

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

VATAP No. 59 of 2014 (O&M)

Date of Decision:8.09.2016

M/s Mahashiv Promoters Pvt Ltd.

.....Appellant

Versus

The State of Haryana and another

.....Respondents

**CORAM: HON'BLE MR. JUSTICE RAJESH BINDAL
HON'BLE MR. JUSTICE HARINDER SINGH SIDHU**

Present: Mr. Sandeep Goyal, Advocate
for the appellant (in VATAP No. 59 of 2014) and
for the petitioner (in CWP No. 14681 of 2014).

None for the petitioner (in CWP No. 8436 of 2014)

Ms. Mamta Singla Talwar, DAG Haryana.

RAJESH BINDAL,J.

1. This order will dispose of VAT Appeal No. 59 of 2014, CWP Nos. 8436 and 14681 of 2014.

Facts of VAT Appeal No. 59 of 2014:

2. The assessee is in appeal before this Court impugning the order passed by the Haryana Tax Tribunal (for short 'the Tribunal'), upholding levy of surcharge on the amount of lump sum tax paid by the appellant on the works contract. The appellant in the present case is a dealer registered under the Haryana Value Added Tax Act, 2003 (for short 'the VAT Act') and is carrying on business as works contractor.

Facts in CWP No. 8436 of 2014:

3. The assessee has filed the present petition impugning the order of assessment dated 27.11.2013 passed by the Assessing Authority levying surcharge on the tax payable on lump sum basis on the works contract. The petitioner is carrying on the business as works contractor.

Facts in CWP No. 14681 of 2014:

4. The petition has been filed by Haryana Pradesh Brick Kiln Owners Association (Regd.) impugning the circular dated 14.1.2014 issued by the Excise and Taxation Commissioner, Haryana, referring to the order passed by the Tribunal in STA No. 485 of 2012-13 in the case of M/s Mahashiv Promoters (P) Limited, Rohtak Vs. State of Haryana, (this order of the Tribunal is subject matter of challenge in VATAP No. 59 of 2014) specifying that the surcharge is leviable and be collected from the lump-sum composition dealers availing benefit of lump sum payment of tax except the retailers.

5. As the legal issue involved in all the cases is identical, the detailed facts are being taken from VATAP No. 59 of 2014.

6. The assessee has filed the present appeal against the order dated 8.10.2013 passed by the Tribunal in STA No. 485 of 2012-13, raising the following substantial questions of law:

- (i) Whether on the facts and in the circumstances of the case, the Ld. Tribunal was justified in upholding the levy of additional tax as surcharge leviable on the taxable turnover even in the case of works contractor who has opted for lump sum tax?

(ii) Whether on the facts and in the circumstances of the case, the Haryana Tax Tribunal was justified in upholding the levy of interest?

Arguments of Appellant

7. Learned counsel for the appellant submitted that the appellant is working as a works contractor duly registered under the provisions of the VAT Act. For the assessment year 2010-11, the appellant filed its quarterly return on statutory Form VAT-R6, as the appellant had opted for payment of lump-sum tax. The case of the appellant was taken up in scrutiny and vide order dated 13.9.2012, the assessment was framed calculating the amount of tax payable on the gross receipts, in addition surcharge was also levied including interest. Aggrieved against the order, the appellant preferred appeal before the Joint Excise and Taxation Commissioner (Appeal) Rohtak, who vide order dated 22.1.2013 dismissed the same by passing a totally non-speaking order. Still aggrieved, the appellant preferred appeal before the Tribunal, which was dismissed vide order dated 8.10.2013. It is the aforesaid order of the Tribunal which has been impugned before this Court raising the substantial questions of law as have been referred to above.

8. Learned counsel for the appellant argued that Section 3 of the VAT Act which is the charging section provides for incidence of tax. The tax is to be calculated on the taxable turnover determined in terms of the provisions of Section 6 of the VAT Act at the rates of tax provided for in Section 7 of the VAT Act. Section 9 of the VAT Act provides for payment of lump sum in lieu of tax payable under the Act by way of composition. Section 7A of the VAT Act provides for levy of additional tax. A plain

reading of Section 7A of the VAT Act shows that it provides for levy of additional tax in the nature of surcharge on the taxable turnover of a dealer calculated at the rate of 5% of the tax payable by him. Reference was made to Rule 46 of the Haryana Value Added Tax Rules, 2003 (for short 'the Rules') providing for general provisions in respect of lump-sum dealers. Reference was also made to the Rules 47 to 52 of the Rules applicable for different types of dealers who can opt for payment of lump-sum tax.

