Before Ajay Kumar Mittal & Jaspal Singh, JJ.

CHD DEVELOPERS LTD., KARNAL —*Petitioner*

versus

STATE OF HARYANA AND OTHERS—*Respondents*

CWP No. 5730 of 2014

April 22, 2015

Constitution of India, 1950 – Arts. 226, 227, 246, 366 (29-A)(b), Sch. 7, List 2, Entry 54 – Haryana Value Added Tax Act, 2003 – Ss. 2(1) (zg), 9 & 42 – Haryana Value Added Tax Rules, 2003 – Rls. 25 & 49 – CBEC circulars dated 7.5.2003, 4.6.2003 & 10.2.2014 – VAT on cost of land on sale of flats constructed thereon by developing flats – Petitioners were developer engaged in business of development and sale of apartments/flats/units – Circular dated 7.5.2013 was issued stating that developers entering into agreements for sale of constructed apartments or flats were chargeable to VAT – Consequently, circular dated 4.6.2013 was issued regarding making of assessments on builders and developers – Subsequently, vide circular dated 10.2.2014, circular dated 7.5.2013 was varied and value of land was sought to be included for imposition of VAT – Contention of Petitioners was that imposition of tax on land cost was unconstitutional – Hence, they challenged validity of sections 9 and 42 of VAT Act – Held that, contract to build a flat includes an element of sale of goods – Building contracts are species of works contracts – For purpose of levying VAT, value of immovable property (e.g., value of land) and labour or service or any other charges done prior to date of entering of agreement of sale of flat is to be excluded from agreement value – Consequently, Rule 25(2) would be held to be valid only if State Government bring necessary changes in Rules in consonance with above observations – Further, section 42 of Act, 2003 only safeguards interest of revenue in event of failure on part of sub-contractor to discharge his liability of tax in respect of transaction with contractor; thus, section 42 is not arbitrary – Section 9, read with Rule 49 and circular dated 10.2.2014 provide for determination of tax under composition scheme which is optional and by opting composition scheme, dealer gets various advantages and privileges; thus, section 9 also cannot be questioned.

Held, that the Supreme Court crystallizing the legal principles, in other words, had opined that the agreement between the

promoter/builder/developer and the flat purchaser to construct a flat and thereafter sell the flat with some portion of land, does involve activity of construction which would be covered under the term 'works contract'. The term 'works contract' encompasses a contract in which one of the parties is obliged to undertake or to execute works. The activity of construction has all the attributes, elements and characteristics of works contract though essentially it may be a transaction of sale of flat. To put it differently, so long as construction is for and on behalf of the purchaser, it remains a 'works contract' under the Act.

(Para 30)

Further held, that the essential conditions to be fulfilled for sustaining levy of tax on the goods deemed to have been sold in execution of a "works contract" are as under:–

(i) there must be a works contract.

(ii) the goods should have been involved in the execution of a works contract, and

(iii) the property in those goods must be transferred to a third party either as goods or in some other form.

These conditions are fulfilled in a building contract or any contract to do construction. In a contract to build a flat, necessarily there will be an element of sale of goods included therein and therefore, building contracts are species of the works contract. Still further, a contract comprising of both a works contract and a transfer of immovable property, such contract is not denuded of its character of being a works contract. Article 366 (29A)(b) of the Constitution of India does contemplate a situation where the goods may not be transferred in the form of goods but may be transferred in some other form which may even be in the form of immovable property. No doubt, there is no legislative competence in the State legislature to levy tax on the transfer of immovable property under Entry 54 of List II of the Seventh Schedule. However, the States are empowered to levy sales tax on the sale of goods in an agreement of sale of flat which also has a component of a deemed sale of goods.

(Para 31)

Further held, that once it is concluded that the developer/builder/promoter are covered under the works contract while entering into an agreement between them and the flat purchaser to construct a flat and ultimately to sell the flat with the fraction of land,

we proceed to examine the broad principles for determining the taxable turnover relating to transfer of goods involved in the execution of such works contract. Where the developer/builder/promoter/contractor or the sub-contractor maintains proper books of account, it shall be the value of the goods incorporated in the works contract as per books of account. On the other hand, where the developer/ builder/ promoter/ contractor/ sub-contractor does not maintain proper accounts or the accounts maintained by him are not found worthy of credence, it would be permissible for the State Legislature to prescribe a formula for determining the charges for labour, service and cost of land by fixing a particular percentage of the works contract and to allow deduction of the amount thus determined from the value of the works contract for assessing the value of the goods involved in the execution of the works contract. The taxable event is the transfer of property in the goods involved in the execution of a works contract and the said transfer of property in such goods takes place when the goods are incorporated in the works. The value of the goods which can constitute the measures for the levy of the tax has to be the value of the goods at the time of incorporation of the goods in the works. The activity of construction undertaken by the developer etc. would be works contract only from the stage he enters into a contract with the flat purchaser. However, the deduction permissible under various heads would depend upon facts of each case on the basis of material available on record. It is clarified that where the agreement is entered into after the completion of the flat or the unit, there would be no element of works contract but in a situation, where agreement is entered into before the completion of construction, it would be a works contract. If at the time of construction and until the construction was completed, there was no contract for construction of the building with the flat purchaser, the goods used in the construction cannot be deemed to have been sold by the builder since at that time there is no purchaser even if building is intended to be sold after construction would be of no consequence. The value addition made to the goods transferred after the agreement is entered into with the flat purchaser can only be made chargeable to tax by the State Government. Taxing the sale of goods element in a works contract under Article 366(29A)(b) read with Entry 54 List II of Schedule VII of the Constitution of India is permissible even after incorporation of goods provided tax is directed to the value of the goods at the time of incorporation and does not purport to tax the transfer of immovable property. No tax can be charged from the developer/builder/promoter or contractor in respect of the value of goods incorporated in the works

contract after the agreement with the flat purchaser on which the sub-contractor has already paid the tax.

(Para 31)

Further held, that grievance was also raised relating to validity of Instructions dated 7.5.2013, 4.6.2013 and 10.2.2014 (Annexure P-2 Colly). Instructions No. 952/ST-1 dated 7.5.2013 (Annexure P-2) issued by respondent No.2 provides that the agreements/contracts entered by developers with prospective buyers for sale of apartments/flats before the completion of construction constitutes 'works contract' and thus VAT was imposable on such transactions. Clause 4 of the said circular relates to measure of tax and deduction towards labour and other like charges. Circular dated 4.6.2013 was issued regarding making of assessments on builders and developers. In view of legal position enunciated hereinbefore, there is no illegality in the issuance of circulars dated 7.5.2013 and 4.6.2013. However, Circular issued on 10.2.2014 relates to lump sum tax under composition tax scheme and has been dealt with while analyzing the provisions of Section 9 of the Act and Rule 49 of the Rules.

(Para 36)

Further held that now we proceed to analyze Rule 25 of the Rules. The said rule provides for exclusions in respect of labour, services and other like charges and does not provide any mechanism for exclusion of the value of land. Wherever developer/builder/promoter or the sub- contractor who carries on construction work in a works contract maintains proper accounts, it shall be on the basis of actual value addition on account of goods utilized in the property. Rule 25(2) of the Rules provides for deduction of charges towards labour, services and other like charges and where they are not ascertainable from the books of account maintained by a developer etc., the percentage rates are prescribed in the table provided in the said rule. It is necessarily required to provide mechanism to tax only the value addition made to the goods transferred after the agreement is entered into with the flat purchaser. The 'deductive method' thereunder does not provide for any deduction which relate to the value of the immovable property. The legislature has not made any express provision for exclusion of value of immovable property from the works contract and its method of valuation has been left to the discretion of the rule making authority to prescribe.

(Para 41)

Further held, that the State had filed an affidavit dated 24.4.2014 of Shri B.L. Gupta, Additional Excise and Taxation Commissioner, Haryana.

(Para 42)

Further held, that the assertion in the affidavit in the absence of any specific provision in the statute or the rule would not give it a statutory flavour as the action of the respondent in furnishing the affidavit dated 24.4.2014 would not meet the test of requisite amendment in the Rules as it has to be done by the competent authority in accordance with law. Though it may be observed that the State Government shall remain bound by the affidavit dated 24.4.2014 filed by it in this Court.

(Para 43)

Further held, that in case the provisions of law are seeking to charge sales tax on any amount other than the value of goods transferred in course of execution of works contract, the provisions would be *ultra vires* the Constitution of India. The tax is to be computed on a value not exceeding the value of transfer of property in goods on and after the date of entering into agreement for sale with the buyers. However, the 'deductive method' requires all the deductions to be made there from to be specifically provided for to ensure that tax is charged only on the value of transfer of property in goods on and after the date of entering into agreement for sale with the buyers. Where 'deductive method' has been prescribed under the rules for ascertaining the taxable turnover, ordinarily it should include a residuary clause in consonance with the mandate of law so as to cover all situations which can be envisaged.

(Para 46)

Further held, that in view of the above, essentially, the value of immovable property and any other thing done prior to the date of entering of the agreement of sale is to be excluded from the agreement value. The value of goods in a works contract in the case of a developer etc. on the basis of which VAT is levied would be the value of the goods at the time of incorporation in the works contract even where property in goods passes later. Further, VAT is to be directed on the value of the goods at the time of incorporation and it should not purport to tax the transfer of immovable property. Consequently, Rule 25(2) of the Rules is held to be valid by reading it down to the extent indicated hereinbefore and subject to the State Government remaining bound by its affidavit dated 24.4.2014. The State Government shall bring

necessary changes in the Rules inconsonance with the above observations.

(Para 47)

Further held, that under sub-section (1) of Section 42 of the Act, where the works contractor gets the construction work executed through a sub-contractor, whether in whole or in part, it shall be the joint and several liability of the contractor and the sub-contractor. Sub-section (2) of Section 42 thereof clarifies that a contractor shall not be under any liability to pay tax in respect of a "works contract", if the same has been paid by a sub-contractor and that his assessment has become final. This provision only safeguards the interest of the revenue in the event of failure on the part of the sub contractor to discharge his liability of tax in respect of transaction entered by the sub contractor with the contractor. The provision, thus, cannot be said to be arbitrary, discriminatory or unreasonable in any manner. The contention of the learned counsel for the petitioners in this behalf is, thus, repelled.

(Para 49)

Further held, that equally, the challenge to validity of Section 9 of the Act and Rule 49 of the Rules in CWP No. 7720 of 2014 (M/s ABW Suncity v. State of Haryana) cannot be accepted. Rule 49 of the Rules and Section 9 of the Act provides for scheme of lump sum tax under composition tax scheme which is purely optional in nature. The dealer is not under any bounden duty to subscribe to this scheme. Similar provision under the 1973 Act was upheld by Division Bench of this Court in *Tirath Ram Ahuja v. State of Haryana* (1991) 83 STC 523. Section 9 of the Act read with Rule 49 of the Rules and the circular dated 10.2.2014 provide for determination of the tax under composition scheme which is optional and are not the charging provisions for the levy of VAT. Once a dealer opts for composition scheme which is optional, he gets various advantages and privileges which otherwise are not available to ordinary VAT dealers. In such a situation, in view of the judgment of the Apex Court in *Koothattukulam Liguous v. Deputy Commissioner of Sales Tax* (2014) 72 VST 353, the method of determining tax liability under these provisions could not be questioned by such a dealer. In view of the above, circular dated 10.2.2014 cannot be faulted.

