certificate in the prescribed from declaring inter alia that the goods so sold to him are intended for sale in the course of inter-State trade or commerce or in the course of export of goods out of the territory of India by him or by the registered dealers to whom he sells the goods. Section 9 provides for the levy of the general sales tax and lays down that subject to the provisions of section 7, a general sales tax shall be levied on the turnover of sales of goods specified in column 1 of Schedule B at the rates, if any, specified against them in column 3 in the said Schedule. The section contains three provisos and an explanation, but it does not appear to be necessary to recite them here. Section 10 provides for the levy of purchase tax and lays down that there shall be levied a purchase tax on the turnover of purchases of goods specified in column 1 of Schedule B at the rates, if any, specified against such goods in column 4 of the said Schedule, (a) where such goods are purchased from a person who is not a registered dealer, and (b) where a certificate under clause (b) of section 8 has been furnished in respect of such goods and the purchasing dealer does not show to the satisfaction of the Collector that the goods have been sold by him or by a registered dealer to whom he has sold the goods, in the course of inter-State trade or commerce or in the course of export of goods out of the territory of India within a period of six months from the date of purchase by the dealer furnishing such certificate. The section contains a proviso which provides that no purchase tax shall be levied under clause (a) on the purchase of any goods specified in entries 1 to 18 of Schedule B if such goods are sold by the dealer after such purchase. It will be seen from Schedule B that no sales tax under section 8 is payable in respect of goods set out in entries 1 to 18 (both inclusive) and the sales tax is payable in respect of the goods enumerated in entries 19 to 22 and 25 to 80 of that Schedule. Edible oil set out in entry No. 14 is therefore not subject to the sales tax leviable under section 8 as the rates of such sales tax on edible oil are nil.

6. Section 18, with which we are in this reference immediately concerned, empowers the State Government to make rules in connection with granting drawback, set-off, refund, etc. Sub-section (1), as it stood at the material time, provided that the State Government may by rules provided that the tax leviable under sections 8, 9, 10 or 10A shall not be payable in respect of any specified class of sales or purchases, (b) a drawback, set-off or refund of the whole or part of the tax leviable on any class of sales or purchases under sections 8, 9, 10 or 10A, shall be granted to the purchasing dealer in such circumstances and subject to such conditions as may be specified, and

(c) the sale price or purchase price shall, in the case of any class of sales or purchases, be reduced for the purpose of levy of tax under sections 8, 9, 10 or 10a to such extent and in such manner as may be specified. Sub-section (2), upon which reliance has been placed, reads as under :-

'Any rules made under sub-section (1) shall provide that in the case of a registered dealer who manufactures or processes any goods for sale there shall be set-off against the sales tax payable by him under section 8, the aggregate of sums -

(i) recovered from the dealer by other registered dealer by way of

(a) general sales tax on the purchase of goods specified in entries 1 to 18 (both inclusive) of Schedule B, and

(b) sales tax on the purchase of goods specified in entries 19 to 22 (both inclusive) and 25 to 80 (both inclusive) of Schedule B; and

(ii) payable as purchase tax under clause (a) of section 10 on the purchase of goods by such dealer,

after deducting therefrom on per cent. of the sale price of any goods manufactured or processed, where the sale of the goods takes place outside the pre-Reorganisation State of Bombay, excluding the transferred territories.'

7. It is clear from a reading of these two sub-sections that though sub-section (1) is an enabling provision authorising the State Government to frame rules with regard to granting of drawback, set-off, refund, etc., and gives power to the State Government to prescribed under clause (b) thereof circumstances and conditions subject to which such drawback, set-off and refund etc., should be granted, sub-section (2) provides that any rules made under sub-section (1) 'shall provide' that in the case of a registered dealer manufacturing or proceeding any goods for sale, a set-off shall be granted against the sales tax payable by him under section 8. It will be noticed that though the provisions of sub-section (2) are mandatory in nature, the set-off, which it is incumbent upon the State Government to provide under the rules made under the rules made under sub-section (1), is against the sales tax payable by such a dealer under the provisions of section 8. Rule 11(1A), which is challenged as being in conflict with section 18B(2) and therefore as being in excess of the rule-making power of the State Government, provides as follows :-

'11. (1A) In assessing the amount of sales tax payable by a registered dealer who manufactures or processes any goods for sale in respect of any period, the Collector shall grant him a drawback, set-off or refund, as the case may be, of an amount equal to the aggregate of the sums -

(i) recovered from the dealer by other registered dealers by way of sales tax or general sales tax;

(ii) calculated in the manner specified in sub-rule (1) of rule 11-A; and

(iii) payable as purchase tax under clause (a) of section 10 of the purchase of such goods by the dealer,

after deducting therefrom one per cent., and in the case of goods falling under entry 23 or 24 of Schedule B to the Act, one-quarter per cent. of the sale price of the goods which have been so manufactured or processed by him where the sale of goods takes place at any place in India outside the State of Bombay; the goods having been transported to such place on or after the 1st day of July, 1957.

