

**FISCAL INCENTIVES AND EXEMPTIONS: REFLECTIONS
ON THE NEW INTERPRETATION STANDARD**

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ABSTRACT

Interpretation of fiscal statutes, as contrasted from interpretation of other enactments, is a nuanced task as a variety of additional considerations apply. Jurisprudential survey reveals that the complexity is accentuated when subordinate fiscal legislation particularly those relating to exemptions or extending concessions, form the subject-matter of interpretation. Ruefully noting the “unsatisfactory state of the law as it stands today”, the Supreme Court a few years back reiterated the need “to resolve the doubts” and declare the legal position clearly.¹ In this background, a recent decision of a five-judge bench of Supreme Court in Dilip Kumar² has revisited the entire law governing the interpretation of such fiscal exemption provisions which confer concessional treatment to the taxpayer. The decision is, in a sense, a course-correction as it simultaneously affirms and overrules various earlier decisions. In another sense, the decision categorically and substantially alters the legal standard of interpretation in such cases. This article

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¹ Commissioner of Customs (Imports) v. Dilip Kumar & Ors., (2018) 9 SCC 40 (India) [hereinafter Dilip Kumar].

² *Id.*

appraises the changes brought about by this decision in the interpretative standard and the larger ramifications in the space of fiscal jurisprudence.

TABLE OF CONTENTS

I. INTRODUCTION: SETTING THE CONTEXT	4
II. INTERPRETATIVE STANDARDS PRIOR TO <i>DILIP KUMAR</i> DECISION.....	5
A. ‘Strict’ versus ‘Purposive’ Construction	6
B. ‘Substantive’ versus ‘Procedural’ Debate	8
C. Burden of Proof	10
D. Fairness Principle.....	11
E. Reference to a Larger Bench	13
III. THE DECISION OF SUPREME COURT IN <i>DILIP KUMAR</i>.....	14
IV. IS <i>DILIP KUMAR</i> THE FINAL ANSWER TO INTERPRETATIVE WOES?.....	18
V. CONCLUSION	26

I. INTRODUCTION: SETTING THE CONTEXT

It is now well settled that a subject can be taxed only when it is covered by the ‘plain language’ of the fiscal enactment which must “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.”³ Thus, while there can be no tax by *estoppel*,⁴ there cannot also be any escapement from the rigours of a fiscal enactment on account of equitable considerations.⁵ As per constitutional standards, no tax can be collected except by the authority of the law.⁶ Conversely, therefore, a charge of tax arising under a statutory provision can be dispelled only under another provision which generally or specifically exempts the subject from such charge.⁷

The role of tax-exemptions, besides repelling the charge of tax, is diverse. Tax-exemptions are an indispensable part of tax-policy in so

³ Mathuram Agrawal v. State of Madhya Pradesh, (1999) 8 SCC 667 (India).

⁴ Bonanzo Engineering and Chemical Pvt. Ltd. v. Commissioner of Central Excise, (2012) 4 SCC 771 (India).

⁵ De Vigier v. Inland Revenue Commissioners [1964] 2 All ER 907 (HL), per Lord Reid, *inter alia* observing that “... the Revenue do not and probably should not have any discretion to remit tax legally due on the ground that the innocent taxpayer has fallen into a trap”. The decision in Bansal Wire Industries Ltd. v. State of Uttar Pradesh, (2011) 6 SCC 545 (India) is to similar effect. *See also* Tarun Jain, *Is Section 206AA Unconstitutional? Why is the Karnataka High Court, in Kowsalya Bai, Wrong?*, (2012) 349 INCOME TAX REPORTS (JOURNAL) 74-88, for detailed discussion of legal position on this aspect.

⁶ INDIA CONST. art. 265.

⁷ Tarun Jain, *Tweaking with Treaty Provisions: A Lawyer’s Perspective on the Direct Taxes Code Bill, 2009*, (2011) 41 TAX’N L. R. 1041-1055.

much so that they directed towards objectives as wide as the attainment of social and economic goals to as minor as reducing tax-compliance and administrative burden. Given the wide range of objectives being pursued, the design of tax-exemptions is both flexible as also purely contingent upon the discretion of the executive government.⁸ Thus, tax-exemptions cannot be claimed as a matter of right by anyone.⁹ As a natural corollary, the underlying purpose of the exemption becomes a relevant, rather crucial, criteria for interpretation of the provision containing the exemption and it is for this principle reason that conflict arises in the choice of interpretative standard, as is evident in the following part. Suffice would be had to state that both the cause and the outcome are not of contemporary-origin alone. Instead, this state of affairs has prevailed for decades and the search for a categorical legal enunciation has been at best elusive.

II. INTERPRETATIVE STANDARDS PRIOR TO *DILIP KUMAR*

DECISION

Prior to the decision in *Dilip Kumar*, a number of varying legal tests were in vogue for interpretation of exemption provisions. An enlistment of these principles, which in no manner can be exhaustive and at best are an enumeration of the fundamental tenets, clearly establishes the need for reconciliation. For ease of reference, the relevant variables are segregated in the sections below.

