

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION (LODG) NO. 2440 OF 2012

Builders Association of India .Petitioner

Vs

The State of Maharashtra, and .. Respondents
Ors.

WITH

WRIT PETITION NO. 2502 OF 2012

Maharashtra Chamber of .Petitioners
Housing & Industry and Ors

Vs

The State of Maharashtra, and .. Respondents
Ors

.....

Mr. V. Sridharan, Senior Advocate with Mr V. P. Patkar i/b Mr
M.Vaidya, for the Petitioners.

Mr. Darius J. Khambata, Advocate General with Mr Venkatesh
Dhond, Senior Advocate, Mr B.B.Sharma, A.G.P and Ms Naira
Jejeebhoy for the Respondents.

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**CORAM : DR.D.Y.CHANDRACHUD AND
R.G.KETKAR,JJ.**

DATE : 30 OCTOBER 2012

ORAL JUDGMENT: (PER DR. D.Y.CHANDRACHUD,J.)

1. Rule. By consent, the Rule is made returnable forthwith.
Counsel appearing on behalf of the Respondents waives service.
By consent, both the Petitions are taken up for final hearing at
this stage.

2. Both these petitions under Article 226 of the Constitution essentially seek two reliefs: (i) there is a challenge to the validity of two Circulars issued on 6 August 2012 and 26 September 2012 by the Commissioner of Sales Tax; (ii) the Petitioners seek the benefit of a composition scheme notified under section 42(3A) of the Maharashtra Value Added Tax Act, 2002 by a Notification dated 9 July 2010 in respect of the period commencing from 26 June 2006 in the same manner as extended by the Notification to agreements which are registered on or after 1 April 2010. The proceedings before this Court have been instituted by the Builders Association of India and by the Maharashtra Chamber of Housing and Industry on behalf of their members.

3. The Legislature in the State of Maharashtra amended the provisions of Section 2(24) of the Maharashtra Value Added tax Act, 2002 initially by Maharashtra Act XXXII of 2006 and thereafter by Maharashtra Act XXV of 2007. Consequent upon these amendments, the expression "sale" in Section 2(24) is defined in the following terms:

"(24) "sale" means a sale of goods made within the State for cash or deferred payment or other valuable consideration, but does not include a mortgage, hypothecation, charge or pledge; and the words "sell", "buy" and "purchase", with all their grammatical variations and cognate expressions, shall be construed accordingly;"

Explanation (ii) provides that for the purpose of this clause, sale would include:

“(ii) the transfer of property in goods whether as goods or in some other form involved in the execution of a works contract including, an agreement for carrying out for cash, deferred payment or other valuable consideration, the building, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property;”

As a result of the amendment, the State Legislature brought within the field of taxation under the MVAT Act, the transfer of property in goods involved in the execution of a works contract including inter alia agreements for building and construction of immovable property. The constitutional validity of these provisions together with those of Rule 58(1A) of the Rules framed under the Act was challenged in a batch of Writ Petitions before this Court. The challenge in those cases also involved the validity of a Trade Circular dated 7 February 2007 and a Notification dated 9 July 2010. By a Judgment in **Maharashtra Chamber of Housing and Industry and Others Vs. State of Maharashtra and Others**¹, this Court repelled the challenges addressed in the batch of petitions and held inter alia that in amending section 2(24) the legislature has not transgressed the limitations prescribed in Article 366(29A)(b) of the Constitution.

1 (2012) 51 VST 168 (Bom)

The Judgment of the Court held that the amended definition does not transgress the expanded concept of what constitutes a sale or purchase of goods for the purpose of Entry 54 of List II of the Seventh Schedule as defined in Article 366(29A). A batch of Special Leave Petitions has been filed before the Supreme Court to challenge the Judgment of this Court.

4. After the Judgment of this Court was delivered on 10 April 2012 the Commissioner of Sales Tax issued a Circular on 6 August 2012 inter alia providing for certain administrative relief to developers. The Circular inter alia provided that though ordinarily a delay in obtaining a certificate of registration beyond a period of five years would be treated as an attempt to evade tax, in the case of developers such a delay would not be regarded as an attempt to evade tax and dealers would be granted administrative relief if they apply for registration before 16 August 2012 and furnish proof of filing returns and the payment of tax on or before 31 August 2012. In an interim application filed before the Supreme Court, a stay was sought of the Circular dated 6 August 2012 besides an order of restraint against the Sales Tax Authorities from taking coercive steps for recovery of tax for the period from 2006. In an interim order dated 28 August 2012 the Supreme Court noted the statement made by the Advocate General on behalf of the State that the

time prescribed for registration until 31 August 2012 would stand extended until 15 October 2012 and the time for filing of returns would stand extended to 31 October 2012. In view of this statement, the Supreme Court issued the following interim directions:

“Having regard to the above statement of the learned Advocate General, we are satisfied that the following interim arrangement shall subserve the ends of justice:

(i) The time for registration by the developers as per clause (1) of the Trade Circular dated August 6, 2012 shall stand extended up to October 15, 2012 and the time for filing returns by the developers as per clause (m) of the said circular shall stand extended up to October 31, 2012.