Provided that -

(a) such goods have been used as raw materials, processing materials, etc., or processing of any goods specified in entries 19 to 80 (both inclusive) of Schedule B to the Act for sale,

(b) and the goods so manufactured or processed are not the goods on the sale of which no sales tax is payable under rule 5 or clause (i) of rule 7.'

8. At first sight, it would appears as if there is a conflict between section 18B(2) and the proviso to rule 11(1A) inasmuch as whereas section 18B(2) provides that set-off should be granted without any conditions or restrictions, the proviso lays down a restriction that set-off in respect of the sales tax, the general sales tax and the purchase tax under section 10A should be given provided the goods so purchased have been used as raw materials in the manufacture or processing of goods which are set out in entries 19 to 80 only and not in entries 1 to 18. Therefore, since edible oil is the subject-matter of entry 14 of Schedule B, no set-off can be granted if the rule were to prevail.

9. It will, however, be observed that the relief which section 18B(2) prescribed has to be granted under the rules which may be made under sub-section (1) as a set-off and not refund and that set-off is to be against the sales tax payable by the dealer under section 8. If, therefore, there is no sales tax payable by such a dealer under section 8, there would be no question of set-off, for there would be no sales tax against which set-off can be asked for or given. Though under section 8, sales tax is provided for in respect of sales of goods set out in column 1 of Schedule B, so far as entries 1 to 18 are concerned, the rates of sales tax are nil in respect of all of them. Therefore, edible oil being item No. 14 in Schedule B, no sales tax was payable in respect of that item and that being so, there was nothing against which a dealer could claim a set off. It would seem that it was because the rates of sales tax in respect of goods enumerated in entries 1 to 18 in Schedule B were nil that in rule 11(1A) a proviso was inserted, namely, that set-off could only be claimed against turnover of sales of goods enumerated in entries 19 to 80 in column 1 of Schedule B. It would also seem that the object of providing for set-off was to grant to a registered dealer, who manufactured or processed goods for sale, some relief against the sales tax payable by him under section 8 on goods manufactured or processed by him. To achieve this end, set-off on the general sales tax, the sales tax on purchase of goods set out in entries 19 to 22 and 25 to 80 of Schedule B and purchase tax payable by a dealer on the purchase of goods was provided for against the sales tax payable by him under section 8. If the dealer had paid taxes on his purchase of raw materials, then the amount paid by him by way of such taxes could be set-off against the sales tax payable by him on the turnover of sales by him of the goods manufactured or processed by him. This, however, does not mean that where no such sales tax was payable by him, he would still get set-off of the taxes paid by him on the purchase of raw materials by him. If the construction of section 18B(2) suggested on behalf of the applicants were to be accepted, it would mean that they could claim, not set-off but in effect refund which is

not what is provided by section 18B(2), and a dealer in that case would not have to pay taxes either on the purchase of raw materials or the sales tax on the finished goods at all. This was not the the intention of enacting section 18B(2). The object in enacting section 18B(2) was to provide a relief to a dealer who has to pay sales tax by way of a set-off against such sales tax, the general sales tax, the sales tax on purchases and the purchase tax paid by him under section 10(a). Therefore, if no sales tax is payable by him on the manufactured or processed goods, there would be no question of his claiming a set-off, first, because there is nothing against which he could claim a set-off, secondly, because such a claim would not be by way of set-off but refund, and thirdly, allowance of such a claim would be contrary to the very object for which sub-section (2) was enacted.

