IN THE HIGH COURT OF JUDICATURE OF BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4520 OF 2014

Confederation of Real Estates Developers' Association of India – Maharashtra
Registered under the provisions of the Societies Registration Act, 1860 bearing Registration No. Maharashtra / 9337-94/Pune, having its registered office at -
Nucleus Jeejeebhoy Tower, 3rd Floor,
Office Nos. T-1, T-2, T-3, Church Road
Opp Commissioner Office, Camp,
Pune – 411 001 PETITIONER

VERSUS

1. The State of Maharashtra
Through Ministry of Finance,
3rd Floor, Mantralaya,
Mumbai-400 032

2. Commissioner of Sales Tax,
Maharashtra State,
8th Floor, Room No. 831,
Vikrikar Bhavan,
Mazgaon Mumbai-400 010 RESPONDENTS

WITH
WRIT PETITION NO.2557 OF 2014

Builders Association of India
Rep by its trustee,
Mr. D. L. Desai,
Having its office at G-1/G-20,
7th Floor, Commerce Centre,
J. Dadaji Road, Tardeo
Mumbai- 400 034 PETITIONER

VERSUS

1. The State of Maharashtra RESPONDENTS
Through Ministry of Finance,
3rd Floor, Mantralaya,
Mumbai-400 032

2. Commissioner of Sales Tax,
Maharashtra State,
8th Floor, Room No. 831,
Vikrikar Bhavan,
Mazgaon Mumbai-400 010

WITH
WRIT PETITION (LODG) NO.1148 OF 2014

M/s Prime Property Development Corporation Ltd. PETITIONER
Having its Registered office at
101, Soni House, Plot No. 34,
Gulmohor road No.1, Juhu Scheme,
Vile Parle (W), Mumbai-400 049

VERSUS

1. The State of Maharashtra RESPONDENTS
Through Ministry of Finance,
3rd Floor, Mantralaya,
Mumbai-400 032

2. Commissioner of Sales Tax,
Maharashtra State,
8th Floor, Room No. 831,
Vikrikar Bhavan,
Mazgaon Mumbai-400 010

WITH
WRIT PETITION NO.1258 OF 2014

M/s Shree Shridharkrupa Builders PETITIONER
and Realtors Pvt. Ltd.,
Having its registered office at
Ground Floor, Building No.1,
Chembur Shree Siddhivinayak
Co-op Hsg. Society Ltd.,
Mahatma Phule Nagar, Tilak Nagar,
Mumbai- 400 080

VERSUS

1. The State of Maharashtra RESPONDENTS
Through Ministry of Finance,
3rd Floor, Mantralaya,
Mumbai-400 032

2. Commissioner of Sales Tax,
Maharashtra State,
8th Floor, Room No. 831,
Vikrikar Bhavan,
Mazgaon Mumbai-400 010

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Mr. V. Sridharan, Senior Advocate with Rahul Thakur i/b Ms. Manjiri Parasnis, for the petitioner in writ petition No. 4520 of 2014

Mr. V. P. Patkar along with Mr. M. M. Vaidya, for petitioner in Writ Petition No.2557 of 2014

Mr. V. P. Patkar along with Ms. Manjiri Parasnis, for petitioner in Writ Petition (Lodg) No. 1148 of 2014 and writ petition No. 1258 of 2014

Mr. Sunil V. Manohar, Advocate General along with Ms. Geeta Shastri, Additional Government Pleader and Ms. Naira Variava, Special Counsel and Mr. B. B. Sharma, AGP for respondent State

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[CORAM : S. C. DHARMADHIKARI &

SUNIL P. DESHMUKH, J.J.]

RESERVED ON : 14th JANUARY, 2015

PRONOUNCED ON : 30th APRIL, 2015

JUDGMENT (PER SUNIL P. DESHMUKH, J.) :

1. Petitioners, in this group of writ petitions, challenge constitutional validity and propriety of notification dated January 29, 2014, issued by Finance Department of State of Maharashtra, pursuant to proviso to sub section (4) of section 83 of the Maharashtra Value Added Tax, 2002 (Maharashtra Act of IX of 2005) (Hereinafter, for brevity referred to as "MVAT Act") and Trade Circulars, one dated February 21, 2014 bearing No. 7 T of 2014 issued by Joint Commissioner of Sales Tax and another dated April 17, 2014, bearing No. 12 T of 2014 issued by the Commissioner of Sales Tax, Maharashtra State pursuant to provisions of MVAT Act.

2. The petitioners *inter alia* request to issue writ of certiorari or an order in the nature of writ of certiorari, quashing and setting aside aforesaid notification dated January 29, 2014 and Trade Circulars dated 21st February, 2014 bearing No. 7 T of 2014 and Trade Circular dated 17th April, 2014 bearing No. 12 T of 2014 and to process applications for determination, as directed to be done in paragraph No. 34 of High Court's order dated 10th April, 2012 in Writ Petition No. 2022 of 2007 and other petitions as well as paragraph No. 121 of Supreme Court's

decision dated 26th September, 2013 and the order of the High Court dated 30th October, 2012 in writ petition (L) No. 2405 of 2012 in case of "*Ashok R. Gokani and Another V/s State of Maharashtra and Another*" with a further direction to permit them to deduct consideration / profit of sale of land while determining sale price for the purpose of Rule 58 (1) and determination of value of works contract on percentage of material consumption instead of stages given under the notification of January 29, 2014 and to allow them to submit revised VAT returns with '*material cost plus gross profit*' method and certain other directions to determine value of works contract and to declare that notification of January 29, 2014 to be *ultra vires* the provisions of MVAT Act 2002 *inter alia* for want of requirement of previous publication required under section 83 of the Maharashtra Value Added Tax and Rules 58 (1A) and 58 (1B) of MVAT Rules, 2005 and circular 12 T dated 17th April, 2014 to be bad in law and other reliefs.

3. Rule 58 as it stood prior to January 29, 2014 read thus -

> ***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 sub-contractors;

(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 whether 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 said transfer of property.

Table

Sr. No.	*Type of Works Contract*	*Amount to be deducted from the contract price (expressed as a percentage of the contract price)*
(1)	*(2)*	*(3)*
1	*Installation of plant and machinery*	*Fifteen per cent*
2	*Installation of air conditioners and air coolers*	*Ten per cent*
3	*Installation of elevators (lifts) and escalators*	*Fifteen per cent*
4	*Fixing of marble slabs, polished granite stones and tiles (other than mosaic tiles)*	*Twenty Five per cent*
5	*Civil works like construction of buildings, bridges, roads etc.*	*Thirty per cent*
6	*Construction of railway coaches on under carriages supplied by Railways*	*Thirty per cent*
7	*Ship and boat building including construction of barges, ferries, tugs, trawlers and dragger*	*Twenty per cent*
8	*Fixing of sanitary fittings for plumbing drainage and the like*	*Fifteen per cent*
9	*Painting and polishing*	*Twenty per cent*
10	*Construction of bodies of motor vehicles and construction of trucks*	*Twenty per cent*
11	*Laying of pipes*	*Twenty per cent*
12	*Tyre re-treading*	*Forty per cent*
13	*Dyeing and printing of textiles*	*Forty per cent*
14[t]	*Annual Maintenance contracts*	*Forty per cent*
15	*Any other works contract*	*Twenty five per cent*

[Note[1] : The percentage is to be applied after first deducting from the total contract price, the cost of land determined under sub-rule (1A) and

then, the quantum of price on which tax is paid by the sub-contractor, if any, and the quantum of tax separately charged by the contractor if the contractor provides for separate charging of tax].

"58 (1A) In case of 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.

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

(2) The value of goods so arrived at under sub-rule (1) shall, for the purposes of levy of tax, be the sale price or, as the case may be, the purchase price relating to the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract."

4. While there is no amendment to rule 58 (1), by notification dated January 29, 2014, amended rule 58 (1A), rules 58 (1B), (1C) and Rule 58 (2) are brought in operation, which read thus -

"58 (1A) In case of 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 deduction of 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, after payment of tax on the value of goods, determined as per this rule, it shall be open to the dealer to prove before the Department of Town Planning and Valuation of the actual cost of the land is higher than that determined in accordance with the Annual Statement of Rates (including guidelines) prepared under the provisions of the Bombay Stamp (Determination of True Market Value of Property) Rules, 1995. On such actual cost being proved to be higher than the Annual Statement of Rates, the actual cost of the land will be deducted and excess tax paid, if any, shall be refunded."

"58 (1B) (a) Where the dealer undertakes the construction of flats, dwellings, buildings or premises and transfers them in pursuance of an agreement along with the land or interest underlying the land then, after deductions under sub-rules (1) and (1A) from the total contract prices, the value of the goods involved in the works contract shall be determined after applying the percentage provided in column (3) of the following TABLE depending upon the stage at which the purchaser entered into

contract.

Table

Sr. No.	*Stage during which the developer enters into a contract with the purchaser*	*Amount to be determined as value of goods involved in works contract*
(1)	*(2)*	*(3)*
(a)	*Before issue of the Commencement Certificate*	*100%*
(b)	*From the Commencement Certificate to the completion of plinth level*	*95%*
(c)	*After the completion of plinth level to the completion of 100% of RCC framework*	*85%*
(d)	*After the completion of 100% RCC framework to the Occupancy Certificate.*	*55%*
(e)	*After the Occupancy Certificate*	*NIL %*

(b) For determining the value of goods as per the Table of clause (a), it shall be necessary for the dealer to furnish a certificate from the Local or Planning Authority certifying the date of completion of the stages referred above and where such authority does not have a procedure for providing such certificate then such certificate from a registered RCC consultant.