(ii) In case the concerned developers pay tax under the Maharashtra Value Added Tax Act, 2002 (for short “2002 Act”) as amended *vide* section 2(24) w.e.f. June 20, 2006 on or before October 31, 2012, the coercive process for recovery of tax, interest or penalty shall remain stayed. This shall however not preclude the Assessing Officer to complete the assessment.

(iii) The above payment of tax by the concerned developers shall be subject to the final decision in the matter before this Court.

(iv) In case the amendment in section 2(24) of the 2002 Act is held to be unconstitutional and the tax so deposited/paid by the developers is ordered to be returned by the State Government to the developers, the same shall be returned along with interest at such rate that may be ordered by the court finally at the time of disposal of the matter.”

The Supreme Court has directed by way of an interim arrangement that coercive process for recovery of tax, interest and penalty shall remain stayed in the case of those developers who pay tax under the MVAT Act as amended with effect from 20

June 2006 on or before 31 October 2012. The petition under Article 226 of the Constitution by the Builders Association of India was lodged before this Court on 3 October, 2012 while the petition by the Maharashtra Chamber of Housing and Industry was lodged on 20 October, 2012, the latter with barely a fortnight remaining for compliance of the directions issued by the Supreme Court. Affidavits in reply have been filed by the State of Maharashtra and we have taken up the petitions for final disposal in view of the deadline of 31 October, 2012.

5. Before we deal with the merits of the rival submissions, it would be necessary to set out in brief the import of the two Circulars dated 6 August 2012 and 26 September 2012 and of the composition scheme which has been notified by the Commissioner of Sales Tax on 9 July 2010. As we have noted earlier, the Circular dated 6 August 2012 inter alia provided for the grant of certain administrative reliefs to developers. The Circular inter alia contains the responses of the revenue to frequently asked questions (FAQs). Among them were the options available to developers for discharging the tax liability. The response of the revenue was in the following terms:

“From 20.06.2006 to 31.03.2010

1. Composition Scheme U/s 42 (3)- Under this scheme developer has to pay 5% tax on the agreement value. Land deduction is not available. Input tax credit is available

subject to the reduction of 4 per cent.

2. Actual Expense Method U/r 58- Under rule 58, the deduction of Labour and service charges is available on actual basis. Land deduction is also available. Set-off will be calculated subject to the condition u/r 53 and 54.

3. Standard Deduction Method U/r 58- Under rule 58, the deduction of land cost will be allowed. Thereafter 30% standard deduction from remaining amount will be available as per proviso to sub-rule 1. Set-off will be calculated subject to the condition u/r 53 and 54.

After 01.04.2010

The developers can opt for fourth option also, under this option u/s 42 (3A), developer has to pay 1% tax on agreement value. No land deduction and input tax credit is available.”

In the Circular dated 26 September 2012 the options which were provided to developers for the payment of VAT were reiterated in similar terms. The Circular dated 26 September 2012 stipulates that developers would have to discharge their tax liability by selecting one option. The Circular then states as follows:

“Some queries have been received regarding liability to be worked out on cost plus basis, i.e. cost of material and profit as per balance sheet. It is now clarified that no method apart from those statutorily prescribed and mentioned above in the rules will be admissible.”

6. Section 42 of the MVAT 2002 provides for composition of tax. Sub section (3) of Section 42 provides for composition in respect of a dealer liable to pay tax on sales effected by way of transfer of property in goods involved in the execution of a works contract. Under sub section (3) a provision is made for the payment of a lump-sum by way of composition, subject to the

restrictions and conditions that may be prescribed, of an amount equal to (i) five per cent of the total contract value of the works contract in the case of a construction contract; and (ii) eight per cent of the total contract value of a works contract in any other case. Sub section (3A) was introduced by way of an amendment to section 42 by the Maharashtra Tax Laws (Levy and Amendment) Act, 2010 with effect from 1 May 2010. Sub-section (3A) of Section 42 provides as follows:

“(3A) The State Government may, by notification in the Official Gazette -

(a) to provide a scheme of composition for registered dealers who undertake the construction of flats, dwellings or buildings or premises and transfer them in pursuance of an agreement along with the land or interest underlying the land;

(b) prescribe the rate of tax by way of composition, in lieu of the amount of tax payable on the transfer of goods whether as goods or in some other form, in the execution of such works contracts by such registered dealer under this Act.”