10. But the argument was that as section 18B(2) stood prior to 1st July, 1957, there was a proviso thereto which expressly restricted the scope of the set-off provided in the operative part of the section only if the general sales tax, the sales tax on the purchase of goods specified in entries 19 to 22 and 25 to 80 of Schedule B and the purchase tax payable by the dealer under section 10(a) were on goods which were used by the dealer in the manufacture or processing of any goods specified in entries 19 to 22 (both inclusive) and 25 to 80 (both inclusive) of Schedule B for sale. It was pointed out that sub-section (2) was recast in the present form by Bombay Act XVI of 1957 which came into force as from 1st July, 1957, and the argument was that the omission of the proviso in the amended sub-section indicated that the Legislature intended not to restrict the relief of set-off any more to the manufactured or processed goods falling under entries 19 to 80 of Schedule B and, therefore, the restriction placed in the proviso to rule 11(1A) to goods which have been used in the manufacture or processing of any of the goods specified in entries 19 to 80 of Schedule B would be in conflict with the unrestricted right of set-off provided in sub-section (2) of section 18B.

11. Sub-section (2) of section 18B, as it stood prior to 1st July, 1957, read as follows :-

'(2) Any rules made under sub-section (1) shall provide that in the case of a registered dealer who manufactures or processes any goods for sale there shall be set-off against the sales tax payable by him under section 8, the excess, if any, of the amount mentioned in clause (I) below over the amount mentioned in clause (II) below :-

(I) the aggregate of the sums -

(i) recovered from the dealer by other registered dealer by way of -

(a) general sales tax on the purchase of goods specified in entries 1 to 18 (both inclusive) of Schedule B, and

(b) sales tax on the purchase of goods specified in entries 19 to 22 (both inclusive) and 25 to 80 (both inclusive) of Schedule B, and

(ii) payable as purchase tax under clause (a) of section 10 on the purchase of such goods by the dealer :

Provided that such goods have been used in the prescribed manner in the manufacture or processing of any goods specified in entries 19 to 22 (both inclusive) and 25 to 80 (both inclusive) of Schedule B for sale.

(II) Three pies in the rupee on the aggregate of the sale prices of goods which have been so manufactured or processed, where -

(i) the sale is not liable to tax by virtue of the provisions of section 46; or

(ii) the dealer has claimed a deduction under clause (b) of section 8 in respect of the sale.'

12. It will be noticed that in the first part of the sub-section, it is expressly provided that set-off in respect of the aggregate of sums set out thereafter would be against the sales tax payable by a dealer under section 8. Thereafter, the set-off to be granted to the dealer had to be against the sales tax payable by him under section 8. The sales tax payable by him is, however, not the sales tax on the goods manufactured or processed by him from the goods on which he has paid the general sales tax or the sales tax on the purchase of goods set out in entries 19 to 22 and 25 to 80 of Schedule B or the purchase tax payable under section 10(a), but the sales tax payable by him on any goods manufactured or processed by him. But while calculating the quantum of the set-off, the proviso laid down that the set-off would be claimable provided that the goods in respect of which the dealer had paid the general sales tax, the sales tax on the purchase of goods specified in entries 19 to 22 and 25 to 80 of Schedule B and the purchase tax under section 10(a) were goods which were used in the manufacture or processing of any goods specified in entries 19 to 22 and 25 to 80 of Schedule B for sale. Rule 11(1A) framed under section 18B(1) incorporated the terms of this proviso and restricted, what the proviso had restricted, the set-off in respect of the goods which had been used in the manufacture or processing of goods specified in entries 19 to 80 of Schedule B.

13. It is true that when sub-section (2) of section 18B was amended in 1957, the proviso was omitted from the amended sub-section and therefore, it would be possible to say that the restriction to the right of set-off laid down in the original sub-section as a result of that proviso was removed and therefore, if the State Government were to frame rules regarding set-off under sub-section (1), it would be mandatory on it to provide for set-off in respect of taxes paid by a dealer even though the goods on which he has paid those taxes were not used by him in the manufacture or processing of foods falling under entries 19 to 22 and 25 to 80 of Schedule B. That may perhaps be said to be the result of the omission of the proviso from the amended sub-section (2). Nevertheless, the condition precedent to a claim of set-off was still retained in the amended sub-section (2), namely, that a set-off of the amount of taxes set out there could only be against the sales tax payable by a dealer under section 8 and therefore, no such set-off could be claimed if the dealer had not to pay sales tax under section 8. Since no sales tax was payable by a dealer in respect of the goods specified in entries 1 to 18 of Schedule B, the omission of the proviso from the amended sub-section (2) would make no difference in the case of a dealer whose turnover of sales was in respect of goods falling under any of the entries 1 to 18 of Schedule B.