⁸ *Amin Merchant v. Chairman, Central Board of Excise and Revenue*, (2016) 9 SCC 191 (India).

⁹ *Union of India v. Aflon Engineering Corporation*, (2001) 10 SCC 677 (India); *Union of India v. Parameswaran Match Works*, (1975) 1 SCC 305 (India).

A. 'STRICT' VERSUS 'PURPOSIVE' CONSTRUCTION

The principal reason for the conflicting interpretative standards is the inherent dichotomy between the strict-interpretation standard and the purposive-interpretation standard. This aspect is exemplified by the long-settled principle of strict construction of fiscal statutes which permits only adoption of the plain meaning of the statutory provision irrespective of its consequences.¹⁰ On the other hand is the purposive construction rule which accommodates liberal expansion of the scope of the relevant exemption provision.¹¹ Thus, law reports are replete with instances reflecting the conundrum faced by the judges in their choice between strict construction versus purposive construction of exemption provisions¹², despite there being another set of decisions which

¹⁰ A.V. Fernandez v. State of Kerala, (1957) SCR 837 (India); Giridhar G. Yadalam v. Commissioner of Wealth Tax, (2015) 17 SCC 664 (India), (expressly rejecting purposive construction unless there is ambiguity in language of statutory provision or it leads to absurd results); State of Kerala v. M.K. Agrotech Pvt. Ltd., (2017) 16 SCC 210 (India), (advocating literal construction of relevant fiscal provision); Martand Dairy and Farm v. Union of India, (1975) 4 SCC 313 (India); etc.

¹¹ See, e.g., Bajaj Tempo Ltd. v. Commissioner of Income Tax, (1992) 3 SCC 78 (India), *inter alia* observing that “since a provision intended for promoting economic growth has to be interpreted liberally, the restriction on it, too, has to be construed so as to advance the objective of the section and not to frustrate it.” See also Commissioner of Customs v. Rupa & Co., (2004) 6 SCC 408 (India), *inter alia* observing that “an exemption notification has to be construed strictly but that does not mean that the object and purpose of the notification is to be lost sight of and the wording used therein ignored”.

¹² E.g., Commissioner of Customs v. Reliance Petroleum Ltd., (2008) 7 SCC 220 (India); HMM Ltd. v. Collector of Central Excise, (1996) 11 SCC 332 (India); Collector of Central Excise v. Himalayan Co-operative Milk Product Union Ltd., (2000) 8 SCC 642 (India); Rohit Pulp and Paper Mills Ltd. v. Collector of Central Excise, (1990) 3 SCC 447 (India); Coastal Paper Ltd. v. Commissioner of Central Excise, (2015) 10 SCC 664 (India); etc.

unequivocally adopt the strict construction rule for interpreting such provisions.¹³

The outcome of the aforesaid pendulum-like swing of judicial opinion resulted into an interpretative standard which attributed strict construction to the eligibility criteria in the exemption provision and also simultaneously accorded a liberal construction to the conditions enumerated therein for claiming the exemption.¹⁴ In addition, were the divergent declarations from the Supreme Court which compounded the issues against a clear legal position. For illustration, it was declared that “exemption is a stand-alone process” and “there is no question of equity”, thus “either an industry claiming exemption comes within it or it does not.”¹⁵, meaning thereby that the overarching purpose of the exemption can be ignored as no amount of equitable claims can lead to an exemption. As another illustration of the divergence, which obviates as a non-issue the conflict between the strict and purposive standard, is the declaration that the “basic rule in the interpretation of any statutory provision is that the plain words of the statute must be given effect to. It is only in the case of ambiguity that the principle of strict/liberal

¹³ *E.g.*, *Star Industries v. Commissioner of Customs*, (2016) 2 SCC 362 (India); *Uttam Industries v. Commissioner of Central Excise*, (2011) 11 SCC 528 (India); *Commissioner of Central Excise v. Rukmini Pakkwell Traders*, (2004) 11 SCC 801 (India); *Commissioner of Customs v. Variety Lumbers Pvt. Ltd.*, (2018) 16 SCC 806 (India); etc.

¹⁴ *E.g.*, *Commissioner of Customs v. Tullow India Operations Ltd.*, (2005) 13 SCC 789 (India); *Compack Pvt. Ltd. v. Commissioner of Central Excise*, (2005) 8 SCC 300 (India); *Bombay Chemical Pvt. Ltd. v. Collector of Central Excise*, (1995) Supp (2) SCC 646 (India); *Mangalore Chemicals & Fertilizers Ltd. v. Deputy Commissioner of Commercial Taxes*, (1992) Supp (1) SCC 21 (India); *Union of India v. Wood Papers Ltd.*, (1990) 4 SCC 256 (India); etc.

¹⁵ *State of Gujarat v. Essar Oil Ltd.*, (2012) 3 SCC 522 (India).

interpretation would arise”.¹⁶ These clearly illustrate the extent of dichotomy.