9. Elaborating the arguments, learned counsel for the appellant contended that Section 9 of the VAT Act, which provides for payment of tax in lump-sum clearly mentions that such amount is payable 'in lieu of tax payable under the Act'. This will include all types of taxes payable under the Act. Even Section 7A of the VAT Act under which additional tax has been levied is also a tax. Hence, there cannot be any further demand of tax from the appellant beyond the composition amount as determined in the Rules. He further submitted that in the case of the contractors and for that matter in none of the cases, where payment of tax in lump sum has been provided for except the retailers, there is determination of taxable turnover. In the cases of contractors, the tax is payable on gross receipts, which includes labour component also, whereas in the other types of cases, such as, brick-kiln, halwai, lottery dealer, ply-board manufacturer etc., the same is payable in terms of capacity. The mere fact that there is exclusion of retailers, one of the category in which case lump-sum payment of tax is permissible, shows that the intent of the levy is in those cases where taxable turnover can be determined. In support of the plea reliance was placed upon **Bhima Jewellery Vs. Assistant Commissioner (Assessment), Kerala and another, (2014) 71 VST 110 (SC); State of Uttar Pradesh and others**

Versus Systematic Conscom Limited, 2013 STPL (Web) 219 SC; South India Corporation Ltd. Vs. Commercial Tax Officer, Coimbatore and others (2001) 124 STC 654 (Madras) and Taher Ali Industries and Projects (P) Ltd. Versus State of Tamil Nadu and another, (2012) 47 VST 155 (Madras).

10. The judgment of Hon'ble the Supreme Court in **Sarojini Tea Co. (P) Ltd. Versus Collector of Dibrugarh, Assam and another, (1992) 2 Supreme Court Cases 156** was referred with reference to the meaning of term 'surcharge', which is a kind of tax.

Arguments of State

11. On the other hand, learned counsel for the State submitted that a plain reading of Section 7A of the VAT Act shows that the tax, which is in the form of additional tax or surcharge, is to be calculated on the tax payable under the VAT Act. It has not been levied or to be calculated on the taxable turnover, as is sought to be argued by counsel for the appellant. She further argued that the provision starts with a non-obstante clause, meaning thereby, it overrides all other provisions of the VAT Act, hence, has to be given its true meaning. The exception has been carved out in the section is only for retailers, who opted for payment of lump-sum tax. Section 9 of the VAT Act, which provides for payment of lump-sum tax on composition in lieu of the tax payable under the VAT Act in fact takes care of the tax generally levied on the regular dealers which is the tax payable under Section 3 of the VAT Act. The surcharge levied under Section 7A of the VAT Act is over and above.

12. The judgment of Hon'ble the Supreme Court in **Bhima Jewellery's case (supra)** was distinguished referring to the provisions under

consideration there. In that case, additional tax was leviable with reference to tax, which was payable under specific sections. It did not include the section under which lump-sum tax was payable. She referred to a Division Bench judgment of this Court in **Hoshiarpur Large and Medium Industries Association and others Versus State of Punjab and another, 2002(2) PLR 697** where vires of Sections 30-AA of the Punjab General Sales Tax Act, 1948 providing for levy of surcharge was upheld. Reference was also made to judgment of Hon'ble the Supreme Court in **M/s Hoechst Pharmaceuticals Ltd. and another Versus State of Bihar and others , 1983(4) SCC 45**, defining the term 'surcharge' which amounts to tax. The Judgment of Hon'ble the Supreme Court in **M/s Jindal Poly Films Ltd. Versus Commissioner of Central Excise, Meerut-II, 2006(198) ELT 3**, was cited dealing with the non-obstante clause. Reference was made to assessment order passed in the case of the appellant, wherein taxable turnover had been determined.

Reply by Appellant

13. In response, learned counsel for the appellant submitted that all the words used in Section 7A of the VAT Act have to be given their true meaning. Words "levied and collected on the taxable turnover" cannot be held to be surplus. The judgment of this Court in **Hoshiarpur Large and Medium Industries Association's case (supra)**, is distinguishable, as in that case vires of Section imposing surcharge was under challenge. It was further submitted that even as per the understanding of the department, there was no surcharge payable on the tax payable by the dealers opting for lump-sum payment. Though the amendment was carried out in the VAT Act by adding Section 7A therein, w.e.f 2.4.2010, however, no surcharge was

demanded from the dealers. Even the circular was issued by the Excise and Taxation Commissioner on 14.1.2014 only after the order was passed by the Tribunal on 8.10.2013, which is subject matter of appeal before this Court.

