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INDIRECT TAX

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I INTRODUCTION

THE SHARE of revenue earned through indirect taxes is growing very fast since the last decade of the past century and one and half decade of the twenty first century. In this growth the role of service tax is significant. However a large amount is lost due to the ever increasing delays in long standing litigation. The year 2014 is marked by a number of Supreme Court pronouncements to a great extent towards clarification of laws, rules and notifications. The various aspects dealt with by the Supreme Court during the period covered are related to assessment, determination of nature of a commodity and tax liability, the schemes of composition tax, refunds of taxes collected under different circumstances and so on. A good number of decisions covers the area of interpretation of taxing statutes. The rules applicable to specific cases are illustratively discussed. It would be appropriate to mention about the discussion relating to strict and liberal interpretation, nature of exemptions and tax incentives.

The discussion relating to "works contract" is noteworthy. The declaring of the National Tax Tribunal Act as unconstitutional would prove a landmark in the tax administration.

Assessment: Compounded versus regular

In *Bhima Jewellery* v. *Asstt. Commissioner (Assessment) Kerala*,[1] the appellant firm was a dealer in gold and silver ornaments. It is registered both under the Kerala Commercial Taxes Act (KGST) and the Central Sales Tax Act, 1956. The appellant had opted to pay tax at the compounded rate as provided under section 7 of the KGST Act and the request of the appellant was accepted by the department. The appellant continued to pay tax at the compounded rate for the assessment year 2001-02. On July 23rd 2001, the legislature had brought in an amendment to the KGST Act by inserting section 5D to the KGST Act, levying

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1 (2014) 71 VST 110 (SC).

2 (2014) 72 VST 353 (SC).

additional tax on those dealers who are taxable under section 5 and 5A of the KGST Act. The appellant in accordance with this provision had to deposit additional tax for the months of July and August 2001. Being aggrieved by the demand of additional tax under section 5D of the KGST Act for the aforesaid months and also for subsequent months, the appellant has approached the writ court. The single judge of the high court after a careful consideration, came to the conclusion that when a dealer exercises his option to pay tax at the compounded rate under section 7 of the KGST Act, it pays the tax payable under section 5(1) of the KGST Act and therefore the appellant is liable to pay the additional tax under section 5D of the KGST Act. The division bench of the high court confirmed the orders passed by the single judge. It is the correctness or otherwise of the said order, which is called in question by the appellant before the Supreme Court.

The Supreme Court took the view that the dealer is not being taxed under section 5 or section 5A of the KGST Act but is paying tax at the compounded rate as envisaged in section 7 of the KGST Act and therefore will not be liable to pay additional tax under the amended provision of the KGST Act. The court pointed out that the aforesaid proposition is in agreement with several decisions of apex court, where the court has reached the conclusion that the option of composition of tax is like a bilateral agreement between the parties with an object to dispense with the rigors of regular assessment.

The Supreme Court allowed the appeal and set aside the impugned judgment and order passed by the high court. It directed the assessing authority to refund the additional tax paid by the appellant.

In *Koothattukulam Liquors* v. *Deputy Commissioner of Sales Tax* [2] it has been held that, once a compounding option is availed by the assessee and accepted by the revenue, it is not permissible for either side to withdraw from the said option. The concept of composition of payment is a bilateral statutory contract between the parties. The department and the dealers are bound by the agreement. The object of the scheme is to dispense with the requirement of the regular assessment and for the purpose of easy levy and the collection of the tax payable under the Act.

In *State of UP* v. *Systematic Conscom*[3] the tax payer opted for the composite scheme which was to be adjusted if the government decides to change the rate of tax. A new tax was levied and the court said that the new levy is different and there is no change in the rate of tax. Composite scheme available under section 7D of the Trade Tax Act, 1948 which provided for composition of amount at an agreed rate on the turnover of a dealer, in lieu of taxes payable by it under the Act. The proviso to section 7D of the Act provided that when there is any change in the rate of tax on the goods, such increase will proportionately affect the rate of compounding of tax. The object of the scheme was mentioned by the court in detail. The State government thereafter introduced the state development tax under section 3H of the Act at the rate of 1% of the turnover. The Supreme Court held

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3 (2014) 75 VST 267 (SC).

that the new tax is not covered under the old composite scheme and the new tax has to be paid over and above.

Interpretation of taxing statutes

In *Kalyan Roller Flour Mills (P) Ltd* v. *Commissioner of Commercial Tax, AP* [4] the appellant is running a roller flour mill. The tax liability on sale of wheat and wheat products and the sale of flour was imposed. The assessee claimed that it is exempted from the liability on the sale or purchase of wheat by the roller flour mills within the State for a period of five years. Thus aggrieved by the order passed by the assessing authority an appeal was filed. The appellate deputy commissioner has allowed the appeal. However the revisional authority being of the opinion that the order passed by the first appellate authority is erroneous and prejudicial to the interest of revenue. The revisional authority observed that: [5]

> though the language of the first notification(the exemption order) is clear and unambiguous, it would defeat the object of issuance of the notification, i.e to encourage flour milling activity in the State and that such object not be resorted to while interpreting the notification. It would create the unnatural and impermissible distinction the sale activities of the dealers who own a roller flour mill but sell wheat and wheat products not manufactured by them and dealers who *do not* own a roller flour mills and are engaged in sell of wheat and wheat products not manufactured by them; the first being exempted from tax and second not being exempted from tax.