14. It is an admitted fact that the applicants were not liable to pay any sales tax under section 8 on their manufactured product, namely, edible oil, falling under entry 14 of Schedule B in respect of which the rates of sales tax payable under section 8 were nil and therefore, irrespective of rule 11(1A), they would not be entitled to claim set-off as a result of sub-section (2) of section 18B itself, which expressly enacts that set-off there provided for can only be against the sales tax payable by a dealer under section

8. This conclusion is supported by the fact that while enacting section 18B, the Legislature has made a distinction between refund and set-off, and has expressly provided that the relief of set-off can be only against the sales tax payable by a dealer under section 8 and not against any other tax provided in the Act. The right to claim set-off, therefore, is not independent or unconditional, but is conditioned by a dealer having to pay sales tax under section 8.

15. Mr. Kaji, who is interested in a writ petition which is yet to follow and in which also the question of construction of this very sub-section arises, supported, the applicants' contention and argued that sub-section (2) of section 18B was available to any registered dealer who manufactures or processes goods but there was no restriction as to the kind of goods on which he was liable to pay sales tax and that the only requirement of the sub-section was that he must be a dealer whose turnover of sales was taxable under section 8, in other words, turnover of sales in respect of goods set out in Schedule B. The argument was that sales of all goods set out in Schedule B were chargeable to sales tax under section 8 except that the rates of sales tax in the case of goods set out in entries 1 to 18 were nil. Nevertheless, even sales of such goods were chargeable under section 8 with sales tax and though the rates of sales tax in respect of such goods were nil, they still fell under section 8 and therefore, even if a dealer who manufactured or processed goods falling under entries 1 to 18 of Schedule B had not to pay any sales tax by reason of the fact that the rates of sales tax in respect of them were nil, he would still be entitled to set-off. He relied on two decisions in A. P. Mariappa v. The State of Madras ([1962] 13 S.T.C. 746.) and Collector of Sales Tax v. Parimal Brothers ([1962] 13 S.T.C. 647.). But neither of these two decisions supports the proposition he canvassed and both the decisions are on different questions. The fallacy in the argument lies in the fact that the right to set-off under the sub-section is conditioned not on the mere chargeability of sales tax under section 8 but on the sales tax payable by a dealer under section 8. The construction suggested by him would mean altering the words of sub-section (2) and substituting the words 'payable under section 8' by the words 'chargeable under section 8'. The construction suggested by Mr. Kaji, therefore, has to be rejected.

16. Mr. Shah also argued that the set-off contemplated by sub-section (2) was an independent relief and though it is called in the sub-section a set-off, it is in the nature of a counter-claim and therefore, did not require sales tax being actually payable by a dealer. He relied on the meaning of the word 'set-off' given in Motion's Pocket Law Lexicon, Eight Edition, at page 338, where it is stated that in an action to recover money, a set-off is a cross-claim for money by the defendant, for which he might maintain a separate action against the plaintiff. But this does not mean that every cross-claim is a counter-claim and there is in law a well-settled distinction between a set-off and a counter-claim. The learned author himself brings out this distinction by observing in that very passage that a set-off extinguishes the plaintiff's claim pro tanto, so that the plaintiff can recover against the defendant the balance of his claim after deducting what is due from him to the defendant. He also relied upon the meaning of 'set-off' given in Halsbury's Laws of England, Third Edition, Volume 34, at page 395. But there also, the distinction between a set-off and a counter-claim has been clearly drawn in the sense that whereas set-off is a ground of defence, a shield and not a sword, which if established, affords an answer to the plaintiff's claim wholly or pro tanto, a counter-claim as such affords no defence to a plaintiff's claim but is a weapon of offence which enables a defendant to enforce a claim against the plaintiff as effectually as in an independent action. It is also there stated that where facts by way of counter-claim constitute a set-off, they can be additionally pleaded as

such. This observation again brings out the fact that a set-off and a counter-claim are distinct remedies and are not one and the same. It is true that in a case where a set-off is established as a defence against a plaintiff's claim, a court may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, but this is done in view of the express rules of procedure to be found in the Supreme Court Rules in England and similar rules in the Civil Procedure Code, such as Order 8, rule 6, and Order 20, rule 19. But because a decree can be passed in favour of a defendant where, in a defence by way of set-off a balance is found in his favour, does not mean that there is no distinction in law between a set-off and a counter-claim or that both are one and the same, nor would it be justified to bring to aid the special provisions as to procedure in construction of a statute to which such procedure is not applicable. The contention, therefore, that the right of set-off under sub-section (2) of section 18B is an independent right irrespective of whether a dealer claiming it has to pay sales tax under section 8, cannot be sustained.