B. ‘SUBSTANTIVE’ VERSUS ‘PROCEDURAL’ DEBATE

Besides the aforesaid debate on the manner of appreciating of exemption provisions i.e. strictly in line with the text versus in the larger context of the purpose sought to be served by the exemption, there was another interpretative issue which in view of the author can be described as the substantive versus the procedural debate. This essentially revolves around the level of primacy to be accorded to adjunct rules appended to the exemption provision or the exemption provision itself.

The *inter-se* conflict arising on account of these and other decisions came up for consideration before a five-judge bench of the Supreme Court in *Hari Chand* case¹⁷ wherein the question of law framed by the Court specifically indicated that the debate between substantive and procedural compliance was not a non-issue¹⁸ as the benefit of exemption had been extended to taxpayers in a set of decisions¹⁹ on the basis of the doctrine of “intended use” and the principle of “substantial compliance”.

¹⁶ Commissioner of Central Excise v. Bhalla Enterprises, (2005) 8 SCC 308 (India).

¹⁷ Commissioner of Central Excise v. Hari Chand Shri Gopal, (2011) 1 SCC 236 (India).

¹⁸ *Id.*, “1. The question that falls for consideration in these appeals is whether a manufacturer of a specified final product falling under the schedule of the Central Excise Tariff Act, 1985 is eligible to get the benefit of exemption from remission of excise duty on specified intermediate goods as per Notification No. 121/94-C.E., dated 11-8-1994, if captively consumed for the manufacture of final products on the ground that the records kept by it at the recipient end would indicate its “intended use” and “substantial compliance” of the procedure set out in Chapter X of the Central Excise Rules, 1944”.

¹⁹ Thermax Private Ltd. v. Collector of Customs, (1992) 4 SCC 440 (India); Collector of Central Excise v. J.K. Synthetics, (2000) 10 SCC 393 (India).

Basis these principles the taxpayers contended before the Supreme Court in *Hari Chand* case that where the conditions for availing the exemption were procedural, they must be liberally construed to accommodate the taxpayer as the conditions had been substantially complied.

It was expected that this case, being specifically referred to a five-judge bench for a categorical pronouncement, would settle the legal position. Instead, the decision in *Hari Chand* case approved both the approaches. On the one hand the principle of strict construction of fiscal statutes was reiterated, on the other the Supreme Court in *Hari Chand* case acknowledged that “some of the provisions of an exemption notification may be directory in nature and some are of mandatory in nature” and it is essential that “distinction between provisions of statute which are of substantive character and were built in with certain specific objectives of policy, on the one hand, and those which are merely procedural and technical in their nature, on the other, must be kept clearly distinguished”.²⁰ On this premise the Supreme Court accepted that substantial compliance in certain cases could indeed be considered as sufficient for an entitlement of exemption in as much as the “doctrine of substantial compliance seeks to preserve the need to comply strictly with the conditions or requirements that are important to invoke a tax or duty exemption and to forgive non-compliance for either unimportant and tangential requirements or requirements that are so confusingly or

²⁰ Commissioner of Central Excise v. Hari Chand Shri Gopal, (2011) 1 SCC 236 (India).

incorrectly written that an earnest effort at compliance should be accepted.”²¹

In its facts while the Supreme Court concluded against the taxpayers, in *Hari Chand* case, however, the Supreme Court did not overrule the decisions which had accepted and applied the doctrine of “intended use” and the principle of “substantial compliance”, thereby impliedly acknowledging the earlier decisions as laying down correct legal position as also permitting them to be relied upon as precedents to claim benefit of exemptions based upon substantial compliance alone instead of strict observance of all conditions attendant to the exemption provision. In short, the legal position continued to remain in a state-of-flux as far as the strict construction standard continued to be pitted-up with the doctrine of “intended use” and the principle of “substantial compliance” in context of interpreting exemption provisions.

C. BURDEN OF PROOF

Another angle of inquiry is determining who bears the burden of proof in so far as the claim for exemption is concerned? The standard principle under civil laws, which has also been extended to fiscal enactments, is that the burden lies on the person asserting the fact.²² In continuation of this principle, the English view that “all exemptions from taxation to some extent increase the burden on other members of the community” and therefore, “the principle that in case of ambiguity a

²¹ *Id.* at ¶ 33.

²² *Uniworth Textiles Ltd. v. Commissioner of Central Excise*, (2013) 9 SCC 753 (India).

taxing statute should be construed in favour of a taxpayer does not apply to a provision giving a taxpayer relief in certain cases from a section clearly imposing liability”.²³ This view was endorsed by the Supreme Court to the effect that “a person invoking an exception or an exemption provision to relieve him of the tax liability must establish clearly that he is covered by the said provision” and in the “case of doubt or ambiguity, benefit of it must go to the State”.²⁴

This principle has been recently reiterated that the onus lies upon the taxpayer “to show that its case falls within the four corners” of the exemption provision.²⁵ However, the position is far from settled as a number of decisions hold to the contrary on the premise that when two views are possible on the construction of the exemption provision then the view which is in favour of the taxpayer should be adopted.²⁶

D. FAIRNESS PRINCIPLE

The contrarian principle i.e. to opine in favour of the taxpayer when two views are possible, has in fact been validated by another five-judge bench of the Supreme Court in its recent decision in *Vatika*

²³ *Commissioners of Inland Revenue v. James Forrest*, [1890] 15 AC (HL) 334 and *Littman v. Barron* (Inspector of Taxes) [1951] 2 All ER 393 (CA), as noted in *Novopan India Ltd. v. Collector of Central Excise and Customs*, (1994) Supp (3) SCC 606 (India).