A Notification was issued by the State Government on 9 July 2010 under section 42 (3A) to provide for a scheme of composition for registered dealers who undertake the construction of flats, dwellings, buildings or premises and transfer them in pursuance of an agreement along with land or interest underlying the land. The composition amount is 1% of the amount specified in the agreement or of the value specified for the purpose of stamp

duty in respect to the agreement under the Bombay Stamp Act,1958 which is higher. Among the conditions attaching to the composition scheme is a condition which stipulates that all agreements which are registered on or after 1 April 2010 shall be covered under the scheme.

7. Rule 58 of the MVAT Rules provides for determination of the sale price and of the purchase price in respect of a sale by the transfer of property in goods involved in the execution of a works contract. Insofar as is material, the substantive part of sub-rule (1) provides as follows:

“58. 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.

(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 far 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:"

The proviso to sub rule (1) however stipulates that where the contractor has not maintained accounts which enable a proper evaluation of the different deductions as specified above, or where the accounts maintained by the contractor are not sufficiently clear or intelligible, the Commissioner may in lieu of the deductions specified provide a lump-sum deduction as stipulated in a Table annexed to the proviso. For civil works, such as construction of buildings, the lump sum deduction is an amount representing 30%.

8. Sub rule (1A) was introduced into Rule 58 by a Notification dated 1 June 2009 with effect from 20 June 2006 in the following terms:

"(1A) In case of a construction contract, where along with 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:

Provided that, deduction towards cost of land under this sub-rule shall not exceed 70% of the agreement value."

(The proviso has since been deleted.).

9. Now it is in this background that it would be necessary to consider the submissions which have been urged on behalf of the petitioners.

10. Learned Senior Counsel appearing on behalf of the petitioners in the petition filed by the Builders Association of India urged the following submissions:

(i) The Circular dated 6 August 2012 essentially requires compliance of the Judgment of this Court upholding the constitutional validity of Section 2(24) and is unexceptionable. The substantive challenge, however, is to the Circular dated 26 September 2012 on the ground that the Circular stipulates that no method apart from those which are statutorily prescribed will be admissible for determining the assessable value of the goods

which are transferred in the execution of a works contract; and

(ii) Rule 58(1) stipulates that the value of the goods at the time of transfer of property in goods involved in the execution of a works contract may be determined by effecting certain specified deductions from the value of the entire contract. The use of the expression 'may be' is indicative of the legislative intent that the method prescribed by Rule 58(1) is not the only permissible method. It would be perfectly open to the assessee to provide his computation of the assessable value on the basis of the actual cost of the material supplied coupled with a profit element and the cost plus method is a recognized method of valuation. Rule 58(1) does not preclude an assessee while filing returns from taking recourse to the cost plus method. The Circular dated 26 September 2012, to the extent to which it stipulates that no other method than what is statutorily prescribed would be permissible is contrary to rule 58(1);

(iii) The amended provisions of Section 2(24) came into effect from 20 June 2006. The composition scheme which has been notified on 9 July 2010 under section 42 (3A) should therefore be extended with effect from 20 June 2006 and the Notification of the State Government to the extent to which it applies the scheme to all agreements registered from 1 April 2010 is discriminatory and violative of Article 14 of the Constitution. The

rate of tax is the same and since the delegate of the legislature while notifying the scheme for composition indicated that payment of tax at the rate of 1% of the agreement value would sufficiently protect the revenue, there is no justification to apply the scheme for composition only with effect from 1 April 2010.

11. The following submissions have been urged by learned Senior Counsel in the petition filed by the Maharashtra Chamber of Housing and Industry:

(i) Rule 58(1) does not provide the only method of computing assessable value and it is open to each assessee to provide its own method of computation. Rule 58(1) is not exhaustive of the methods to be followed nor do clauses 1 (a) to (h) contain an exhaustive list of deductions which an assessee may avail;

(ii) Rule 58(1A) contains an incorporation of the provision of the Bombay Stamp (Determination of True Market Value of Property) Rules, 1995. Under the Stamp Duty Rules, it is open to a developer to demonstrate under rule 4(6) that the market value for the purposes of stamp duty is less than what is prescribed in the ready reckoner;