(1C) If the dealer fails to establish the stage during which the agreement with the purchaser is entered, then the entire value of goods as determined after deductions under sub-rules (1) and (1A) from the value of the entire contract, shall be taxable.

(2) The value of goods so arrived at under sub rule (1), (1A) or, as the case may be, under sub-rule (1B) shall, for the purposes of levy of tax, be the sale price or, as the case may be, the purchase price relating to the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract.

5. Grounds of challenge are that the impugned notification and the trade circulars are in express conflict with the observations of the Supreme Court in the case of *"Larsen and Toubro Limited V. State of Karnataka and Another" (2014) 1 SCC 708* and other pronouncements of this High Court and the Supreme Court. It is being submitted that amended Rule 58 fails to arrive at true and correct value of goods at the time of incorporation in the works contract and tends to indirectly tax immovable property and along with goods. Though Rule 58 (1A) makes allowance for deduction of cost of land, it compels determination in accordance with guidelines appended to Annual Statement of Rates, prepared under the provisions of Bombay Stamp (Determination of True Market Value of Property) Rules, 1995 (Hereinafter referred to as Bombay TMV Rules, 1995), as would be applicable on 1st January of calendar year in which agreement of sale is to be registered, and as such, profit relatable to transfer of land would not be deductible from the total contract value. The Amended Rule 58 (1A) of the MVAT Rules also does not give allowance to deductions on account of consideration for acquisition of FSI / TDR, payments towards eviction of tenants, clearance of encroachment on land. While Rule 58 (1) (h) permits deduction of profit relatable to supply of labour and

service, amended rule does not provide for profit relatable to third element, namely, the land and the object of taxing of value of goods at the time of incorporation, as such, gets blurred. Trade Circular dated 21st February, 2014 restricts options to only one from the four methods given and no other option such as, '*cost plus gross profit*' is admissible. Various other arguments have been advanced to contend that the Rule is deficient to provide for many things involved. Arguments are also advanced contending that Trade Circulars tend to be ambiguous and do not clarify many issues while they purport to answer the questions. According to the petitioners *cost plus gross profit* method is viable and practicable.

6. The petitioners further contend that Rule 58 (1B) of the MVAT Rules, seeks to enact a wide and arbitrary categorization. Stage wise percentage provided under rule 58 (1B) has no basis, either for stage or for percentage of construction. According to them, percentage of material on which taxes are sought to be levied is on higher side and it is unfair and unconstitutional. The percentage prescribed is not in tune with ground realities and technical considerations. According to the petitioners, though prescription of table has been modelled on recommendations of Public Works Department, the same is insufficient and would not

be applicable to the cases of developers. There is huge difference in the contracts with the Public Works Department and the nature of work of the developer, *viz*., Public Works Department contract provides for escalation, which is not the case with the developer. It is further contended that presumptions underlying the table under rule 58 (1B) that work is done on site as per stage given, yet it would not necessarily represent the way construction is carried out, in stages and in the sequences, for, it may be combination of various stages or activities may be simultaneous and as such, the table would not be able to give correct determination of value of work done at the time of entering into an agreement.

7. In the affidavit in reply by respondents, it is referred to that insertion of sub Rule (1A) in Rule 58 of the MVAT Rules, with effect from 20th June, 2006 under Maharashtra Value Added Tax (Amendment) Rules 2009 dated 1st June, 2009 provides for deduction of cost of land in the case of a construction contract where there is also a transfer of land or interest in the land and that its constitutional validity had been considered by the Supreme Court mentioning that the Maharashtra Government has to bring clarity in Rule 58 (1A) as indicated in paragraph No. 124 and subject to that validity of Rule 58 (1A) and MVAT Rules

has been sustained. It is submitted that it is open for the legislature to devise a method of determining cost of land and that Supreme Court had earlier on upheld the manner of determination of cost of land under Rule 58 (1A). It has further been submitted that introduction of proviso in Rule 58 (1A) under amendment by notification dated 29th January, 2014 (impugned in the present petitions) enables a dealer to prove that actual cost of land involved / interest involved is higher than the one arrived at by using annual statement of rates and provides for refund of excess amount, if any, and is beneficial to dealers providing additional evidence. This being an additional remedy / benefit, it cannot be said that Rule 58 (1A) is unconstitutional, especially when the Supreme Court has already considered and upheld determination of cost of land on the basis of guidelines appended annual statement of rates.

8. The 2014 amendment also introduces sub rule (1B) to Rule 58 of the MVAT Rules. This sub rule clarifies that the value of goods in a construction contract has to be determined taking into account the stage during which the developer enters into a contract with a purchaser since the activity of construction undertaken by the developer would be a works contract only from the stage the developer enters into contract with flat

purchaser. The value addition made to the goods transferred after the agreement is entered into with the flat purchaser is chargeable to tax by the State Government.

9. According to the respondents, the amendment of 2014 has been introduced incorporating changes to Rule 58 on due and careful consideration of the observations of the Supreme Court in *Larsen & Tourbo* decision (*supra*), after taking opinion from the relevant department of the State of Maharashtra in respect of quantity of goods used at different stages of construction and after taking into account the information by finance department, stages and percentages have been introduced in Rule 58 (1B). It is, thus, submitted that the Rule clearly has nexus with the tax sought to be levied, keeping in mind the principles laid down by the Supreme Court and cannot be said to be arbitrary.

10. Rule 58 (1B), therefore, clarifies the scope of Rule 58 (1A) and ensures that it is the value of the goods only after the works contract is entered into is being levied tax. The rules have nexus to the Supreme Court decision.

11. In the reply, respondent No.2 Joint Commissioner of Sales Tax, Maharashtra State Mumbai purports to point out that proviso to Rule 58 (1) has been incorporated in accordance with

the observations of the Supreme Court in *Gannon Dunkerley II*, by providing for a lump sum deduction in lieu of individual deductions where the contractor has not maintained proper accounts or the accounts are found by the assessing authority to be unworthy of credence.

12. It is submitted that the amendments to Rule 58 were called for by the dealers themselves, who have made representations to the Department seeking such changes. Representatives of the State have also met with the dealers and developers and have considered their representations. It is being submitted that amendment to Rule 58 is workable and is evident from the number of returns filed for refund claimed under the amended Rule 58 and rely on table given in the reply. It is further submitted that the State Government has put in effective machinery to enable implementation of the provisions of amended Rule 58. The Town Planning and Valuation Department will process representations received from the dealers.

13. According to the respondents, Rule 58 of MVAT Rules prescribes a measure of tax on sale of goods element in the case of works contract. Relying on *"Union of India V. Bombay Tyre International Ltd.," reported in (1984) 1 SCC 467* it is submitted that

measure of tax is distinguishable from the nature of tax and so long as any standard which maintains a nexus to essential character of levy has to be regarded as valid basis for assessing measure of levy. Further referring to *"Builders Association of India V. State of Maharashtra" (2012) 55 VST 504 (Bom)*, it is submitted that it is a settled legal position that the legislature or its delegate can choose one among several possible methods of computing measure of the tax and so long as the measure chosen is not arbitrary, the courts would generally not interfere with the choice of the Legislature or its delegate.

14. The reply refers to that the impugned Trade Circulars are clarificatory and do not give any direction as alleged or at all. It is submitted that the Trade Circular 7 T of 2014 grants time up to 30th April, 2014 to developers from 20th June, 2006 to 31st December, 2014 and benefit of this extension is optional. It is further referred to that dead line under the circular having been crossed, the challenge to the circulars is infructuous. The circular merely clarifies that one of the statutorily prescribed method is to be followed. A similar clarification was intended in Trade Circular 14 T of 2012 and that challenge to the same has been negatived by this Court. It is submitted that Trade circular 12 T of 2014 comprises responses to certain frequently asked

questions, making reference to the existing provisions of the MVAT Act and Rules and does not contain any direction. It is further, however, submitted that even in absence of said circular, the dealers are required to comply with the MVAT Act and Rules.

15. Mr. Sridharan, learned senior advocate leading the arguments with other appearing advocates, submits that the petitions predominantly challenge Rule 58 (1A) and Trade Circular No. 7 T of 2014 as those are in express conflict with the dictum under the decision of the Supreme Court in *"Larsen and Toubro Ltd & Another V. State of Karnataka & Anr" (2014) 1 SCC 708*. According to him, paragraphs No. 115 and 124 of said judgment play pivotal role in the matter. Paragraphs No. 115 and 124 of said judgments read thus -

> *"115. It may, however, be clarified that activity of construction undertaking by the developer would be works contract only from the stage the developer enters into a contract with the flat purchaser. 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."*
>
> *"124. 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 (1A) has to be read in the manner that meets this criteria and we read down Rule 58 (1A) accordingly. ***The Maharashtra Government has to bring clarity in Rule 58 (1A) as indicated above****. Subject to this, the validity of Rule 58 (1A) of MVAT Rules is sustained."*

16. The learned senior advocate submits that, Rule 58 (1A) as amended under notification dated January 29, 2014, does not remove the defect noticed in *Larsen and Tourbo's* case (*supra*) and thus is unconstitutional. Trade Circular 7 T of 2014 is *ultra vires* Rule 58 (1) of MVAT Rules, 2005 making valuation method mandatory, although the Supreme Court had directed the State to bring clarity in Rule 58 (1A), with an object to ensure that tax is not directed to immovable property and is directed to value of goods. According to him two issues were settled by the Supreme Court that goods transferred in execution of works contract, after entering into agreement could be subjected to sales tax / VAT and levy of tax could be directed only to value of goods and not the immovable property and had required such clarity to be brought in the rule. Though insertion of rule 58 (1B) on amendment to Rule 58 ostensibly is aimed at providing clarity as to value of goods to be considered as being transferred in execution of works contract by builder / developer at various

stages of construction, however it fails to effectively comply with the directions contained in paragraph No. 124 of the judgment in *Larsen and Tourbo's* case and retains same vagueness noted by the Supreme Court.