(Para 50)

Ashok Aggarwal, Senior Advocate with
Puneet Aggarwal, Advocate,
Sandeep Goyal, Advocate,

Rishab Singla, Advocate, *for the petitioner (s)*
(in CWP No. 5730 and 7575 of 2014).

Manav Bajaj, Advocate for
Sumeet Goel, Advocate *for the petitioner*
(in CWP No. 6845 of 2014).

Rajiv Agnihotri, Advocate *for the petitioner*(s)
(in CWP Nos. 7440, 7441 and 7614 of 2014).

Gajendra Maheshwari, Advocate and
Puneet Siddhartha, *Advocate for the petitioner(s)*
(in CWP Nos. 7720, 8338, 8339, 12387 and 12429 of 2014).

Bhupeshwar Jaswal, Advocate for
Mukul Aggarwal, Advocate *for the petitioner*
(in CWP No. 7832 of 2014).

Ashwani Chopra, Senior Advocate with
Pankaj Gupta, Advocate *for the petitioner*
(in CWP No. 7834 of 2014).

Shammi Kapoor, Advocate and
Megha Suri, Advocate *for the petitioner*
(in CWP No. 7908 of 2014).

Rajesh Goyal, Advocate for
Pritam Saini, Advocate *for the petitioner*
(in CWP No. 8093 of 2014).

Amar Pratap Singh, Advocate and
Amrinder Singh, Advocate *for the petitioner* (s)
(in CWP Nos. 9314, 9364, 9370, 9456, 11072, 110911 and 13684 of 2014).

Sanjay Singh, Advocate for
Karanvir Singh Khehar, Advocate *for the petitioner*
(in CWP No. 11696 of 2014).

Vikram Jeet Singh, Advocate for
Aman Pal, Advocate *for the petitioner*
(in CWP No. 12170 of 2014).

Tanisha Peshawaria, DAG, Haryana with
M.K. Dutta, Advocate for State of Haryana.

AJAY KUMAR MITTAL, J.

(1) This order shall dispose of a bunch of 65 petitions bearing CWP Nos. 5730, 5731, 5746, 5751, 5753, 5754, 5755, 6043, 6044, 6050, 6051, 6119, 6132, 6135, 6142, 6143, 6148, 6149, 6165, 6199, 6224, 6250, 6363, 6845, 7138, 7440, 7441, 7575, 7614, 7720, 7832, 7833, 7834, 7908, 8093, 8338, 8339, 9314, 9342, 9364, 9370, 9456, 9748, 10027, 10029, 10030, 10342, 10404, 10405, 10408, 10409, 10411, 10412, 10413, 10422, 11072, 11091, 11696, 12107, 12387, 12429, 12667, 13684, 18075 of 2014 and 5120 of 2015 as according to learned counsel for the parties, the issues involved herein are identical. For brevity, the facts are being extracted from CWP No. 5730 of 2014.

(2) In this writ petition filed under Articles 226/227 of the Constitution of India, the petitioner has prayed for issuance of a writ in the nature of mandamus declaring Explanation (i) to Section 2(1)(zg) of the Haryana Value Added Tax Act, 2003 (in short "the Act") and Rule 25 (2) of the Haryana Value Added Tax Rules, 2003 (hereinafter referred to as "the Rules") (Annexure P-1 Colly) in particular and other related provisions in so far as they include the value of land for charging Value Added Tax (for brevity "VAT") on developers to be *ultra vires* the Constitution of India in so far as it violates Article 246 of the Constitution of India read with Schedule VII, List II, Entry 54; for issuance of a writ in the nature of certiorari for quashing the notices (Annexure P-3 Colly) issued by respondent No.3 for charging tax on sale of flats/apartments/units and to make assessments of VAT; for quashing the circulars dated 4.6.2013 and 10.2.2014 (Annexure P-2 Colly) being in violation of the provisions of the Act and for issuance of a writ of mandamus directing respondent No. 4 not to charge and to refund the tax already paid in so far as it related to the value of materials sought to be charged to VAT. Besides, in some writ petitions, assessment orders passed by the assessing authority whereas in other writ petitions, the revisional order passed by the revisional authority on the basis of circulars and aforesaid provisions have also been assailed. In some cases, validity of Section 42 and Section 9 of the Act read with Rule 49 of the Rules has also been challenged.

(3) Briefly stated, the facts necessary for adjudication of the instant writ petition as narrated therein may be noticed. The petitioner is a developer engaged in the business of development and sale of apartments/flats/units. Interested buyers enter into a flat buyers agreement. The property is ultimately sold by execution of sale deed on payment of stamp duty on total consideration. A circular dated 7.5.2013

was issued by the Excise and Taxation Commissioner, Haryana stating therein that the developers entering into agreements for sale of constructed apartments or flats prior to or during construction were chargeable to VAT. Consequently, a circular dated 4.6.2013 was issued regarding making of assessments on builders and developers. Subsequently, vide circular dated 10.2.2014, the circular dated 7.5.2013 was varied and value of the land was sought to be included for imposition of VAT. Notices (Annexure P-3 Colly) for re-assessment for the year 2010-11 under Section 17 of the Act were issued for imposing tax on the transaction of sale of flats, floors and villas amounting to `42,98,90,718/- as being under assessed. The petitioner filed reply (Annexure P-4) to the said notices. However, no response was received in this regard. The developer being engaged in the sale of immovable property where stamp duty was paid and also there being no mechanism provided under the Act for computation of tax, the imposition of tax insisted by the authorities was unconstitutional and beyond the provisions of the Act and Rules. Hence, the present writ petitions. Upon notice, respondents No.2 and 3 contested the writ petitions by filing written statement. It was pleaded therein that the issue regarding applicability and levy of VAT on builders and developers engaged in the activities of construction of building, flat and commercial properties and selling the same to the prospective buyers which the petitioners are contesting by way of the present writ petitions has already been settled by the Apex Court in ***M/s Larsen & Toubro Limited*** *versus* ***State of Karnataka***[1] wherein it was held that the builders and developers etc. engaged in the activities of the construction of building, flat and commercial properties were covered in the definition of "works contract" and were liable to sales tax laws of the State. The definition of 'works contract' contained in the Act is similar to that of VAT Act of Karnataka. Petitioner- M/s CHD Developers Limited is also a builder/developer/promoter who was engaged in the development of residential/commercial properties. A variety of agreements were entered into by the petitioner (s) with its prospective buyers for construction and sale of flats/ apartments/ villas/ commercial projects against valuable consideration. Hence, the activity was covered by the definition of the expression 'works contract' as contained in Section 2(1) (zt) of the Act. Further, the definition of 'sale' as contained in clause (ze) of Section 2(1) of the Act covers the activities of 'works contract' which is similar to that of the VAT Act of

[1] (2013) 46 PHT 269 (SC)

Karnataka. The definition of "sale in the State" as contained in clause (zf) of sub-section (1) of Section 2 of the Act also covers the activities of 'works contract' which reads as under:-

> "(zf) "Sale in the State" in relation to a sale as defined in sub-clause (ii) of clause (ze) means transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract in the State."

(4) In view of the above and the law settled **in *M/s Larsen & Toubro Limited's case (supra)***, the respondents were satisfied that the petitioner has incurred liability for payment of VAT under the Act and accordingly, they have issued notice asking the petitioners to furnish requisite details to enable them to quantify correct tax liability under the Act. It was further pleaded that the respondents have initiated assessment proceedings under the Act to determine the actual tax liability of the petitioners and had provided reasonable opportunity of being heard to represent during the course of assessment proceedings. The petitioners have remedy to challenge the order passed under the Act. Further, this Court vide order dated 19.1.2012 passed in CWP No. 16751 of 2011 [reported as (2013) 57 VST 453] relegated the petitioner therein to the appellate authority to challenge the assessment order before it. The respondents knowing well that sale of land was not taxable under the Act being immovable goods, issued notice only for computing the tax liability on sale of goods liable to tax involved in the execution of the works contract under the Act and no notice proposing levy of tax on value of land has been issued by them. According to the respondents, the circulars dated 7.5.2013 (Annexure P-2), dated 4.6.2013 and dated 10.2.2014 were issued by respondent No.2 which related to works contractors and developers/ builders so as to remove some confusion amongst the departmental officers in determining the gross turnover and deductions allowable therefrom and consideration which was liable to tax. The said circulars in no way interfere with the quasi judicial functions of the Assessing Officers. It was further pleaded that there is transfer of property in goods in the said execution of the contract and the transfer is for a consideration to be paid in stages. Such transfer of property in goods was covered under clause (zt) of sub-section (1) of Section 2 of the Act. Therefore, the petitioner was contractor and the prospective buyer a contractee. The other averments made in the writ petitions were denied and a prayer for dismissal of the same was made.

(5) Learned counsel for the petitioners submitted that the builders/developers were not works contractors as they were engaged in sale of immovable property. It was argued that the provisions of Explanation (i) to Section 2(1)(zg) of the Act and Rule 25(2) of the Haryana Value Added Tax Rules were *ultra vires* the Constitution of India as under Entry 54 List II of Seventh Schedule to the Constitution of India, the State was empowered to charge tax on transfer of property in goods in execution of works contract whereas under its garb, they seek to charge tax on a value which was far in excess of the value of goods transferred in the course of execution of works contract including value of immovable property and expenses unrelated with transfer of property in goods. It was next submitted that it is well settled that all the elements on which the State Legislature did not have power to charge VAT or sales-tax have to be specifically excluded by way of express and specific provisions and if any of the elements remain unspecified, the provisions shall be *ultra vires* the Constitution. Reference was made to definition of sale price in Section 2(ad) of UP VAT Act, 2008 which allows deduction for charges for labour, services and other prescribed amounts while Rule 9 of the Rules framed thereunder relates to determination of turnover of sale of goods involved in execution of works contract where deduction of proportionate amount of cost of land and amount representing the cost of establishment and other similar expenses is provided for. Support was also gathered from Rule 3 of Delhi VAT Rules, 2005 which provides for taxing works contract after excluding charges towards cost of land and other expenses elaborately referred in sub-rule 3 of Rule 3. It was urged that when the State had no power to charge tax on anything except value of transfer of property in goods, by its own admission, the provisions under the Act and Rules were indeed leading to inclusion of value addition in immovable property thereof whereas the Supreme Court in ***M/s Larsen & Toubro Limited's case (supra*)** had held that the State had the power to charge tax only on value additions in goods, property in which gets transferred after entering into agreement with the buyer. It was further contended that when the definition of 'works contract' was to be read with the definition of 'sale price', it was clear that the assessment had to be framed keeping in view pure and simple works contractors and not developers. Even no tax can be charged on the developer in respect of materials transferred directly by the sub-contractor as Section 42 of the Act provides for levy of tax on the developer only in cases where property had been transferred by the sub-contractor who fails to discharge his liability. Further, Section

42 of the Act stipulates joint and several liability of the contractor and sub-contractor involved in the execution of the works contract. Section 42(2) of the Act provides that in case the main contractor proves to the satisfaction of the assessing authority that the tax has been paid by the sub-contractor and the assessment of such tax has become final, then he shall not be liable to pay tax on the sale of such goods. According to the learned counsel, taxing the contractor and sub-contractor for the same sale amounted to double tax and there could not be two deemed sales in one works contract. It was further urged that the activity of construction undertaken by the developer would only be a works contract from the stage when the developer enters into a contract with the flat purchaser. The value addition made to the goods transferred by the developer, after the agreement is entered into with the flat purchaser, is the only component that can be made chargeable to tax by the State under the Act. Lastly, in the alternative, learned counsel submitted that if the VAT is levied on the element of transfer of immovable property in the composite contract by bringing it within the scope of term 'works contract', then to that extent the transaction should not be treated as conveyance as the property passes not by conveyance but by the agreement which was considered to be an agreement for construction. Therefore, the stamp duty cannot be charged treating the transaction as conveyance and stamp duty, if any, paid till date, becomes refundable. The levy of VAT and stamp duty on the transfer of immovable property amounted to double taxation. In some of the writ petitions, validity of the provisions of Section 9 of the Act read with Rule 49 of the Rules have also been questioned.