The aggrieved assessee approached the high court, which rejected the appeal and upheld the order of the revisional authority. The Supreme Court emphasised that it has been reiterated in numerous decisions that if the language of the notification or an executive order is clear and unambiguous, the courts need not presume anything on the issuance of such notification or order, need or delve into the intention behind issuance of such notification or order. When the language is clear and plain, courts cannot enlarge their scope by interpretative purposes. [6]

The apex court clarified and fortified the position through various precedents. It was said more than seven decades ago by Lord Mersey in *Thompson* v. *Goold and Company*.[7] "It is a strong thing to read into an Act of Parliament words which are not there and in the absence of clear necessity, it is a wrong thing to do." Lord Loreborn, L.C. also observed in *Vickers, Sons and Maxim Limited* v. *Evans*[8] that the judges are not entitled to read word into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself.

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4 2014 (2) SCALE 6.

5 *Id.* at 9.

6 *H.H. Sri Rama Verma* v. *CIT*, 1991 Supp (1) SCC 209; *Maharashtra State Financial Corpn.* v. *Jaycee Drugs and Pharmaceuticals (P) Ltd.* (1991) 2 SCC 637.

7 (1910) AC 409.

8 (1910) AC 444.

In *Assessing Authority-cum-Excise and Taxation Officer* v. *East India Cotton Mfg. Co. Ltd*., [9] the Supreme Court had reiterated the aforesaid proposition and observed that,[10] *in ordinary course when the language of a statutory provision is plain and unambiguous, there is no need to resort to the object and purpose of the enactment because in such a case, the language best declares the intention of the law-giver.* [Emphasis Added]

In *Oswal Agro Mills Ltd.* v. *CCE*,[11] the court has observed that:[12]

> Where the words of the statute are plain and clear, there is no room for applying any of the principles of interpretation which are merely presumption in cases of ambiguity in the statute. The court would interpret them as they stand. The object and purpose has to be gathered from such words themselves. Words should not be regarded as being surplus nor be rendered otiose. Strictly speaking there is no place in such cases for interpretation or construction except where the words of statute admit of two meanings. The safer and more correct course to deal with a question of construction of statute is to take the words themselves and arrive, if possible, at their meaning, without, in the first place, reference to cases or theories of construction.

In *CST* v. *Modi Sugar Mills Ltd.*,[13] this court has further observed as follows:[14]

> In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed: it cannot imply anything which is not expressed; it cannot import provisions in the statutes so as to supply any assumed deficiency.

In *State of Haryana* v. *Bharti Teletech Ltd*[15] the respondent assessee, was allowed sales tax exemption. This benefit was granted subject to the certain conditions which were specifically laid down. One of the conditions postulated that the industrial unit after availing of the benefit shall continue its production at least for the next five years not below the level of average production for the preceding five years. Further it is also stipulated that if the unit violates any of the

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9 (1981) 3 SCC 531.

10 *Ibid.*

11 1993 Supp (3) SCC 716.

12 *Id*. at 721.

13 (1961) 2 SCR 189.

14 *Id.* at para 10.

15 (2014) 68 VST 1(SC).

conditions it shall be liable to make, in addition to the full amount of tax benefit availed of by it during the period of exemption, payment of interest chargeable under the Act as if no tax exemption was ever available to it. The grant of exemption has a sacrosanct purpose. The concept of exemption has been introduced for development of industrial activity and it is granted for a certain purpose to a unit for certain types of good. An entrepreneur could not get an exemption of a unit and thereafter establish number of units and try to club together the production of all of them to get the benefit for all. It would be well nigh unacceptable, for what is required is that each unit must meet the condition to avail the benefit. After considering several authorities the court observed that:[16]

> it is clear as crystal that a statutory rule or an exemption notification which confers benefit to the assessee on certain conditions should be liberally construed but the beneficiary should fall within the ambit of the rule or notification and further if there are conditions and violation thereof are provided, then the concept of liberal construction would not arise. Exemption being an exception has to be respected regard being had to its nature and purpose. *There can be cases where liberal interpretation or understanding would be permissible, but in the present case, the rule position being clear, the same does not arise.* [Emphasis Added]

The court held that such type of clubbing is not permissible. It amounts to a violation of the conditions stipulated and therefore, the consequences have to follow and as a result, the assessee has to pay the full amount of tax benefit and interest. The approach of the high court is absolutely erroneous and it really cannot withstand close scrutiny.