17. According to learned advocates, provisions are deficient to capture deductions on account of various costs pertaining to land as immovable property. This may include, for example, profits on land, costs of providing various amenities in the construction project, costs of acquisition of transferable development rights (TDR), cost of acquisition of increase of Floor Space Index (FSI). They further submit that Bombay TMV Rules, 1995 are applicable to vacant lands whereas in the agreement entered into by the developers / builders, subject transfer pertains to developed land. According to them, the provision contemplates that some portion of land may get taxed despite the deductions as are allowed under the provisions and as such, provides for refund. This being so, Rule 58 (1A) does not obviate value of immovable property being taxed. It is contrary to direction of the Apex Court in paragraph No. 124 of the judgment in *Larsen and Toubro's* case. According to learned advocates, the provision for refund of excess value of land proved by the assessee would not save Rule 58 (1A) being unconstitutional, for, *(1957) 8 STC, 561 "A. V. Fernandez*

V. State of Kerala" applied by five Judges Bench in *"Bhawani Cotton Mills Ltd V. State of Pubjab (1967) 20 STC 290* have held that the legislature cannot impose tax merely on the justification that refund of the same may be provided at a later stage. Learned senior advocate relies on an extract from said judgment, which is reproduced herein below -

> *"If a person is not liable for payment of tax at all, at any time, the collection of a tax from him, with a possible contingency of refund at a later stage, will not make the original levy valid."*

18. According to learned advocates, therefore, proviso to Rule 58 (1A) making the provision for refund would not cure invalidity of the Rule, insofar as it results in taxation on some value of immovable property.

19. Relying on paragraphs No. 23 and 28 of the judgment reported in *"State of Rajasthan v. Rajasthan Chemists Association" (2006) 6 SCC 773*, it is submitted that measure / value of tax cannot be divorced from the subject matter of tax. Paragraphs No. 23 and 28 of said judgment are reproduced herein below -

> *"23. .... Obviously, all four components of a particular concept of tax have to be interrelated having nexus with each other. Having identified the taxable event, tax cannot be levied on a person unconnected with the event, nor the measure or value to which rate of tax can be applied can be altogether unconnected with the subject of tax, though the contours of the same may not be identified."*

> *"28. The question of tax on sale of goods may be examined in the same background. The subject of tax being sale, measure of tax for the purpose of quantification must retain nexus with "sale" which is the subject of tax. As noticed above, tax on sale of goods, is tax on the vendor in respect of his sales and is substantially a tax on sale price. The vendor or buyer cannot be taxed dehors the subject of tax, that is, sale by the vendor or purchase of the buyer."*

20. It is submitted that Rule 58 (1A) insofar as it contemplates inclusion of any value relatable to immovable property is *dehors* the subject of tax that is the value of goods deemed to be sold in execution of a works contract and as such, warrants striking down of the rule, being unconstitutional to the extent it imposes tax on value of immovable property.

21. The Learned senior advocate further contends that there is no general power with the statutory authority to refer to another statutory authority, unless expressly provided in the statute itself. Reliance is placed on "*Amia Bala Paul V CIT Shillong (2003) 6 SCC 342*, which was a case relating to a valuation report of valuation officer upon an inquiry held by him, and the reliance on the same by the assessing officer cannot be equated to the inquiry by the assessing officer. Having regard to provisions, the court considered that the assessing officer did not have power to refer the matter to the valuation officer for inquiry by him. It is thus

being contended that determination according to the provisions of Bombay TMV Rules, 1995, as such, would be *ultra vires* the MVAT Act, which does not provide for valuation by any other statutory authority.

22. Learned advocates go on to submit that Rule 58 (1B) fictionally ascertains the value of goods assumed to be transferred in execution of a works contract, depending on the stage of construction. However, according to them, the tax cannot be levied on fictionally prearranged pattern applicable to all cases alike. For said purpose they relied on "*Pandit Banarsi Das V. State of Madhya Pradesh" (1955) 6 STC 93*. Learned senior advocate submits that it is price of goods deemed to be sold, which shall be levied and not on the basis of slabs, which are prone to error. (It has to be noted that the citation is prior to the amendments, to Article 366 of the Constitution of India giving allowance to inclusion of works contract). It is being contended that the stages consider only 5% incorporation of goods in the construction till plinth level whereas the purchaser has to pay tax on 95% of the contract value, after deductions and since according to them value of cement, steel, etc. used in the construction up to plinth level is likely to be far in excess of 5% of goods used in the entire project. As sales tax is a tax on each

transaction of sale, each agreement has to be considered separately for determining value. The stages referred to in Rule 58 (1B), do not accurately measure value of goods transferred.

23. Learned senior advocate, relying on wording of Rule 58 (1) particularly "*may be determined*", submits that it is open to the assessing authority to adopt any other method to arrive at actual value of the goods deemed to be sold in execution of a works contract and as such, Trade Circular bearing No. 7 T of 2014 dated 21st February, 2014 is unreasonable and *ultra vires*. The counsel refers to *"Chunni Lal Parshadi Lal V. Commissioner of Sales Tax (1986) 2 SCC 501* to contend that when an act provides one method of doing a certain thing, unless expressly prohibited any other method can be adopted by an assessee. It is being submitted that the assessee will not be allowed any other method of arriving at such value, (such as *cost plus gross profit method*), as the circulars are binding on the authorities and the assessee, would be denied an opportunity to resort to any other method. Consequently, the impugned circular is bad in law. According to the petitioners, the method, as referred to in *Pandit Banarasi Das V State of Madhya Pradesh & Others" (1995) 6 STC, 93* would be appropriate method to ascertain value of goods, by arriving at cost of goods, the cost incurred in transportation, etc. and the gross profit on

such goods and any other method would be like finding a needle in a haystack, by various deductions. The deductions would not include cost of profit on land. It is vehemently submitted that cost plus profit is workable and most appropriate method. It is thus, submitted that the impugned circular dated 21st February, 2014 bearing No. 7 T of 2014 negates the possibility of ascertaining value of goods by any other method than the ones referred to in the same and as such is *ultra vires* and bad in law.

24. Mr. Patkar, learned advocate *inter alia* contends that reasons given by the Government justifying levy are not sufficient and convincing and indicate non consideration of relevant matters.

25. Learned advocate Ms. Parasnis relies upon Queen's Bench decision of Divisional Court in case of "*Kruse V. Johnson"*, to contend that the Division Bench would have a power to review, if it thinks fit to differ from previous decisions of the Divisional Court on the same subject. Having regard to said case, as had been done in that case, seeks indulgence in the present case to reconsider the matter afresh. She further relies on *(1985) 1 SCC 641 "Indian Express Newspapers V Union of India*". This was a case relating to freedom of press, and was considered that it is court's

duty to protect and on background, the reasonableness of imposition of import duty and auxiliary duty was being considered. She contends that incidence at times tends to be on the land or interest in the same and as such, not in conformity with statutory and constitutional requirements and tends to be arbitrary. She also relies on *(2006) 4 SCC 517 "State of T. N. V. P. Krshnamurthy"*.

26. The Advocate General Mr. Sunil V. Manohar leading the arguments for the State of Maharashtra along with other appearing counsel for the respondents submits that while examining the constitutional validity of the law, fundamentally pith and substance of the Act and provisions have to be looked into. The provisions are introduced with basic object and intention to levy tax on transfer of goods in works contract including the works contract involving construction of building and purchase of the flat / tenements / apartments and the measure has always remained to be value of goods and giving effect to it the manner of computation is being prescribed.

27. Learned Advocate General submits that taking into account upholding of constitutional validity of amendment to section 2 (24) being in tune with the amendment to Article 366 of the

Constitution and further validity of Rule 58 (1A) having been upheld in earlier round of litigation, rationale and the reasons which underwent in considering validity of provisions, apply on all fours to the present case. Present challenge does not require any different approach and / or consideration and as a matter of fact the field having been already circumscribed, nothing further is required to be considered.

28. He submits that it cannot be disputed that the object and intention, underlying the provisions as were subsisting earlier and even under impugned amendment, are not digressed from and provide / direct tax to be levied and imposed on transfer of goods in a works contract.

29. Mr. Manohar submits that so long as tax is directed on the subject of tax and the measure adopted has nexus with the same, a challenge to said measure is untenable and must fail.