²⁴ *Novopan India Ltd. v. Collector of Central Excise and Customs*, (1994) Supp (3) SCC 606 (India).

²⁵ *Meridian Industries Ltd. v. Commissioner of Central Excise*, (2015) 15 SCC 469 (India).

²⁶ *E.g.*, *Commissioner of Central Excise v. Calcutta Springs Ltd.*, (2007) 15 SCC 89 (India); *Cemento Corporation Ltd. v. Collector of Central Excise*, (2002) 8 SCC 139 (India); *Poulose and Mathen v. Collector of Central Excise*, (1997) 3 SCC 50 (India); *Collector of Customs v. Lotus Inks*, (1997) 10 SCC 291 (India); etc.

Township case²⁷ which introduced the principle of fairness in fiscal statutes for the first time. Prior to this decision, the following observations of Rowlett J. were often quoted that “in a taxing Act one has to look merely at what is already said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.”²⁸ That there is no role of equitable considerations in the enforcement of fiscal enactments and actions was thus a fairly well settled legal proposition.²⁹

The decision in *Vatika Township* case, albeit invoking the doctrine in the context of repelling implied retrospectivity in fiscal statutes,³⁰ turned the entire tide of settled fiscal jurisprudence in so far as it introduced the doctrine of ‘fairness’ as a balancing factor to the benefit of the taxpayer against the Revenue.³¹ This decision has also been relied upon to determine the extent of liability of taxpayers and for construction

²⁷ Commissioner of Income Tax v. Vatika Township Pvt. Ltd., (2015) 1 SCC 1 (India).

²⁸ Cape Brandy Syndicate v. Inland Revenue Commissioners [1921] 1 KB 64 (CA).

²⁹ Commissioner of Trade Tax v. National Industrial Corporation, (2008) 15 SCC 259 (India); Baidyanath Ayurved Bhawan v. Excise Commissioner, (1971) 1 SCC 4 (India); Oswal Agro Mills Ltd. v. Commissioner of Central Excise, (1993) Supp (3) SCC 716 (India).

³⁰ See, Tarun Jain, *Doctrine of ‘Fairness’: Countering ‘Implied Retrospectivity’ of Fiscal Enactments*, 397 INC. TAX REP. 21 (2017).

³¹ In Commissioner of Income Tax v. Vatika Township Pvt. Ltd., (2015) 1 SCC 1 (India), it was *inter alia* observed that “at the same time, this very principle is based on “fairness” doctrine as it lays down that if it is not very clear from the provisions of the Act as to whether the particular tax is to be levied to a particular class of persons or not, the subject should not be fastened with any liability to pay tax. This principle also acts as a balancing factor between the two jurisprudential theories of justice — Libertarian theory on the one hand and Kantian theory along with Egalitarian theory propounded by John Rawls on the other hand.”

of exemption provisions.³² Thus, the legal standard regarding the interpretation of exemption provisions requires to be revisited.

E. REFERENCE TO A LARGER BENCH

It can, therefore, be said that a number of views and applicable standards prevailed which led to diverse and often contradictory variables and tests for interpreting exemption provisions. In fact, the complexity was compounded in case of indirect tax legislations which, in contrast to direct taxes where exemptions are part of the statutory enactment itself,³³ only provided the framework for exemption under the statute and enabled the executive government to notify the exemption.³⁴ Thus the exemption provision in indirect taxes, being an instance of delegated legislation, called upon additional variables for interpretation.³⁵

These varying standards and tests came up for consideration before the Supreme Court³⁶ called upon to interpret a customs exemption notification which conferred exemption to ‘prawn feed’. The taxpayer,

³² *See, e.g.*, Union of India v. Margadarshi Chit Funds Pvt. Ltd., (2017) 13 SCC 806 (India); Shanti Fragrances v. Union of India, (2018) 11 SCC 305 (India); Adani Power Ltd. v. Union of India, 2015 (330) ELT 883 (Guj) (India).

³³ The Income Tax Act, 1961, No. 43, Acts of Parliament, 1961 §§ 10, 80A, 80C, 80IA, 80IB and 80IC (India).

³⁴ The Central Excise Act, 1944, No. 1, Acts of Parliament 1944 § 5A (India); The Customs Act, 1962, No. 52, Acts of Parliament 1962 § 25 (India); The Chapter V of the Finance Act, 1994 § 93 (in context of service tax) (India), etc.

³⁵ *See, e.g.*, WPIL Ltd. v. Commissioner of Central Excise, (2005) 3 SCC 73 (India), adding a new dimension to interpret the exemption notification in that case opining it to be merely clarificatory of the government’s intent and thus extending the exemption retrospectively to the taxpayer.