(6) On the other hand, learned State counsel stressing preliminary objection regarding maintainability of writ petition on the plea of alternative remedy drew support from the judgments in ***State of Haryana and others*** *versus* ***M/s Alfa Surgical P. Ltd.***[2]***, Commissioner of Income Tax, Gujarat*** *versus* ***Vijaybhai N. Chandrani***[3]***, M/s Alcatel India Ltd., New Delhi*** *versus* ***State of Haryana***[4] *and* ***Larsen & Toubro Limited*** *versus* ***State of Haryana and others***[5] Challenging the merits of the claim of the petitioners as well, it was urged that the method of calculation of value of land for the purposes of levying VAT adopted by the State was totally in conformity with the principles laid down by

[2] 2001 (124) STC 417 (SC)
[3] 2013 (14) SCC 661
[4] (2003) 22 PHT 418 (P&H)
[5] (2013) 57 VST 453 (P&H)

the Apex Court **in *Larsen & Toubro and Raheja Builders' s cases (supra)***. It was further contended that the Act which is in complete consonance with Entry 54, List II, Seventh Schedule of the Constitution, provides for levy of tax on goods which expression does not include immovable property. Further, the State had furnished an affidavit specifically stating that there was no proposal to tax land component in the case of developers/builders. It was argued that the other provisions of the Act and the Rules, the validity of which have been challenged by the petitioners, were in conformity with law.

(7) We have heard learned counsel for the parties.

(8) Noticing the contentions of learned counsel for the parties, the following primary issues emerge for our consideration:-

(i) Whether the developers and builders are works contractors and the agreement between the developer/builder/promoter and the prospective purchaser to construct a flat and thereafter sell the same with some portion of land, authorises the State to impose VAT thereon?

(ii) If the answer to the first issue is in the affirmative, whether the method of valuation of VAT on such agreements, can directly or indirectly, include the value of land by following the method of calculation of the taxable turnover in the manner expressed by the Commissioner vide circulars dated 7.5.2013, 4.6.2013 and 10.2.2014 and also in terms of Explanation (i) to Section 2(1)(zg) of the Act and Rule 25(2) of the Rules?

(iii)Whether the provisions of Section 42 of the Act and also Section 9 of the Act read with Rule 49 of the Rules would qualify to be legal and valid?

(iv)Whether the alternative remedy of appeal etc. would debar this Court to entertain the present writ petitions?

(9) Adverting to first issue, necessarily one has to make reference to the following:-

(a) Statutory provisions

(b) Legislative history relating to taxability of 'works contract' and constitutional provisions.

(10) Learned counsel for the petitioners drew the attention of this Court to the relevant provisions of the Act. The Act came into force in the State of Haryana w.e.f. 1.4.2003. It purports to levy VAT at each stage. A dealer would now pay tax after deducting the tax paid on purchases made during a quarter from the tax collected by him on sale of goods during that quarter. Section 2 of the Act defines various terms which finds mention therein. According to Section 2(1)(zg) of the Act, "sale price" means the amount payable to a dealer as consideration for the sale of any goods, less any sum allowed at the time of sale as cash or trade discount according to the practice, normally prevailing in the trade, but inclusive of any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof and the expression "purchase price" shall be construed accordingly. Explanation (i) appended thereto, which is material for resolving controversy involved herein, provides that in relation to the transfer of property in goods (whether as goods or in some other form) involved in execution of a works contract, sale price shall mean such amount as is arrived at by deducting from the amount of valuable consideration paid or payable to a person for the execution of such works contract, the amount representing labour and other service charges incurred for such execution, and where such labour and other service charges are not quantifiable, the amount of such charges shall be calculated at such percentage as may be prescribed.

(11) Section 2(1)(zn) of the Act defines "taxable turnover" to mean that part of the gross turnover which is left after making deductions therefrom in accordance with the provisions of section 6; plus purchase value of goods liable to tax under sub-section (3) of section 3.

(12) Under Section 2(1)(zt) of the Act "works contract" includes any agreement for carrying out for cash, deferred payment or other valuable consideration, the assembling, construction, building, altering, manufacturing, processing, fabrication, installation, fitting out, improvement, repair or commissioning of any movable or immovable property.

"Goods" have been described under Section 2(1)(r) of the Act as under:-

> "(r) "goods" means every kind of movable property, tangible or intangible, other than newspapers, actionable claims, money, stocks and shares or securities but includes growing crops, grass, trees and things attached to or

forming part of the land which are agreed to be severed before sale or under the contract of sale."

The definition of "gross turnover" falls under Section 2(1)(u) of the Act in the following terms:-

"(u) "gross turnover" when used in relation to any dealer means the aggregate of the sale prices received or receivable in respect of any goods sold, whether as principal, agent or in any other capacity, by such dealer and includes the value of goods exported out of State or disposed of otherwise than by sale;

Explanation.–(i) The aggregate of prices of goods in respect of transactions of forward contracts, in which goods are actually not delivered, shall not be included in the gross turnover.

(ii) Any amount received or receivable or paid or payable on account of variation, escalation or de-escalation in the price of any goods sold previously to any person but not exactly determinable at that time, shall, subject to such conditions and restrictions, as may be prescribed, be included in, or excluded from, the gross turnover, as the case may be, in the manner prescribed.

(iii) Any amount collected by the dealer by way of tax shall not be included in the gross turnover and where no tax is shown to have been charged separately, it shall be excluded from the taxable turnover (denoted by 'TTO') taxable at a particular rate of tax in per cent (denoted by 'r') by applying the following formula –

$$\text{tax} = \frac{r \times TTO}{100 + r}$$

illustration – If TTO is 220 and r is 10 (per cent), tax will be 20."

(13) Section 3 of the Act relates to 'Incidence of tax' which is as follows:-

"3. (1) Every dealer who would have continued to be liable to pay tax under this Act of 1973 had this Act not come into force, and every other dealer whose gross turnover during the year immediately preceding the

appointed day exceeded the taxable quantum as defined or specified in the Act of 1973, shall, subject to the provisions of sub-section (4), be liable to pay tax on and from the appointed day on the sale of goods effected by him in the State.

(2) & (3) XX XX XX

(4) The tax levied under sub-sections (1), (2) and

(3) shall be calculated on the taxable turnover, determined in accordance with the provisions of section 6, at the rates of tax applicable under section 7, and where the taxable turnover is taxable at different rates of tax, the rate of tax shall be applied separately in respect of each part of the taxable turnover liable to a different rate of tax.

(5) to (7) XX XX XX"

(14) Reference was also made to Section 6 of the Act which provides for determination of taxable turnover. It reads thus:-

"(1) Subject to the provisions of sub-section (2), in determining the taxable turnover of a dealer for the purposes of this Act, the following deductions shall be made from his gross turnover, namely: -

(a) turnover of sale of goods outside the State;

(b) turnover of sale of goods in the course of inter-State trade and commerce;

(c) turnover of sale of goods in the course of the import of the goods into the territory India;

(d) turnover of sale of goods in the course of the export of the goods out of the territory of India;

(e) turnover of export of goods out of State;

(f) turnover of disposal of goods otherwise than by sale;

(g) turnover of sale of exempted goods in the State;

(h) turnover of sale of goods to such foreign diplomatic missions/consulates and their diplomats, and agencies and organisations of the United Nations and their diplomats as may be prescribed; and

(i) turnover of sale of goods returned to him, subject to such restrictions and conditions as may be prescribed, and to the remainder shall be added the purchases taxable under subsection (3) of section 3, if any,

Note. - 1. In this sub-section "turnover" means. –

(i) for the purpose of clauses (a), (b), (c), (d), (g) and (h), the aggregate of the sale prices of goods which is part of the gross turnover;

(ii) for the purpose of clauses (e) and (f), the aggregate of value of goods exported out of State or disposed of otherwise than by sale, as the case may be, which is part of the gross turnover; and

(iii) for the purpose of clause (i), the aggregate of the sale prices of goods which is or has been part of gross turnover (including under the Act of 1973).

Note. - 2. If the turnover in respect of any goods is included in a deduction under any clause of this sub-section, it shall not form part of deduction under any other clause of the sub-section.

(2) The deductions mentioned in sub-section (1) shall be admissible on furnishing to the assessing authority in such circumstances, such documents or such proof, in such manner as may be prescribed.

(3) Save as otherwise provided in sub-section (1), in determining the taxable turnover of a dealer for the purposes of this Act, no deduction shall be made from his gross turnover.

(15) Section 9 of the Act relates to payment of lump sum tax in lieu of tax which reads as under:-

"9. (1) The State Government may, in the public interest and subject to such conditions as it may deem fit, accept from any class of dealers, in lieu of tax payable under this Act, for any period, by way of composition, a lump sum linked with production capacity or some other suitable measure of extent of business, or calculated at a flat rate of gross receipts of business or gross turnover of purchase or of sale or similar other measure, with or without any

deduction therefrom, to be determined by the State Government, and such lump sum shall be paid at such intervals and in such manner, as may be prescribed, and the State Government may, for the purpose of this Act in respect of such class of dealers, prescribe simplified system of registration, maintenance of accounts and filing of returns which shall remain in force during the period of such composition.

(2) No dealer in whose case composition under sub-section (1) is in force, shall issue a tax invoice for sale of goods by him and no dealer to whom goods are sold by such dealer shall be entitled to any claim of input tax in respect of the sale of the goods to him.

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

(16) Section 42 of the Act provides for levy of tax on the developer even in cases where property had been transferred by the sub-contractor. The said Section reads thus:-

"42. Joint and several liability of certain class of dealers.(1) Where a works contractor appoints a sub-contractor, who executes the work contract, whether in whole or in part, the contractor and the subcontractor shall both be jointly and severally liable to pay tax in respect of transfer of property in goods whether as goods or in some other form involved in the execution of the works contract by the sub-contractor.

(2) If the contractor proves to the satisfaction of the assessing authority that the tax has been paid by the sub-contractor on the sale of the goods involved in the execution of the works contract by the subcontractor and the assessment of such tax has become final, the contractor shall not be liable to pay tax on the sale of such goods but he

shall be entitled to claim input tax, if any, in respect of them if the same has not been availed of by the sub-contractor.