30. He relies on Five Judge Bench Judgment of the Supreme Court reported in *AIR 1980 SC 1088* in the case of *"M/s R. R. Engineering Co V. Zilla Prishad Bareilly"*, wherein the bench has considered as under-

> *"16. It may be, and is often so, that the tax on circumstances and property is levied on the basis of income which the assessee receives*

from his profession, trade, calling or property. That is, however, not conclusive on the nature of the tax. It is only as a matter of convenience that income is adopted as a yardstick or measure for assessing the tax. As pointed out in Re a Reference under Govt. of Ireland Act, the measure of the tax is not a true test of the nature of the tax. Therefore, while determining the nature of a tax, though the standard on which the tax is levied may be a relevant consideration, it is not a conclusive consideration. One must have regard in such matters, as stated by the Privy Council in Governor General in Council v. Province of Madras, not to the name of the tax but to its real nature, its pith and substance, which must determine into what category it falls. Applying these tests, the tax on 'circumstances' will fall in the category of a tax on "a man's financial position, his status taken as a whole and includes what may not properly be comprised under the term 'property' and at the same time ought not to escape assessment." This quotation finds place in the judgment of Malik C.J. in the Full Bench decision in 10 District Board of Farrukhabad. (supra) The formulation, which the learned Chief Justice would appear to have extracted from another source, since he has put it within quotes, is in similar terms as that of this Court in Pandit Ram Narain v. The State of U.P. In that case an assessee challenged his liability to pay the tax on circumstances and property under section 14 (1) (f) of the U. P. Town Areas Act, 1914 on the ground that he did not reside within the jurisdiction of the Town Area Committee of Karhal and that Rule 3 framed under section 39 (2) of the Act was invalid. This Court, after referring approvingly to the decision in District Board of Farrukhabad, (supra) particularly to the statement therein that the name given to a tax did not matter and that what had to be considered was the pith and substance of it, observed:

> *A tax on 'circumstances and property' is a composite tax and the word 'circumstances' means a man's financial position, his status as a whole depending, among other things, on his income from trade or business.*

17. The Full Bench decision under appeal in the instant case, R. R. Engineering Co. (supra) has taken the same view of the nature of the tax on circumstances and property by holding that it is not a tax on income but is a tax on a man's financial position, his status as a whole, depending upon his income from trade or business. Earlier another Full Bench of the Allahabad High Court had held in Zila Parishad Muzaffrnagar v. Jugal Kishore that the tax on circumstances and property is fundamentally distinct from and cannot be equated with income tax, that it is not covered by item 82, List I, Schedule 7, of the Constitution and that it is essentially a tax on status or financial position combined with a tax on property. These decisions correctly describe the nature of the tax on circumstances and property. We affirm the view taken therein, especially that the aforesaid tax is not a tax on income.

31. He further relies on *(1996) 3 SCC 465* "*Union of India V. A. Sanyasi Rao*" wherein the Court held thus -

"It is well settled that the word 'income' occurring in Entry 82 in List I of the Seventh Schedule should be construed liberally and in a very wide manner and the power to legislate will take in all incidental and ancillary matters including the authorization to make provision to prevent evasion of tax, in any suitable manner.

The object in enacting Section 44-AC and 206-C as is evident from the Finance Bill, 1978 was to enable the Revenue to collect the legitimate dues of the State from the persons carrying on particular trades in view of the peculiar difficulties experienced in the past and the measure was so enacted to check evasion of substantial revenue due to the State. Trade or business produces or results in income which can be brought to tax. In order to prevent evasion of tax legitimately due on such 'income', Section 44-AC and Section 206-C were enacted, so as to facilitate the collection of tax on that income which is bound to arise or accrue, at the

very inception itself or at the anterior stage and therefore one cannot contend that the aforesaid statutory provisions lack legislative competence. After all, statutory provisions obliging to pay "advance tax" are not anything new and the impugned provisions are akin to that. This is permissible and the standard by which the amount of tax is measured, being the purchase price, will not in any way alter the nature and basis of the levy viz., that the tax imposed is a tax on income. It cannot be liable as a tax on purchase of goods.

Considered in the light of the practical difficulties envisaged by the Revenue to locate the persons and to collect the tax in certain trades, if the legislature in its wisdom thought that it will facilitate the collection of the tax due from such specified traders on a "presumptive basis", there is nothing in the said legislative measure to offend Article 14 of the Constitution. Hence, it cannot be held that section 44-AC read with section 206-C is wholly hit by Article 14 of the Constitution of India."

32. He refers to following observations in said judgment -

"We should also bear in mind the principles laid down in a more recent decision in Ganga Sugar Corporation Ltd. vs. State of U.P. and others (AIR 1980 SC 286), wherein it was held thus:-

> *"Article 14, a great right by any canon, by its promiscuous forensic misuse, despite the Dalmia decision has given the impression of being the last sanctuary of losing litigants. In the present case, the levy which is uniform on all sugarcane purchases, is attacked as ultra vires, on the score that the sucrose content of various consignments may vary from place to place, the range of variation being of the order of 8 to 10 per cent and yet a uniform levy by weight on these unequals is sanctioned by the Act. Price of cane is commanded as the only permissible criterion for purchase tax. The whole case is given away by the very circumstance that, substantially, the sucrose content is the same for sugarcane in the State, the marginal difference being too inconsequential to build a case of discrimination or is blamable on the old machinery. Neither in intent nor in effect*

> *is there any discriminatory treatment discernible to the constitutional eye. Price is surely a safe guide but other methods are not necessarily vocational. It depends. Practical considerations of the Administration, traditional practices in the Trade, other economic pros and cons enter the verdict but, after a judicial generosity is extended to the legislative wisdom, if there is writ on the statute perversity, madness in the method or gross disparity, judicial credulity may shape and the measure may meet with its funeral.*

The Court also quoted the following observations contained in the earlier case - Murthy Match Works Case:

> *"....Even so, a large latitude is allowed to the State for classification upon a reasonable basis and what is reasonable is a question of practical details and a variety of factors which the court will be reluctant and perhaps ill-equipped to investigate. In this imperfect world perfection even in grouping is an ambition hardly even accomplished. In this context, we have to remember the relationship between the legislative and judicial departments of Government in the determination of the validity of classification. Of course, in the last analysis courts possess the power to pronounce on the constitutionality of the acts of the other branches whether a classification is based upon substantial differences or is arbitrary, fanciful and consequently illegal. At the same time, the question of classification is primarily for legislative judgment and ordinarily does not become a judicial question. A power to classify being extremely broad and based on diverse considerations of executive pragmatism, the judicature cannot rush in where even the legislature warily treads."*

33. While considering the challenge in the writ petitions, it would be necessary to refer to preceding litigation. Amendments to section 2 (24) of the Maharashtra Value Added Tax Act, 2002 in 2006 and 2007, questioning constitutional validity on the ground that the amendments transgress the limitations contained in Article 366 (29A) (b) of the Constitution, were

challenged in writ petition No. 2022 of 2007 and other companion writ petitions on the premise that State Legislature purported to bring within ambit and purview of the expression "sale" under MVAT, an agreement for building and construction of immovable property which is not a works contract and questioned competence of the State Legislature to legislate. As a result, the petitioners contended that the amendments seek to impose a tax on a transaction, which would not be "sale" of goods within the meaning of Entry 54 of the State List under Seventh Schedule to the Constitution and as such, contravene the limitations on legislative powers under Article 246 (3) of the Constitution. Consequently, challenge was also posed to the provisions of Rule 58 (1A) of Maharashtra Value Added Rules, 2005 (for brevity hereinafter referred to as "MVAT Rules"), introduced under State notification dated 1st June, 2009, Circular dated 7th February, 2007 issued by the State Government and notification dated 9th July, 2010 issued by the State Government, notifying a composition scheme as well as legitimacy of certain notices had also been challenged.

34. Division Bench of this Court (Dr. D. Y. Chandrachud and R. D. Dhanuka, JJ) under their judgment, have turned down the challenge to the constitutional validity of section 2 (24) as well

as Rule 58 (1A) holding them to the constitutionally valid, leaving it open to the determination of the assessing authorities as to whether there is a works contract in given case or not, as it was not possible to provide a comprehensive or all encompassing list of what would constitute works contract.

35. It was held that Rule 58 (1A) provides for measure of tax. A measure of tax has to be distinguished from the charge of tax and the incidence of tax. The Legislature had acted within its legislative powers in devising a measure for tax by excluding cost of land. The Division Bench also considered that a Trade Circular is only meant for guidance of the trade and circular would not be able to override a legislative provision or would be an exercise in the nature of subordinate legislation.

36. The Division Bench, further observed that value of goods at the time of transfer is to be calculated after making deductions, which are specified under Sub Rule (1). This was permitted to the States as a convenient mode for determining the value of goods in execution of the works contract.

37. And that with the amended definition, cost of land / interest in the land being transferred under the agreement is also required to be excluded from the total value and sub rule

(1A) of Rule 58 stipulates that cost shall be determined in accordance with 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 1st January of the year in which the agreement to sell the property is registered putting the ceiling on the deductions towards cost of land at 70% of the agreement value. The Court considered that nothing was brought on record to show that Sub Rule (1A) of Rule 58 of the MVAT Rules is an arbitrary Rule.