14. Heard learned counsel for the parties and perused the paper book.

Discussions

15. As per the scheme of the VAT Act, Section 3 is a charging section, which provides for levy of tax on sale of goods within the State. The tax is to be calculated on the taxable turnover. The taxable turnover is to be determined in accordance with the provisions of Section 6 of the VAT Act. Rates of tax have been specified in Section 7 thereof.

16. Section 7A was added subsequently w.e.f. 2.4.2010 providing for charging of additional tax. Sections 7A and 9 of the VAT Act, relevant to the controversy, are extracted below:

"7A. Levy of Additional Tax:-

1. Notwithstanding anything contained in this Act, there shall be levied and collected on the taxable turnover of a dealer registered under this Act, other than a retailer in lump-sum composition with the department, an additional tax, in the nature of surcharge, which shall be calculated at the rate of five percent of the tax, payable by him:

Provided that the aggregate of tax and the surcharge payable under this Act, shall not exceed in respect of the goods, declared to be of special importance in inter-State trade or commerce under Section 14 of the Central Sales

Tax Act, 1956 (Central Act 74 of 1956), the rate fixed under Section 15 of that Act.

2. Except as otherwise provided in sub-section (1), the provisions of this Act shall, so far as may be, apply in relation to the additional tax leviable under sub-section (1), as they apply in relation to the tax leviable under any other provision of this Act.

9. Payment of lump sum in lieu of tax

(1) The State Government may, in the public interest and in subject to such conditions as it may deem fit, accept from any class of dealers, in lieu of tax payable under this Act, for any period, by way of composition, a lump sum linked with production capacity or some other suitable measure of extent of business, or calculated at a flat rate of gross receipts of business or gross turnover of purchase or of sale or similar other measure, with or without any deduction therefrom, to be determined by the State Government, and such lump sum shall be paid at such intervals and in such manner, as may be prescribed, and the State Government may, for the purpose of this Act in respect of such class of dealers, prescribe simplified system of registration, maintenance of accounts and filing of returns which shall remain in force during the period of such composition.

(2) No dealer in whose case composition under sub-section (1) is in force, shall issue a tax invoice for sale of

goods by him and no dealer to whom goods are sold by such dealer shall be entitled to any claim of input tax in respect of the sale of the goods to him.

(3) A dealer in whose case composition under sub-section (1) is made and is in force may, subject to such restrictions and conditions, as may be prescribed, opt out of such composition by making an application containing the prescribed particulars in the prescribed manner to the assessing authority, and in case the application is in order, such composition shall cease to have effect on the expiry of such period after making the application as may be prescribed."

17. Rule 46 of the Rules provides for general provisions in respect of lump-sum dealers. Rules 47 to 52 of the Rules deal with different kinds of dealers, who can opt for payment of lump sum tax. The amount of tax and the manner of calculation thereof has been provided for in the Rules. The relevant provisions thereof are extracted below:

"47. Lump sum scheme in respect of brick-kiln owners.

(1) A brick kiln owner may, subject to other provisions of this rule, opt for payment of lump sum in lieu of tax payable under the Act by way of composition at the rates given in the Table below:-

<i>Sr. No.</i>	<i>Capacity of Kiln</i>	<i>Category</i>	<i>Lump sum tax payable in lieu of tax for the period 1-10-2005 to (30-9-2009)</i>
1	2	3	4

<i>Sr. No.</i>	<i>Capacity of Kiln</i>	<i>Category</i>	<i>Lump sum tax payable in lieu of tax for the period 1-10-2005 to (30-9-2009)</i>
1	Brick kiln of capacity of more than 33 number of Ghorī	+A	Rs. 2,68,800/- plus Rs.9,360/- per additional ghorī above 33 ghories
2	Brick-kiln of capacity of 28 to 33 number of Ghorī	A	Rs.2,68,800/-
3	Brick kiln of capacity of 22 to 27 number of Ghorī	B	Rs. 2,10,000/-
4	Brick kiln of capacity of below 22 number of Ghorī	C	Rs.1,68,000/-
5.	Brick Kiln not fired during the year ending 30 th September, 2010, in which stock in and outside the kiln as on 1st October, 2009 last, did not exceed five lakh bricks of all categories	D	Rs.42,000/-

