Systematic Conscom Limited Vs. State of U.P. and ors.

Systematic Conscom Limited Vs. State of U.P. and ors.

SooperKanoon Citation : sooperkanoon.com/467202

Court : Allahabad

Decided On : Mar-31-2009

Reported in : (2009)23VST520(All)

Judge : Amitava Lala and ;Rajes Kumar, JJ.

Appellant : Systematic Conscom Limited

Respondent : State of U.P. and ors.

Disposition : Petition allowed in favour of assessee

Judgement :

Rajes Kumar, J.

1. The petitioners herein are civil and electrical contractors. During the relevant assessment year 2005-06, they have executed works contracts of civil and electrical nature. The petitioners are liable to tax on the value of the goods involved in the execution of works contract under Section 3F of the U. P. Trade Tax Act, 1948 (hereinafter referred to as, 'the Act'). The State Government in exercise of powers under Section 7D of the Act has issued compounding scheme in respect of civil and electrical contracts for the assessment year 2005-06. Under such scheme in respect of civil contracts, the tax was payable at the rate of one per cent on the total receipt after allowing deduction of the value of the goods supplied by the contractee and at the rate of two per cent in the case of electrical

contracts.

2. By Act No. 9 of 2005 with effect from May 1, 2005 Section 3H of the Act has been introduced levying State development tax at the rate not exceeding one per cent of the taxable turnover as the State Government may by notification specify on the dealers whose aggregate turnover as referred to in Sub-section (2) of Section 3, exceeds fifty lakh rupees. The Commissioner of Trade Tax has issued circular dated June 4, 2007 to all officers concerned stating therein that in case of civil and electrical contracts under the compounding scheme one per cent State development tax is also leviable.

3. By means of the present writ petitions, the petitioners are challenging the circular dated June 4, 2007 and the levy of one per cent State development tax.

4. Heard Sri Bharat Ji Agrawal, learned Senior Advocate, Sri Kunwar Saxena, Advocate, Sri S.D. Singh, Advocate, Sri N.C. Gupta, Advocate and Sri Ashok Kumar, Advocate appearing on behalf of the petitioners and Sri S.P. Kesharwani, learned Counsel appearing on behalf of the respondents.

5. Sri Bharat Ji Agrawal, learned Senior Advocate, submitted that under Section 7D of the Act composition money is payable in lieu of the tax payable. The tax payable under Section 7D of the Act means all taxes under the Act including the State development tax. He submitted that under the Compounding Scheme issued by the State Government in exercise of powers under Section 7D of the Act only the composition amount stated therein, is payable. He submitted that Section 7D of the Act starts with the word 'notwithstanding', i.e., an obstantive clause, which has an overriding effect over all the sections of the Act. He submitted that the compounding scheme has been introduced as an alternative method of assessment in place of regular assessment and, therefore, once the composition amount is fixed under the scheme and the assessing authority has accepted the application of the dealer thereby agreeing to accept the said amount, the assessing authority is debarred to demand any other amount including the State development tax. He submitted that under the proviso to Section 7D of the Act, it is open to the State Government to amend the scheme on the change of rate of tax. He submitted that levy of State development tax under Section 3H of the Act does

not amount to change of rate of tax inasmuch as the State Government has not amended the scheme enhancing the composition money. He submitted that subsequent circular dated January 24, 2006 clarifies that the State development tax would not be levied in case of compounding scheme. He submitted that in the case of Bhadauria Gram Sewa Sansthan v. Assistant Commissioner, Sales Tax, Allahabad reported in 2006] 148 STC 356 : [2006] UPTC 538, the Full Bench of this Court has held that once the assessee accepts to pay the composition amount under the scheme of Section 7D of the Act, it is not open to the assessee to withdraw and seek for the regular assessment.

6. Sri Kunwar Saxena, Advocate, submitted that Section 3H(2) of the Act says that the facility of composition of tax in relation to compoundable goods under Section 7D of the Act shall also be available in respect of State development tax. He submitted that any change in the scheme enhancing or reducing the composition amount can only be made by the State Government and not by the assessing authority or by the Commissioner. He submitted that in case of Compounding Scheme relating to brick kiln for the assessment year 2005-06, State development tax is not chargeable.