In *Mamta Surgical Cotton* v. *Asstt. Commnr. (Anti-Evasion)*[17] the issue was that whether surgical cotton produced and sold by the assessee is a separate commercial commodity from cotton and thus liable to be taxed at 4% under the Central Sales Tax Act, 1956.

The question which arises for consideration and decision before the Supreme Court is whether the manufacturing process is involved in the production of surgical cotton from ordinary cotton in terms of definition mentioned in section 2(27) of the Act and whether the same commodity in the same entry would be liable for taxation. Further when the scheme of Act suggests that cotton is a commodity of special importance and must be taxed only once in terms of section 15 of the CST Act. The judge discussed the rules of interpretation at a great length.[18]

The High Court of Rajasthan has opined that "surgical cotton" is a commercially different commodity from 'cotton' and accordingly confirmed the order passed by the Rajasthan Tax Board, Ajmer(hereinafter "the Board") in appeal nos. 509 to 512 of 2001, June 28, 2002.

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16 *Id.* at 12.

17 (2014) 68 VST 498 (SC); 2014 (2) SCALE 695 SC.

18 The issue regarding interpretation is deliberately not included here to avoid unnecessary diversion.

The facts are that the appellant is a partnership firm registered as a dealer both under the Rajasthan Sales Tax Act, 1994 and the Central Sales Tax Act, 1956. The appellant carries on the business of processing the cotton and transforming it into surgical cotton.

The judgement of the Supreme Court is in two parts:

As regards the assessment years 1992-93 to 1998-99 the assessee purchases cotton after paying tax at the rate of 4% and thereafter process it into surgical cotton for sale.

For the relevant assessment years, the assessing authority had conducted a survey on the business premises of the assessee and opined that surgical cotton produced and sold by the assessee is a separate commercial commodity from cotton and thus liable to be taxed at 4% under the Act. Accordingly, a show cause notice was issued to the assessee. The assessee took the stand that cotton and surgical cotton are not distinct commodities for the purposes of levy of tax under the Act. The said stand of the assessee was rejected by the assessing authority which passed an order of assessment whereby the assessee was taxed at the rate of 4% and the penalty and interest thereon, dated 28.03.2000.

Being aggrieved by the aforesaid order of assessment, the assessee had carried the matter by way of an appeal before the Deputy Commissioner (Appeals) Commercial Tax, Ajmer. The said authority, accepted the stand of the assessee that the process adopted for making surgical cotton out of cotton purchased does not bring into existence a new commercial commodity and that surgical cotton is nothing but another form of cotton and accordingly, allowed the appeal and granted the relief to the assessee by order on October10, 2000.

Aggrieved by the aforesaid order passed by the first appellate authority, the revenue had carried the matter before the Rajasthan Tax Board, Ajmer. The Board after considering the meaning of the expression 'manufacture' as defined under the Act and also placing reliance on the observations made by this court in various decisions has come to the conclusion that the surgical cotton manufactured by the assessee is a new commercial commodity exigible to tax separately at the rate of 4% under the Act and therefore, set aside the orders passed by the first appellate authority and restored the orders passed by the assessing authority for the assessment years in question by order on June 06,2002.

The assessee being aggrieved by the said order passed by the board had approached the high court. It noticed entry 16 of the notification for the assessment year 1992-93 and analysed the submissions of parties to the *lis* and thereafter reached the conclusion that surgical cotton is amenable to be taxed as an independent entity and accordingly, rejected the tax revision cases and confirmed the orders passed by the tax board.

For the assessment year 1992-93, entry 16 prescribes that cotton of all kinds whether indigenous or imported and whether ginned or unginned, baled, pressed or otherwise including cotton waste is covered by this entry. This is a comprehensive inclusion of all kinds of cotton for the purposes of taxing. A reading of this entry means that the commodity cotton in all its forms namely, indigenous, imported, ginned, unginned, baled, pressed, non-pressed is liable to be taxed at the rate of 4% alongwith cotton waste. Since neither does "surgical cotton" find mention in

the aforesaid entry as a commodity nor does it suitably fit into the description aforesaid, it becomes relevant to delve into the question whether the commodity in question has undergone any change in its characteristics so as to acquire a new commercial identity, that is to say, whether surgical cotton remain as cotton after having undergone transformation through various processes. In other words whether the process of conversion of cotton into surgical cotton be termed as "manufacture of surgical cotton".

The court finds it relevant to notice the definition of 'manufacture' as defined in the dictionary clause of the Act. Section 2(27) of the Act defines the expression 'manufacture'. After discussing several cases on interpretation of this term the court concludes that by referring to "the common parlance test" observed that:[19]

> It can be said when a consumer requires surgical cotton, he would not be satisfied with cotton being provided to him and the same principle would reversibly apply that a customer of cotton would not use surgical cotton as a substitute. Further the purposes for which cotton and surgical cotton are used are diametrically opposite. While surgical cotton finds utility primarily for medical purposes in households, dispensaries, hospitals, etc, raw cotton being, inter alia, non-sterlised and riddled with organic impurities cannot be used as such at all.