XX XX XX XX

(4) A brick kiln owner liable to pay lump sum shall not be authorised to make purchase of goods at lower rate of tax under sub-section (2) of section 7 but he may make purchase of goods on the authority of declaration(s) in Central Form C, which he shall disclose use of, at the time of applying for issue of declaration forms and in an annual return to be furnished in Form VAT-R8 within a month of the close of the year. He shall

not be required to make use of declaration in Form VAT-D3 for carrying goods.

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48. Lump sum scheme in respect of lottery dealers.

(1) Every dealer engaged in the business of purchase or sale of lottery tickets of face value of less than seven rupees per ticket (hereinafter called the "lottery dealer") shall at his option pay lump sum in lieu of tax payable under the Act on the sale of such lottery tickets at the rates given below:-

<i>S. No.</i>	<i>Type of lottery</i>	<i>Lump sum payable in lieu of tax</i>
1	Weekly Lottery	Rs.65,000 per draw
2	Monthly Lottery	Rs. 19 lakh per draw
3	Festival Lottery	Rs. 19 lakh per draw
4	Instant Lottery	Rs. 19 lakh per draw

PROVIDED that no refund of any amount of lump sum already paid shall be made on account of reduction/omission of lump sum rates paid at the rates applicable before such reduction/omission.

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(6) A lottery dealer liable to pay lump sum may purchase lottery tickets for sale on the authority of declaration(s) in Central Form C, which he shall disclose use of at the time of applying for issue of forms and in quarterly returns to be filed in Form

VAT-R9 within a month of the close of the quarter.

49. Lump sum scheme in respect of contractors

(1) A contractor liable to pay tax under the Act may, in respect of a works contract awarded to him for execution in the State, pay in lieu of tax payable by him under the Act on the transfer of property (whether as goods or in some other form) involved in the execution of the contract, a lump sum calculated at four per cent of the total valuable consideration receivable for the execution of the contract, by making an application to the appropriate assessing authority within thirty days of the award of the contract to him, containing the following particulars:-

(1) Name of the applicant contractor;

(2) TIN;

(Append application for registration, if not registered or not applied for registration);

(3) Name of the contractee;

(4) Date of award of the contract;

(5) Place of execution of the contract;

(6) Total cost of the contract;

(7) Period of execution,

and appending therewith a copy of the contract or such part thereof as relates to total cost and payments.

(2) The application shall be signed by a person authorised to make an application for registration. On receipt of the application, the assessing authority shall, after satisfying itself that the contents of the application are correct, allow the same.

(3) The lump sum contractor shall be liable to make payment of lump sum quarterly calculated at four per cent of the payments received or receivable by him during the quarter for execution of the contract. The payment of lump sum so calculated shall be made within thirty days following the close of the quarter after deducting therefrom the amount paid by the contractee on behalf of the contractor under section 24 for that quarter. The treasury receipt in proof of payment made and certificate(s) of tax deduction and payment obtained from the contractee shall be furnished with the quarterly return.

(4) The lump sum contractor shall file returns at quarterly intervals in Form VAT-R6 within a month of the close of the quarter and shall pay lump sum, if any, due from him according to such return after adjusting the amount paid under sub-rule (4).

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50. Deleted.

51. Lump sum scheme in respect of ply-board manufacturers

(1) Subject to the other provisions of this rule, a ply-board manufacturer may, by exercising option in the manner given in sub-rule (6), at any time offer to make payment of lump sum in lieu of tax payable by him under the Act on sale of ply-board manufactured by him and waste products arising therefrom, at the rate(s) mentioned below:-

<i>S. No.</i>	<i>Press size</i>	<i>Rate of lump sum per press per annum</i>
1	8' x 4' x 10	Rs. 9.00 lakh
2	8' x 4' x 7	Rs. 6.30 lakh
3	6' x 4' x 10	Rs. 6.75 lakh
4	6' x 4' x7	Rs. 4.73 lakh
5	4' x 4' x 10	Rs.3.21 lakh
6	4' x 4' x 7	Rs. 2.25 lakh

Where an 8'x 4' x 10 press is designed to make 10 number ply-boards each measuring 8 feet by 4 feet i.e. 320 square feet ply-board in single operation and presses of other sizes are designed to make ply-board in the same proportion:

PROVIDED that annual rate of lump sum in respect of press of any other size not tabulated above shall, if the press is designed to make ply-boards of size not exceeding 4' x 4' i.e. 16 square

feet per piece be computed @ Rs.2008.93 per square feet else @ Rs.2812.50 per square feet, rounded off to nearest thousand in each case:

PROVIDED FURTHER that lump sum for any additional press of the same or lower size shall be computed at one-half of the full rate tabulated above.