7. Sri S.D. Singh, Advocate, states that like Section 3 of the Act, Section 3H of the Act is a charging section contemplating levy of State development tax not exceeding one per cent of the taxable turnover in case the turnover of the dealer exceeds Rs. 50 lacs, in addition to the tax payable under any other provisions of the Act. He emphasises that for the levy of State development tax, the assessing authority has to determine the total turnover and then taxable turnover and if the total aggregate turnover exceeds Rs. 50 lacs, the State development tax may be levied on the taxable turnover. This whole exercise of determination of the turnover and the taxable turnover is against the Compounding Scheme. He submitted that the composition amount fixed under the Compounding Scheme includes all the taxes under the provisions of the Act including the State development tax and, therefore, apart from the composition amount fixed under the Compounding Scheme, State development tax cannot be levied and demanded separately. He submitted that Section 7D of the Act has an overriding effect over all the sections of the Act including Section 3H of the Act. He further

submitted that in Section 3H(2) of the Act, the word used is 'shall' which means that it is mandatory. He placed reliance on the decisions in the case of State of Bihar v. Bihar Rajya M.S.E.S.K.K. Mahasangh reported in : [2005] 9 SCC 129 (para 47), Kothari Contract Interiors, New Delhi v. Trade Tax Officer, Modinagar, Ghaziabad reported in : [2007] 10 VST 60 (All) : [2006] UPTC 74 and Commissioner of Trade Tax, U.P., Lucknow v. Qayum Khan Thekedar, Aliganj, Banda reported in [2009] 23 VST 508 : [2007] 33 NTN 53.

8. Sri N.C. Gupta, Advocate, states that Section 2(bb) of the Act defines 'trade tax' to mean the tax payable under this Act on sale or purchase of the goods, as the case may be, and the 'tax' is defined in Section 2(n) of the Act to include additional tax and composition money under Section 7D of the Act and the State development tax. Therefore, the State development tax is included in the tax.

9. Sri Ashok Kumar, Advocate, states that prior to substitution of the present Section 3H(1) of the Act by new Section 3H in the year, 2005, Section 3H of the Act provided levy of turnover tax. The old Section 3H(2) of the Act provided levy of turnover of tax separately apart from the composition money, but the language of the present Section 3H(2) of the Act is entirely different and it provides for the facility of composition tax in respect of State development tax also.

10. Sri S.P. Kesharwani, learned Standing Counsel, submitted that the Compounding Scheme for the first time has been introduced in respect of civil contract on August 10, 2000. Section 3H of the Act has been introduced with effect from May 1, 2005 by Act No. 9 of 2005 creating liability of State development tax in addition to the tax liability under other provisions of the Act. He submitted that subsequent part of Section 3H of the Act states that State development tax shall be realised in addition to the tax payable under any other provisions of this Act. Emphasizing on the words 'under any other provisions of the Act', he submitted that in effect, Section 3H of the Act has an overriding effect over Section 7D of the Act and in addition to the composition amount, one per cent in respect of State development tax is payable. He submitted that Section 3H(2) of the Act is an enabling provision by which the power is with the State Government to provide facility of the composition tax in respect of State development tax. Having such

power, in case of brick kiln, biscuit, the facility of the Compounding Scheme was also provided in respect of the State development tax under the Compounding Scheme and it has been provided that the State development tax shall not be chargeable over and above the composition amount, while in the case of civil and electrical contracts under the Compounding Scheme such benefit has not been specifically provided. He submitted that in the counter-affidavit, the State Government has pleaded that they have not provided any compounding for State development tax in respect of civil and electrical contracts. He submitted that in case in an Act the word 'notwithstanding' is used in two sections, the provision which is introduced later will prevail. He submitted that since Section 3H of the Act has been introduced subsequent to Section 7D of the Act, therefore, Section 3H of the Act will prevail over Section 7D of the Act. Reliance has been placed on the decision of the apex court in the case of Maruti Udyog Ltd. v. Ram Lal reported in : [2005] 1 JT 449. He submitted that text and context has to be looked into and not the word 'notwithstanding' only. Reliance is placed on the decision in the case of Anand Swamp Mahesh Kumar v. Commissioner of Sales Tax reported in : [1980] 46 STC 477 (SC) : [1980] UPTC 1308 (paras 10 and 11 of UPTC ; page 481 of STC). He also placed reliance on the decision in the case of Commissioner, Sales Tax, U.P. v. Agra Belting Works reported in : [1987] 66 STC 1 (SC) : [1987] UPTC 850. He further submitted that no notification has been issued under Section 3H(4) of the Act excluding levy of State development tax in addition to the composition money. He further submitted that levy of one per cent tax, State development tax with effect from May 1, 2005 falls within the purview of 'change of rate of tax' under the proviso to Section 7D of the Act and, therefore, State development tax is separately leviable for which no fresh Government order is required.

11. The argument of the learned Standing Counsel that the levy of one per cent State development tax with effect from May 1, 2005 falls within the purview of change of rate of tax under the proviso to Section 7D of the Act and therefore, the State development tax is separately leviable and for which no fresh Government Order is required is without any substance for the reason that under Section 3H one per cent State development tax is separately levied by creating an independent charge. It does not amount to change in the rate of tax and secondly that in case of any change in the rate of tax which may come into force after the

date of such agreement, it is only the State Government who can modify the composition amount and neither the Commissioner nor the assessing authority is empowered to modify the composition amount. Admittedly the State Government has not modified the composition amount by any order for modification.