Thus the court opined that surgical cotton is a separately identifiable and distinct commercial commodity manufactured out of raw cotton and therefore, ceases to be cotton under entry 16 of the said notification.

In the context of the assessment years 1993-94 to 1998-99 the legislature has consciously included "absorbent cotton wool I.P." immediately after the words "cotton waste" in entry 16. The notification was further amended by later notifications. As a result the entry stands enlarged and it included all kinds of cotton (indigenous or imported), kinds of readymade garments, whether ginned or unginned, baled, pressed or otherwise including absorbent cotton wool I.P. and cotton waste.

During the proceedings before the high court it was not brought to the notice of the court that an amendment to entry 16 was made in the year 1993 whereby the meaning of the expression "cotton" has been expanded to include "absorbent cotton wool I.P." and thus, the high court has only analysed entry 16 as it stands for the assessment year 1992-1993.

The apex court had to decide the taxability of the cotton of the manufactured and sold by the appellant here again the court considered the meaning of includes under the provision and held:[20]

> In light of the aforesaid, we are of the considered opinion that "surgical cotton/absorbent cotton wool I.P." is also "cotton" for the purposes of the relevant entries in the notifications for assessment

19 *Supra* note 13, para 32.

20 *Id.* at para 55.

> years 1993-94 to 1998-99 and therefore is liable to exemption from levy of tax under the Act. In light of the same. The order passed by the high court for the assessment years 1993-1994 to 1998- 1999 could not be sustained.

In *Commissioner of Trade Tax, UP* v. *Bhushan Steel & Strips Ltd.*,[21] the issues before the Supreme Court was to determine the meaning of fix capital investment (FCI) for the purposes of claiming tax exemptions. The respondent had claimed preoperative expenses as part of the FCI which included interest to financial institutions, rights, shares, issue expenses and foreign travel expenses. The tribunal allowed the claim. The view was affirmed by the high court. The Supreme Court reversed the decision on this issue due to the specific provision against such inclusion. As regards second issue whether the transformers/CVT stalled for regulating voltage for running of the machinery in the factory premises was held to be included in the FCI.

In *Commercial Tax Officer* v. *Binani Cement Ltd.*[22] the respondent-assessee is a new industrial unit manufacturing cement with fixed capital investment (FCI) exceeding Rs.500/- Crores and employs more than 250 employees.

The core issue arises out of the respondent-assessee's application for grant of eligibility certificate for exemption from payment of Central Sales Tax and Rajasthan Sales Tax to the State Level Screening Committee, Jaipur under the "Sales Tax New Incentive Scheme for Industries, 1989"

It claimed the exemption at 75% under the Scheme. The committee rejected the claim of the respondent- assessee and observed that since the respondent-assessee is a large scale unit covered under the specific provision of Item 1E of Annexure 'C', it is entitled to 25% exemption,

Aggrieved by this order, the respondent-assessee filed appeal before Rajasthan Tax Board, Ajmer. The Board held that the assessee is entitled to 75% tax exemption by holding the respondent-unit as prestigious unit under the scheme.

The dispute came before the high court in a tax revision petition on behalf of the revenue. The high court dismissed the revision petition filed by the revenue and upheld the decision of the board by holding that the respondent-unit is a prestigious unit and therefore, entitled to 75% tax exemption under the Scheme.

The apex court held that the high court has erred in reaching at its conclusion by holding that the respondent-company would fall into all the three categories of industries referred to in the scheme, that is to say it is a new unit which is a 'Large Scale Unit', a "Prestigious New Unit" and also a "Very Prestigious Unit". The court concluded that the respondent-company would only be eligible for grant of exemption under Item 1E as a large new cement unit in accordance with its FCI being above Rs.5/- crores. In light of the aforesaid, we are of the considered opinion that the judgment and order passed by the high court ought to be set aside and the appeal of the revenue requires to be allowed.

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21 2014 (2) SCALE 11 SC.

22 2014 (2) SCALE 436 SC.

During the course of reaching at the decision the Supreme Court referred to a very good number of its earlier decisions on the appropriate rules of interpretation in this context. The court reiterated the settled legal position in law, that is, if in a statutory rule or statutory notification, there are two expressions used, one in general terms and the other in special words, under the rules of interpretation, it has to be understood that the special words were not meant to be included in the general expression. Alternatively, it can be said that where a statute contains both a general provision as well as specific provision, the later must prevail. Here it would be most appropriate and illustrative to refer the whole gamut of case law both Indian and foreign on the principle of maxim *generalia specialibus non derogant* as discussed by HL Dattu J (as he then was) as such. HL Dattu J. observed that: [23]

> …[T]he Court should examine every word of a statute in its context and must use context in its widest sense. We are also in acquaintance with observations of this Court in *Reserve Bank of India* v. *Peerless General Finance and Investment Co. Ltd*., 1987 SCR (2) 1 where Chinnappa Reddy, J. noting the importance of the context in which every word is used in the matter of interpretation of statutes held thus:

Interpretation must depend on the text and the context. They are the basis of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute- maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place.