38. The Division Bench, while turning down challenge to Rule 58 (1A) as was then subsisting, observed in paragraph No. 35 thus -

> *35. The challenge to Rule 58(1A), may now be considered. 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 involved in the execution of the construction contract is also transferred, it is the latter component which is brought to tax. The value of the goods at the time of transfer is to be calculated after making the deductions which are specified under sub-rule (1). The judgment in the second Gannon Dunkerley specifies the nature of such deductions which can be made from the entire value of the works contracts. This was permitted to the States as a convenient mode for determining the value of the goods in the execution of the works contract. Sub-rule*

(1A) stipulates that the cost shall be agreement value. Similarly, the cost of the land is required to be excluded from the total 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 1 January of the year in which the agreement to sell the property is registered. The Proviso stipulates that deduction towards the cost of land under the sub-rule shall not exceed 70% of the agreement value. The petitioners have not brought on the record any material to indicate that the proviso to sub-rule (1A) of Rule 58 is arbitrary. Rule 58(1A) provides for the measure of the tax. The measure of the tax, as held by the Supreme Court in its decision in Union of India Vs. Bombay Tyre International Ltd, must be distinguished from the charge of tax and the incidence of tax. The Legislature was acting within the field of its legislative powers in devising a measure for the tax by excluding the cost of the land.

39. Challenge by the petitioners to the Trade Circular dated 7th February, 2007 and 9th July, 2010 was also negatived.

40. While deciding said writ petition No. 2022 of 2007 and other writ petitions, the Division Bench has taken into account various citations *viz.*, *141 STC 298 (SC) M/s K. Raheja Development Corporation; AIR 1953 Allahabad 700 Radha Raman V State of U.P.; AIR 1958 SC 560 State of Madras V. Gannon Dunkerley & Co; (1970) 2 SCC 287 Commissioner of Sales Tax V. Purshottam Premji; (1979) 1 SCC 487 Ram Singh & Sons Engineering Works V. Commissioner of Sales Tax; 1983 (2) Bom. C. R. 267 Vrindavan (Borivali) co-operative Housing Society Ltd., Vs. Karmarkar*

Brothers; (1984) 1 SCC 467 "Union of India V. Bombay Tyre International Limited" (1989) 2 SCC 645 Builders Association of India V. Union of India; AIR 1991 Bombay 27 Maria Philomina Pereira V. Rodrigues Construction; 1992 (2) Bom. C. R. 1 The State of Maharashtra V. Mahavir Lalchand Rathod; (1993) 1 SCC 364 Gannon Dunkerley V. State of Rajashtan; (1999) 5 SCC 725 Veena Hasmukh Jain V. State of Maharashtra; (2000) 6 SCC 579 Hindustan Shipyard Ltd. V. State of A. P.; (2001) 4 SCC 66a Kartar Singh Vs Hari Singh Nalwa; (2006) 3 SCC 1 Bharat Sanchar Nigam Ltd. V. Union of India and *(2007) 9 SCC 220 Jayantilal Investments V Madhuvihar Co-op Housing Society.*

41. The Division Bench of this Court had considered that in the decision in *Gannon Dunkerley Vs. State of Rajasthan (1994) 210 ITR 886 (SC)*, the Supreme Court had accepted the contention of the States that in order to determine value of goods involved in execution of works contract, it would be open to the States to adopt a convenient mode for such determination by taking value of works contract as a whole and to deduct therefrom cost of labour and services rendered by the contractor during the course of execution of works contract. The Division Bench has also further adverted to that the Supreme Court has also emphasized that there could be cases where the contractor has not maintained proper accounts or the accounts are not found to be worthy of credence by the assessing authority. In such cases, it would be

permissible for such legislation to prescribe a formula by fixing a particular percentage of the value of works contract and to allow deduction of amount, which is determined from the value of works contract for the purpose of determining value of goods involved in its execution with a rider that however, the values of deductions should not differ appreciably in the normal circumstances.

42. Later a Division Bench of this Court (Dr. D. Y. Chandrachud and R. G. Ketkar, JJ) under judgment and order dated 30th October, 2012 in writ petition (L) No. 2440 of 2012 and writ petition No. 2502 of 2007 held that the circulars dated 6th August, 2012 and 26th September, 2012 are not *ultra vires* and negatived the challenge to the date of enforcement of composition scheme for the reasons as have been contained in the judgment.

43 The Division Bench in paragraph No. 17 of aforesaid judgment has considered thus -

> *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 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 (1994) 210 ITR 886 (SC), 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 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 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.***

44. This court had then noted that the sub rule (1A) of Rule 58 of MVAT Rules was introduced effective from 20th June, 2006 dealing with a 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 is also transferred to the purchaser. Rule 58 (1A) stipulates that the value of the goods transferred shall be calculated after making deductions under sub-rule (1) and similarly, cost of land has to be deducted from the total agreement value. It was further considered that in so far as the cost of the land is concerned, Rule 58 (1A) provides that it shall be determined in accordance with guidelines appended to the annual statement of rates prepared under the provisions of the Bombay TMV Rules, 1995 as applicable on 1st January of the year in which the agreement to sale is registered. The Court found that Rule 58 (1A) does not entirely incorporate

Bombay TMV Rules, 1995, but only the guidelines which are appended to the annual statement of rates prepared under the provisions of said Rules. However, while understanding the guidelines, it would be open for the assessing authority to have due regard to all the provisions of the Rules, but this is only for understanding that part of the Rules.

45. Challenge in writ petition (Lodg) No. 2440 of 2012 and writ petition No. 2502 of 2012 *inter alia* was on the allegation that the circular dated 26th September, 2012 does not give allowance to any other method apart from the ones which are statutorily prescribed for determination of the assessable value of goods, which are transferred in execution of works contract. It was submitted that Rule 58 (1) does not preclude an assessee while filing returns from taking recourse to the cost plus method. The Division Bench of this Court in said case has further observed that the Supreme Court had held that it would be permissible for the State Legislation to prescribe a formula for determining the charges and labour and service after fixing a particular percentage of the value of the works contract, for the purpose of determining value of goods involved in the execution of works contract. It has been noted that proviso to Rule 58 (1) was enacted to deal with the situation where the Commissioner finds

that the accounts of the contractor are not sufficiently clear.

46. A Division Bench at Aurangabad of this Court (R. M. Borde and S. S. Shinde, JJ) under their order dated 3rd March, 2014 had followed aforesaid orders of the Division Bench, observing that whether there exists works contract in the given case and whether the developer or any other person is liable to pay taxes or dues is to be determined on the basis of facts of each case and it is for the assessing authority to determine such question, if raised, leaving it open to the petitioners to raise appropriate objections before the assessing authority, finding that it is obligatory for the assessing authority to determine such objections in accordance with law, observing further that determination by the assessing officer of the objection by the assessee is also amenable to challenge before appropriate forum, provided under the Act.

47. The decision of the Division Bench on 12th April, 2012 in writ petition No. 2022 of 2007 and other connected writ petitions, had been taken to the Supreme Court, by the aggrieved petitioners. The Supreme Court has dismissed the challenge to amendment to section 2 (24) of the MVAT Act and rule 58 (1A) of MVAT Rules and had approved the decision

rendered by this Court on 12th April, 2012 while deciding *Larsen and Tourbo* case *(2014) 1 SCC 708*, observing thus -

> *"123. Sub-rule (1A) was inserted into Rule 58 by a notification dated 01.06.2009. As a matter of fact, Rule 58(1) of the MVAT Rules provides that the value of the goods at the time of the transfer of the property in goods involved in the execution of a works contract may be determined by effecting certain deductions from the value of the entire contract insofar as the amounts relating to deductions pertain to the said works contract. The challenge was laid to Rule 58(1A) of the MVAT Rules before the Bombay High Court. The Division Bench of the Bombay High Court found that there was nothing to show that the proviso to the said provision was arbitrary. It held that the Legislature was acting within the field of the legislative powers in devising a measure for the tax by excluding the cost of the land. The Division Bench recorded the following reasons in repelling the challenge to Rule 58(1A).*
>
> (The Supreme Court had quoted paragraph No. 35 of the judgment of Bombay High Court in writ petition No. 2022 of 2007 and others, which is reproduced in foregoing paragraph No.38)

In paragraph No. 124 of said judgment has observed thus-

> *"124. 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(1A) 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 MVAT Rules is sustained."

48. While examining the challenge in the present batch of writ petitions, judgment of this Division Bench, authored by Hon'ble Mr. Justice S. C. Dharmadhikari, in "*Hyva (India) Private Limited V. Union of India and Another*" in writ petition No. 4427 of 2013 and other connected matters, would be of immense benefit, wherein challenge had been laid to the validity of Rule 10A of the Central Excise Valuation (Determination of Price and Excisable Goods) Rules, 2000.

49. It has been considered in aforesaid judgment that merely for the legislature devising a mode which reflects full value of measure, it may not be considered that it falls foul on mandate of Article 14 and 19 (1) (g) of the Constitution of India and travel beyond the legislative intent of the parent Act. The nature of levy and reading of relevant provisions of the Act together and harmoniously with the rules, do not lead us to a situation where it can be considered that the challenged rules are unconstitutional or invalid.

50. It has been considered in the same that there are several cases in which measure of this nature has been held to be in tune with the constitutional mandate. The Division Bench has reproduced paragraphs No. 28 and 33 from the decision in case of "*Laghu Udyog Bharati & Anr. V. Union of India and Others" (1999) 6 SCC 418*, which read thus -

> ***"28****. There is a distinction between the object of tax, the incidence of tax and the machinery for the collection of the tax. The distinction is important but is apt to be confused. Legislative competence is to be determined with reference to the object of the levy and not with reference to its incidence or machinery. There is a further distinction between the objects of taxation in our constitutional scheme. The object of tax may be an article or substance such as a tax on land and buildings under Entry 49 of List II, or a tax on animals and boats under Entry 58 List II or on a taxable event such as manufacture of goods under Entry 84 of List-I, import or export of goods under Entry 83 of List-I, entry of goods under Entry 52 of List II or sale of goods under Entry 54 List II to name a few. Theoretically, of course, as we have held in Godfrey Phillips India Ltd. v. State of U.P. and others, 2005 SCALE Page 367, ultimately even a tax on goods will be on the taxable event of ownership or possession. .... But, usually, it would be inexpedient, if not impossible, to recover the tax directly from the passengers and so, it would be expedient and convenient to provide for the recovery of the said tax from the owners of the vehicles themselves." (p.908) (See also: Sainik Motor Jodhpur v. The State of Rajasthan 1962 (1) SCR 517).*
>
> *29. .....*

30 .....