(3) Where an agent purchases or sells any goods on behalf of a principal, such agent and the principal shall both be jointly and severally liable to pay tax in respect of the purchase or sale of goods by the agent.

(4) If the principal on whose behalf the agent has purchased or sold the goods proves to the satisfaction of the assessing authority that the tax on such goods had been paid by the agent and the assessment of such tax has become final, then, the principal shall not be liable to pay tax on such goods but he shall be entitled to claim input tax, if any, in respect of them if the same has not been availed of by the agent."

(17) Rules 25(2) and 49 of the Rules were also referred to by the learned counsel for the petitioners. Rule 25 (2) of the Rules provides for certain exclusions to be made while computing the taxable turnover for a works contractor:-

"**25.** ***Computation of taxable turnover.***-(2)(a) In case of turnover arising from the execution of the works contract or job work, the amount representing the taxable turnover shall exclude the charges towards labour, services and other like charges subject to the dealer's maintaining proper records such as invoice, voucher, challan or any other document evidencing payment of charges to the satisfaction of the Taxing Authority.

b. For the purpose of clause (a) of sub-rule (2), the charges towards labour services for execution of works shall include,

(i) labour charges for execution of works;

(ii) charges for planning and architect"s fees;

(iii) cost of consumables such as water, electricity, fuel, etc. used in the execution of the works contract the property in which is not transferred in the course of execution of a works contract;

(iv) cost of establishment of the contractor to the extent it is relatable to supply of labour and services;

(v) other similar expenses relatable to supply of labour services;

(vi) profit earned by the contractor to the extent it is relatable to supply of labour and services subject to furnishing of a profit and loss account of the works sites:

Provided that where the amount of charges towards labour, services and other like charges are not ascertainable from the books of accounts of the dealer or the dealer fails to produce documentary evidence in support of such charges, the amount of such charges shall be calculated at the percentages of valuable consideration specified in the table given below:

Table

XX XX XX XX"

(18) **Rule** 49 of the Rules deals with lump-sum tax as under:-

"49. Lump sum scheme in respect of contractors.

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

(1) Name of the applicant contractor:

(2) TIN:

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

(3) Name of the contractee:

(4) Date of award of the contract;

(5) Place of execution of the contract:

(6) Total cost of the contract:

(7) Period of execution:

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

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

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

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

(5) The lump sum contractor shall be entitled to make purchase of goods for use in execution of the contract both on the authority of declaration in Central Form C as well as Form VAT-D1 prescribed under clause (a) of sub-section (3) of section 7 and for this purpose he shall be deemed as a manufacturer.

(6) The lump sum contractor shall maintain complete account of, declarations in Central Form C and Form VAT-D1 used by him and, the utilisation of the goods purchased on the authority of these forms. He shall be required to make use of declaration(s) in Form D3 for carrying goods of which he shall keep account. He shall also keep complete account of, payments receivable by him for the execution of the contract and, the payments actually received by him.

(7) A lump sum contractor shall have to pay lump sum in respect of every works contract awarded to him after the

award of the contract in respect of which he first elected to pay lump sum and he shall continue to pay tax in respect of contracts awarded before as if he is not a lump sum contractor.

(8) A lump sum contractor may at any time by appearing before the appropriate assessing authority himself or through an authorised agent express in writing his intention to opt out of the scheme of payment of lump sum in lieu of tax payable under the Act. Such contractor in respect of the contracts awarded to him thereafter shall not be liable to pay lump sum in lieu of tax payable under the Act but in respect of the other contract(s) he shall continue to pay lump sum in lieu of tax payable under the Act till the completion of each of such contract(s).

(9) A lump sum contractor may, when rate of lump sum is revised, opt out of the scheme of payment of lump sum in lieu of tax payable under the Act by appearing before the appropriate assessing authority himself or through an authorised agent within ninety days of such revision and expressing in writing his intention to opt out of the scheme of payment of lump sum. Such contractor shall be liable to pay lump sum for the period before the revision in lump sum rate at the un-revised rate and in respect of transfer of property in any goods, whether as goods or in some other form, involved in the execution of the contract(s) thereafter he shall be liable to pay tax as a contractor not being a lump sum contractor."

(19) In order to appreciate rival submissions, legislative history of the taxability of 'works contract' needs to be noticed.

(20) The power to levy sales tax was conferred on the legislatures of States by Entry 54 of List II of the Seventh Schedule to the Constitution of India. The entry as originally enacted, read thus:-

"54. Taxes on the sale or purchase of goods other than newspapers."

(21) After the judgment of the Apex Court in ***Bengal Immunity Co. Ltd.*** *versus* ***State of Bihar***[6] Parliament passed the Constitution (Sixth Amendment) Act, 1956 which received the assent of the

[6] AIR 1953 SC 252,

President on 11.9.1956. By the said amendment, Entry 92-A in List I of the Seventh Schedule to the Constitution of India was added in the following terms:

> "92-A.Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce."
>
> In List II existing Entry 54 was substituted by the following entry:-
>
> "54. Taxes on the sale or purchase of goods other than newspaper subject to the provisions of Entry 92-A of List I."

(22) The question whether the cost of the goods supplied by a building contractor in the course of the construction of building could be subjected to payment of sales tax was resolved by the Apex Court in ***State of Madras*** *versus* ***Gannon Dunkerley & Co. (Madras) Ltd***[7] which was an appeal filed against the decision of the High Court of Madras in Gannon Dunkerley & Co. (Madras) Ltd. v. The State of Madras. In this case the Apex Court held that on a true interpretation of the expression "sale of goods" meant an agreement between the parties for the sale of the very goods in which eventually property passed. In a building contract where the agreement between the parties was that the contractor should construct the building according to the specifications contained in the agreement and in consideration therefor received payment as provided therein, there was neither a contract to sell the materials used in the construction nor the property passed therein as movables. The Supreme Court further held that the expression "sale of goods" was at the time when the Government of India Act, 1935 was enacted, a term of well- recognised legal import in the general law relating to sale of goods and in the legislative practice relating to that topic and should be interpreted in Entry 48 in List II in Schedule VII of the Government of India Act, 1935 as having the same meaning as in the Sale of Goods Act, 1930. It was concluded that in a building contract which was one, entire and indivisible, there was no sale of goods and it was not within the competence of the Provincial Legislature under Entry 48 in List II in Schedule VII of the Government of India Act, 1935, to impose a tax on the supply of the materials used in such a contract treating it as a sale. The Supreme Court had noted in subsequent decisions that the said decision though was rendered on the basis of the provisions in the Government of India

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[7] 1955 SCR 379

Act, 1935 was equally applicable to the provisions found in Entry 54 of List II of Schedule VII of the Constitution. By virtue of this decision, no sales tax could be levied on the amounts received under a works contract by a building contractor even though he had supplied goods for the construction of the buildings.

(23) In the year 1982 Parliament passed the 46th Amendment amending the Constitution in several respects in order to bring many of the transactions, in which property in goods passed but were not considered as sales for the purpose of levy of sales tax, within the scope of the power of the States to levy sales tax. By the 46th Amendment a new clause, namely clause (29A) was introduced in Article 366 of the Constitution. Clause (29A) of Article 366 of the Constitution reads thus:

> "366, Definitions.--In this Constitution, unless the context otherwise requires, the following expressions have the meaning hereby respectively assigned to them, that is to say-
> (29-A) 'tax on the sale or purchase of goods' includes—
>
> (a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;
>
> (b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;
>
> (c) a tax on the delivery of goods on hire-purchase or any system of payment by installments;
>
> (d) a tax on the 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;
>
> (e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;
>
> (f) a tax on the supply, by way of or as part. of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the

transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made."

(24) Prior to the Forty Sixth Amendment Composite Contracts were not exigible to States sales tax under Entry 54, List II of Schedule VII. After the 46th Amendment the works contract which was an indivisible one, by a legal fiction created in Article 366(29A)(b), was altered into a contract which was divisible into one for sale of goods and the other for supply of labour and services. Thus, it has become possible for the States to levy sales tax on the value of goods involved in a works contract in the same way in which the sales tax was leviable on the price of the goods and materials supplied in a building contract which had been entered into in two distinct and separate parts.

(25) Before proceeding further it would be necessary to analyze sub-clause (b) of clause 29-A of Article 366 of the Constitution. Article 366 is the definition clause of the Constitution. It provides that in the Constitution unless the context otherwise requires, the expressions defined in that article have the meanings respectively assigned to them in that article. The expression 'goods' is defined in clause (12) of Article 366 of the Constitution as including all materials, commodities and articles. Sub-clause (b) of clause (29-A) states that 'tax on the sale or purchase of goods' includes among other things a tax on the transfer of property in the goods (whether as goods or in some other form) involved in the execution of a works contract. The emphasis is on the transfer of property in goods (whether as goods or in some other form). While referring to the transfer, delivery or supply of any goods that takes place as per sub-clauses (a) to (f) of clause (29-A), the latter part of clause (29-A) stipulates that 'such' transfer, delivery or supply of any goods' shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made. Hence, a transfer of property in goods' under sub clause (b) of clause (29-A) is deemed to be a sale of the goods involved in the execution of a works contract by the person making the transfer and a purchase of those goods by the person to whom such transfer is made. The introduction of new definition in clause (29-A) of Article 366 of the Constitution had enlarged the scope of 'tax on sale or purchase of goods' wherever it occurred in the Constitution to include within its scope the transfer, delivery or supply of goods that may take place under any of the transactions referred to in sub-clause (a) to (f) thereof

wherever such transfer, delivery or supply becomes subject to levy of sales tax. The expression 'tax on the sale or purchase of goods' in Entry 54 of the State List, therefore, includes a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract also. The tax leviable by virtue of sub-clause (b) of clause (29-A) of Article 366 of the Constitution thus becomes subject to the same discipline to which any levy under Entry 54 of the State List is made subject to under the Constitution.

(26) Interpreting the provisions of Article 366(29A) of the Constitution of India, the Constitution Bench of the Apex Court in ***Builders' Association of India and others*** *versus* ***Union of India***[8] had laid down as under:-

> "39. In view of the foregoing statements with regard to the passing of the property in goods which are involved in works contract and the legal fiction created by clause (29-A) of Article 366 of the Constitution it is difficult to agree with the contention of the States that the properties that are transferred to the owner in the execution of a works contract are not the goods involved in the execution of the works contract, but a conglomerate, that is the entire building that is actually constructed. After the 46th Amendment it is not possible to accede to the plea of the States that what is transferred in a works contract is the right in the immovable property.
>
> 40. We are surprised at the attitude of the States which have put forward the plea that on the passing of the 46th Amendment the Constitution had conferred on the States a larger freedom than what they had before in regard to their power to levy sales-tax under Entry 54 of the State List. The 46th Amendment does no more than making it possible for the States to levy sales tax on the price of goods and materials used in works contracts as if there was a sale of such goods and materials. We do not accept the argument that sub-clause (b) of Article 366(29A) should be read as being equivalent to a separate entry in List II of the Seventh Schedule to the Constitution enabling the States to levy tax on sales and purchases independent of Entry 54 thereof. As the Constitution exists today the power of the States to levy taxes on sales and purchases of goods including the "deemed" sales

[8] (1989) 2 SCC 645

and purchases of goods under clause (29A) of Article 366 is to be found only in Entry 54 and not outside it. We may recapitulate here the observations of the Constitution Bench in the case of ***Bengal Immunity Company Ltd. (supra)*** in which this Court has held that the operative provisions of the several parts of Article 286 which imposes restrictions on the levy of sales tax by the States are intended to deal with different topics and one could not be projected or read into another and each one of them has to be obeyed while any sale or purchase is taxed under Entry 54 of the State List.