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(7) A ply-board manufacturer liable to pay lump sum may make use of declarations in Form VAT-D1 or in Central Form C for making purchase of goods at lower rate of tax or Central Sales Tax, as the case may be, for use in manufacturing of goods for sale. He shall not be required to make use of declaration(s) in Form VAT-D3 for carrying goods. He shall be required to furnish quarterly returns in Form VAT-R11 within a month of the close of the quarter.

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52. Lumpsum scheme in respect of retailers

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(2) Subject to other provisions of this rule, a retailer, in whose case aggregate of purchases of taxable goods made, and value of goods received for sale, by him during the last year does not exceed (forty lakh rupees), may, at any time, opt

for payment of lump sum, calculated in accordance with the provisions of sub-rule (4), by making an application in Form A given below and a retailer who makes an application for registration may also exercise such option by making an application in Form B given below simultaneously:

PROVIDED that a retailer who deals in aerated water/drinks or medicines shall not be eligible to opt for payment of lump sum.

xx xx xx xx

(4) The retailer whose application has been allowed (hereinafter referred to as the 'lump sum retailer') under the foregoing sub-rule shall furnish returns in Form VAT-R7 and shall pay lump sum at quarterly intervals within one month of the close of the quarter. The lump sum for a quarter shall be computed at the rate of 1% of the aggregate of purchases of taxable goods made from registered dealers in the State during the quarter subject to a minimum of Rs.900/- per month (or part thereof) plus lumpsum computed on the value of taxable goods purchased in the course of inter-State trade or commerce from outside the State during the quarter at the same rates as the rates of tax applicable if such goods were to be sold in the State:

PROVIDED that the lump sum retailer shall, within one month of his application having been allowed, pay a lump sum on the value of goods, not purchased in the State on payment of tax whether under the Act or the Act of 1973 or received or brought from outside the State, held in stock by him on the date of application, calculated at the rate of tax applicable on sale of such goods in the State:

PROVIDED FURTHER that purchase value of goods for the purpose of computing lump sum shall be the invoiced price including all taxes and charges shown in the invoice.

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(6) The lump sum retailer shall be authorised to make purchase of goods on declarations in Central Form C from outside the State but he shall not be authorised to make use of declaration in Form F. He shall be required to make use of declarations in Form VAT-D3 for carrying goods. He shall declare the use of both declarations in Central Form C and Form VAT-D3 in his returns."

18. A perusal of Section 9 of the VAT Act shows that the State Government has been authorized to accept from a class of dealers, in lieu of tax payable under the VAT Act, for any period, by way of composition, a lump-sum tax. It can be linked with production capacity or can be

determined on the basis of other suitable measures related to the extent of business or calculated at a flat rate of gross receipt of business or gross turnover of purchase or sale etc. The tax so determined has to be paid at such intervals as may be specified. The State is further entitled to provide for other conditions in the process. For the dealers, who opted for payment of lump sum tax, the Government is authorized to prescribe simplified system of registration, maintenance of accounts and filing of returns. A dealer, who may have opted for payment of lump sum tax, can opt out by making an application to that effect.

19. Rules 47 of the Rules provides for payment of lump sum tax by brick kiln owners by way of composition. The rate of tax prescribed has relation with the capacity of the kiln. He is required to file his annual return on Form VAT-R8. There are other restrictions also. Similarly Rule 48 of the Rules, prescribes for payment of lump sum tax in respect of lottery dealers. The rates have been prescribed with reference to types of lotteries such as, weekly, monthly, festival or instant lottery and the rates prescribed are per draw. In this case return is to be filed on statutory form VAT-R9.