In the case of *Commissioner of Central Excise, Jaipur* v. *M/s. Super Synotex (India) Ltd*.[24] the respondent is engaged in the manufacture of yarn of manmade fibers falling under chapter 55 of the schedule to the Central Excise Tariff Act, 1985, chargeable to duty. A show-cause notice was issued to the respondent-assessee on the ground that for certain period it had contravened the Rules, 1944 which had resulted in evasion of central excise duty. The fulcrum of the show-cause notice was that the assessee had not paid the duty on the additional consideration collected towards the sales tax. The case of the revenue was that

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23 *Id*. at 446.

24 (2014) 69 VST 1(SC).

though the assessee was availing exemption from payment of sales tax, it was showing sales tax in the invoices but assessable value was shown separately for payment of central excise duty as a consequence of which the net yarn value was invariably higher than the assessable value and excise duty paid thereon.

The explanation of the assessee was that it was extended the benefit of the incentive scheme and not granted any exemption and, therefore, the sales tax collected was not includible in the assessable value and deduction was admissible. The commissioner of excise repelled the stand of the assessee, interpreted the benefit granted to the assessee as partial exemption and, taking certain other facts into consideration, came to hold that the assessee had deliberately with an intent to evade payment of duty had suppressed the fact that though it was availing partial sales tax exemption under the Sales Tax Incentive Scheme of 1989 for the relevant period up to 75% of tax liability, yet it was paying only 25% of the tax leviable despite collecting additional consideration to the extent of the amount of sales tax and, therefore, the additional amount collected under the camouflage of incentive tax had to be taken note of and, accordingly, price was to be declared and formed as a part of the value for the levy of excise duty.

In *State Of Jharkhand* v. *La Opala R.G. Ltd* [25] the respondent-dealer was a public limited company engaged in the manufacture of glass and glassware made of opal glass, registered under the provisions of the Bihar Finance Act, 1981 and the Central Sales Tax Act, 1956. Under the statutes the tax was payable in respect of sale of all types of glass and glass sheets in the course of interstate sale or commerce from any place of business in the State of Jharkhand shall be calculated at the rate of three per centum and no statutory form in this regard shall be required. The authorities directed him to deposit the tax in relation to its transactions in respect of the inter-state sales to registered and unregistered dealers at the rate of 4% and 12%, respectively. The respondent was also directed to show-cause as to why a penalty under sections 16 and 16(9) of the Bihar Finance Act, 1981 and the Act should not be imposed and the respondent not be directed to correct the returns and deposit tax at the rate of 4%, if the sales is effected to registered dealers and at the rate of 12% if the inter-state sale is effected to un-registered dealers. The respondent-dealer had filed its reply, on January 16, 2004, wherein it took the stand that it was liable to charge and deposit tax at the rate of 3 per cent on sale in the course of inter-state trade in respect of its products; that the returns had been correctly filed and that the tax was validly deposited at the rate of 3 percent.

After the issuance of the aforesaid letter/notice, the authorities by their letter on May 05, 2004, rejected its stand and informed that the respondent would be liable to pay tax at the rate of 4 percent on its inter-state sales if made to a registered dealer and at the rate of 12 per cent if made to an unregistered dealer. Further, the respondent-assessee was informed by the authorities that the product manufactured by him is glassware and, therefore, not covered under the notification by letter dated July 07, 2004. The respondent-dealer, being aggrieved by the communications dated January 09, 2004, May13, 2004 and July 13, 2004 had filed a writ petition

25 (2014) 70 VST 342(SC).

before the high court, inter alia, requesting the court to issue a writ in the nature of certiorari to quash the aforesaid letters and direct the authorities under the Act to extend the benefit of the notification, which has come into force with effect from June 06, 2001. The high court, after a detailed consideration of the issue before them, has come to the conclusion that the glassware manufactured by the respondent-dealer is a type of glass and therefore, it is entitled to the benefit of reduced rate of tax under the notification and, accordingly has quashed the said letters.

The main issue to be decided by the Supreme Court was that notification has used the expression types of glass and not the expression forms of glass. Therefore, what requires to be examined was whether the two terms would be identical in their connotation and import. The court discussed various rules of interpretation of taxing statutes and after rejecting the use of liberal interpretation allowed the appeal the set aside the judgement and order passed by the high court.