41. We, therefore, declare that sales tax laws passed by the Legislatures of States levying taxes on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract are subject to the restrictions and conditions mentioned in each clause or sub-clause of Article 286 of the Constitution. We, however, make it clear that the cases argued before and considered by us relate to one specie of the generic concept of 'works contracts'. The case-book is full of the illustrations of the infinite variety of the manifestation of “works-contracts”- Whatever might be the situational differences of individual cases, the constitutional limitations on the taxing power of the State as are applicable to “works contracts” represented by "building-contracts" in the context of the expanded concept of "tax on the sale or purchase of goods" as constitutionally defined under Article 366 (29A), would equally apply to other species of “works contracts” with the requisite situational modifications.

42. The Constitutional-Amendment in Article 366 (29A) read with the relevant taxation entries has enabled the State to exert its taxing power in an important area of social and economic life of the community. In exerting this power particularly in relation to transfer of property in goods involved in the execution of “works-contracts” in building activity, in so far as it affects the housing projects of the underprivileged and weaker sections of society, the State might perhaps, be pushing its taxation power to the peripheries of the social limits of that power and, perhaps, even of the constitutional limits of that power in dealing with unequals. In such class of cases 'building activity' really relates to a basic subsistential necessity. It would be wise and appropriate for the State to

consider whether the requisite and appropriate classifications should not be made of such building activity attendant with such social purposes for appropriate separate treatment. These of course are matters for legislative concern and wisdom."

(27) Approving the aforesaid decision, another Constitution Bench in ***Gannon Dunkerley and Co. and others*** *versus* ***State of Rajasthan and others***[9] had concluded as under:-

"49. Normally, the contractor will be in a position to furnish the necessary material to establish the expenses that were incurred under the aforesaid heads of deduction for labour and services. But there may be cases where the contractor has not maintained proper accounts or the accounts maintained by him are not found to be worthy of credence by the assessing authority. In that event, a question would arise as to how the deduction towards the aforesaid heads may be made. On behalf of the States, it has been urged that it would be permissible for the State to prescribe a formula on the basis of a fixed percentage of the value of the contract as expenses towards labour and services and the same may be deducted from the value of the works contract and that the said formula need not be uniform for all works contracts and may depend on the nature of the works contract. We find merit in this submission. In cases where the contractor does not maintain proper accounts or the accounts maintained by him are not found worthy of credence it would, in our view, be permissible for the State legislation to prescribe a formula for determining the charges for labour and services by fixing a particular percentage of the value of the works contract and to allow deduction of the amount thus determined from the value of the works contract for the purpose of determining the value of the goods involved in the execution of the works contract. It must, however, be ensured that the amount deductible under the formula that is prescribed for deduction towards charges for labour and services does not differ appreciably from the expenses for labour and services that would be incurred in normal circumstances in respect of that particular type of works contract. Since the expenses for labour and services would depend on the nature of the

[9] (1993) 1 SCC 364

works contract and would not be the same for all types of works contracts, it would be permissible, indeed necessary, to prescribe varying, scales for deduction on account of cost of labour and services for various types of works contracts.

50. A question has been raised whether it is permissible for the State Legislature to levy tax on deemed sales falling within the ambit of Article 366 (29-A)(b) by prescribing a uniform rate of tax for all goods involved in the execution of a works contract even though different rates of tax are prescribed for sale of such goods. The learned Counsel for the contractors have urged that it would not be permissible to impose two different rates of tax in respect of sale of the same article, one rate when the article is sold separately and a different rate when there is deemed sale in connection with the execution of a works contract. On behalf of the States it has been submitted that it is permissible for the State to impose a particular rate of tax on all goods involved in the execution of a works contract which may be different from the rates of tax applicable to those goods when sold separately. In the field of taxation the decisions of this Court have permitted the legislature to exercise an extremely wide discretion in classifying items for tax purposes, so long as it refrains from clear and hostile discrimination against particular persons or classes. See East India Tobaco Co. v. State of Andhra Pradesh, 1983(1) SCR 404, at p. 411, P.M. Ashwathanarayan Shetty and Ors. v. State of Karnaiaka and Ors., 1988 Supp. (3) SCR 155 at p. 188; Federation of Hotel & Restaurant Association of India v. Union of India, : [1989]178 ITR 97(SC) ; and Kerala Hotel & Restaurant Association and Ors. v. State of Kerala and Ors.: [1990] 1SCR 516. Imposition of sales tax at different rates depending on the value of the annual turnover was upheld in S. Kodar *versus* State of Kerala : [1975] 1 SCR 121 . Similarly, imposition of purchase tax at different rates for sugar mills and khandsari units was upheld in Ganga Sugar Co. Ltd. v. State of U.P. and Ors., : [1980] 1SCR 769 . In our opinion, therefore, it would be permissible for the State Legislature to tax all the goods involved in the execution of a works contract at a uniform rate which may be different from the rates applicable to individual goods because the goods which are involved in the execution of the works

contract when incorporated in the works can be classified into a separate category for the purpose of imposing the tax and a uniform rate may be prescribed for sale of such goods.

51. The aforesaid discussion leads to the following conclusions:-

(1) In exercise of its legislative power to impose tax on sale or purchase of goods under Entry 54 of the State List read with Article 366 (29-A)(b), the State Legislature, while imposing a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract is not competent to impose a tax on such a transfer (deemed sale) which constitutes a sale in the course of inter-State trade or commerce or a sale outside the State or a sale in the course of import or export.

(2) The provisions of Sections 3, 4 and 5 and Sections 14 and 15 of the Central Sales Tax Act, 1956 are applicable to a transfer of property in goods involved in the execution of a works contract covered by Article 366(29-A)(b).

(3) While defining the expression 'sale' in the sales tax legislation it is open to the State Legislature to fix the situs of a deemed sale resulting from a transfer falling within the ambit of Article 366(29-A)(b) but it is not permissible for the State Legislature to define the expression "sale" in a way as to bring within the ambit of the taxing power a sale in the course of interstate trade or commerce, or a sale outside the State or a sale in the course of import and export.

(4) The tax on transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract falling within the ambit of Article 366(29-A)(b) is leviable on the goods involved in the execution of a works contract and the value of the goods which are involved in execution of the works contract would constitute the measure for imposition of the tax.

(5) In order to determine the value of the goods which are involved in the execution of a works contract for the purpose of levying the tax referred to in Article 366(29-A)(b), it is permissible to take the value of the works contract as the basis and the value of the goods involved in the execution of the works contract can be arrived at by

deducting expenses incurred by the contractor for providing labour and other services from the value of the works contract.

(6) The charges for labour and services which are required to be deducted from the value of the works contract would cover (i) labour charges for execution of the works, (ii) amount paid to a sub-contractor for labour and services; (iii) charges for obtaining on hire or otherwise machinery and tools used for execution of the works contract; (iv) charges for planning, designing and architect's fees; and (v) cost of consumables used in execution of the works contract; (vi) cost of establishment of the contractor to the extent it is relatable to supply of labour and services, (vii) other similar expenses relatable to supply of labour and services; and (viii) profit earned by the contractor to the extent it is relatable to supply of labour and services.

(7) To deal with cases where the contractor does not maintain proper accounts or the account books produced by him are not found worthy of credence by the assessing authority the legislature may prescribe a formula for deduction of cost of labour and services on the basis of a percentage of the value of the works contract but while doing so it has to be ensured that the amount deductible under such formula does not differ appreciably from the expenses for labour and services that would be incurred in normal circumstances in respect of that particular type of works contract. It would be permissible for the legislature to prescribe varying scales for deduction on account of cost of labour and services for various types of works contract.

(8) While fixing the rate of tax it is permissible to fix a uniform rate of tax for the various goods involved in the execution of a works contract which rate may be different from the rates of tax fixed in respect of sales or purchase of those goods as a separate article."

(28) On another occasion, where the developers were undertaking to build for the prospective purchasers on payment of the price in various installments set out in the agreement for such construction/development, the issue of taxability under VAT was considered by a two Judge Bench of the Apex Court in ***K. Raheja***

Development Corporation *versus* ***State of Karnataka***[10] wherein it was held as under:-

> "19. To consider whether the Appellants are executing works contract one needs to look at a typical Agreement entered into with the purchaser. The relevant clauses are clause (q), (r) of the recitals and clauses 1, 5(c) and 7, which read as follows:
>
> "(q) (i) Construction of the said multi-storeyed building;
>
> (ii) Sale of the units in the aforesaid multi-storeyed building to different persons in whose favour ultimately a Deed of Conveyance would be obtained by the Holders, directly from the Vendors, of an undivided fractional interest in the said land (i.e. the area of 5910.17 sq. metres described in the First Schedule hereunder written) and such owner of units would own, on ownership basis, the respective units on condition that an Agreement would be entered into between the Holders on the one hand and the persons (desiring to acquire on ownership basis a unit in such multi-storeyed building) on the other hand and it would be an essential, integral and basic concept, term and condition of the proposed transaction (which would be by way of a package deal not capable of being segregated or separated or terminated one without the corresponding effect on the other) that K. Raheja Development Corporation as the Land-holder would agree to sell to such persons an undivided fractional interest in the said land described in the First Schedule hereunder written on condition that they i.e. M/s K. Raheja Development Corporation as Developers on behalf of and as Developers of such person would construct for, as a unit ultimately to belong to such person a unit or units that would be so mutually selected and settled by and between K. Raheja Development Corporation and the person concerned;
>
> r) The Prospective Purchaser is interested in acquiring ownership rights in respect of unit/s Nos. 1101 on the eleventh floor/s of the said multi-storeyed building named Raheja Towers' and also car parking space/s No./s nil in the

[10] (2005) 5 SCC 162

basement/ground floor of the said building (hereinafter referred to as ′the said Unit')"

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1. As and by way of a package deal :

a) K. Raheja Development Corporation, (as Holders) agree to sell to the Prospective Purchaser an undivided 0.42% share, right, title and interest in the said land described in the First Schedule hereunder written (with no right to the Prospective Purchaser to claim any separate sub-division and/or right to exclusive possession of any portion of the said land) for a lump sum agreed and quantified consideration of `3,25,000/- (Rupees three lacs twenty five thousand only) to be paid by the Prospective Purchaser to the Holders at the time and in the manner stated in Clause 2 hereof;

b) K. Raheja Development Corporation, (as Developers) agree to build the said building named `Raheja Towers', having the specifications and amenities therein set out in the Second Schedule hereunder written and as Developers for the prospective Purchaser, the Developers shall build for and as unit/s to belong to the Prospective Purchaser, the said premises (details whereof are set out in the Third Schedule hereunder written) for a lump sum agreed and quantified consideration of `5,07,000/- (Rupees five lacs seven thousand only) to be paid by the Prospective Purchaser to the Developers at the time and in the manner set out in Clause 3 hereof. The said premises shall have the amenities set out in the Fourth Schedule hereunder written.