12. Having heard the learned Counsel for the parties, we have given our anxious consideration to the rival submissions.

13. It will be useful to refer relevant provisions of the U. P. Trade Tax Act which requires consideration.

Section 2(bb). 'Trade tax' means a tax payable under this Act on sales or purchases of goods, as the case may be ;

2(n) 'Tax' includes an additional tax and the composition money accepted under Section 7D and the State development tax ;

Section 3. Liability to tax under the Act.-(1) Subject to the provisions of this Act, every dealer shall, for each assessment year, pay a tax at the rates provided by or under Section 3A or Section 3D or Section 3H on his turnover of sales or purchases or both, as the case may be, which shall be determined in such manner as may be prescribed.

(2) No dealer shall, except as otherwise provided in Section 18, be liable to tax under Sub-section (1), if, during the assessment year, the aggregate of his turnover of:

(a) purchases of goods notified under Section 3D ;

(b) purchases liable to tax under any other provisions of this Act ;

(c) sale of goods notified under Section 3D, where such goods have not been purchased within the State ;

(d) sales of all goods (except those notified under Section 3D), whether such sale is made by the dealer directly or through his branch, depot or agent inside the State, in the course of inter-State trade or commerce or outside the State,

is less than two lakh rupees in the case of manufacturers and three lakh rupees in the case of other dealers, or such larger amount as the State Government may, by notification in the Gazette, specify in that behalf either in respect of all dealers in any goods or in respect of a particular class of such dealers.

(3) Nothing in Sub-section (2) shall apply in respect of:

(a) the sale by a dealer of goods imported by him from outside Uttar Pradesh, the turnover whereof is liable to tax under Sub-section (1) of Section 3A, or

(b) the sale by a dealer of:

(i) goods imported by him from outside Uttar Pradesh after furnishing to the selling dealer a declaration under Sub-section (4) of Section 8 of the Central Sales Tax Act, 1956 (Act No. 74 of 1956); or as the case may be ;

(ii) goods purchased or imported by furnishing any declaration or certificate prescribed under any provision of this Act ;

(iii) goods manufactured by him by using the goods referred to in Sub-clause (i) or Sub-clause (ii).

(4) Where the amount specified in, or notified under Sub-section (2) is altered during an assessment year, the tax payable by a dealer under this section shall be computed as follows:

(a) on the turnover relatable to the period prior to such alteration, as though the amount specified in or notified under Sub-section (2) had not been altered ; and

(b) on the remainder, as though the altered amount had been in force on all material dates.

(5) Where tax is payable, and has been so paid, by a commission agent on any turnover on behalf of his principal, the principal shall not be liable to pay the tax in respect of the same turnover.

(6) Notwithstanding anything to the contrary contained in any other provision of this Act, where the State Government considers it expedient in public interest so to do, it may, by notification, permit a dealer selling any goods specified in the notification to another dealer, hereinafter in this sub-section referred to as the purchaser, to own the liability of tax or composition money, as the case may be, payable by the purchaser in the event of resale of such goods or sale of any other commodity manufactured from such goods and if such dealer owns such liability, he shall be liable in place of the purchaser, to pay the tax or composition money in respect of the turnover of such resale of such goods or sale of such commodity.

(7) Subject to such conditions as may be prescribed, the State Government may permit any power project industrial unit, engaged in generation, transmission and distribution having the aggregate capital investment of Rs. 1,000' crore or moire to own the trade tax liabilities of a dealer of such sales as are made to that unit:

Provided that such permission may also be granted in the case of a sub-dealer whose sales culminate in the purchases by such unit.(8) The State Government may, by notification, remit the amount of tax to the extent necessary to ensure the effective rates of trade tax on all purchases for and sales by a power project industrial unit, do not exceed the respective rates applicable to as on the date of commencement of State Energy Policy subject to the conditions as may be notified in such notification.

Section 3A. Rates of tax.-(1) Except as provided in Section 3D, the tax payable by a dealer under this Act shall be levied:

(a) on the turnover in respect of 'declared goods', at the point of sale to the consumer at the maximum rate for the time being specified in Section 15 of the Central Sales Tax Act, 1956, or where the State Government, by notification, declares any other single point or a lesser rate, at such other point or at such lesser rate ;

(b) on the turnover in respect of such goods, other than the goods referred to in Clause (a), at such point and at such rate, not exceeding fifty per cent, as the State Government may, by notification, declare, and different points and different

rates may be declared in respect of different goods.

(c) on the turnover in respect of goods, other than those referred to in Clause (a) or Clause (b), at the point of sale by manufacturer or importer at the rate of ten per cent.