In *Nathu Ram Ramesh Kumar* v. *Commr. of Delhi Value Added Tax* [26] appellant assessee has been registered under the Delhi Sales Tax Act, 1975 (hereinafter referred to as the 'Act') as well as under the Delhi Value Added Tax, 2004 and is carrying on the business of manufacture and sale of sweets, namkeens and other eatables. On March 09, 2000 and March 10, 2000, officers from the office of the commissioner of sales tax had visited business premises of the appellant-firm and had recorded statements of partners of the appellant-firm and had also checked total cash inflow on those days. On those two days, sale proceeds were Rs.2,13,974/- (Rupees two lakhs thirteen thousand nine hundred and seventy four only) and Rs.1,98,009/- (Rupees one lakhs ninety eight thousand and nine only) respectively. In spite of issuance of notice and giving hearing to the appellant-assessee firm, sufficient explanation was not provided to the assessing officer and therefore, assessment for assessment year 1999-2000 was made under section 23(3) of the Act. As the assessing officer had come to a conclusion that correct books of accounts had not been maintained, penalty was also imposed upon the assessee by assessment order December 31, 2001 for the said assessment year. Similarly, for the assessment year 2000-2001 also, the books of accounts had not been maintained properly. In view of the said fact the assessing officer had taken into account figures of sales arrived at by him for the assessment year 1999-2000 and had added 10% thereon as that was considered to be a normal growth of the business in normal circumstances, thereby arriving at gross sales for the Assessment Year 2000-2001.

Being aggrieved by the above mentioned assessment orders, the assessee had preferred appeals before the commissioner of sales tax, which had been dismissed by an order dated November 13, 2003 and therefore, the assessee had preferred appeals before the appellate tribunal of sales tax, which had also been dismissed by a common order dated November 03, 2004.

The Supreme Court observed that:[27]

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26 (2014) 70 VST 1 (SC).

27 *Id.* at 6.

> in our opinion, the Assessing Officer had rightly come to the conclusion that the books of accounts maintained by the assessee were not showing correct sales and therefore, the conclusion arrived at by him cannot be said to be incorrect. There was a reasonable basis for him to arrive at the said conclusion, especially when the assessee did not offer any satisfactory explanation in spite of issuance of notice.

The Supreme Court therefore found the impugned judgment delivered by the high court as just and proper, which does not require any interference.

Works contract or sale

In *Kone Elevator India Pvt. Ltd* v. *State of Tamil Nadu,*[28]the spinal issue was whether a contract for manufacture, supply and installation of lifts in a building is a "contract for sale of goods" or a "works contract". in case of the former, the entire sale consideration would be taxable under the sales tax or value added tax enactments of the state legislatures, whereas in the latter case, the consideration payable or paid for the labour and service element would have to be excluded from the total consideration received and sales tax or value added tax would be charged on the balance amount. Sales Tax Appellate Tribunal, Andhra Pradesh, considering the nature of work is a "works contract", for the erection and commissioning of lift cannot be treated as "sale". On a revision the High Court of Andhra Pradesh affirmed the view of the tribunal. Aggrieved by the decision of the high court, the State of Andhra Pradesh preferred special leave to the Supreme Court. In the present case the apex court by a majority of 4: 1 decided the transaction as a "works contract" and overruled its earlier decision rendered in a three-Judge Bench, in *State of A.P.* v. *Kone Elevators (India) Ltd.*[29]

Constitutionality of National Tax Tribunal (NTT)

Madras Bar Association v. *Union of India*[30] is a case of great importance. The court declared that the establishment of National Tax Tribunal is unconstitutional. The court traced the historical back ground in a very systematic way. It is appropriate here to incorporate the same for beneficial use.

The first Law Commission of independent India was established in 1955 for a three year term under the chairmanship of M.C. Setalvad, who was also the first Attorney General for India. The idea of constituting a "National Tax Court" was mooted by the first Law Commission in its 12th Report, suggesting the abolition of the existing appellate tribunal, under the framework of the Income Tax Act. It recommended a direct appeal to the high courts, from orders passed by appellate Commissioners. This recommendation was not accepted.

A direct taxes enquiry committee was set up by the Government of India in 1970, with K.N. Wanchoo a retired Chief Justice of the Supreme Court, as its

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28 (2014) 71 VST 1 (SC); (2014) 7 SCC 1.

29 (2005) 3 SCC 389.

30 2014 (11) SCALE 166 SC.

Chairman. The Wanchoo Committee recommended creation of a "National Court", which would be comprised of 20 judges with special knowledge of tax laws. The recommendation made by the Wanchoo Committee, was for creation of permanent "Tax Benches" in high courts, and appointment of retired judges to such benches, under article 224A of the constitution. The suggestion was aimed at clearing the backlog of tax cases. The Wanchoo Committee did not suggest the establishment of any separate tax courts as that, according to the committee, would involve an amendment to the provisions of the Constitution, besides other statutory and procedural changes.