³⁶ Commissioner of Customs (Imports) v. Dilip Kumar & Ors., (2018) 9 SCC 40 (India).

relying upon an earlier decision³⁷ holding that animal feed also covered animal feed supplement, contended that exemption to prawn feed should also extend to prawn feed supplements. Doubting the interpretation standard emanating from the earlier decision as also taking note of the “unsatisfactory state of law”, the Supreme Court bench found compelled to refer the issue for consideration by a larger bench which led to the decision in *Dilip Kumar*.

III. THE DECISION OF SUPREME COURT IN *DILIP KUMAR*.

The five-judges of Supreme Court in *Dilip Kumar Case*,³⁸ speaking through Ramana J., were unanimous on the need to restate the legal position on the interpretative standard in exemption provisions. However, the Supreme Court went much beyond to examine the interpretation standards of the fiscal statutes *per se* and addressing the conflict between the strict rule versus purposive construction, the role of equity, and other aspects declaring the legal position in the following terms:

“We are not suggesting that literal rule debors the strict interpretation nor one should ignore to ascertain the interplay between ‘strict interpretation’ and ‘literal interpretation’. We may reiterate at the cost of repetition that strict interpretation of a statute certainly involves literal or plain meaning test. The other tools of interpretation, namely contextual or purposive interpretation cannot be applied nor any resort be made to look to other supporting material, especially in taxation statutes. Indeed, it is well-settled that in a taxation statute, there is no room for any intendment; that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification.

³⁷ Sun Exports Corporation v. Collector of Customs, (1997) 6 SCC 564 (India).

³⁸ Dilip Kumar, *supra* note 1.

*Equity has no place in interpretation of a tax statute. Strictly one has to look to the language used; there is no room for searching intendment nor drawing any presumption. Furthermore, nothing has to be read into nor should anything be implied other than essential inferences while considering a taxation statute.”*³⁹

...

“There is abundant jurisprudential justification for this. In the governance of rule of law by a written Constitution, there is no implied power of taxation. The tax power must be specifically conferred and it should be strictly in accordance with the power so endowed by the Constitution itself. It is for this reason that the courts insist upon strict compliance before a State demands and extracts money from its citizens towards various taxes. Any ambiguity in a taxation provision, therefore, is interpreted in favour of the subject/assessee. The statement of law that ambiguity in a taxation statute should be interpreted strictly and in the event of ambiguity the benefit should go to the subject/assessee, may warrant visualising different situations. For instance, if there is ambiguity in the subject of tax, that is to say, who are the persons or things liable to pay tax, and whether the Revenue has established conditions before raising and justifying a demand. Similar is the case in roping all persons within the tax net, in which event the State is to prove the liability of the persons, as may arise within the strict language of the law. There cannot be any implied concept either in identifying the subject of the tax or person liable to pay tax. That is why it is often said that subject is not to be taxed, unless the words of the statute unambiguously impose a tax on him, that one has to look merely at the words clearly stated and that there is no room for any intendment nor presumption as to tax. It is only the letter of the law and not the spirit of the law to guide the interpreter to decide the liability to tax ignoring any amount of hardship and eschewing equity in taxation. Thus, we may emphatically reiterate that if in the event of ambiguity

³⁹ Dilip Kumar, *supra* note 1 at ¶ 55.

*in a taxation liability statute, the benefit should go to the subject / assessee. ...*⁴⁰

In respect of the specific issue before it the Supreme Court, without restraint, admitted that the earlier decisions to the effect that “if two views are possible in interpreting the exemption notification, the one favourable to the assessee in the matter of taxation has to be preferred ... created confusion and resulted in unsatisfactory state of law” as it did so “in spite of catena of judgments of this Court, which took the *contra* view, holding that an exemption notification must be strictly construed, and if a person claiming exemption does not fall strictly within the description of the notification otherwise then he cannot claim exemption.”⁴¹ Explaining this point further, in *Dilip Kumar* the Supreme Court pointed out that “the distinction in interpreting a taxing provision (charging provision) and in the matter of interpretation of exemption notification is too obvious to require any elaboration”. In respect of the former it confirmed the application of the strict interpretation standard generally in context of fiscal provisions so much so that “if there are two views possible in the matter of interpretation of a charging section, the one favourable to the assessee need to be applied”. However, the Supreme Court in *Dilip Kumar* went on to state that the exact opposite standard was to apply in case of exemption provision.

Posing a question for itself, i.e. whether “the benefit of such ambiguity [should] go to the subject/assessee or should such ambiguity

⁴⁰ *Id.*

⁴¹ Dilip Kumar, *supra* note 1 at ¶ 12.

should be construed in favour of the Revenue, denying the benefit of exemption to the subject/assesse⁴² and after traversing the judicial opinion on the subject across the span of decades, the Supreme Court concluded that “three important aspects which comes out of the discussion are [i] the recognition of horizontal equity by this Court as a consideration for application of strict interpretation, [ii] subjugation of strict interpretation to the plain meaning rule and [iii] interpretation in favour of exclusion in light of ambiguity.”⁴³ In other words the Supreme Court gave due weightage not just to the interpretative standards but also the effect of stretching the ambit of exemption and its adverse effect over other taxpayers and thus the reference to ‘horizontal equity’.⁴⁴ For this reason the Supreme Court in *Dilip Kumar* concluded that while “in case of ambiguity in a charging provisions, the benefit must necessarily go in favour of subject/assessee, but the same is not true for an exemption notification wherein the benefit of ambiguity must be strictly interpreted in favour of the Revenue/State.”⁴⁵

In the aforesaid background, the following legal position was set out by the Supreme Court in *Dilip Kumar*,

⁴² *Id.* at ¶ 36.