(2) Every notification made under this section shall, as soon as may be after it is made, be laid before each house of the State Legislature, while it is in session, for a total period of not less than fourteen days, extending in its one session or more than one successive sessions, and shall, unless some later date is appointed, take effect from the date of its publication in the Gazette subject to such modifications or annulments as the two Houses of the Legislature may during the said period agree to make, so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done thereunder except that any imposition, assessment, levy or collection of tax or penalty shall be subject to the said modification or annulment.

(3) Where the State Government has declared any point or rate at which the tax payable by a dealer under the Act be levied under Clause (b), Clause (c), Clause (c1), Clause (d) or Clause (e) of Sub-section (1) as it existed immediately before the commencement of the Uttar Pradesh. Trade Tax (Second Amendment) Act, 2000 and such declaration is in force on such commencement, such rate or point of tax shall continue to be in force after such commencement, until modified or rescinded.

Section 3F. Tax on the right to use any goods or goods involved in the execution of a works contract.

(1) Notwithstanding anything contained in Section 3A, or Section 3AAA or Section 3D but subject to the provisions of Sections 14 and 15 of the Central Sales Tax Act, 1956, every dealer shall, for each assessment year, pay a tax on the net turnover of:

(a) transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration ; or

(b) transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract,

at such rate not exceeding twenty per cent as the State Government may, by notification, declare and different rates may be declared for different goods or different classes of dealers.

(2) For the purposes of determining the net turnover referred to in Sub-section (1), the following amounts shall be deducted from the total amount received or receivable by a dealer in respect of a:

(a) transfer referred to in Clause (a) of Sub-section (1) whether such transfer was agreed to during that assessment year or earlier:

(i) the amount representing the sales value of the goods covered by Sections 3, 4 and 5 of the Central Sales Tax Act, 1956 ;

(ii) the amount representing the value of the goods exempted under Section 4;

(iii) the amount received as penalty for default in payment or as damages for any loss or damage caused to the goods by the person to whom such transfer was made,:

(b) transfer referred to in Clause (b) of Sub-section (1),:

(i) the amount representing the sales value of the goods covered by Sections 3, 4 and 5 of the Central Sales Tax Act, 1956 ;

(ii) the amount representing the value of the goods exempted under Section 4;

(iii) the amount representing the value of the goods on the sale or purchase whereof tax has been levied or is leviable under this Act at some earlier stage ;

(iv) the amount representing the value of the goods manufactured in a new unit exempted under Section 4A or Section 4AAA ;

(v) the amount representing the value of the goods supplied to the contractor by the contractee:

Provided that the ownership of such goods remains with the contractee under the terms of the contract ;

(vi) the amount representing the labour charges for the execution of the works contract ;

(vii) all amounts paid to the sub-contractors as the consideration for execution of the works contract, whether wholly or in part:

Provided that no deduction under this sub-clause shall be allowed unless the dealer claiming deduction produces proof that the subcontractor is a registered dealer liable to tax under this Act and that such amount is included in the return of turnover filed by such subcontractor under the provisions of this Act;

(viii) the amount representing the charges for planning, designing and architect's fees ;

(ix) the amount representing the charges for obtaining on hire otherwise machinery and tools used for execution of the works contract ;

(x) the amount representing the cost of consumables used in the execution of the works contract, the property in which is not transferred in the execution of the works contract;

(xi) the amount representing the cost of establishment and other similar expenses of the contractor to the extent it is relatable to supply of labour and services ;

(xii) the amount representing the profit earned by the contractor to the extent it is relatable to the supply of labour and services.

(3) Where in respect of a transfer referred to in Clause (b) of Sub-section (1), the contractor does not maintain proper accounts or the accounts maintained by him are not found by the assessing authority to be worthy of credence and the amount actually incurred towards charges for labour and other services and profit relating to supply of labour and services are not ascertainable, such charges for labour and other services and such profit may, for the purposes of deductions under Clause (b) of Sub-section (2), be determined on the basis of such percentage of

the value of the works contract as may be prescribed and different percentages may be prescribed for different types of works contract.

Section 3H of the Act prior to May 1, 2005.

Section 3H. Turnover tax-(1) There shall be levied a turnover tax at the rate of one per cent on the dealers whose aggregate turnover as referred to in Sub-section (2) of Section 3 exceeds fifty lakh rupees, in addition to the tax payable under this Act. Such tax shall be levied and collected notwithstanding any rebate, concession or exemption provided under this Act.

(2) In the case of composition of tax liability under Section 7D, the turnover tax leviable under Sub-section (1) shall be calculated separately and be charged in addition to the amount payable as composition money.