31 .....

32 .....

33. Since service Tax is not a levy on passengers and goods but on the event of service in connection with the carriage of goods, it is not therefore possible to hold that the Act in pith and substance is within the States exclusive power under Entry 56 of List II. What the Act ostensibly seeks to tax is what it, in substance, taxes. In the circumstances, the Act could not be termed to be a colourable piece of legislation. It is not the case of the petitioners that the Act is referable to any other entry apart from Entry 56 of List II. Therefore the negation of the petitioners submission perforce leads to the conclusion that the Act falls within the residuary power of Parliament under Entry 97 of List I."

51. The principles of Statutory Interpretation of Justice G. P. Singh's Thirteenth Edition, 2012 have also been referred to, that, in respect of charging provisions and machinery provision it must be taken into account that rule of strict construction is applied primarily to charging provision in taxing statute and said rule would seldom have application to non charging provision laying down machinery for its calculation or procedure for its collection and such machinery provisions will have to be construed by ordinary rule of construction effectuating liability imposed by charging section and make the machinery workable.

52. It has been considered that nature of tax imposed under

the statute has to be determined by examination of pith and substance of the statute paying more attention to charging section than to the machinery adopted for assessment and collection of tax. It has been further considered that while examining the same, three important components have to be given regard to *viz*., subject of tax, person bearing incidence of tax and the rate at which the tax is levied.

53. This Court has reproduced paragraphs No. 33 and 135 of the decision in case of "*State of West Bengal & Anr. V. Kesoram Industries Limited & Others" AIR 2005 SC 1646*, which read thus-

> "***33***. *We now proceed to enter a deeper dimension in the field of tax legislation by considering the problem of devising the measure of taxation. This aspect has been dealt with in detail in Union of India and others v. Bombay Tyre International Ltd., (1983) 4 SCC 210. Tracing the principles from the leading authority of Re.: a reference under the Government of Ireland Act 1920 and Section 3 of the Finance Act (Northern Ireland) 1934, (1936) A.C. 352, passing through Rella Ram v. Province of East Punjab, 1948 FCR 207, and treading through the law as it has developed through judicial pronouncements one after the other, this Court has made subtle observations therein. It has been long recognized that the measure employed for assessing a tax must not be confused with the nature of the tax. A tax has two elements; first, the person, thing or activity on which the tax is imposed, and secondly, the amount of tax. The amount may be measured in many ways; but a distinction between the subject-matter of a tax and the standard by which the amount of*

tax is measured must not be lost sight of. These are described respectively as the subject of a tax and the measure of a tax. It is true that the standard adopted as a measure of the levy may be indicative of the nature of the tax, but it does not necessarily determine it. The nature of the mechanism by which the tax is to be assessed is not decisive of the essential characteristic of the particular tax charged, though it may throw light on the general character of the tax.

... ...

***135**. The relevant principles culled out from the preceding discussion are summarized as under:-*

(1) In the scheme of the Lists in the Seventh Schedule, there exists a clear distinction between the general subjects of legislation and heads of taxation. They are separately enumerated.

(2) Power of 'regulation and control' is separate the distinct from the power of taxation and so are the two fields for purposes of legislation. Taxation may be capable of being comprised in the main subject of general legislative head by placing an extended construction, but that is not the rule for deciding the appropriate legislative field for taxation between List I and List II. As the fields of taxation are to be found clearly enumerated in Lists I and II, there can be no overlapping. There may be overlapping in fact but there would be no overlapping in law. The subject matter of two taxes by reference to the two Lists is different. Simply because the methodology or mechanism adopted for assessment and quantification is similar, the two taxes cannot be said to be overlapping. This is the distinction between the subject of a tax and the measure of a tax.

(3) The nature of tax levied is different from the measure of tax. While the subject of tax is clear and well defined, the amount of

tax is capable of being measured in many ways for the purpose of quantification. Defining the subject of tax is a simple task; devising the measure of taxation is a far more complex exercise and therefore the legislature has to be given much more flexibility in the latter field. The mechanism and method chosen by Legislature for quantification of tax is not decisive of the nature of tax though it may constitute one relevant factor out of many for throwing light on determining the general character of the tax.

(4) Entries 52, 53 and 54 in List I are not heads of taxation. They are general entries. Fields of taxation covered by Entries 49 and 50 in List II continue to remain with State Legislatures in spite of Union having enacted laws by reference to Entries 52, 53, 54 in List I. It is for the Union to legislate and impose limitations on State's otherwise plenary power to levy taxes on mineral rights or taxes on lands (including mineral bearing lands) by reference to Entry 50 and 49 in List II and lay down the limitations on State's power, if it chooses to do so, and also to define the extent and sweep of such limitations.

(5) The Entries in List I and List II must be so construed as to avoid any conflict. If there is no conflict, an occasion for deriving assistance from non-obstante clause "subject to" does not arise. If there is conflict, the correct approach is to find an answer to three questions step by step as under:

One - Is still possible to effect reconciliation between two Entries so as to avoid conflict and overlapping?

Two - In which Entry the impugned legislation falls by finding out the pith and substance of the legislation?
and

Three - Having determined the field of legislation wherein the impugned legislation falls by applying doctrine of pith and substance, can an incidental trenching upon another field of legislation be ignored?

(6) 'Land', the term as occurring in Entry 49 of List II, has a wide connotation. Land remains land though it may be subjected to different user. The nature of user of the land would not enable a piece of land being taken out of the meaning of land itself. Different uses to which the land is subjected or is capable of being subjected provide basis for classifying land into different identifiable groups for the purpose of taxation. The nature of user of one piece of land would enable that piece of land being classified separately from another piece of land which is being subjected to another kind of user, though the two pieces of land are identically situated except for the difference in nature of user. The tax would remain a tax on land and would not become a tax on the nature of its user.

(7) To be a tax on land, the levy must have some direct and definite relationship with the land. *So long as the tax is a tax on land by bearing such relationship with the land, it is open for the legislature for the purpose of levying tax to adopt any one of the well known modes of determining the value of the land such as annual or capital value of the land or its productivity. The methodology adopted, having an indirect relationship with the land, would not alter the nature of the tax as being one on land.*

(8) ***The primary object and the essential purpose of legislation must be distinguished from its ultimate or incidental results or consequences, for determining the character of the levy. A levy essentially in the nature of a tax and within the power of State Legislature cannot be annulled as unconstitutional merely because it may have an effect on the price of the commodity.*** *A*

State legislation, which makes provisions for levying a cess, whether by way of tax to augment the revenue resources of the State or by way of fee to render services as quid pro quo but without any intention of regulating and controlling the subject of the levy, cannot be said to have encroached upon the field of 'regulation and control' belonging to the Central Government by reason of the incidence of levy being permissible to be passed on to the buyer or consumer, and thereby affecting the price of the commodity or goods."

54. With reference to several decisions settling the principles to be applied for determining the larger issues, in said judgment paragraph No. 35 of "*Gujarat Ambuja Cements Limited & Anr. V Union of India and Anr*" reported in *AIR 2005 SC 3020*, was reproduced which may also be relevant for the present matters, which reads thus -

"35. The point at which the collection of the tax is to be made is a question of legislative convenience and part of the machinery for realization and recovery of the tax. The manner of the collection has been described as "an accident of administration; it is not of the essence of the duty". It will not change and does not affect the essential nature of the tax. Subject to the legislative competence of the Taxing Authority a duty can be imposed at the stage which the authority finds to be convenient and the most effective whatever stage it may be. The Central Government is therefore legally competent to evolve a suitable machinery for collection of the service tax subject to the maintenance of a rational connection between the tax and the person on whom it is imposed. By Sections 116 and 117 of the Finance Act, 2000, the tax is sought to be levied from the recipients of the services. They cannot claim that they are not connected with the service since the service is rendered to

them."

55. Paragraph No. 23 from the judgment in "*National Minerals Development Corporation Ltd V State of M. P. and Another" AIR 2004 SC 2456*, restating principles governing interpretation of charging section or provisions and the machinery provision, has also been reproduced in Hyva's case (*Supra*), observing that measure of tax cannot be equated with the charge or levy of tax, referring to that the Supreme Court has emphasized in the matters of computation and calculation of tax there has to be more flexibility and latitude to the legislature. Said paragraph No. 23 reads thus -

> *"23. Section 9 is not the beginning and end of the levy of royalty. The royalty has to be quantified for purpose of levy and that cannot be done unless the provisions of the Second Schedule are taken into consideration. For the purpose of levying any charge, not only the charge has to be authorized by law, it has also to be computed. The charging provision and the computation provision may be found at one place or at two different places depending on the draftsman's art of drafting and methodology employed. In the latter case, the charging provision and the computation provision, though placed in two parts of the enactment, shall have to be read together as constituting one integrated provision. The charging provision and the computation provision do differ qualitatively. In case of conflict, the computation provision shall give way to the charging provision. In case of doubt or ambiguity the computing provision shall be so interpreted as to act in aid of charging provision. If the two can be read together homogeneously then both shall be given effect to,*

more so, when it is clear from the computation provision that it is meant to supplement the charging provision and is, on its own, a substantive provision in the sense that but for the computation provision the charging provision alone would not work. The computing provision cannot be treated as mere surplusage or of no significance; what necessarily flows therefrom shall also have to be given effect to."