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5. The undermentioned terms and provisions are express conditions to be observed, performed and fulfilled by the Prospective Purchaser, on the basis of which this Agreement has been entered in to by the Holder/Developers and the due and proper fulfillment whereof are to be conditions precedent to any title being created and/or being capable of being documented by the Prospective Purchaser in the

aforesaid fractional interest in the land described in the First Schedule hereunder written and/or in the said premises:

a) XX XX XX

b) XX XX XX

c) The overall control and management of the project and the development and completion of the said building shall be with the Developers and furthermore the Developers are and shall continue to be in possession of the said land and building and shall be entitled to a lien thereon and that the Prospective Purchaser shall not be entitled to claim or demand from the Holders possession of any portion of the said land or to claim or demand from the Developers possession of the said premises unless and until the Prospective Purchaser has paid in full through the Holders the full consideration money payable to the Holders under Clause 2 above and the full consideration money payable to the Developers under Clause 3 above.

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7. If the Prospective Purchaser commits default in payment of any of the installments of consideration aforesaid on their respective due dates (time being the essence of the contract) and/or in observing and performing any of the terms and conditions of this Agreement, the Holders/Developers shall be at liberty, after giving 15 days notice specifying the breach and if the same remains not rectified within that time, to terminate this Agreement, in which event, a sum equivalent to 10% of the amounts that may till then have been paid by the Prospective Purchaser to the Holders and the Developers respectively shall stand forfeited. The Holders and the Developers shall, however, on such termination, refund to the Prospective Purchaser the balance amounts of the installments of part payment, if any, which may have till then been paid by the Prospective Purchaser to the Holders and the Developers respectively but without any further amount by way of interest or otherwise. On the Holder/Developers terminating this Agreement under this Clause, they shall be at liberty to dispose off the said Unit/s and the said fractional interest in the land to any other person as they deem fit, at such price as they may determine

> and the Prospective Purchaser shall not be entitled to question such sale, disposal or to claim any amount from them."
>
> 20. Thus the Appellants are undertaking to build as developers for the prospective purchaser. Such construction/development is to be on payment of a price in various installments set out in the Agreement. As the Appellants are not the owners they claim a "lien" on the property. Of course, under clause 7 they have right to terminate the Agreement and to dispose off the unit if a breach is committed by the purchaser. However, merely having such a clause does not mean that the agreement ceases to be a works contract within the meaning of the term in the said Act. All that this means is that if there is a termination and that particular unit is not resold but retained by the Appellants, there would be no works contract to that extent. But so long as there is no termination the construction is for and on behalf of purchaser. Therefore, it remains a works contract within the meaning of the term as defined under the said Act. It must be clarified that if the agreement is entered into after the flat or unit is already constructed, then there would be no works contract. But so long as the agreement is entered into before the construction is complete it would be a works contract."

(29) The correctness of the judgment in ***K. Raheja Development Corporation's case (supra)*** was doubted on a later occasion in ***Larsen & Toubro Ltd's case (supra)*** and it was felt by the Apex Court that the decision was required to be reconsidered by a larger Bench. The three Judges Bench of the Supreme Court in ***Larsen & Toubro Ltd's case (supra)*** upholding the view expressed in ***K. Raheja Development Corporation's case (supra)***, summarised the legal position as under:-

> "(i) For sustaining the levy of tax on the goods deemed to have been sold in execution of a works contract, three conditions must be fulfilled: (one) there must be a works contract, (two) the goods should have been involved in the execution of a works contract and (three) the property in those goods must be transferred to a third party either as goods or in some other form.
>
> (ii) For the purposes of Article 366(29-A)(b), in a building contract or any contract to do construction, if the developer

has received or is entitled to receive valuable consideration, the above three things are fully met. It is so because in the performance of a contract for construction of building, the goods (chattels) like cement, concrete, steel, bricks etc. are intended to be incorporated in the structure and even though they lost their identity as goods but this factor does not prevent them from being goods.

(iii) Where a contract comprises of both a works contract and a transfer of immovable property, such contract does not denude it of its character as works contract. The term "works contract" in Article 366 (29-A)(b) takes within its fold all genre of works contract and is not restricted to one specie of contract to provide for labour and services alone. Nothing in Article 366(29-A)(b) limits the term "works contract".

(iv) Building contracts are species of the works contract.

(v) A contract may involve both a contract of work and labour and a contract for sale. In such composite contract, the distinction between contract for sale of goods and contract for work (or service) is virtually diminished.

(vi) The dominant nature test has no application and the traditional decisions which have held that the substance of the contract must be seen have lost their significance where transactions are of the nature contemplated in Article 366(29-A). Even if the dominant intention of the contract is not to transfer the property in goods and rather it is rendering of service or the ultimate transaction is transfer of immovable property, then also it is open to the States to levy sales tax on the materials used in such contract if such contract otherwise has elements of works contract. The enforceability test is also not determinative.

(vii) A transfer of property in goods under clause 29-A(b) of Article 366 is deemed to be a sale of the goods involved in the execution of a works contract by the person making the transfer and the purchase of those goods by the person to whom such transfer is made.

(viii) Even in a single and indivisible works contract, by virtue of the legal fiction introduced by Article 366 (29-A)(b), there is a deemed sale of goods which are involved in

the execution of the works contract. Such a deemed sale has all the incidents of the sale of goods involved in the execution of a works contract where the contract is divisible into one for the sale of goods and the other for supply of labour and services. In other words, the single and indivisible contract, now by Forty-sixth Amendment has been brought on par with a contract containing two separate agreements and States have now power to levy sales tax on the value of the material in the execution of works contract.

(ix) The expression "tax on the sale or purchase of goods" in Entry 54 in List II of Seventh Schedule when read with the definition clause 29-A of Article 366 includes a tax on the transfer of property in goods whether as goods or in the form other than goods involved in the execution of works contract.

(x) Article 366(29-A)(b) serves to bring transactions where essential ingredients of "sale" defined in the Sale of Goods Act, 1930 are absent within the ambit of sale or purchase for the purposes of levy of sales tax. In other words, transfer of movable property in a works contract is deemed to be sale even though it may not be sale within the meaning of the Sale of Goods Act.

(xi) Taxing the sale of goods element in a works contract under Article 366(29-A)(b) read with Entry 54 List II is permissible even after incorporation of goods provided tax is directed to the value of goods and does not purport to tax the transfer of immovable property. The value of the goods which can constitute the measure for the levy of the tax has to be the value of the goods at the time of incorporation of the goods in works even though property passes as between the developer and the flat purchaser after incorporation of goods."

(30) The Supreme Court crystallizing the legal principles, in other words, had opined that the agreement between the promoter/builder/ developer and the flat purchaser to construct a flat and thereafter sell the flat with some portion of land, does involve activity of construction which would be covered under the term "works contract". The term "works contract" encompasses a contract in which one of the parties is obliged to undertake or to execute works. The activity of construction has all the attributes, elements and characteristics of works contract

though essentially it may be a transaction of sale of flat. To put it differently, so long as construction is for and on behalf of the purchaser, it remains a "works contract" under the Act.

(31) Further, the essential conditions to be fulfilled for sustaining levy of tax on the goods deemed to have been sold in execution of a "works contract" are as under:-

(i) there must be a works contract,

(ii) the goods should have been involved in the execution of a works contract, and

(iii) the property in those goods must be transferred to a third party either as goods or in some other form.

(32) These conditions are fulfilled in a building contract or any contract to do construction. In a contract to build a flat, necessarily there will be an element of sale of goods included therein and therefore, building contracts are species of the works contract. Still further, a contract comprising of both a works contract and a transfer of immovable property, such contract is not denuded of its character of being a works contract. Article 366 (29A)(b) of the Constitution of India does contemplate a situation where the goods may not be transferred in the form of goods but may be transferred in some other form which may even be in the form of immovable property. No doubt, there is no legislative competence in the State legislature to levy tax on the transfer of immovable property under Entry 54 of List II of the Seventh Schedule. However, the States are empowered to levy sales tax on the sale of goods in an agreement of sale of flat which also has a component of a deemed sale of goods.

(33) Once it is concluded that the developer/builder/promoter are covered under the works contract while entering into an agreement between them and the flat purchaser to construct a flat and ultimately to sell the flat with the fraction of land, we proceed to examine the broad principles for determining the taxable turnover relating to transfer of goods involved in the execution of such works contract. Where the developer/builder/promoter/contractor or the sub-contractor maintains proper books of account, it shall be the value of the goods incorporated in the works contract as per books of account. On the other hand, where the developer/builder/ promoter/contractor/sub-contractor does not maintain proper accounts or the accounts maintained by him are not found worthy of credence, it would be permissible for the State Legislature to prescribe a formula for determining the charges for

labour, service and cost of land by fixing a particular percentage of the works contract and to allow deduction of the amount thus determined from the value of the works contract for assessing the value of the goods involved in the execution of the works contract. The taxable event is the transfer of property in the goods involved in the execution of a works contract and the said transfer of property in such goods takes place when the goods are incorporated in the works. The value of the goods which can constitute the measures for the levy of the tax has to be the value of the goods at the time of incorporation of the goods in the works. The activity of construction undertaken by the developer etc. would be works contract only from the stage he enters into a contract with the flat purchaser. However, the deduction permissible under various heads would depend upon facts of each case on the basis of material available on record. It is clarified that where the agreement is entered into after the completion of the flat or the unit, there would be no element of works contract but in a situation, where agreement is entered into before the completion of construction, it would be a works contract. If at the time of construction and until the construction was completed, there was no contract for construction of the building with the flat purchaser, the goods used in the construction cannot be deemed to have been sold by the builder since at that time there is no purchaser even if building is intended to be sold after construction would be of no consequence. The value addition made to the goods transferred after the agreement is entered into with the flat purchaser can only be made chargeable to tax by the State Government. Taxing the sale of goods element in a works contract under Article 366 (29A)(b) read with Entry 54 List II of Schedule VII of the Constitution of India is permissible even after incorporation of goods provided tax is directed to the value of the goods at the time of incorporation and does not purport to tax the transfer of immovable property. No tax can be charged from the developer/builder/promoter or contractor in respect of the value of goods incorporated in the works contract after the agreement with the flat purchaser on which the sub-contractor has already paid the tax.

(34) Next, it was claimed by learned counsel for the petitioners that the State of Uttar Pradesh has framed rule 9 of UPVAT Rules, 2005 and Delhi State under Rule 3 of Delhi VAT Rules, 2005 have introduced specific provisions for charging VAT on transaction of the developers etc. whereas there is no such provision in the rules. The developer who does not carry on construction activities itself but creates sub contractors for that work, would not be liable for any tax under the Act. It would be the liability of the sub-contractor alone on

account of works contract undertaken by him. Elaborating further, it was urged that in the case of a developer's transaction of sale of a flat to a buyer, if the tax can be charged, it can only be on the value of materials incorporated into the works on and after the date of entering into agreement for sale of immovable property and cannot be directed on the value of immovable property. However, the Act and the Rules do not contain *inter alia* any deduction on account of the following:

(a) Immovable property, and

(b) value of all other expenses which are not relatable to the supply of goods such as

(1) EDC

(2) IDC

(3) change of land use charges

(4) charges for sanctioning of maps

(5) charges for processing of maps

(6) Marketing expenses, etc.