(3) No tax under Sub-section (1) shall be leviable on,:

(a) the newspapers and other goods or the dealers specified or notified under Section 4 ;

(b) the declared goods mentioned under Section 14 of the Central Sales Tax Act, 1956 ;

(c) the goods liable for the payment of additional tax ;

(d) sales to, or purchases by, manufacturers of such goods as specified in the recognition certificate issued under Section 4B ;

(e) goods on the turnover of which tax is leviable under Section 3A or 3D at the rate not exceeding two per cent;

(f) goods exempted under Section 4C.

Explanation-For the purposes of this section the expression 'turnover tax' means the turnover tax on the sale or the purchase of goods, as the case may be.

Section 3H of the Act after May 1, 2005.

Section 3H. State development tax.-(1) There shall be levied a State development tax at the rate not exceeding one per cent of the taxable turnover as the State Government may by notification specify on the dealers whose aggregate turnover as referred to in Sub-section (2) of Section 3, exceeds fifty lakh rupees. The State development tax shall be realised in addition to the tax payable under any other provision of this Act. This tax shall cease to be levied after a period of five years from the date of publication of the notification issued by the State Government under this section.

(2) The facility of composition of tax in relation to compoundable goods under Section 7D shall also be available in respect of State development tax.

(3) The State development tax shall be adjustable in the monetary limit specified in the eligibility certificate issued under Section 4A.

(4) No State development tax shall be leviable on,:

(a) the newspapers and other goods or the dealers specified or notified under Section 4 ;

(b) declared goods under Section 14 of the Central Sales Tax Act, 1956;

(c) the goods liable for the payment of additional excise duty ;

(d) such goods as may be specified by notification by the State Government.

7D. Composition of tax liability.-Notwithstanding anything contained in this Act, but subject to directions of the State Government, the assessing authority may agree to accept a composition money either in lump sum or at an agreed rate on his turnover in lieu of tax that may be payable by a dealer in respect of such goods or class of goods and for such period as may be agreed upon:

Provided that any change in the rate of tax, which may come into force after the date of such agreement shall have the effect of making a proportionate change in the lump sum or the rate agreed upon in relation to that part of the period of assessment during which the changed rate remains in force.

Explanation.-For the purposes of this section the assessing authority includes an officer not below the rank of Trade Tax Officer, Grade II posted at a check-post.

14. Now let us consider the relevant decisions on the subject.

15. In the case of Sainik Motors, Jodhpur v. State of Rajasthan reported in : AIR 1961 SC 1480, the apex court has considered the Compounding Scheme under the Rajasthan Passengers and Goods Taxation Act, 1959. While dealing with the matter, the apex court held as follows:

The next contention is that the Act allows an option to pay a lump sum in lieu of the tax, but rules 8 and 8A and the notification make the payment of the lump sum compulsory. There is no doubt that ex facie the two provisos to Section 4 employ language which is permissive, while the two Rules and the notification employ language which is imperative. The two provisos to Section 4 are enabling, and thereby authorise the State Government to accept a lump sum payment in lieu of the tax actually chargeable. The word 'accept' shows that the election to pay a lump sum is with the tax-payer, who may choose one method of payment or the other. The inclusion of such a provision is designed to promote easy observance of the Act and also its easy enforcement. The charge of tax calculated on fares and freights involves difficulties for the operators who have to keep accounts and also difficulties for the taxing authorities, who have to maintain constant checks and inspections. The lump sum payment is a convenient mode by which an amount is payable per year irrespective of whether the tax would be more or less if calculated on actual fares or freights. The operators pay the lump sum if they so choose, to avoid having to maintain accounts and to file returns, and the Government accepts it to avoid having to inspect accounts and to keep a check. The rates which are prescribed for a lump sum payment per year are for those who wish to avail of them.

16. Section 7D of the Act came up for consideration with reference to Section 21 of the Act in the case of Kothari Contract Interiors, New Delhi v. Trade Tax Officer, Modinagar, Ghaziabad reported in [2007] 10 VST 60 : [2006] UPTC 74 wherein the Division Bench of this Court held as follows: (page 67 of VST)

Thus, the payment of compounded tax is a convenient hassle-free and simple method of assessment. A dealer who has opted for payment of lump sum amount in lieu of tax is not required to file monthly or quarterly returns of the turnover. A dealer has to pay a fixed sum of money as tax as agreed upon by the Department. It is the choice of a dealer to opt for compounded payment of tax. If the said choice is in accordance with the scheme and is ultimately accepted by the authority concerned, it becomes an agreed amount of tax. The Department as well as the dealer both are bound by the said agreement. The necessary corollary of this is that a dealer whose application for compounding has been accepted cannot turn around and urge that he is not liable to pay any tax for any reason, such as closure of business or low turnover, etc.