56. The Division Bench has further considered that these principles will have to be applied while interpreting the provisions and the nature of tax and its character. *Hyva's* case was with reference to duty on manufacture of goods and taxable value and it has been observed thus -

"For the purpose of computation or calculation of the duty liability of the parties like the petitioners there is nothing erroneous if the Legislature takes into consideration and account the price at which the principal manufacturer sells the product or goods to the buyer. That is nothing but a measure of the tax. In other words, that is how the tax has to be computed and measured. Such a provision does not alter or change the character or nature of the duty or tax. The tax or duty remains a tax or duty on production or manufacture of goods. Insofar as its measure is concerned, the Legislature thought it fit and in its wisdom to quantify the duty liability of parties like the petitioners on the price which the finished product or goods command in the market. That would be the true measure of the tax according to the Legislature".

57. The Supreme Court in case the of "*Union of India & Others V. Bombay Tyre International Ltd" (1984) 1 SCC 467 = 1983 (14) ELT 1896 (SC)*

has comprehensively and elaborately dealt with various aspects involved in respect of taxing statutes which largely hold the field. The Supreme Court in said case has observed thus-

> *"Nature of an excise duty is indicated by the fact that it is imposed in respect of the manufacture or production of an article, the point at which it is collected is not determined by the point of time when its manufacture is completed but will rest on the considerations of administrative convenience and that generally it is collected when the article leaves the factory for the fist time.*
>
> *The object of assessment when it is sold by the manufacturer does not detract from its true nature, that it is a levy on the fact of manufacture. It has to be borne in mind that method of collecting tax is an accident of administration and it is not an essence of the duty."*

58. In said judgment the Supreme Court has quoted Gwyer C. J. as under-

> *"Theoretically there can be no reason why an excise duty should not be imposed even on the retail sale of an article, if the taxing Act so provides. Subject always to the legislative competence of the taxing authority, a duty on home-produced goods will obviously be imposed at the stage which the authority find to be the most convenient and the most lucrative, wherever it may be; but that is a matter of the machinery of collection, and does not affect the essential nature of the tax. The ultimate incidence of an excise duty, a typical indirect tax, must always be on the consumer, who pays as he consumes or expends; and it continues to be an excise duty, that is, a duty on home-produced or home-manufactured goods no matter at what stage it is collected."*

59. We must make it clear that contentions on behalf of the assessee are that to determine the value of an article, all the expenses be excluded, which do not enter into transfer of goods and the value must be confined to the cost of goods and the profit. It is said that if the deductions claimed are allowed, the price would be brought down to conceptual value.

60. The conceptual nature of the measure of subject of tax occurs as neither the identity of the seller of goods nor the identity of the goods sought to be charged, nor the actual cost charged by the seller is a determining factor. Conceptual value governs the assessment of the levy.

61. New provisions determine the value on the basis of the eliminations and deductions and the value arrived at is charged and chargeable in respect of transfer of goods in a works contract. Specific value of the subject of tax is determined in that context. When that is so, the fundamental basis on which arguments as have been advanced and raised on behalf of the petitioners does not survive. We may add that whether any further deductions can be claimed beyond those already mentioned, may depend on the nature of claims in the case of a particular assessee adducing evidence in a proper case and at

proper stage. In such cases, it will be for the revenue to determine on the evidence before it and what should be the cost to be taken as value of subject of tax for the purpose of MVAT.

62. This Court is to consider validity of provisions valuing taxable goods for the purpose of charging duty. While enacting a measure to serve as a standard as levy, the legislation may not contour it along with the lines which spell out the character of the levy itself. Viewed from this standpoint, it is not possible to accept the contention that because the levy of MVAT is a levy on transfer of goods in a works contract, the value of goods must be limited to cost plus profit. The broader based standard may be adopted and would be within authority and power of legislation. A standard which maintains a nexus with the essential character of the levy can be regarded as a valid basis for assessing the measure of levy.

63. There is further consideration that the value shall be arrived at, assessed and ascertained on the modality as has been referred to under Rule 58 (1) (1A)and (1B) of the MVAT Rules. The value is a measure of tax and Rule 58 provides for determination of value of goods to be arrived at after deductions therefrom, referred under the rules / formulae. Values and items

as referred to under Rule 58 (1), 58 (1A) and 58 (1B) are criteria for computing value of subject of tax at various stages as have been referred to under the Rules. Table under Rule 58 (1B) specifies the stages and value at the stages. The computation of value is to be done in accordance with the terms of the same. It is intended to determine value of goods and provides basis for determining such value. The value has to be ascertained and determined in such a manner as is prescribed and shall be value of the subject of tax for the purpose of charging MVAT. The legislature, while enacting amended rules, did not intend to create a scheme materially different from the one in the previous rule 58 (1A) of the MVAT Rules. The object and purpose remained the same and so did original principle at the core of the scheme, and has been made more flexible and wider.

64. The first essential characteristic of MVAT is it is a tax on transfer of property in goods, secondly, uniformity of incidence is also a characteristic of the tax and thirdly the collection of tax. MVAT can be imposed on assessable value determined with reference to transfer of goods at the stage as referred to in the table. It is legislature's power to legislate in respect of the basis for determining the measure of tax. The computation being made strictly in accordance with the express provisions under

the rules, there is no warrant for confining the value as sought to be submitted by the assessee. It is open for the legislature to adopt any basis for determining the value of a taxable article. The measure for assessing the levy need not correspond completely to the nature of levy, and no fault can be found with the measure so long as it bears nexus with the charge.

65. It is urged that the value for the purpose of levy must be a value loaded with elements, which generally come along in respect of land dealings. Exclusion of the factors referred to by the petitioners is a matter pertaining to assessment on ascertainment of the value of subject of tax and not to the nature of duty. The standard adopted by the legislature for determining value may possess a broader base than that on which the charging provision proceeds. The value of goods determined under the new provisions may also vary according to certain circumstances.

66. It was open for the legislature to specify measure for assessing the levy. The other important considerations are certainty and convenience in the administration of levy from the view point of the assessee and the revenue. The legislation has done so. Both in the earlier / older rule 58 (1A) and the

amended Rule 58 (1A), the value of subject of tax arrived at represents the measure. Value of the subject of tax has to be computed with reference to the rules.

67. The amended provisions define a measure of charge and the standard adopted by the legislature for determining value which may require / press for broader base than that on which the charging proceeds. By now, it is well settled that stage of collection need not in point of time synchronize with the transfer of property in goods for as is being a long standing position that in our country levy has status of constitutional concept while the point of collection is to be located where the statute declares it. Taking into account this, the valuation of tax being made at the stages is a convenient mode for point of collection. It would not be necessarily confused with the nature of tax. Rule 58 (1B) envisages a method of valuation of tax at the stages as have been referred to under the Table for collection of the same. In order to overcome various difficulties, to have the value of taxable articles for the purpose of MVAT, the legislature or its delegate has prescribed table giving stages for the purpose of computation of value of subject of tax. This appears to have been provided in order to have uniformity and to avoid vagaries, disparity or inconvenience from case to case. The same has been

incorporated after deliberation and consultation with concerned departments and would not be liable to be termed as arbitrary.

68. Nature of deductions which can be claimed by the assessee as land cost and the profit for the purpose of determining value may be subject matter for consideration by the Assessing Authority at a proper stage as provided upon evidence.

69. Incidence of MVAT ultimately will always be on the consumer and as such, said tax can be levied at a convenient stage so long as the character of the impost, that is, it is a tax on transfer of goods is not lost. The method and stage of collection do not affect the essence of the tax and relates only to machinery and collection for administrative convenience. It is clear that while MVAT is a levy on transfer of goods in a works contracts *inter alia* of the nature of construction and buildings, the stage of collection need not, in point of time coincide with transfer of goods. The MVAT is chargeable with reference to the value of goods being transferred in a works contract and the value is to be determined in express terms of the provisions. The Courts have always regarded and recognized that measure employed for assessing tax must not be confused with the nature of tax. There is clear distinction between subject matter

of tax and the standard by which amount of tax is measured. The two elements are described as subject of tax and measure of tax. The levy of tax is defined by its nature and the measure of tax may be assessed by its own standard. A standard may be adopted as the measure of levy and may indicate nature of the tax but would not necessarily determine it. Though the measure of tax is furnished by the method referred to under Rule 58, it does not cease to be a tax on transfer of goods in a works contract. The Supreme Court and the other High Courts have approved and upheld the measure of levy and action under a legislation with the annual value of place prescribing a uniform formula for determination.

70. As referred to above, in earlier challenge, the division bench of this court has considered that Rule 58 (1A) provides that where the construction contract involves transfer of interest in immovable property - land, value of goods in execution of works contract shall be calculated after making deductions under sub rule (1). To put it in other words, where in construction contracts element of transfer of interest in land is involved, Rule 58 (1A) provides for mandatory method of computing the assessable value. The Circular of February 21, 2014 clarifies what has been provided in rules and as such, is not *ultra vires*.