(7) finance charges

(8) stamp duty

(9) legal expenses

(10) labour cess

(11) scrutiny fee

(12) charges for various approvals such as fire, forest, environment, aviation etc.

(13) another charges/cost/expenses not relatable to transfer of property in goods.

(14) Similar expenses which does not involve any transfer of property in goods in execution of works contract but are incidental in carrying on the business of the developer etc.

(35) Still further, as urged by learned counsel, Explanation (i) to Section 2(1)(zg) of the Act provides exclusion only in respect of labour and other service charges. Likewise Rule 25(2) of the Rules also provides for deductions on that account alone. It is, therefore, clear that on application of these provisions to a developer etc., the value of

immovable property and other expenses incidental thereto which are integral part of the transaction of sale of flat, would not be excluded and the net effect of which would be that rather than being a tax on value of materials transferred, the provisions lead to taxing of value of immovable property and expenses not relateable to value of materials. Rule 25(2) of the Rules only provide for deductive method in the event of labour and services but does not reduce the value of immovable property. The legality of both the provisions was put to test by the learned counsel for the petitioners.

(36) Grievance was also raised relating to validity of Instructions dated 7.5.2013, 4.6.2013 and 10.2.2014 (Annexure P-2 Colly). Instructions No. 952/ST-1 dated 7.5.2013 (Annexure P-2) issued by respondent No.2 provides that the agreements/contracts entered by developers with prospective buyers for sale of apartments/ flats before the completion of construction constitutes 'works contract' and thus VAT was imposable on such transactions. Clause 4 of the said circular relates to measure of tax and deduction towards labour and other like charges. Circular dated 4.6.2013 was issued regarding making of assessments on builders and developers. In view of legal position enunciated hereinbefore, there is no illegality in the issuance of circulars dated 7.5.2013 and 4.6.2013. However, Circular issued on 10.2.2014 relates to lump sum tax under composition tax scheme and has been dealt with while analyzing the provisions of Section 9 of the Act and Rule 49 of the Rules.

(37) Examining the validity of Explanation (i) to Section 2(1)(zg) of the Act and Rule 25(2) of the Rules, it would be essential to notice that in order to avoid declaration of unconstitutionality, the Courts have adopted such principles of interpretation which would result in sustaining the statute. The Constitution Bench of the apex Court in the ***State of Madhya and others*** *versus* ***M/s Chhotabhai Jethabhai Patel and Co. and another***[11] in para 10 had held as under:

> "It is settled law that where two constructions of a legislative provision are possible one consistent with the constitutionality of the measure impugned and the other offending the same, the Court will lean towards the first if it be compatible with the object and purpose of the impugned Act, the mischief which it sought to prevent ascertaining from relevant factors its true scope and meaning."

[11] AIR 1972 SC 971

(38) Further, another Constitution Bench of the Supreme Court in ***Sunil Batra*** *versus* ***Delhi Administration and others***[12]***,*** *i*n para 38 had observed as under:

> "Constitutional deference to the Legislature and the democratic assumption that people's representatives express the wisdom of the community lead courts into interpretation of statutes which preserves and sustains the validity of the provision. That is to say, courts must, with intelligent imagination, inform themselves of the values of the Constitution and, with functional flexibility, explore the meaning of meanings to adopt that construction which humanely constitutionalizes the statute in question. Plainly stated, we must endeavour to interpret the words in Ss.30 and 56 of the Prisons Act and the paragraphs of the Prison Manual in such manner that while the words belong to the old order, the sense radiates the new order. The luminous guideline in Civil Writ Petition No.6573 of 2007 17 Weems v. United States (1909) 54 L Ed 793 at p.801 sets our sights high: "Legislation, both statutory and constitutional is enacted, it is true, from an experience of evils, but - its general language should not, therefore, be necessarily confined to the form that evil had, therefore, taken. Time works changes, brings into existence new conditions and purposes. Therefore, a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it". The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value, and be converted by precedent into impotent and lifeless

[12] AIR 1978 SC 1675

> formulae. Rights declared in the words might be lost in reality. And this has been recognised. The meaning and vitality of the Constitution have developed against narrow and restrictive construction."

(39) The rule of interpretation requires that such meaning should be assigned to the provision which would make the provision of the Act effective and advance the purpose of the Act. This should be done wherever possible without doing any violence to the language of the provision. A statute has to be read in such a manner so as to do justice to the parties. Moreover, the Apex Court in ***B. R. Enterprises*** *versus* ***State of U.P***[13]***, Calcutta Gujarathi Education Society*** *versus* ***Calcutta Municipal Corporation***[14] *and* ***M.Nagraj*** *versus* ***Union of India***[15] has interpreted the rule of reading down statutory provisions to mean that a statutory provision is generally read down so as to save the provision from being pronounced to be unconstitutional or ultra vires. The rule of reading down is to construe a provision harmoniously and to straighten crudities or ironing out creases to make a statute workable.

(40) Explanation (i) to Section 2(1)(zg) of the Act which defines "sales price" provides for deduction on account of labour, material and services related charges from the gross turnover as defined under Section 2(1)(u) of the Act while arriving at the "sale price" in a works contract. It is not a charging provision which creates any liability for assessing VAT in a "works contract". It is in the definition clause of the Act and the provision does not embrace within its ambit something which is otherwise prohibited by law. Thus, the said provision does not suffer from any vice or defect of unconstitutionality.

(41) Now we proceed to analyze Rule 25 of the Rules. The said rule provides for exclusions in respect of labour, services and other like charges and does not provide any mechanism for exclusion of the value of land. Wherever developer/builder/promoter or the sub contractor who carries on construction work in a works contract maintains proper accounts, it shall be on the basis of actual value addition on account of goods utilized in the property. Rule 25(2) of the Rules provides for deduction of charges towards labour, services and other like charges and where they are not ascertainable from the books of accounts maintained by a developer etc., the percentage rates are prescribed in

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[13] (1999) 9 SCC 700
[14] (2003) 10 SCC 533
[15] (2006) 8 SCC 212

the table provided in the said rule. It is necessarily required to provide mechanism to tax only the value addition made to the goods transferred after the agreement is entered into with the flat purchaser. The 'deductive method' thereunder does not provide for any deduction which relate to the value of the immovable property. The legislature has not made any express provision for exclusion of value of immovable property from the works contract and its method of valuation has been left to the discretion of the rule making authority to prescribe.

(42) The State had filed an affidavit dated 24.4.2014 of Shri B.L. Gupta, Additional Excise and Taxation Commissioner, Haryana, wherein paras 3 to 8 read thus:-

> "3. That it is affirmed that the developers/work contractors, being assessed as normal VAT dealers, are entitled to all deductions admissible as per Law/Rules.
>
> 4. That as per the provisions contained in the Haryana VAT Act, 2003 and the rules framed thereunder, the tax is to be levied on transfer of property in goods involved in the execution of works contract. It is clarified that the definition of the word 'goods', as available in Section 2(1)(r) of the Haryana Value Added Tax Act, 2003, does not include immovable property, that is, land.
>
> 5. That the Act ibid, which is relatable to entry 54, List II Seventh Schedule of the Indian Constitution does provide for levy of tax on sale or purchase of goods except newspaper.
>
> 6. That having regard to above, neither any tax is leviable nor can it be levied on price of land involved in execution of works contract.
>
> 7. That the respondents, being law abiding officers, cannot violate the above constitutional mandate.
>
> NON-VAT DEALER (WORKS CONTRACTORS):
>
> 8. That there is, however, some difference as regards levy vis-a-vis non-VAT dealer i.e. works contractor operating under composition/lump sum scheme provided under section 9 of the Act and rule 49 of the Rules made thereunder. It is submitted that such works contractors, who opt for the benefit of the scheme aforesaid, are required to pay a lump

> sum in lieu of tax on the total valuable consideration receivable for the execution of works contract. In other words, no deduction whatsoever (including value of land), is admissible from total value consideration as the scheme is intended to provide administrative convenience and simplicity for both the assessee and the department. In such lump sum scheme, an easily observable yard stick, such as total valuable consideration in this case, is taken to compute the quantity of tax to be paid. It is submitted that the law does not oblige or force any works contractor to exercise this option against his will. He is fully free to exercise his option. If the scheme aforesaid does not suit him, he can very well refrain from the same. The provisions, referred to above, upon application of strict interpretation principle to fiscal statute, leaves no manner of doubt that such a contractor is not entitled to any deduction whatsoever."

(43) The assertion in the affidavit in the absence of any specific provision in the statute or the rule would not give it a statutory flavour as the action of the respondent in furnishing the affidavit dated 24.4.2014 would not meet the test of requisite amendment in the Rules as it has to be done by the competent authority in accordance with law. Though it may be observed that the State Government shall remain bound by the affidavit dated 24.4.2014 filed by it in this Court.

(44) The Apex Court in *Larsen & Toubro's case (supra)* while considering the legality of Rule 58 of the Maharasthra Value Added Tax Rules, 2005 (in short "the MVAT Rules 2005") under similar circumstances, had applied the principle of reading down a provision for upholding its constitutional validity. Rule 58 of the MVAT Rules 2005, *inter alia*, provide for determination of sale price and of purchase price in respect of sale by transfer of property in goods (whether as good or in some other form) involved in the execution of a works contract. Sub rule (1) and (1A) thereof which is relevant, reads thus:-

> "(1) The value of the goods at the time of the transfer of property in the goods (whether as goods or in some other form) involved in the execution of a works contract may be determined by effecting the following deductions from the value of the entire contract, in so for as the amounts relating to the deduction pertain to the said works contract:--
>
> (a) labour and service charges for the execution of the works;

(b) amounts paid by way of price for sub-contract , if any, to subcontractors;

(c) charges for planning, designing and architect's fees;

(d) charges for obtaining on hire or otherwise, machinery and tools for the execution of the works contract;

(e) cost of consumables such as water, electricity, fuel used in the execution of works contract, the property in which is not transferred in the course of execution of the works contract;

(f) cost of establishment of the contractor to the extent to which it is relatable to supply of the said labour and services;

(g) other similar expenses relatable to the said supply of labour and services, where the labour and services are subsequent to the said transfer of property;

(h) profit earned by the contractor to the extent it is relatable to the supply of said labour and services: Provided that where the contractor has not maintained accounts which enable a proper evaluation of the different deductions as above or where the Commissioner finds that the accounts maintained by the contractor are not sufficiently clear or intelligible, the contractor or, as the case may be, the Commissioner may in lieu of the deductions as above provide a lump sum deduction as provided in the Table below and determine accordingly the sale price of the goods at the time of the said transfer of property.

TABLE

Sr. No.	Type of work contract	Amount to be deducted from the contract price (expressed as a percentage of the contract price)
(1)	(2)	(3)
1 to 15	XX XX XX	XX XX

(1A) In case of a construction contract, where alongwith the immovable property, the land or, as the case may be, interest in the land, underlying the immovable property is to be conveyed, and the property in the goods (whether as goods

or in some other form) involved in the execution of the construction contract is also transferred to the purchaser such transfer is liable to tax under this rule. The value of the said goods at the time of the transfer shall be calculated after making the deductions under sub-rule (1) and the cost of the land from the total agreement value.