(iii) The Circular dated 26 September 2012 is ultra vires because it prevents a developer from claiming other deductions and from providing other acceptable methods for computation of

the assessable value. Though initially the proviso to rule 58(1A) had stipulated that the deduction towards the cost of land shall not exceed 70% of the agreement value, this proviso was deleted by a Notification dated 30 July 2012 from its inception which would constitute an acknowledgment that the land cost can extend beyond 70%. The circular to the extent to which it restricts options available to the developers under the statutory rules, would be ultra vires;

(iv) There can be no valid distinction between agreements which were executed from 20 June 2006 until 30 March 2010 and those registered after 1 April 2010. Both sets of agreements constitute the same class. Assessment under the composition scheme of the value of the goods transferred in the execution of a works contract is determined at 1% of the contract value and there is no reason why this should not apply to the period commencing from 20 June 2006 for which such transactions have come into the fold of value added taxation. Moreover, since the amendment which was brought out with effect from 20 June 2006, proceedings were pending before this court and there was no clarity on the issue until the Judgment of the Division Bench dated 10 April 2012. In these circumstances, the composition scheme which applies to agreements which have been registered after 1 April 2010 should equally apply to agreements which were

registered prior to that date.

12. In response to the submissions which were urged on behalf of the petitioners, the learned Advocate General urged the following submissions:

(i) The provisions of Rule 58(1) including the deductions that are specified in clause (a) to (h) are in conformity with the Judgment of the Constitution Bench of the Supreme Court in **Gannon Dunkerley and Co and Others Vs State of Rajasthan and Ors**². The proviso to Rule 58(1) is similarly in accordance with the observations of the Supreme Court insofar as it provides that in those cases where the accounts of the developer are not intelligible or worthy of credence, a lump sum deduction can be allowed in lieu of individual deduction that has been specified earlier;

(ii) in any event rule 58(1A) which has been held to be constitutionally valid, provides that where the construction contract involves a transfer of interest in land, the value of the goods involved in the execution of the works contract shall be calculated after making deductions under sub rule (1). In other words, in respect of those construction contracts where an element of transfer of interest in land is involved, rule 58(1A) provides for a mandatory method of computing the assessable

² (1993) 1 Supreme Court Cases 364

value. The Circular dated 26 September, 2012 only clarifies what has been provided in Rule 58(1A) and is, therefore, not ultra vires;

(iii) There is no challenge in these proceedings either to Rule 58(1) or to rule 58(1A). The circular does not travel beyond the boundaries which are set out in the rules and, therefore, cannot be assailed;

(iv) Rule 58(1A) incorporates only the guidelines appended to the yearly statement of rates in the stamp duty ready reckoner. The other provision of the Stamp Duty Rules may only be looked at for understanding the guidelines. However, the other provisions do not stand incorporated in Rule 58(1A). Rule 58(1A) is mandatory and both the deductions and the land cost have to be determined in the mode as specified;

(v) In any event, the judgment of the Constitution Bench of the Supreme Court in **Gannon Dunkerley** (supra) held this to be a permissible method. Once it is a permissible method, it is open to the Legislature or its delegate to adopt one of those methods on principles of uniformity;

(vi) A composition scheme involves a concession or exemption which need not be given to everyone in order to be valid. Under inclusion can never be a ground to set aside a concession. A composition scheme is not in the nature of an

amnesty. While providing a scheme of composition, it was legitimately open to the government as a delegate of the legislature to prescribe a cut off date and to extend the scheme to agreements registered on or after that date. Section 42(3A) was introduced by way of amendment with effect from 1 April 2010 and a view was taken to the effect that the scheme should be extended to agreements which are registered after 1 April 2010. That in itself would not render the scheme invalid. Section 42(3A), properly construed, is prospective in nature and it was open to the Government in consequence to apply the scheme of composition with effect from 1 April 2010.

13. The rival submissions now fall for consideration.

14. The provisions of Section 2(24) of the MVAT 2002 which defines the expression "sale" were amended with effect from 20 June 2006 so as to bring within the fold of value added taxation, the transfer of property in goods involved in the execution of a works contract including inter alia an agreement for building or construction of immovable property. The expression "sale price" is defined in Section 2 (25) to mean the amount of valuable consideration paid or payable to a dealer for any sale made including any sum charged for anything done by the seller in respect of goods at the time of or before delivery. The expression 'turnover of sales' is defined in Section 2(33) to mean "the

aggregate of the amounts of sale price received or receivable by a dealer in respect of any sale of goods made during a given period after deducting the amount of (a) sale price, if any, refunded by the seller, to a purchaser, in respect of any goods purchased and returned by the purchaser within the prescribed period; and (b) deposit, if any, refunded in the prescribed period, by the seller to a purchaser in respect of any goods sold by the dealer.” The constitutional validity of the provisions of section 2(24) as amended, have been upheld by this Court, though, as noted earlier, a batch of petitions challenging the Judgment is pending before the Supreme Court. By and as a result of the interim order of the Supreme Court, coercive processes for the recovery of tax, interest and penalty shall not be adopted if the developers pay the tax due under the MVAT Act 2002, as amended on or before 31 October 2012. Time for registration was extended until 15 October 2012 while the time for filing of returns has been extended until 31 October 2012.