20. Rule 49 of the Rules deals with lump sum payment of tax by the contractors. The tax is to be calculated at the rate of 4% of the total valuable consideration receivable for the execution of works contract, which may include even the component of labour. The returns are to be filed on statutory form VAT-R6. In Rule 51 of the Rules, lump sum tax payable by Ply Board Manufacturers has been specified. The calculation is as per size of press installed in the factory and the rates prescribed are per press/per annum depending on the size. The return is to be filed on statutory form VAT-R11.

21. Rule 52 of the Rules, which provides for payment of lump sum tax by the retailers, is little bit different as compared to other category of dealers, who can opt for payment of lump sum tax. Option for payment of lump sum tax can be exercised only by a dealer, whose aggregate of purchases of taxable goods made and the value of goods received for sale by him during the last year did not exceed ₹ 40 lacs. The retailer dealing in aerated water/drinks or medicines are not eligible to opt for payment of lump sum tax. They are required to file their returns on Form VAT-R7. The amount of tax payable by the retailers is to be computed @ 1% of the aggregate of purchases of taxable goods made from the registered dealers within the State during a quarter subject to a minimum of ₹ 900/- per month. In addition thereto, tax at the rates applicable on the taxable goods purchased in the course of inter-state trade or commerce from outside the state is leviable when these goods are sold in the State. This provision though provides for payment of lump sum tax, but the calculation thereof is at the rates of tax provided on the taxable turnover. Even for the sale of goods from the purchase of goods from outside the State when sold within the State, the tax is leviable at the rates provided under the VAT Act. Meaning thereby, the taxable turnover will have to be determined.

22. Section 7A of the VAT Act if analyzed starts with a non-obstante clause. It provides for

- levy and collection of tax is on the taxable turnover of a registered dealer,
- additional tax in the nature of surcharge,
- to be calculated at the rate of 5% of the tax payable by him,

-except in the cases of retailers opting for payment of lump sum tax.

23. In addition to Section 3 of the VAT Act, which is a charging Section providing for levy of tax under the VAT Act, Section 7A thereof is also charging Section for levy and collection of additional tax in the nature of surcharge on taxable turnover.

24. The issue regarding various components in the concept of taxation was considered by Hon'ble the Supreme Court in Govind Saran Ganga Saran v. Commissioner of Sales Tax and others, (1985) 60 STC 1 (SC). It was opined that four components are: (i) taxable event; (ii) taxable person; (iii) rate of tax and (iv) measure or value for which rate of tax is to be applied. In the absence of any of the components, the levy may be struck down. The relevant paragraph thereof is extracted below:

“6. The components which enter into the concept of a tax are well known. The first is the character of the imposition known by its nature which prescribes the taxable event attracting the levy, the second is a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax, the third is the rate at which the tax is imposed, and the fourth is the measure or value to which the rate will be applied for computing the tax liability. If those components are not clearly and definitely ascertainable, it is difficult to say that the levy exists in point of law. Any uncertainty or vagueness in the legislative scheme defining any of those components of the levy will be fatal to its validity.”

25. The same view was expressed by Hon'ble the Supreme Court in

2015(1) SCC 1, Commissioner of Income Tax Versus Vatika Township Private Ltd.

26. On interpretation of a statute, Hon'ble the Supreme Court in Mathuram Agrawal v. State of M. P., (1999) 8 SCC 667 opined that it is only the plain language of the statute which is considered. Nothing is to be added or intended. The words can neither be added nor substituted or ignored. Relevant paragraph thereof is extracted below:

“In a taxing Act it is not possible to assume any intention or governing purpose of the statute more than what is stated in the plain language. It is not the economic results sought to be obtained by making the provision which is relevant in interpreting a fiscal statute. Equally impermissible is an interpretation which does not follow from the plain, unambiguous language of the statute. Words cannot be added to or substituted so as to give a meaning to the statute which will serve the spirit and intention of the legislature. The statute should clearly and unambiguously convey the three components of the tax law i.e. the subject of the tax, the person who is liable to pay the tax and the rate at which the tax is to be paid. If there is any ambiguity regarding any of these ingredients in a taxation statute then there is no tax in law. Then it is for the legislature to do the needful in the matter.”

27. In National Mineral Development Corporation Limited Vs. State of M.P. and another, 2004 (6) SCC 281, the issue under consideration before Hon'ble the Supreme Court was as to whether despite there being levy under the charging section, the royalty could be demanded in the

absence of rates, the answer was in negative.

28. Four components required for levy of additional tax are existing in the section. Such as:

(i) taxable event - the taxable turnover.