Moreover Section 7D starts with a non obstante clause and it excludes the applicability of other provisions of the Act which deal with the assessment and payment of tax. A non obstante clause as observed by the Supreme Court in the case of State of Bihar v. Bihar Rajya M.S.E.S.K.K. Mahasangh AIR 2004 SCW 7151 is generally appended to a section with a view to give the enacting part of the section, in case of conflict, an overriding effect over the provision in the same or other Act mentioned in the non obstante clause. It is equivalent to saying that in respect of the provisions of Act mentioned in the non obstante clause, the provision following it will have its full operation or the provisions embraced in the non obstante clause will not be an impediment in the operation of the enactment or the provisions in which non obstante clause occur.

A dealer who has opted to pay the tax in lump sum under Section 7D of the Act and the said option has been accepted by the Department, the demand for that period is not relatable to the actual turnover but to the sum agreed upon. In other words, the Department as well as the dealer both know the amount payable and receivable by each other. The determination of the lump sum in lieu of tax, displaces the requirement of regular assessment proceedings. The qualification of tax liability is by agreement as per terms of the scheme, which would bind both the parties. The object of introducing such scheme under the taxing statute is well established, as so many advantages are attached to such schemes. Besides being hassle-free to the dealer, it also avoids unnecessary litigation. The

Department in its turn receives a fixed amount as tax without undertaking the assessment work and thus saves a lot of time. It also facilitates speedy recovery of tax. In this background we have to answer the issues raised in the writ petition.

17. In the case of Vora Electric Service, Kanpur v. State of U.P. reported in [2005] UPTC 977, the Division Bench of this Court held as follows:

Section 7D of the Act starts with the non obstante clause, i.e., 'notwithstanding anything contained in the Act.' Thus it has an overriding effect over the provision of the Act. Perusal of the section shows that it contemplates payment by agreement in lump sum. Once the Department agrees to accept the tax in the name of compounding money in lump sum, in lieu of tax payable, it displaces the regular assessment proceeding...

18. Full Bench of this Court in the case of Bhadauria Gram Sewa Sansthan, Fatehpur v. Assistant Commissioner, Sales Tax, Allahabad reported in [2006] 148 STC 356 : [2006] UPTC 538 in Civil Misc. Writ Petition No. 252 of 1994 decided on January 13, 2006 held as follows : (page 370 of STC).It is the choice of a dealer to opt for compounded payment of tax and if the said choice is in accordance with the scheme and is ultimately accepted by the authority concerned, it becomes an agreed amount of tax. The Department as also the dealer are bound by the said agreement. Once a dealer has opted to pay the tax in lump sum under Section 7D of the Act after it has been accepted by the Department, any demand for that period is not relatable to the actual turnover but the sum agreed upon. In other words, the Department as well as the dealer both know the amount payable and receivable by each other. The determination of lump sum amount in lieu of tax displaces the requirement of regular assessment proceeding and the quantification of tax liability is by agreement as per the term of the scheme which would bind both the parties. The object of introducing such a scheme under a taxing statute is well established as so many advantages are attached to such scheme besides being hassle-free to the dealer. It also avoids unnecessary litigation. The Department in its turn receives a fixed amount of tax without undertaking the assessment work and, thus, saves a lot of time. It also facilitates the speedy recovery of tax.

19. Like Section 7D of the Act similar provisions are also available under the Kerala General Sales Tax Act, 1963, Central Excise Act, 1944, U. P. Sugarcane (Purchase Tax) Act, 1961, etc. The apex court and the High Court had occasions to consider the scope of such provisions.

20. In the case of State of Kerala v. Builders Association of India reported in : [1997] 104 STC 134 : [1997] 2 SCC 183, the apex court while considering the constitutional validity of Sections 7(7) and 7(7A) and 5(1)(iv) of the Kerala General Sales Tax Act, 1963, which provided for payment of tax in lump sum in place of actual amount of tax, has held that the alternate method of taxation provided by Sub-section (7) or (7A) of Section 7 is optional. It is wholly at the choice or pleasure of the contractor and the contractor who has opted to the said alternate method of taxation, cannot complain. It has further held that having, voluntarily and with full knowledge of the features of the alternate method of taxation, opted to be governed by it, a contractor cannot be heard to question the validity of the relevant sub-sections or the Rules. The impugned sub-sections have been evolved for convenient, hassle-free method of assessment of tax, just as the system of levy of entertainment tax on the gross collection capacity of the cinema theatre and by opting to this alternate method, the contractor saves himself the botheration of book-keeping, assessment, appeals and all that it means. It has also held that it is not necessary to enquire and determine the extent or value of goods which have been transferred in the course of execution of a works contract, the rate applicable to them and so on. It is only an alternative method of ascertaining the tax payable, which may be availed of by a contractor if he thinks it is advantageous to him. The Constitution does not preclude the Legislature from evolving such alternate, simplified and hassle-free method of assessment of tax payable making it optional for the assessee.