⁴³ *Dilip Kumar*, *supra* note 1 at ¶ 49.

⁴⁴ *Id.* Also noteworthy is the observation in paragraph 61 (following *Mangalore Chemicals and Fertilizers Ltd. v. Commissioner of Commercial Taxes* (1992) Supp (1) SCC 21 (India) and *Novopan India Ltd. v. Commissioner of Central Excise* (1994) Supp (3) SCC 606) (India), that “exemptions from taxation have tendency to increase the burden on the other un-exempted class of taxpayers. A person claiming exemption, therefore, has to establish that his case squarely falls within the exemption notification, and while doing so, a notification should be construed against the subject in case of ambiguity.”

⁴⁵ *Id.* at ¶ 53.

“To sum up, we answer the reference holding as under -

(1) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.

(2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/ assessee and it must be interpreted in favour of the Revenue.

(3) The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export case (supra) stands overruled.”⁴⁶

IV. IS *DILIP KUMAR* THE FINAL ANSWER TO INTERPRETATIVE WOES?

The decision in *Dilip Kumar* makes significant impact on fiscal jurisprudence. What was earlier a gradual contribution of the division benches of the Supreme Court across decades of evolution, is now a firmly embedded law of the land with this categorical decision.⁴⁷ It not just restates the legal position in context of general interpretative standard to be adopted and the manner of appreciating the exemption provisions but also goes beyond to overrule a number of decisions which have in fact formed the basis for evolution of the fiscal jurisprudence itself across decades.

⁴⁶ Dilip Kumar, *supra* note 1 at ¶ 66.

⁴⁷ See, e.g., Chandra Kattha Industries Pvt. Ltd. v. State of Uttarakhand, 2018 SCC Online Utr 1027 (India), which quotes and applies the legal position emanating from the decision in Dilip Kumar as the touchstone for determination of claims under exemption provisions.

Nonetheless, while the conclusion in *Dilip Kumar* is unequivocal, the reason assigned to reach to this conclusion suffers from the same infirmity as evident in the past decisions. There is more than one passages in the decision which point out that the earlier deviations may nonetheless have survived. To illustrate, first, the decision in *Dilip Kumar* expressly approves the reasoning in earlier decisions that there are two different stages of appreciating the exemption provision i.e. “whether a subject falls in the notification or in the exemption clause, has to be strictly construed” whereas “once the ambiguity or doubt is resolved by interpreting the applicability of exemption clause strictly, the Court may construe the notification by giving full play bestowing wider and liberal construction.”⁴⁸

Thus, the rule of purposive construction in context of exemption provision does survive, albeit in a limited context, notwithstanding the categorical enunciation in *Dilip Kumar*.

Second and on a related note, given the approval in *Dilip Kumar* to the earlier decisions⁴⁹ wherein the two stage test were propounded and advocated for exemption provision, the interpretation process has become more arduous. This results in a complex task for any court faced with determining correctness of the claim for exemption wherein the court must not just bifurcate the exemption provision between its substantive criteria and other conditions but also attribute different legal

⁴⁸ *Dilip Kumar*, *supra* note 1 at ¶ 59, approving *Union of India v. Wood Papers Ltd.*, (1990) 4 SCC 256 (India) and *Commissioner of Central Excise v. Parle Exports Pvt. Ltd.*, (1989) 1 SCC 345 (India).

⁴⁹ *Id.*

standards for appreciating the two. This is not an optimal solution as it confers more latitude and subjectivity upon the court rather than permitting an objective assessment regarding the scope of exemption. Since in any case equitable considerations are absent in tax, a throughout strict construction appears to be a qualitative superior standard in this interpretative process.

Third, in *Dilip Kumar* the reasoning of *Hari Chand* case regarding substantial compliance, etc. was not just quoted⁵⁰ but also expressly approved.⁵¹ In fact in *Dilip Kumar* the Supreme Court specifically held that *Hari Chand* case rightly “indicates that while construing an exemption notification, the Court has to distinguish the conditions which require strict compliance, the non-compliance of which would render the assessee ineligible to claim exemption and those which require substantial compliance to be entitled for exemption.” Thus the acceptance of the substantial compliance in *Hari Chand* case continues to be good law and despite the test of strict construction laid out in *Dilip Kumar*, each future dispute will have to be decided on the touchstone of the specific language of the exemption provision depending on whether the parts of the provision are characterised as substantive or procedural.