(ii) taxable person - the dealer registered under the Act.

(iii) rate of tax - @ 5%

(iv) measure of tax - on the tax payable under the Act.

29. As has already been noticed above, levy of tax under Section 7A of the VAT Act is on the taxable turnover. At the time of prescribing the rates instead of mentioning different rates of taxes for different commodities, it has been provided that its calculation shall be at the rate of 5% of the tax payable. A simplified method is adopted. Tax payable would mean that tax as calculated on the taxable turnover after it is determined in terms of Section 6 of the VAT Act, after application of rates as provided for under Section 7 of the VAT Act. Taxable event for levy of additional tax under Section 7A of the VAT Act is on taxable turnover, is also evident from the fact that the retailers opting for payment of lump sum tax have been excluded from the levy. As provided for in Rule 52 of the Rules, in the case of retailers, taxable turnover is determined only then the amount of tax is calculated. Whereas in none of the other categories of the dealers opting for payment of tax on lumpsum basis, the taxable turnover is calculated. Unless in the case of a dealer taxable turnover is determined, the provision will not have application. As has already been noticed above in the case of Brick kiln owners, the amount of lump sum tax is related with the capacity of brick kiln. In the case of lump sum tax on lotteries, it has relation with type of lottery with reference to draw. In respect of contractors, the amount

is calculated on the total valuable consideration receivable for the execution of the contract on the transfer of property with no reference to the sale of taxable goods only specifically. In a case of Ply Board manufacturers, the amount specified has relation with the size and number of the press installed in the factory.

30. One of the important component on taxation being missing namely taxable turnover in the case of dealers opting for payment of tax on lump sum basis, levy of additional tax thereon cannot be sustained.

31. In South India Corporation Ltd's case (supra), the issue under consideration before the Division Bench of Madras High Court was regarding levy of additional tax in terms of a separate Act enacted for the purpose, titled as Tamil Nadu Additional Sales Tax Act (for short 'the 1970 Act'), the existing Act being the Tamil Nadu General Sales Tax Act, (for short 'the 1959 Act'). Section 2 of the 1970 Act provided for levy of additional tax on the taxable turnover of a dealer as payable under the 1959 Act. The Court opined that under the general provisions of the 1959 Act, there is no difficulty in determination of taxable turnover of a dealer engaged in execution of works contract. However, in the case of a dealer, who had opted for payment of tax on lump sum basis, the amount of tax is not determined on the taxable turnover, but is determined with reference to the total value of works contract, in respect of which option was exercised. In the absence of determination of taxable turnover, additional sale tax was held to be not leviable. Claim for additional sales tax by treating contract value as taxable turnover was held to be not permissible. Relevant paras of the judgment are extracted below:

“15. As the additional tax is thus levied at the prescribed

percentage on the taxable turnover of the dealer that percentage varying from 1.5 to 3 depending on the turnover of the assessee for the purpose of levy of this additional tax, the determination of the taxable turnover is crucial. Despite the declared intention to levy additional tax on the sale or purchase of goods, the tax levied under that Act having been linked solely to the taxable turnover, mere payment of tax under the principal enactment would not render the dealer liable for the additional sales tax unless taxable turnover of that dealer is determinable under the principal Act.

16. While there is no difficulty in determining the taxable turnover of a dealer who is engaged in the execution of a works contract in cases where the tax is computed in terms of section 3-B of the Act, the determination of turnover of a dealer who has opted for payment of tax under section 7-C is not possible at all under the parent Act, as the amount computed under section 7-C is not an amount which is determined as tax on the taxable turnover, but is determined with reference to the total value of the works contract in respect of which option is exercised. As already noticed there is no provision in the Act which deems such a total contract value as total turnover.

17. Turnover, as defined in the Act, is the aggregate of value of sales effected or purchase effected by the dealer. The works contract not only involves the transfer of goods but also involves the rendering of several services which cannot be

subjected to tax under the Sales Tax Act. The consent given by the dealer under section 7-C for the levy of percentage of total contract value towards the tax otherwise payable under section 3-B cannot be stretched to include the payment of additional sales tax under any other enactment by treating the contract value as taxable turnover for the payment of tax under the Additional Sales Tax Act.”