21. Similar view has been taken by the apex court in the case of Mycon Construction Limited v. State of Karnataka reported in [2002] 127 STC 105 : [2002] UPTC 585. The apex court has repelled the submission that while evolving a simplified method of payment of tax, which is the case in the instant case, the law cannot give an option to the assessee, which is in the teeth of constitutional provision. It has held that this argument does not survive in view of the principles

laid down by the apex court in the case of State of Kerala v. Builders Association of India : [1997] 104 STC 134 : [1997] 2 SCC 183.

22. In the case of Commissioner of Central Excise and Customs v. Venus Castings (P) Ltd. reported in : [2000] 4 JT 77, the apex court while considering the provision of Section 3A(4) of the Central Excise Act, 1944 and rule 96ZO(3) of the Central Excise Rules, which envisaged the composition method of payment of duty, has held that they provided two alternative procedure to be adopted at the option of the assessee and they do not clash with each other. The manufacturers, if they have availed of the procedure under rule 96ZO(3) at their option, cannot claim the benefit of determination of production capacity under Section 3A(4) of the Act, which is specifically excluded.

23. In the case of Jalan Castings (P) Ltd. v. Commissioner, Central Excise reported in : [2000] 119 ELT 531, this Court has held that where an assessee has himself asked for a lump sum method of assessment and this was agreed to by the Department, then the assessee cannot go back and claim that he should be assessed by the normal mode as the assessee cannot blow hot and cold at the same time. The decision of this Court has been approved by the apex court in the case of Commissioner of Central Excise and Customs v. Venus Castings (P) Ltd. : [2000] 4 JT 77.

24. The same view was taken by the apex court in the case of Union of India v. Supreme Steels and General Mills reported in : [2001] 133 ELT 513. In the aforesaid case, it has been held by the apex court that it was absolutely optional for the manufacturer to opt for payment of excise duty in accordance with Sub-rule (3) of rule 96ZO on the basis of total finished capacity installed as provided thereunder and the manufacturer cannot opt twice during one financial year: first choosing to pay in accordance with Sub-rule (3) of rule 96ZO and thereafter to switch over to actual-production basis under Section 3A(4) of the Central Excise Act, 1944 in case it is less than the duty payable under Sub-rule (3) of rule 96ZO. The said sub-rule is quite clear that the option under it is available subject to the condition that once having opted it, the benefit, if any, under Sub-section (4) of Section 3A of the Central Excise Act, 1944 shall not be available.

25. In the case of Satish Prakash Ajay Kumar v. Assistant Sugarcane Commissioner, Saharanpur reported in [1980] UPTC 64, a Full Bench of this Court while interpreting the provisions of Section 3(1) (b) of the U.P. Sugarcane (Purchase) Tax Act, 1961 and rule 13 of the Rules framed thereunder, has held that the said Act and the Rules do not contemplate exemption from the liability for payment of tax by the owner of a unit who has opted for the assumed basis merely because he has, either by choice or on account of some mechanical defect, been unable to worn some of the crushers composing his unit for any length of time during a particular assessment year.

26. In the case of Venkateshwara Theatre v. State of Andhra Pradesh reported in : [1995] 96 STC 130 (SC) : AIR 1993 SC 1947, the apex court while considering the scheme announced by the Government of Andhra Pradesh, providing that instead of payment of entertainment tax on the basis of actual number of cinema goers, the proprietor of a cinema hall may opt to pay a consolidated levy on the basis of gross collection capacity per show, has held that the compounded payment of entertainment tax is a more convenient mode of levy of the tax inasmuch as it dispenses with the need of verification or to enquire into the number of persons admitted to each show and to verify the correctness or otherwise of the returns submitted by the proprietor containing the number of persons admitted to each show and the amount of tax collected. The aforesaid decision has been followed by the apex court in the case of State of Kerala v. Builders Association of India : [1997] 104 STC 134 : [1997] 2 SCC 183 wherein the apex court has held that the object of levy of compounded payment of tax is not to increase the revenue. The Legislature provides the alternate method of taxation with a view to realise the tax with least discomfort to the assessee. It is only a convenient mode of realisation of tax. It also ensures a fixed amount of payment of tax is made to the Government irrespective of the fact that the business of the assessee has earned profit or not. Similar view has been taken by the apex court in the case of Mycon Construction Limited [2002] 127 STC 105 : [2002] UPTC 585, Venus Castings (P) Ltd. jt [2004] 4 sc 77 and Supreme Steels and General Mills : [2001] 133 ELT 513.

27. In the case of Bharathi Knitting Company v. DHL Worldwide Express Courier, Division of Airfreight Ltd. reported in : [1996] 4 SCC 704, the apex court has held

that when a person signs a document which contains certain contractual terms, normally parties are bound by such contract and it is for the party to establish exception in a suit. When a party to the contract disputes the binding nature of the signed documents, it is for him to prove the terms in the contract or circumstances in which he came to sign the document, and in appropriate cases where there is an acute dispute of facts, the Tribunal has to necessarily refer the parties to original Civil Court established under the Code of Civil Procedure or the State law, to have the claim decided between the parties but when there is a specific term in the contract, the parties are bound by the term in the contract.