Fourth, the decision in *Dilip Kumar* also does not examine the overarching role and mandate of Article 14 of the Constitution which precludes discrimination against the taxpayers. To illustrate, the decision

⁵⁰ *Id.*

⁵¹ *Id.* at ¶ 60.

of the Supreme Court in *Rathnam*⁵² highlights that it is not permissible for the Revenue to discriminate between the taxpayers through the terms of the exemption notification and maintaining parity between them is essential. In this decision the Supreme Court, specifically rejecting the contention of the Revenue that the taxpayer not satisfying the conditions of the exemption notification was not entitled to claim it, approved the decision of the High Court quashing certain terms of the exemption notification so as to not to discriminate between the taxpayers. If the decision of *Dilip Kumar* is taken as an axiomatic and inviolable tenet, the taxpayer is absolutely without liberty to challenge the terms of the exemption notification as it would be bound by its terms. Thus clearly there is an imperative need to caveat the declaration in *Dilip Kumar* or else it runs the risk of being afoul Article 14 which is a part of the basic structure of the Constitution and a sacred obligation to be met by the Executive.⁵³

Fifth, the decision in *Dilip Kumar* states that the “ratio in *Sun Export* case is not correct and all the decisions which took similar view as in *Sun Export* case stands overruled”. From this declaration arise two complex situations. Firstly, the decision in *Sun Export* case was not just in context of exemption notifications but it also was also in context of classification for tax purposes wherein it observed that where two views are possible then one in favour of the taxpayer is to be adopted. With the

⁵² Union of India v. N.S. Rathnam & Sons, (2015) 10 SCC 681 (India).

⁵³ *In Re. Special Reference No. 1 of 2012 (Natural Resources Allocation)*, (2012) 10 SCC 1 (India).

overruling of the decision in *Sun Export* case, it is now unclear whether its enunciation in context of classification (and not just in context of exemption provisions) also stands overruled. Secondly, given that the Supreme Court in *Dilip Kumar* has not specifically enlisted all those cases it seeks to overrule, both as a student of law as also a practitioner in the field, one is required to be overcautious before placing reliance upon earlier decisions lest they be overtly or impliedly overruled by *Dilip Kumar*. In short, one must contradistinguish each earlier decision with the ratio of *Dilip Kumar* or else run the risk of placing reliance upon an overruled decision.

The decision in *Dilip Kumar* also has certain unpleasant consequences for the taxpayer in so far as the practical appreciation of the exemption provisions in context of tax-disputes is concerned. As the decision in *Vatika Township* has noted, there is a need to balance the rights of the taxpayer with those of the Revenue. This is for the simple reason that the Revenue is both the designer as also the execution-agency for the exemption provisions. Further, the Revenue is also statutorily conferred with the power to issue clarifications or instructions binding on the entire tax-administration regarding appreciation of exemption provisions.⁵⁴ In addition the Revenue has the ability, through appropriate parliamentary enactment, to channel an amendment to the statutory provisions which can also be directed during pendency of appellate proceedings where the

⁵⁴ The Central Excise Act, 1944, No. 1, Acts of Parliament, 1944 § 37B (India); The Customs Act, 1962, No. 52, Acts of Parliament 1962 § 151A (India); The Income Tax Act, 1961, No. 43, Acts of Parliament, 1961 § 119 (India).

Revenue has already suffered a loss in lower forums,⁵⁵ and moreover such amendments can also be enacted with retrospective effect, thereby wiping out the very basis for the claim of the taxpayer.⁵⁶ Thus the power-balance is unduly tilted in favour of the Revenue. In these circumstances requiring the taxpayer to establish its claim for exemption may be an additional and undue burden. The decision of the Delhi High Court in *Amazon*⁵⁷ is an appropriate illustration as to the consequences which befall the taxpayer consequent to following the ratio of *Dilip Kumar*.

In *Amazon* the issue related to construction of a notification which exempted “electrical machines with translation or dictionary function” and whether amazon kindle e-reading devices satisfied this description so as to be eligible for concessional tax treatment. The Authority for Advance Ruling (AAR), whose order preceded the declaration in *Dilip Kumar*, was of the opinion that “kindle apparatus is certainly not a game. It has the function of allowing the user to read various books and while reading, if the user comes across any difficult word incomprehensible to the user, he can access the dictionary meaning of the word.” The AAR opined that the concessional tax treatment was available being of the view that the contention of the Revenue that “kindle device which is imported

⁵⁵ Union of India v. Martin Lottery Agencies Ltd., (2009) 12 SCC 209 (India).

⁵⁶ See, e.g., Commissioner of Service Tax v. Great Lakes Institute of Management Ltd., 2010 (19) STR 481 (SC) (India), wherein the Supreme Court set aside the impugned order and remitted the matter back for fresh consideration in view of the retrospective amendment enacted during pendency of appeal; Home Solutions Retails (India) Ltd. v. Union of India, 2011 (24) STR 129 (Del) (India), wherein a full bench of the Delhi High Court overruled an earlier decision of the Division Bench of the High Court in view of a retrospective amendment even when the appeal against the Division Bench decision was pending consideration of the Supreme Court; etc.