15. Rule 58(1), as originally made, provided for the determination of the value of the goods involved in the execution of a works contract at the time of the transfer of property in the goods by making certain specified deductions from the value of the entire contract. In **Gannon Dunkerley and Co Vs. State of Rajasthan** (supra), the Supreme Court considered the

constitutional validity of the Forty Sixth Amendment by which clause 29A was inserted into Article 366. During the course of the Judgment, the Supreme Court dealt with the submissions of the State that while determining the value of the goods involved in the execution of a works contract, a more convenient mode would be to take the value of the works contract as a whole and to make certain specified deductions therefrom of the cost of labour and service rendered by the contractor during the course of the execution of the works contract. This would also ensure against an evasion of tax. As the Judgment of the Supreme Court indicates, counsel for the contractors submitted that in that event certain deductions would have to be made from the value of the entire contract in order to arrive at the value of the goods involved in the execution of the works contract. After considering the rival submissions, the Supreme Court held as follows ;

“The value of the goods involved in the execution of a works contract will, therefore, have to be determined by taking into account the value of the entire works contract and deducting therefrom the charges towards labour and services which would cover:

- a) Labour charges for execution of the works;
- b) amount paid to a sub-contractor for labour and services;
- c) charges for planning, designing and architect's fees;
- d) charges for obtaining on hire or otherwise machinery and tools used for the execution of the

works contract;

e) 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; and

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

g) other similar expenses relatable to supply of labour and services;

h) profit earned by the contractor to the extent it is relatable to supply of labour and services;

The amounts deductible under these heads will have to be determined in the light of the facts of a particular case on the basis of the material produced by the contractor.”

The Supreme Court held that the value of the goods involved in the execution of the works contract would have to be determined after making these deductions and exclusions from the value of the works contract. When the provisions of Rule 58(1) are read in juxtaposition with the aforesaid extract of the Judgment of the Supreme Court, it is evident that the delegate of the legislature in framing rule 58(1) adopted the very same clauses representing the deductions that were held to be permissible in the judgment of the Supreme Court. The Supreme Court however also noted that there may be cases where the contractor has not maintained proper accounts or where the accounts maintained by him are not found to be worthy of credence by the assessing

authority. To deal with such a situation the Supreme Court held that it would be permissible for the State Legislature to prescribe a formula for determining the charges for labour and service after fixing a particular percentage of the value of the works contract and to allow a deduction of the amount thus determined from the total value of the works contract for the purpose of determining the value of the goods involved in the execution of the works contract. The proviso to rule 58(1) was enacted to deal with exactly such a situation where the Commissioner finds that the accounts of the contractor are not sufficiently clear. In such cases, in lieu of individual deduction, a lump sum deduction is provided. In the case of a works contract involving civil works such as construction of the buildings, there is a lump sum deduction of 30%.

16. Sub rule (1A) to rule 58 was introduced by a Notification dated 1 June 2009 with effect from 20 June 2006. In other words, sub-rule 1A relates back to the date of the amendment to section 2(24) of the MVAT Act 2002. Sub Rule (1A) specifically deals with that category of construction contracts in which, along with immovable property, the land or interest in land is to be conveyed and the property in goods involved in the execution of the construction contract is also transferred to the purchaser. Rule 58(1A) stipulates that the value of the goods transferred

shall be calculated after making the deductions under sub-rule (1) and the cost of the land from the total agreement value. In other words, in the case of a construction contract where the works contract involves not just an element of transfer of property in goods, but a transfer of land or interest in land, there is a mandate to apply the provisions of sub-rule (1) in computing the value of the goods at the time of transfer. Similarly, the cost of the land has to be deducted from the total agreement value. That the subordinate legislation has made a mandatory provision is evident from the use of the expression “shall be calculated after making the deductions under sub-rule (1) and the cost of the land from the total agreement value.” In so far as the cost of the land is concerned, rule 58(1A) provides that it 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 the Property) Rules 1995 as applicable on 1 January of the year in which the agreement to sale is registered. Rule 58(1A) incorporates not the entirety of the Stamp Duty Rules 1995 but only the guidelines which are appended to the annual statement of rates prepared under the provisions of the Rules of 1995. Now, undoubtedly in understanding the guidelines, it would be open to the Assessing Authority to have due regard to all the provisions