32. Amendment was carried out in Section 7C of the 1959 Act providing for payment of lump-sum tax by the works contractors defining the term 'taxable turnover' for the purpose of works contract. It was defined to mean total value of the contract executed as referred to in the Section. Vires of aforesaid amendment was challenged before Madras High Court in Taher Ali Industries and Projects (P) Ltd's case (supra) and the same was struck down. Section 7C of 1959 Act, reads as under:

"7C. Payment of tax at compounded rates by works contractor.-

(1) Notwithstanding anything contained in section 3B, every dealer referred to in item (vi) of clause (g) of section 2, may, at his option, instead of paying tax in accordance with section 3B, pay, either on the total value of each works contract or on the total value of all works contract, executed by him in a year, tax calculated at the following rate, namely:

- (i) Civil works contract ... Two percent of the total contract value of the civil works executed.
- (ii) All other works contracts... Four per cent of the total

contract value of works
executed."

Amended definition of 'Taxable turnover' reads as under:

"'Taxable turnover', for the purpose of this clause in respect of a dealer liable to pay tax under section 7C of the said Act for the financial years commencing on the 1st day of April 1993, shall be the total value referred to in the said section."

33. The Judgment of Hon'ble the Supreme Court in Bhima Jewellery's case (supra) is distinguishable as in that case normal tax was payable under Sections 5 and 5-A of the Kerala General Sales Tax Act, 1963, whereas compounded rates were prescribed under Section 7 thereof. Additional tax was levied under Section 5D of that Act therein only on the taxes payable under Section 5 and 5A of that Act. Hence, levy of additional tax on the compounded rates was held to be bad.

34. In Systematic Conscom Ltd 's Case (supra), the facts were that the provision providing for composition of tax liability, further provided that in case there is any change in the rate of tax after the rates were agreed upon, there would be proportionate change in the lump-sum tax payable. Additional tax in that case having been levied in the form of a different tax namely State Development Tax, Hon'ble the Supreme Court opined that it cannot be termed as a change in rate of tax, rather levy of a new tax. Hence, proportionate change in the compounded rates was held to be not permissible. The judgment has no application in the facts of the case.

35. Division Bench judgment of this court in Hoshiarpur Large and Medium Industries Association's case (supra), is not applicable in the case

in hand as the issue involved therein was regarding vires of Section 30-AA added in Punjab General Sales Tax Act, 1948 providing for levy of surcharge even on the dealers availing exemption from payment of tax. Surcharge otherwise was leviable under Section 5(1)(C) of 1948 Act. Vires thereof was upheld. The contention raised by learned counsel for the petitioner therein that it should be adjusted against the exemption limit was also rejected.

36. In the case in hand as referred to earlier, the incidence of tax under Section 3 of the VAT Act is on the taxable turnover. Section 6 of the VAT Act provides for calculation of taxable turnover. Rates of taxes have been provided for under Section 7 of the VAT Act. This is the normal procedure applicable in the cases of all the dealers, where for levy and collection of taxes, taxable turnover is determined and then tax is calculated at the rates provided in Section 7 of the VAT Act. In the cases of some specified class of dealers, at their option the State is authorised to collect tax in lump sum in lieu of the tax payable under the VAT Act. In that process, taxable turnover is not to be determined except in the cases of retailers opting for payment of tax on lump sum basis. As Section 7A of the VAT Act provides for levy and collection of additional tax on taxable turnover, the cases where taxable turnover is not to be determined, the provisions will have no application. It is one of the ingredients for levy of tax. Calculation of tax is a subsequent stage.

37. For the reasons mentioned above, we find merit in the present appeal. The same is accordingly allowed. The substantial question of law No.(i), as referred to above, is answered in favour of the assessee and against the department, while opining that in the cases where no taxable

turnover is to be determined, additional tax under Section 7A of the VAT Act is not leviable. As a consequence thereof, the circular issued by the Excise and Taxation Commissioner, Haryana, dated 14.1.2014 Annexure-P4 in CWP No. 14681 of 2014, is set aside. The order of assessment dated 27.11.2013 (Annexure P-1) in CWP No.8436 of 2014 is set aside only to the extent of levy of additional tax and interest, if any, on alleged delayed payment thereof. Question No. (ii) does not survive.

Accordingly the writ petitions are also disposed of.

(RAJESH BINDAL)
JUDGE

(HARINDER SINGH SIDHU)
JUDGE

08.09.2016
reema

Whether speaking/reasoned Yes/No

Whether Reportable: Yes/No