Another direct tax laws committee was constituted in 1977, under the chairmanship of N.K. Palkhivala, an eminent jurist. The committee was later headed by G.C. Choksi. The committee was constituted, to examine and suggest legal and administrative measures, for simplification and rationalization of direct tax laws. The Choksi Committee recommended the establishment of a "Central Tax Court" with an all-India jurisdiction. It was suggested, that such a court be constituted under a separate statute. Just like the recommendations of the Wanchoo Committee, the recommendations of the Choksi Committee also necessitated amendments in the provisions of the constitution. As an interim measure to the above recommendation, the Choksi Committee suggested, the desirability of constituting "Special Tax Benches" in High Courts, to deal with the large number of pending tax cases, by continuous sitting throughout the year. It was also suggested, that judges who sit on the "Special Tax Benches", should be selected from those who had special knowledge, to deal with matters relating to direct tax laws. The Choksi Committee recommended that the judges selected for the "Special Tax Benches" would be transferred to the "Central Tax Court", and when the same was constituted. It is, therefore apparent, that according to the recommendations of the Choksi Committee, the "Central Tax Court" was to comprise of judges of High Courts, or persons qualified to be appointed as High Court Judges. The recommendations of the Choksi Committee reveal that the suggested "Central Tax Court" would be a special kind of high court, to deal with issues pertaining to direct tax laws. This was sought to be clarified in paragraph 6.22 of the Choksi Committee's Report.

None of the recommendations referred to hereinabove were implemented, Union of India promulgated the National Tax Tribunal Ordinance, 2003. After the Ordinance lapsed, the National Tax Tribunal Bill, 2004 was introduced. The said Bill was referred to a Select Committee of the Parliament. The select committee granted a personal hearing to a variety of stakeholders, including the representatives of the Madras Bar Association (*i.e.*, the petitioner before the court in transferred case (C) no. 150 of 2006). The committee presented its report on August 02, 2005. In its report, it suggested serious reservations on the setting up of the NTT. The above Bill was presented before the Lok Sabha in 2005. The Bill expressed four main reasons for setting up the NTT:

(i) to reduce pendency of huge arrears, that had mounted in High Courts all over the country,

(ii) huge tax recovery was statedly held up, in tax litigation before various High Courts, which directly impacted implementation

of national projects/welfare schemes of the Government of India,

(iii) to have a uniformity in the interpretation of tax laws. In this behalf it was suggested, that different opinions were expressed by different high courts on identical tax issues, resulting in the litigation process being tied up in higher courts, and

(iv) the existing judges dealing with tax cases, were from civil courts, and therefore, were not well-versed to decide complicated tax issues.

The reason for holding it unconstitutional was based on the following grounds:

(i) That the reasons for setting up the NTT, were fallacious and non-existent. Since the foundational basis is untrue, the structure erected thereupon, cannot be accepted as valid and justified. And therefore, the same is liable to be struck down.

(ii) It is impermissible for the legislature to abrogate/divest the core judicial appellate functions, specially the functions traditionally vested with the High Court. Furthermore, the transfer of such functions to a quasi-judicial authority, devoid of essential ingredients of the superior court, sought to be replaced was constitutionally impermissible, and was liable to be set aside. Besides the appellate jurisdiction, the power of judicial review vested in High Courts under Articles 226 and 227 of the Constitution, has also been negated by the NTT Act. And therefore, the same be set aside.

(iii) Separation of powers, the rule of law, and judicial review, constitute amongst others, the basic structure of the Constitution. Article 323B inserted by the Constitution (Forty-second Amendment) Act, 1976, to the extent it is violative of the above mentioned components of the basic structure of the Constitution, is liable to be declared ultra vires the Constitution.

(iv) A number of provisions including Sections 5, 6, 7, 8 and 13 of the NTT Act, undermine the independence of the adjudicatory process vested in the NTT, and as such, are liable to be set aside in their present format.

After an elaborate discussion of constitutional issues of basic structure, judicial review and independence of judiciary *vis-a-vis* the composition of NTT the court held the Act unconstitutional.

Refund

In *Deccan Cements Ltd.* v. *Assist. Director of Mines and Geology*[31] a claim of refund of tax illegally collected by the states not allowed by the Supreme Court.

31 2014 (9) SCALE 374 SC.

A person who passes on the burden of tax to other person either directly or indirectly is not entitled to claim the refund of the tax even if the levy or the collection of which by the state is declared to be illegal or unconstitutional. Otherwise it would become a case of unjust encroachment.

Miscellaneous

In *State of Rajasthan* v. *Khangar Singh*[32] the license fee was not paid by the dealer in time. Under an Excise Amnesty Scheme the relief was made available to a defaulter who applies for the benefit within the time limit. The dealer failed to apply for the relief in time. An order was passed whereby license of the respondent was cancelled and the security deposit was ordered to be forfeited. On a petition against this order to the high court which allowed the relief to the dealer On appeal by the State of Rajasthan, the Supreme Court rejecting the relief held that the high court has exceeded its jurisdiction. High court was not even aware of the exact amount which the respondent was liable to pay. So, therefore the Supreme Court reversed the decision of the High Court.