of the Rules but this is for understanding that part of the Rules which has been incorporated by Rule 58(1A). In **Surana Steels Pvt Ltd Vs. Dy. Commissioner of Income tax and Ors**³, Section 115-J of the Income-tax Act, 1961 which fell for consideration contained an incorporation of the provisions of Section 205 of the Companies Act, 1956. The Supreme Court, while citing the seminal work of Justice G.P.Singh on the Principles of Statutory Interpretation noted that even though only particular sections of an earlier Act are incorporated into a later Act, in construing the incorporated sections it may be at times necessary and permissible to refer to other parts of the earlier statute which are not incorporated. In that context the Supreme Court held that all that remained to be done was to read the provisions plainly and to apply rules of interpretation if any ambiguity survives.

17. Essentially, what rule 58(1A) does is to provide a particular modality for determining the value of goods involved in the execution of construction contracts where an interest in land or land is also to be conveyed under the contract. The provisions of rule 58(1A) are not under challenge. Where the Legislature has an option of adopting one of several methods of determining assessable value, it is trite law that the legislature or its delegate

3 (1999) 4 Supreme Court Cases 306

can choose one among several accepted modalities of computation. The legislature while enacting law or its delegate while framing subordinate legislation are legitimately entitled to provide, in the interest of uniformity, that a particular method of computation shall be adopted. So long as the method which has been adopted is not arbitrary and bears a reasonable nexus with the object of the legislation, the Court would not interfere in a statutory choice made by the legislature or by its delegate. In the present case, rule 58(1A) mandates how the value of goods involved in the execution of a construction contract at the time of the transfer of property in the goods is to be determined in those cases where contract also involves a transfer of land or interest in land. The Circular dated 26.9.2012 does no more than specify the mandate of the statute. The Circular has not introduced a condition by way of a restriction which is not found in the statute. Plainly, rule 58(1A) does not permit the developer to take recourse to a method of computation other than what is specified in the provision. Hence the Circular dated 6 September 2012 was only clarificatory. In **Commissioner of Wealth Tax Vs Sharvan Kumar Swarup & Sons**⁴, the Supreme Court dealt with the provisions of rule 1BB of the Wealth Tax Rules 1957 and the issue which fell for determination was whether that was a

4 (1994) 210 ITR 886 (SC)

provision which altered substantive rights or was merely procedural. The Supreme Court noted that rule 1BB merely provided a choice amongst well known and well settled modes of valuation and even in the absence of rule 1BB it would not have been objectionable, nor would there be any legal impediment, to adopt the mode of valuation embodied in Rule 1BB, namely, the method of capitalization of income on a number of years purchase value. The Supreme Court held that the rule was intended to impart uniformity in valuations and to avoid vagaries and disparities resulting from the application of different modes of valuation in different cases where the nature of the property is similar. The Supreme Court held that rule 1BB was essentially a rule of evidence as to the choice of one of the accepted methods of valuation.

18. The next aspect which needs to be considered is the date of enforcement of the composition scheme. Section 42(3A) was introduced by the Maharashtra Tax Laws (Levy and Amendment) Act, 2010 with effect from 1 May 2010. Under the provision the State Government is empowered by notification to provide a scheme of composition for registered dealers who undertake the construction of flats, dwellings building or premises and transfer them in pursuance of the agreement along with land or interest underlying the land. The State Government is also empowered to

prescribe the rate of tax by way of composition, in lieu of the amount of tax payable on the transfer of goods in the execution of such works contracts by a registered dealer under the Act. The composition scheme was notified on 9 July 2010. The conditions attaching to the scheme stipulate inter alia that all agreements which are registered on or after 1 April 2010 shall be covered under the scheme. The Petitioners contend that the cut off date is arbitrary and that the composition scheme should extend to all agreements registered after 20 June 2006.

19. Now as a matter of first principle, in framing a scheme of composition the revenue has to balance several competing considerations many of which are of a policy nature. One of the objects of a scheme of composition is to encourage compliance. Another consideration that may weigh with the revenue is the element of burden involved in tax administration if assessments in the normal course are to be carried out. A scheme of composition essentially seeks to provide an option under which in lieu of the tax which is payable under the provisions of the Act a registered dealer can pay what is described as the composition amount in discharge of the tax liability. In framing a scheme for composition the State as a delegate of the legislature has to balance numerous considerations including the interest of the revenue, the need to encourage compliance and the burden on

the tax administration which is obviated by the introduction of a composition option. A scheme for composition provides an option to an assessee. The assessee is not compelled to accept the option which is provided in the scheme of composition. The composition scheme is not in the nature of amnesty but a provision which has been made by the State acting as a delegate of the legislature for composition by a registered dealer undertaking the construction of flats or dwelling units. The scheme provides for a rate of tax by way of composition in lieu of the tax payable on the transfer of goods involved in the execution of a works contract. A scheme for composition is, therefore, in the nature of a concession which is granted by the State to a certain class or category of assessees who fulfill the conditions which are spelt out in the scheme.