The circulars cannot be said to have travelled beyond the boundaries, which are set out in the rules. Rule 58 (1A) is mandatory and land cost has to be determined by the method and mode as is specified. It cannot be said that it is not a permissible method in view of High Court and Supreme Court decisions referred to herein before. Once it is permissible, it is open for the legislature or its delegates to adopt one of those methods on principle of uniformity. It was held by the Supreme Court that it would be permissible for the state legislature to prescribe a formula for determination of charges and to allow deductions of amount. Proviso to rule 58 (1A) and 58 (1B) were enacted to deal with such a situation.

71. Having regard to discussion hitherto, legislative competence of state to devise, adopt, prescribe, develop and compute a measure, mode and machinery for collection is beyond question.

72. It will have to be considered that while the Supreme Court had directed that the Government has to bring clarity in the rules, it had not disturbed rule 58 (1A), requiring valuation of land pursuant to Annual Statement of Rates of Bombay TMV Rules, 1995. Thus, application of and governance of valuation of

lands pursuant to the same, would not be open for re-examination in the challenge in the present batch of petitions. The Government of Maharashtra has introduced the proviso giving an opening to the dealers to prove before the Department of Town Planning and Valuation that the actual cost of land is higher than that determined in accordance with the Annual Statement of Rates (including guidelines) under the Bombay TMV Rules, 1995. Apprehension as such, that determination of land value pursuant to Annual Statement of Rates may be different from actual cost, is taken care of and a remedy is made available. The proviso opens an avenue to the dealer to prove actual cost. It cannot be said that by such proviso, tax assessed would not to be directed to the value of goods. Intention is to determine value on evidence produced about land cost.

73. Trade circulars impugned, particularly, which has been focused on, dated 21st February, 2014 referring methods of computation, are clarificatory in nature and do not transgress the contours of Rule 58 of the MVAT Rules. As had been referred to in earlier round of litigation, in such an event, it cannot be said that the impugned circulars are rendered bad or illegal or for that matter unconstitutional. Trade Circular No. 12 T of 2014 dated 17th April, 2014 comprises responses to some frequently

asked questions. The circulars clarify the mandate of statute and do not introduce a condition or restriction not found in the rules or statute.

74. While prescribing the modalities of valuation under rule 58 and particularly under rules 58 (1), 58 (1A) and 58 (1B) of MVAT Rules, the object all along appears to adopt a standard and measure for assessment of subject of tax and the object is neither lost sight of nor is obfuscated. The rules all along have in view and nexus with subject of tax.

75. Allegation with respect to the notifications and Rules being bad for want of previous publication, cannot be sustained in the facts and circumstances of the case, particularly having regard to that the amendments to Rule 58 of the MVAT Rules, have been introduced by the State Government having been satisfied that circumstances exists for immediate action and as such, it had dispensed with the requirement of previous publication. It has come in the reply of the respondents that the notification clarifies that the Government of Maharashtra was satisfied that the circumstances exist, which render it necessary to take immediate action to amend MVAT Rules and to dispense with condition of previous publication under proviso to section 83 (4)

of the MVAT Act. It cannot be said that the government had no power, authority or jurisdiction to make the rules operative without previous publication. As such, it cannot be said that absence of previous publication would render the rules defective, illegal, *ultra vires* or bad in law.

76. While reproducing extract from the judgment in the case of "*State of West Bengal & Anr. V. Kesoram Industries Limited & Others" AIR 2005 SC 1646*, emphasis has been given on that – to be a tax on land, the levy must have some direct relationship with the land and the methodology adopted having an indirect relationship with the land, would not alter the nature of tax and in this case, it being the MVAT. It is to be borne in mind that defining the subject of tax is a simple task and devising measure for tax is far more complex exercise, as has been observed by the Supreme Court and the legislature has to be given much more flexibility in the latter field. Once having taken into account that it is competent of legislature to make a choice and if it does so for the matters of uniformity and convenience, the rules and the circulars cannot be said to be *ultra vires*, unconstitutional or bad in law. Rules 58, 58 (1A) and 58 (1B) and rest of the rules are precisely intended to charge and collect levy of tax assessed pursuant to the same at the stages, as referred to.

77. Division Bench, in earlier round of litigation has already considered that value of goods at the time of transfer is to be calculated according to rules and Rule 58 1A of the MVAT Rules provides for a measure of tax and that the legislature was acting within field of its legislative powers in choosing measure for the tax. This court had further held that where the legislature has an option of adopting one of several methods of determining assessable value, it is "trite law" that the legislature can choose one amongst other accepted modalities of computation. The legislature or its delegate in framing subordinate legislation are entitled to provide, **in the interest of uniformity** that a particular method of computation shall be adopted. So long as the method is not arbitrary and has nexus with the object of the legislation, the court would not interfere in the **statutory choice made by the legislature or by its delegate.** The court also considered that Rule 58 (1A) mandates how the value of goods involved in execution of a construction contract at the time of transfer of property is to be determined when the contract involves transfer of land or interest therein.

78. The court had considered thus -

"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."

This court, referring to *(1994) 210 ITR 886 (SC) "Commissioner of Wealth Tax V. Sharvan Kumar Swarup & Sons*", has observed that the Supreme Court has held that the rule was intended to impart uniformity in valuations and to avoid vagaries and disparities resulting from application of different modes of valuation in different cases where nature of the property is similar and such rules are in the nature of rule of evidence as to the choice of one of the accepted methods of valuation.

79. Judgment reported in *(1957) 8 STC, 561 "A. V. Fernandez V. State of Kerala"* and *(1967) 20 STC 290 "Bhawani Cotton Mills Ltd V. State of Punjab*" relied on by learned senior advocate, would not hold field in the present matters, for, the MVAT is not directed at all as levy on immovable property. It would not be possible to say that the tax was levied on immovable property because rules provide for an opportunity to give evidence for valuation of subject of tax before the Department of Town Planning and Valuation that the actual cost of the land is higher than that determined in accordance with the Annual Statement of Rates (including guidelines) prepared under the provisions of Bombay Stamp

(TMV) Rules, 1995.

80. Taking into account aforesaid discussion, it cannot be said that valuation of tax has no nexus to the subject matter and as such, reliance by learned senior advocate on paragraphs 23 and 28 of the judgment in the case of *"State of Rajasthan V. Rajasthan Chemists Association" (2006) 6 SCC 773*, is of little assistance to the petitioners. So is the case in respect of citation in *"Amia Bala Paul V. CIT Shillong (2003) 6 SCC 342*, especially when the Supreme Court, in its decision in *Larsen and Tourbo (Supra)* has not considered that the mode prescribed under Rule 58 (1A) is not valid. Reliance on other citations, having regard to the considerations referred to herein above, would not carry forward the case for the petitioners.

81. Reliance by learned advocate Ms. Parasnis on "*Kruse V. Johnson*" would also be of little assistance, for, the matter had been taken to the Supreme Court in earlier round. So is the case in respect of *(1985) 1 SCC 641 "Indian Express Newspapers V. Union of India"*, for, facts of that case are widely apart and observations in said decision would not have any bearing on the present case. Judgment in *(2006) 4 SCC 517 "State of T. N. V. V. P. Krshnamurthy"* would also have no bearing in the present scenario.

82. The rules cannot be said to travel beyond the parent act or for that matter alters the character or nature of the tax. We, therefore, do not hesitate to reject the challenge on the ground that the measure provided is beyond the subject for want of nexus to the essential character of levy. It cannot be said that the object underlying rules has no link to and nexus with essential character of the tax being levied.

83. Whether prescription under the provisions according to the contention is inadequate and may be falling short but its incorporation would not be bad or illegal or *ultra vires* the constitution. In the process, in some cases, if there is any over payment of tax, the provision makes allowance for its refund and would not tantamount to tax on land. Legislature does not intend to levy tax on matters other than as are intended under the enactment. Even in case of undervaluation, after determination, till such time overpayment would be towards the tax on goods so long as land value is not revalued and it would continue to tax on goods up to this time, its nature being MVAT over and in excess on taxable value. Only on redetermination, in a particular case if amount is to be refunded, it cannot be said to be bad for being tax on land.

84. For all aforesaid reasons, we are not in agreement with the petitioners. We are not impressed by the submissions made on behalf of the petitioners that valuation of goods under Rule 58 of the MVAT Rules would not let the proper authority to probe into transactions of land dealings by the developers, depending upon facts and circumstances of and evidence in particular case, as it would be open for the competent authority to make proper inquiry and seek details of the transactions and the price at which the property had been purchased. Investigation and inquiries incidental to valuation assessment and the recovery of tax are not precluded or prohibited under the scheme of the rules and there need not be any specific provision for the same, however, with a rider that said investigation or inquiry would not be necessary on vague and general grievances.

85. Having considered that the predominant challenges, as referred by learned senior advocate, are not sustainable, the measures and the mode being not ultra vires, the other reliefs claimed in the nature of declarations and directions would be rendered of little significance and are also rendered unsustainable and do not call for any indulgence in view of above discussion.

86. Taking into account aforesaid and the foregoing discussion, it cannot be said that the challenge to Rule 58, 58 (1A) and 58 (1B) and the trade circulars 7 T of 2014 and 12 T of 2014 is sustainable and can be upheld.

87. As a result of aforesaid discussion, we do not see any substance in the challenge and the writ petitions as such, stand dismissed. In the circumstances, there is no order as to costs.

[SUNIL P. DESHMUKH, J.] [S. C. DHARMADHIKARI, J.]

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