The cost of the land shall be determined in accordance with the guidelines appended to the Annual Statement of Rates prepared under the provisions of the Bombay Stamp (Determination of True Market Value of Property) Rules, 1995, as applicable on the 1st January of the year in which the agreement to sell the property is registered:

XXXX XX."

(45) Under sub-rule (1) to Rule 58 of the MVAT Rules, 2005, the State Government has prescribed the deductive method of taxing the works contract relating to building contracts. It broadly specifies the deduction which are admissible from the entire contract, *inter alia*, on account of labour, service charges, charges for planning, designing, architect fees and similar other expenses specified therein. The rates for deductions are specified in the table where the contractor has not maintained proper accounts which enables proper evaluation of the different deductions noted hereinbefore. However, sub rule (1A) in Rule 58 of the MVAT Rules, 2005 was inserted therein by a notification dated 01.06.2009. The rule has provided that in the case of construction contracts where the immovable property, land or as the case may be, interest therein is to be conveyed and the property in the goods involved in the execution of the construction contract is also transferred, then it is such transfer of goods alone which is liable to tax. The value of the goods at the time of transfer is to be calculated after making the deduction of the cost of the land from the total agreement value. The method for determining the cost of the land has also been specified thereunder. It stipulates that the cost of the land shall be determined in accordance with the guidelines appended to the Annual Statement of Rates prepared under the provisions of the Bombay Stamp (Determination of True Market Value of Property) Rules, 1995 on Ist January of the year in which the agreement to sell the property is registered. The rule provides for measure of determination of the tax. It does not create any liability to tax as a charging provision. The Supreme Court in *Larsen & Toburo's case (supra)* specifically read down Rule 58 which were computational provision whereby exclusion

of value of land on the basis of circle rates and ceiling on such deduction had been provided. The Apex Court noticed as follows:-

> "The value of the goods which can constitute the measure of the levy of the tax has to be the value of the goods at the time of incorporation of goods in the works even though property in goods passes later. Taxing the sale of goods element in a works contract is permissible even after incorporation of goods provided tax is directed to the value of goods at the time of incorporation and does not purport to tax the transfer of immovable property. The mode of valuation of goods provided in Rule 58 (1-A) has to be read in the manner that meets this criteria and we read down Rule 58(1-A) accordingly. The Maharashtra Government has to bring clarity in Rule 58(1-A) as indicated above. Subject to this, validity of Rule 58(1-A) of the MVAT Rules is sustained."

(46) In case the provisions of law are seeking to charge sales tax on any amount other than the value of goods transferred in course of execution of works contract, the provisions would be *ultra vires* the Constitution of India. The tax is to be computed on a value not exceeding the value of transfer of property in goods on and after the date of entering into agreement for sale with the buyers. However, the 'deductive method' requires all the deductions to be made therefrom to be specifically provided for to ensure that tax is charged only on the value of transfer of property in goods on and after the date of entering into agreement for sale with the buyers. Where 'deductive method' has been prescribed under the rules for ascertaining the taxable turnover, ordinarily it should include a residuary clause in consonance with the mandate of law so as to cover all situations which can be envisaged.

(47) In view of the above, essentially, the value of immovable property and any other thing done prior to the date of entering of the agreement of sale is to be excluded from the agreement value. The value of goods in a works contract in the case of a developer etc. on the basis of which VAT is levied would be the value of the goods at the time of incorporation in the works even where property in goods passes later. Further, VAT is to be directed on the value of the goods at the time of incorporation and it should not purport to tax the transfer of immovable property. Consequently, Rule 25(2) of the Rules is held to be valid by reading it down to the extent indicated hereinbefore and subject to the State Government remaining bound by its affidavit dated 24.4.2014 The

State Government shall bring necessary changes in the Rules in consonance with the above observations.

(48) Adverting to the issue of challenge to Section 42 of the Act is concerned, according to the learned counsel for the petitioners the assessing VAT liability on the developer when the goods have been transferred by the sub-contractor was in clear contravention of States 's power vide Entry 54 List II of Seventh Schedule. Therefore, the provision wherein the tax was to be assessed in the hands of the developers even where the property was transferred by the sub-contractor was clearly untenable in law and was liable to be quashed.

(49) Under sub-section (1) of Section 42 of the Act, where the works contractor gets the construction work executed through a sub-contractor, whether in whole or in part, it shall be the joint and several liability of the contractor and the sub-contractor. Sub-section (2) of Section 42 thereof clarifies that a contractor shall not be under any liability to pay tax in respect of a "works contract", if the same has been paid by a sub-contractor and that his assessment has become final. This provision only safeguards the interest of the revenue in the event of failure on the part of the sub contractor to discharge his liability of tax in respect of transaction entered by the sub contractor with the contractor. The provision, thus, cannot be said to be arbitrary, discriminatory or unreasonable in any manner. The contention of the learned counsel for the petitioners in this behalf is, thus, repelled.

(50) Equally, the challenge to validity of Section 9 of the Act and Rule 49 of the Rules in CWP No. 7720 of 2014 (M/s ABW Suncity v. State of Haryana) cannot be accepted. Rule 49 of the Rules and Section 9 of the Act provides for scheme of lump sum tax under composition tax scheme which is purely optional in nature. The dealer is not under any bounden duty to subscribe to this scheme. Similar provision under the 1973 Act was upheld by Division Bench of this Court in ***Tirath Ram Ahuja*** *versus* ***State of Haryana***[16] Section 9 of the Act read with Rule 49 of the Rules and the circular dated 10.2.2014 provide for determination of the tax under composition scheme which is optional and are not the charging provisions for the levy of VAT. Once a dealer opts for composition scheme which is optional, he gets various advantages and privileges which otherwise are not available to ordinary VAT dealers. In such a situation, in view of the judgment of the Apex Court in

[16] (1991) 83 STC 523

Koothattukulam Liguous *versus* ***Deputy Commissioner of Sales Tax***[17] the method of determining tax liability under these provisions could not be questioned by such a dealer. In view of the above, circular dated 10.2.2014 cannot be faulted.

(51) Lastly, ordinarily we would have sustained the preliminary objection of alternative remedy but in view of primary challenge to the validity of Explanation (i) to Section 2(1)(zg) of the Act and Rule 25(2) of the Rules, we felt the necessity to examine the issue in these petitions.

(52) The plethora of case law is a pointer to the proposition that wherever alternative remedies are available, the writ court should be loath in interfering in such matters. However, certain exceptions have been carved out by various judicial pronouncements of the Apex Court and also the High Courts.

(53) A Division Bench of this Court in ***Jindal Strips Limited and another*** *versus* ***State of Haryana and others***[18] after considering the various pronouncements of the Apex Court and other High Courts on the subject in extenso, laid down the exceptions to alternative remedy in the matter relating to exercise of writ jurisdiction as under:-

> "From the various judicial precedents, enumerated above, this Court is of the considered opinion that availability of an alternative remedy for non-entertainment of a petition under Article 226 of the Constitution cannot be of universal application. It is true that ordinarily when the statute provides an alternative remedy, and particularly when there is complete machinery for adjudicating the rights of the parties, which by and large depend upon the facts, the High Court should refrain from entertaining and adjudicating upon the rights of the parties, but to this principle, there are certain exceptions and a citizen, who can successfully cover this case in either of the exceptions, cannot be shown the exit door of his entry to the High Court and be compelled to go before the authorities concerned. Some of the exceptions under which a petition may lie under Article 226 of the Constitution before the High Court without availing of an alternative remedy are when the very provisions of the statute are challenged as being *ultra vires* of the Constitution or repugnant to the Act itself. Obviously, the

[17] (2014) 72 VST 353
[18] (1996) 100 STC 45

> authorities constituted under the Act having jurisdiction to entertain an appeal or revision, howsoever high in the hierarchy of the department cannot quash the provisions of the Act/statute being *ultra vires*. They are bound to follow the Act and the provisions contained therein. The other exception is when the highest authority under the Act has taken a particular view on a question of law and the said view is known to all the subordinate authorities as also when a different or contrary view has not been expressed by the High Court or the Supreme Court. In such an event, the remedy of appeal or revision would be a remedy popularly known as from cesure to cesure or from pole to pole. Subordinate authorities are bound to follow the view expressed by the highest authority in the department constituted under the Act to deal with the appeal or revision, as the case may be. The third exception can be when the order, complained of, is wholly illegal and without jurisdiction. Such an order normally would be when it is totally contrary to the provisions of the statute or when there is no power with the authorities constituted under the Act to pass the order. Yet another exception can be when the orders are actuated on extraneous considerations or mala fides of the highest dignitaries in the State and the allegations are not frivolous and on the contrary are shown, *prima facie,* to be in existence. Yet another exception can be when the alternative remedy is not equally efficacious. Yet another exception can be when the matter is not decided in *limine* and it is taken after several years for hearing and decided on merits and meanwhile the period of limitation prescribed under the statute for filing an appeal has expired. The exceptions can be multiplied but the court does not wish to be exhaustive in detailing all the exceptions. As mentioned above, by and large, it will be dependent upon the facts and circumstances of each case."

(54) The principle of law enunciated in the pronouncements relied upon by learned State counsel for alternative remedy is concerned, are well recognized. However, in the facts and circumstances enumerated hereinbefore, the remedy of writ jurisdiction cannot be shut down particularly when the vires of Explanation (i) to Section 2(1)(zg) of the Act, Rule 25(2) of the Rules and circulars issued by the Excise and Taxation Commissioner have been challenged in the

writ petitions. In so far as the petitioners have raised individual issues regarding non-taxability of their transactions on merits, it shall be open for them to raise all these issues before the Assessing Authority/ revisional authority in accordance with law. It shall also be open to the petitioners to agitate their grievance regarding refund of stamp duty, if any, before appropriate authority in accordance with law.

(55) To conclude, in some of the writ petitions challenge has been laid by the petitioners to the assessment order passed by the Assessing Authority relying upon circular issued by the Excise and Taxation Commissioner whereas in others, the order of the revisional authority on the same premises has been assailed. Still further, in certain cases, the petitioners have approached this Court at the stage of issuances of notices for framing assessments itself. In our opinion, in all these matters, the assessment orders and revisional orders passed by the concerned authorities are liable to be set aside with liberty to the appropriate authority to pass fresh orders in the light of the legal principles enunciated hereinbefore. We order accordingly. In so far as cases where only notices have been issued, the competent authority shall be entitled to proceed further and pass order in accordance with law keeping in view the aforesaid interpretation noticed above. The writ petitions are, thus, partly allowed in the above terms.

P.S . Bajwa

Before Ritu Bahri, J.

PREMWATI—*Appellant*

versus

STATE OF HARYANA AND OTHERS—*Respondents*

R.S.A. No. 2849 of 2009

May 13, 2015

Hindu Succession Act, 1956 – S.10 Rl.1 – Punjab Civil Service Rules, Vol.II, Chapter VI, Para No.6.17 sub rule IV note 1 – Co-widow of deceased husband - Family pension - Appellant filed a suit for mandatory injunction claiming herself to be co-widow of deceased - She sought directions to respondent Nos. 1 to 3 to grant her pensionary benefits upon demise of her husband in equal shares with that of another widow of deceased – Whether a widow who is married during lifetime of first wife of husband, is entitled to family pension in accordance with Family Pension Rules – Appellant married to deceased during life time of first wife – Name of appellant