20. In **Union of India Vs. Parameswaran Match Works and Ors**⁵, a Bench of four learned Judges of the Supreme Court laid down the governing principles of law in the following observations:

“In the matter of granting concessions or exemption from tax, the Government has a wide latitude of discretion. It need not give exemption or concession to everyone in order that it may grant the same to some. As we said, the object of granting the concessional rate of duty was to protect the smaller units in the industry from the competition by the larger ones and that object would have

5 1975 1 Supreme Court Cases 305

been frustrated, if, by adopting the device of fragmentation, the larger units could become the ultimate beneficiaries of the bounty. That a classification can be founded on a particular date and yet be reasonable, has been held by this Court in several decisions (see *Hathisingh Mfg. Co. Ltd. v. Union of India* (1960) 3 scr 528, *Dr. Mohammed Saheb Mahboon Medico v. The Deputy Custodian General*-AIR 1961 SC 1657, *Bhikuse Yamasa Kshatriya (P.) Ltd. v. Union of India*- AIR 1963 SC 1591, and *Daruka & Co. v. Union of India* : [1973] 2 SCC 617. The choice of a date as a basis for classification cannot always be dubbed as arbitrary even if no particular reason is forthcoming for the choice unless it is shown to be capricious or whimsical in the circumstances. When it is seen that a line or a point there must be and there is no mathematical or logical way of fixing it precisely, the decision of the legislature or its delegate must be accepted unless we can say that it is very wide of the reasonable mark.”

In the Judgment of the Supreme Court in **International Cotton Corpn (P) Ltd Vs. Commercial Tax Officer, Hubli**⁶, the grant of a concession in respect of transaction of sale under the Central Sales Tax Act during a certain period was placed in issue on the ground that transactions which have been undertaken prior to the period of concession were not given the same benefit. While repelling the challenge, the Supreme Court observed as follows:

“Firstly, the fact that transactions of sale prior to the period before 10th November 1964 or at least the period between 23-1-1962 and 10-11-64 were not given the same concession as the transactions between 10-11 -64 and 9-6-1969 does not mean that the latter concession is unconstitutional. A concession is not a matter of right. Where the Legislature taking into consideration the hardships caused to a certain set of taxpayers gives them a

6 (1975) 3 Supreme Court Cases 585

certain concession it does not mean that that action is bad as another set of tax-payers similarly situated may not have been given a similar concession. It would not be proper to strike down the provision of law giving concession to the former on the ground that the latter are not given such concession. Nor is it possible for this Court to direct that the latter set should be given a similar concession. That would mean legislation by this Court and this Court has no legislative powers.”

Extrapolating these observations to the facts of the present case, what the scheme of composition has done is to make it applicable to agreements which were registered after 1 April 2010. It would not be proper for this court to strike down the provision by which the option of composition has been given to agreements which were registered after 1 April 2010. Nor for that matter, would the Court be justified in directing that the same option of composition should be allowed to agreements which were registered prior to 1 April 2010. By issuing such a direction the Court in the exercise of its jurisdiction under Article 226 would be legislating by directing the delegate of the legislature to extend the ambit of the composition of scheme beyond what was provided in the scheme. That is impermissible.

21. But it is sought to be urged that those agreements registered after 1 April 2010 and those which have been registered prior to that date fall in the same category and it would be open to the Court under Article 226 to direct the State

Government to extend the same benefit. In support, reliance was placed on the Judgment of the Supreme Court in **D.S.Nakara and Ors Vs. Union of India**⁷ . Now Nakara was a case where an existing scheme of pension was sought to be liberalized through an upward revision. The Supreme Court made it abundantly clear that the Court was not dealing with a new scheme but the revision of an existing scheme. Since pension is not an incentive but a reward for past service, any revision of an existing benefit would stand on a different footing than a new retiral benefit. The decision in Nakara therefore stands on a completely different foundation. Similarly, the Judgment of the Supreme Court in **State of Rajasthan Vs. Mukun Chand and Ors**⁸ , dealt with the provisions of the Rajasthan Jagirdars' Debt Reduction Act, 1957, whose object was to provide for the scaling down of debts of those Jagirdars whose jagir lands had been resumed under the provisions of the state land reform legislation. While defining the expression "debt," Section 2(e) of the Act excluded certain categories of debts including those due to the Central Government or State Government, Scheduled Banks and Co-operative Societies, Waqf, Trust or a person where the debt was advanced on his behalf by the court of Wards. The Supreme Court held that the object of the Act being to ameliorate