In *Agriculture Produce* v. *Biotar Industries Ltd*.[33] the Supreme Court found that 'De-oiled cake' is different from 'oil cake' and not an agriculture produce. Thus held liable for market fee.

In *CCE* v. *Maruti Suzuki India Ltd*[34]the assessee is a prestigious unit manufacturing and selling in Haryana. The issue was concerned with the determination of transaction value for the purposes of central excise. The Supreme Court held that retention of 50% of sales tax amount under the tax concession granted by the state had to be treated as part of 'transaction value.' The retained sales tax was due to the grant of a tax incentive scheme. The retained sale tax was neither actually paid nor actually payable.

In *Delhi International Airport Pvt.* v. *Union of India* [35] the issue before the court was to decide as to who should bear the burden of service tax. In this case the appellant was given on lease the premises of the airport for performing the obligations. The licensees named in the agreement, were granted a licence to set up and operate duty free shops within the airport premises. The revenue issued a demand cum-show cause notice to the appellant demanding service tax. While these demands were raised, the appellant asserted that the liability was that of respondent no. 5, who was to furnish a guarantee or pay the tax. However, the respondent no. 5 claimed that the liability to pay the tax is that of the appellant. The Supreme Court agreed with the plea and held the appellant liable for the service tax.

In the case of *Delta Distilleries Ltd* v. *United Spirits Limited* [36] the respondent no.1 owns certain brands of Indian Made Foreign Liquor (IMFL). The appellant

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32 2014(12) SCALE 506 SC.

33 (2014) 73 VST 1 (SC).

34 (2014) 72 VST 353 (SC).

35 2014 (13) SCALE 570.

36 (2014) 68 VST 498 (SC).

is a company carrying on the business of distilling and bottling of IMFL. The respondent no.1 entered into an agreement with the appellant at a contract price which was exclusive of sales tax and other taxes, and the respondent no.1 was required to bear the taxes. The case of the first respondent is that the appellant had obtained from the sales tax department certain refund on the sales tax paid on packaging material, which reduced the sales tax liability of the appellant, which was ultimately being borne by the respondent no.1 and this benefit should be actually made available to the respondent no 1 who has to borne the ultimate liability of the tax. The matter was referred to arbitration regarding the quantification of the actual amount claimed by the respondent. After a long process of dispute regarding presentation of certain original assessment orders between the parties the arbitration award was referred to the single judge. The judge, allowed the petition invoking section 27 of the Act of 1996, and directed the appellant to produce the documents sought for. The Supreme Court held that the single judge rightly allowed the petition as against the appellant directing the appellant to produce the documents which were sought by the respondent.

In *State of Punjab* v. *Nokia India Pvt. Ltd*.[37] the issue involved was whether the cell phone battery charger sold as composite package along with cell phone would be liable for VAT at the general rate *i.e*., 12.5% or the concessional rate applicable to cell phones. The court rejected the contention "that composite goods being used consisting of different materials and different components, and goods put up in sets for retail sale, cannot be classified" in a separate category. The court approving the opinion of the assessing authority, appellate authority and the tribunal observed that:

it cannot be held that charger is an integral part of the mobile phone making it composite goods. Merely, making a composite package of cell phone charger will not make it composite goods for the purpose of interpretation of the provisions.

In *Yesyem Arecanut Co.* v. *State of Karnataka*[38]a notification issued under Kerala General Sales Act, 1963. The rate of sales tax was reduced with retrospective effect. It specifically provided that the tax paid at higher rate would not be refunded. The Supreme Court held that in view of the language of the notification the dealer was not entitled for refund of taxes already paid. The dealer could not take advantage of the same and gain undue monetary advantage.

II CONCLUSION

The laws are known for their controversial and complex nature. Even after a lot of exercises they could not come out with a perfect legislation. The task of judiciary is to clarify and explain the intention of legislation. It has to interpret the laws on the bedrock of the constitution. The present survey finds that the task has been fulfilled in an illustrative manner especially in the National Tax Tribunal

37 (2015) 77 VST 427 (SC); 2014 (14) SCALE 233 SC.

38 (2014) 73 VST 502 SC.

case, holding the whole exercise unconstitutional. So has happened in the case of *Kane Elevators* and in other cases. The decision in *Khangar Singh* is of special importance as the court has pointed out that the high court has exceeded its jurisdiction. Almost all the cases decided during the period would prove a guideline for the legislatures as well as judiciary to take appropriate steps to avoid unnecessary litigation. This is more important in view of, presently going on the process of tax reform, especially in the field of indirect taxes through introducing the Goods and Service Tax (GST) scheme.