28. In the case of Commissioner of Trade Tax, U.P., Lucknow v. Qayum Khan Thekedar, Aliganj, Banda reported in [2009] 23 VST 508 : [2007] 33 NTN 53, this Court has considered the provisions of Section 7D of the Act with reference to Section 10B of the Act. The question for consideration was whether, once the assessee and the assessing authority agree for the payment of composition amount in lump sum for a particular period, can the same be revised under Section 10B of the Act. This Court held that the agreement between the assessing authority and the assessee is not in the nature of order and cannot be revised under Section 10B of the Act.

29. On perusal of Section 7D of the Act and other provisions of the Act and various decisions referred hereinabove, it is apparent that Section 7D of the Act has an overriding effect over other sections of the Act including Section 3H of the Act which provides levy of State development tax. It is an alternative method of payment of tax. On the scheme being introduced by the State Government, if the assessing authority agrees for the payment of composition amount in lieu of tax payable, such agreement is binding on the assessee as well as assessing authority. It can be nullified only under the Compounding Scheme itself, namely, in case of any suppression of fact, mis-statement, etc. It cannot be revised otherwise. The lump sum payment is a convenient mode by which an amount is payable per year irrespective of whether the tax would be more or less if calculated on actual turnover. Payment of compounded amount is a convenient hassle-free and simple method of assessment. It displaces regular assessment proceeding.

30. Section 3H of the Act creates an independent charge. It contemplates levy of State development tax in addition to the tax payable under other provisions of the Act. State development tax is included within the definition of 'tax' provided under Section 2(n) of the Act. Thus, it also falls within the purview of words 'in lieu of tax payable' under Section 7D of the Act. Therefore, the composition amount fixed under the scheme purports to include the State development tax also along with other tax payable under Section 3 of the Act as per notification under Sections 3A and 3D of the Act.

31. We are of the view that the submission of learned Standing Counsel has no substance.

32. Section 3H of the Act has two parts. The first part creates a charge and provides for levy of State development tax and the second part provides for realization in addition to the tax payable under any other provisions of this Act. The words used in the second part, namely, 'in addition to the tax payable under any other provisions of this Act' simply means that in addition to the tax payable under this Act one per cent State development tax shall be realized. There is nothing in the section leaving any scope to hold that it has overriding effect over Section 7D of the Act. As stated above, State development tax falls within the purview 'in lieu of tax payable' under Section 7D of the Act, therefore, once in a scheme composition amount is fixed the same shall include State development tax unless in the scheme itself anything to the contrary is stated. In the compounding scheme it is not stated that the composition amount would not include the State development tax. Therefore, we are of the considered opinion that apart from the composition amount mentioned in the Compounding Scheme in respect whereof, the assessing authority and the petitioners have agreed, the State development tax cannot be charged over and above the Compounding Scheme.

33. It is true that Section 3H(2) of the Act is an enabling provision and empowers to provide the facility of compounding in respect of State development tax also. Therefore, while introducing the Compounding Scheme, it will be open to the State Government to specify that the composition amount includes the State development tax or separate scheme may be introduced for providing the facility of

compounding in respect of the State development tax, but it does not mean that where it is neither mentioned that the composition amount includes the State development tax nor it is mentioned that it does not include State development tax and could be chargeable separately, it cannot be presumed that State development tax is separately chargeable apart from the composition amount.

34. The tax payable under the Compounding Scheme, which is a composition amount in lieu of the tax payable and is introduced as a simplified method of payment of tax overriding the complicated process of assessment wherein the gross turnover and net turnover are being determined. If the State development tax is held to be chargeable over and above the composition amount for the purpose of determination of the State development tax the aggregate turnover and taxable turnover are to be determined, which may lead to some complicated procedure of determination of gross and taxable turnover. In the circumstances, the whole object of the Compounding Scheme would be frustrated.

35. In view of the above, it is not necessary to deal with various other arguments and the judgment cited by the learned Standing Counsel because they are wholly irrelevant and it is also not necessary to deal with the other arguments of the learned Counsel for the petitioners.

36. In view of the foregoing discussion, we are of the considered opinion that State development tax is not payable by the petitioners in addition to the composition amount mentioned in the Compounding Scheme. The circular dated June 4, 2007 issued by the Commissioner of Trade Tax is erroneous and liable to be set aside.

37. In the result, the writ petitions are allowed. The circular dated June 4, 2007 is hereby quashed. The orders passed by the assessing authority demanding the State development tax is hereby set aside. There shall be no order as to cost.

Amitava Lala J.

38. I agree.