17. Mr. Shah then sought to argue that there were inherent indications in the sub-section itself to show that the relief of set-off granted therein to a dealer was an unconditional and an independent right, not conditioned by any sales tax payable by him under section 8. This he tried to establish by submitting that there was a distinction between a remedy and a relief, that the first part of sub-section (2) provided a relief and the latter part a remedy. His contention in other words was that the sub-section first provides for the relief of set-off which has nothing to do with the sales tax payable by a dealer, and then provides how that relief is to be adjusted, i.e., against the sales tax payable by him. This construction also cannot be accepted at least for two goods reasons, (1) that it refuses to take into account the crucial words in the sub-section, namely, 'set-off against the sales tax payable by him under section 8' which must mean that there must be some sales tax which is payable by the dealer under section 8, and (2) that it is not consistent with the scheme and the object of sub-section (2). The scheme of the sub-section is that it falls into two parts. The first part of the sub-section provides for the relief, i.e., set-off of the aggregate amount of the three taxes paid by the dealer against the sales tax payable by him, a relief given to a dealer who is a registered dealer and who has manufactured or processed goods for sale, and the second part lays down what the quantum of such set-off can be against the sales tax payable by him under section 8. The proviso in the original sub-section laid down a further limitation, namely, that the raw materials over which the dealer has paid the three taxes or any one or more of them, were used for manufacturing or processing of goods which fall under entries 19 and 22 and 25 to 80 of Schedule B. Even though that proviso is deleted and is no longer in the amended sub-section, the condition for the right to the relief of a set-off is still there and unless that condition is fulfilled, a dealer cannot claim such relief. The object of the sub-section as before 1st April, 1957, and thereafter is still the same, namely, the grant to a dealer who is a manufacturer or a processor, a relief by way of set-off against the sales tax payable by him under section 8. It is impossible on this analysis of the sub-section to find any inherent indications of the set-off being an absolute or an unconditional right of relief.

18. Mr. Shah, however, relied upon clause (3) of rule 11B of the said rules in support of his contention that there is no distinction made in the rules between a refund and a set-off. The only thing that can at best be said is that though in the case of set-off the balance if any in favour of a dealer cannot be strictly paid to him, clause (3) of this rule seeks to give a somewhat wider relief in the sense that the clause makes a provision for such an excess or balance to be paid. But this clause cannot be relied

upon to sustain the proposition that the rules do not maintain a distinction between refund and set-off or that the relief of set-off under section 18B(2) is synonymous with the relief of refund. This is clearly seen from the fact that clause (3) of rule 11B itself provides that such excess is to be paid not by way of set-off under sub-section (2) but as refund under the rules made under sub-section (1) of section 18B. Such refund in fact is not contemplated under sub-section (2) at all.

19. It was lastly urged that clause (ii) of sub-section (2) contemplates that there can be set-off even where the turnover of sales of a dealer was in respect of sales outside the State and on which, by reason of section 46, no sales tax can be levied. The argument was that even in such a case, a dealer would be entitled to claim set-off. But such an argument cannot be upheld for the reason against that the set-off is against the sales tax payable by a dealer, and if no sales tax is payable by him, for example, where his sales are outside the State, clearly he would not be entitled to claim the relief of set-off. The relief of set-off under section 18B(2) is not against the taxes paid by a dealer, namely, the general sales tax or the purchase tax on the purchase of raw materials, but against the sales tax paid by him under section 8 on goods manufactured or processed by him. The former tax decides the quantum of relief which the latter tax is the tax against which the relief of set-off is granted. In our view, as the applicants did not have to pay any sales tax under section 8, they were debarred from claiming set-off by reason of the very provisions of section 18B(2) themselves irrespective of rule 11(1A). In that view, there would be no necessity of going into the question of the vires or the validity of rule 11(1A).

20. For the reasons aforesaid, our answer to question No. (2) is in the negative. As regards question No. (1), it is not necessary to give any answer. The applicants will pay to the respondent the costs of this reference.

21. Reference answered accordingly.