7 (1983) 1 Supreme Court Cases 305

8 AIR 1964 SC 1633

the condition of those persons whose capacity to pay debts had been reduced by the resumption of their lands, the exclusion in section 2(e) bore no rational relationship with the object sought to be achieved. Mukun Chand's case therefore dealt with social welfare legislation that was intended to provide relief by way of amelioration to those persons whose lands had been resumed by the State. Having regard to the object of the legislation the Court held that the exclusion of a certain category of debts would not subserve the object of the law. The Judgment of the Supreme Court in **Vishnudas Hundumal Vs The State of M.P.**⁹ dealt with a situation where holders of stage carriage permits granted under the Motor Vehicles Act 1939 were operating stage carriages on routes for which permits were granted. A scheme was framed by the State Road Transport Corporation under which certain routes came to be reserved for exclusive operation by the Corporation. Part of the routes on which the petitioners were operating overlapped with the notified routes, as a result of which their permits were curtailed or cancelled by prohibiting them from operating their stage carriages on a portion of the routes which overlapped with the notified routes. The Supreme Court noted that there were other permit holders in the same class whose routes had overlapped with the notified routes in

9 AIR 1981 SC 1636

respect of which their permits were neither curtailed nor cancelled. The Supreme Court held that this was an error or omission on the part of the Regional Transport Authority which had resulted in gross discrimination between one class of permit holders whose routes overlapped with the notified routes. In this background, the Supreme Court held that the State cannot take recourse to inadvertence the result of which was to cause a glaring discrimination. The Supreme Court therefore held that it was open to the court to remove the cause of discrimination by placing the petitioners in the same class as those who had enjoyed favourable treatment by inadvertence on the part of the Regional Transport Authority. This judgment of the Supreme Court would not really advance the case of the Petitioners any further because evidently that was a case where there was an inadvertent act on the part of the authority as a result of which 19 persons whose routes overlapped with the notified routes were allowed to ply their stage carriages while the petitioners were denied similar treatment. In the present case, the date of 1 April 2010 which has been prescribed for composition is not an act of inadvertence on the part of the delegate of the legislature. In framing a scheme of composition it is open to the legislature and its delegate to determine a cut off date with effect from which an option of composition is available. In view of the

Judgment of the Supreme Court in **Parmeshwaran Match Works** (supra) the legislature in enacting law and the delegate of the legislature while framing subordinate legislation have a wide degree of latitude and a concession does not have to be provided to everyone in order that it should be given to someone. These observations must apply a fortiori to revenue legislation where it is well settled that the court would allow a wide degree of latitude and discretion to the legislature and to its delegate. The Judgment in **Lohara Steel Industries Ltd Vs. State of A.P and Anr**,¹⁰ dealt with a case where a taxing statute imposed tax on the subject which were exempted by the constitution. The Supreme Court held that if the taxing statute has imposed a tax which is divisible in nature and subjects which are exempted by the Constitution are wrongly taxed, the entire taxing statute could not be declared ultra vires because it would be feasible to separate taxes levied on authorised subjects from those which are levied on exempted subjects. That deals with a completely different situation. Similarly in **Trade Links Limited Vs. State of Uttar Pradesh**,¹¹ the provisions of the Act in the State of U.P expressly contemplated that consideration for a liquor license could be determined either by auction or by calling tenders or otherwise. The Supreme Court held that the use of the

10 (1997) 2 Supreme Court Cases 37

11 (1982) 2 Supreme Court Cases 337

expression 'or otherwise' indicated that several methods were available.

22. For these reasons, we have come to the conclusion that there is no merit in the challenges which have been addressed by the Petitioners before this Court. We hold in consequence that the Circulars dated 6 August 2012 and 26 September 2012 are not ultra vires. We have also come to the conclusion that the composition scheme is not ultra vires in imposing a condition to the effect that it shall cover all agreements registered after 1 April 2010. During the course of the hearing we have been informed by counsel appearing on behalf of the Petitioners that representations have been submitted to the State Government for extending the benefit of the composition scheme to agreements which were registered between 20 June 2006 and 31 March 2010. We clarify by way of abundant caution that this Judgment would not stand in the way of the State Government taking an appropriate decision on the representations that have been submitted in that regard.

23. For these reasons, the Petitions are dismissed. Rule is discharged. There shall be no order as to costs.

(Dr.D.Y.Chandrachud,j.)

(R.G.Ketkar, J.)