⁵⁷ Union of India v. Amazon Seller Services Pvt. Ltd., 2018 SCC Online Del 10984.

does not have the translation or as the case may be dictionary functions as it is the main feature” did not emanate from a plain reading of the exemption notification and therefore was to be rejected. In appeal, however, the Delhi High Court followed the decision in *Dilip Kumar* to reverse the AAR’s view.

The Delhi High Court, even though specifically noting that it was upon a plain reading of the exemption notification that the meaning and scope of exemption was to be drawn, observed that the translation or dictionary function not being the main function of kindle device, even though these devices had the dictionary function, were not entitled for exemption. The following reason was assigned to come to this conclusion;

“29. ... Thus, the only issue is whether the said device is ‘with translation or dictionary functions’. The words ‘with translation or dictionary functions’ have been used to restrict and keep the benefit of the exemption notification within bounds and not expand scope of exemption. Kindle device is an electronic device designed for use as an electronic book reader. As an electronic book reader, it has several e-books pre-installed in the device and other e-books can be downloaded. The product is developed and designed to function as an e-book reader and is sold and bought as a e-book reader and not as a translator or as a dictionary. The e-book reader has an inbuilt dictionary feature, which is a secondary or additional feature, useful for the reader. This secondary or additional feature would not make it and qualify the e-reading machine as an ‘electrical machine with translation or dictionary function’. The word ‘with’ can have diverse and varied meaning depending upon the context in which it is used. A restricted meaning to the word ‘with’ is in consonance with the judgments of the Supreme Court on strict construction of exemption notification. In the context of the present notification, we observe and hold that the words ‘translation’ and ‘dictionary’ functions qualifies the words ‘electrical machines’ with the mandate that translation or

dictionary function should be the primary and relevant function of the said machine for which they are purchased and used. The exemption is restricted to machines which translate or perform dictionary functions and not to other machines that primarily perform some other function.

...

32. *In other words, our conclusion is that the exemption notification would apply where the device is an electrical machine covered under tariff item No. 8543 89/8543 7099, and its primary and basic function should be to translate or perform dictionary function. Primary function of kindle device is to enable the user to read e-books. It is an e-book reading device and not a translator, and is not procured or purchased to perform dictionary function. No one purchases a kindle device because it is a translator or device 'with' a dictionary function. E-book readers are purchased because a person wants to read e-books which are pre-loaded or can be downloaded from internet. Dictionary in a Kindle device enables the reader to make use of the dictionary while reading the e-book. E-book reader as such is not a dictionary or translator device. E-book readers would be appropriately classified in 'others' as distinct from 'electrical machines with translation and dictionary function'.* (Emphasis supplied)

From the above it is clear that the High Court was persuaded to accept that in order to be covered within the exemption notification it was essential that the electronic device should not only have a translation or dictionary function but also that such translation or dictionary function should be the main function of such electronic device. In other words the exemption notification providing for “electrical machines with translation or dictionary function” was read and interpreted to mean “electrical machines with translation or dictionary [as its main] function”. Thus not only the Delhi High Court went beyond the plain meaning of the exemption notification but also cast upon the taxpayer the burden to

establish a condition⁵⁸ which was not part of the exemption notification itself but was instead a condition perceived to exist on basis of the context and attendant circumstances projected by the Revenue. The net result of applying the ratio of *Dilip Kumar* therefore turns out to position the taxpayer in a situation wherein the burden to substantiate the exemption claim is not just limited to the plain words of the exemption notification but instead extends to demonstrating the perceived intent underlying the exemption notification itself. The obligation for the taxpayer emanating from *Dilip Kumar*, therefore, can indeed turn onerous and in fact even ominous in certain circumstances as this decision of the Delhi High Court reveals. Given that the appeal against this decision in *Amazon* has already been dismissed⁵⁹ at the threshold itself, it is clear that the taxpayers need to undertake more than a due diligence before staking claim for exemption.

V. CONCLUSION

The reference to the larger bench was made in view of the expectation that it would satisfactorily settle the legal position governing interpretation of fiscal legislations. The decision in *Dilip Kumar* does not disappoint on this count as it categorically lays down the principles to be adopted viz., the strict construction rule, literal interpretation principle, relevance of horizontal equity (in context of exemption provisions) and

⁵⁸ I.e., the ‘common parlance’ test for determining classification of goods and commodities. See Tarun Jain, *Principle of ‘Substitutability’ versus ‘Common Parlance’ Test: Ascertaining Classification of Goods*, (2019) 60 GOODS AND SERVICE TAX REPORTS (JOURNAL) 1-7.

⁵⁹ Vide order dated 01.02.2019 in SLP(C) No. 29/2019.

the interpretation to be adopted in case of more than one view arises from an appraisal of the statutory provisions. It is now a clear judicial fiat that the burden lies on the Revenue to establish the charge of tax whereas the burden lies upon the taxpayer to establish entitlement for exemption. What remains a work in progress despite *Dilip Kumar* in the context of fiscal jurisprudence, however, is the reconciliation of these axioms with the doctrine of substantial compliance and the principle of fairness, etc. which emanate from decisions of the Supreme Court of equal bench-strength and thus are nonetheless relevant and binding in the interpretative process.