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IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) 1907 OF 2012

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Judgments Reserved on:10.4.2012.

Judgment Delivered on:01.6.2012

1.W.P.(C) 1907 OF 2012

M/S LARSEN AND TOUBRO LTD. & ANR

... PETITIONERS

Through :

Mr. N. Venkatramani, Sr.
Advocate with Mr. P.
Purushottam, Mr. Sanand
Ramakrishnan, Mr. Rajeev
Mishra, Mr. Arun Francies, Mr.
M. Shaffique, Mr. Goerge
Francis & Ms. Puja Jain,
Advocates.

VERSUS

UNION OF INDIA & ORS.

... RESPONDENTS

Through:

Mr. Vivek Tankha, ASG with
Mr. Rishabh Sancheti & Mr.
H.C. Bhatia, Advocate.

AND

2. W.P.(C) 1897/2012

M/S LARSEN AND TOUBRO LTD AND ANR
Vs. GOVT OF NCT OF DELHI & ORS

3. W.P.(C) 1898/2012

LARSEN AND TOUBRO LTD AND ANR.
Vs. GOVT.OF NCT OF DELHI & ORS.

4. W.P.(C) 1899/2012

M/S LARSEN AND TOUBRO LTD AND ANR
Vs. GOVT OF NCT OF DELHI & ORS

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| 5. W.P.(C) 1900/2012 | LARSEN AND TOUBRO LTD AND ANR.
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| 6. W.P.(C) 1901/2012 | LAARSEN AND TOUBRO LTD AND ANR
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| 7. W.P.(C) 1902/2012 | LARSEN AND TOUBRO LTD AND ANR.
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| 8. W.P.(C) 1903/2012 | LARSEN AND TOUBRO LTD AND ANR
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| 9. W.P.(C) 1904/2012 | LARSEN AND TOUBRO LTD AND ANR
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| 10. W.P.(C) 1905/2012 | LARSEN AND TOUBRO LTD AND ANR.
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| 11. W.P.(C) 1906/2012 | LARSEN AND TOUBRO LTD AND ANR
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| 12. W.P.(C) 1908/2012 | M/S LARSEN AND TOUBRO LTD AND ANR
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| 15. W.P.(C) 1911/2012 | LARSEN AND TOUBRO LTD AND ANR
Vs. GOVT. OF NCT OF DELHI & ORS |
| 16. W.P.(C) 1912/2012 | LARSEN AND TOUBRO LTD AND ANR
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33. W.P.(C) 1933/2012 LARSEN AND TOUBRO LTD AND ANR
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36. W.P.(C) 1936/2012 LARSEN AND TOUBRO LTD AND ANR
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39. W.P.(C) 1939/2012 LARSEN AND TOUBRO LTD AND ANR.

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40. W.P.(C) 1940/2012	LARSEN AND TOUBRO LTD Vs. GOVT. OF NCT OF DELHI & ORS
41. W.P.(C) 1941/2012	LARSEN AND TOUBRO LTD AND ANR. Vs. GOVT.OF NCT OF DELHI & ORS.
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48. W.P.(C) 1948/2012	LARSEN AND TOUBRO LTD AND ANR. Vs. GOVT.OF NCT OF DELHI AND ORS.
49. W.P.(C) 1949/2012	LARSEN AND TOUBRO LTD AND ANR Vs. GOVT. OF NCT OF DELHI AND ORS.
50. W.P.(C) 1950/2012	LARSEN AND TOUBRO LTD AND ANR Vs. GOVT. OF NCT OF DELHI AND ORS
51. W.P.(C) 1953/2012	LARSEN AND TOUBRO LTD AND ANR Vs. GOVT.OF NCT OF DELHI AND ORS.
52. W.P.(C) 1957/2012	LARSEN AND TOUBRO LTD AND ANR Vs. GOVT OF NCT OF DELHI AND ORS.

CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

A.K. SIKRI, ACTING CHIEF JUSTICE:

1. All these petitions, 52 in numbers, are filed by the same petitioner namely M/s Larsen & Toubro. The entire batch relates to the assessment year 2008-09 wherein the orders passed under Delhi Value Added Tax, 2004 (hereinafter referred to as the DVAT Act) read with Delhi Value Added Tax Rules, 2005 (in short 'the DVAT Rules') are questioned. The composition of these 52 writ petitions is as follows:-

(a) The 3rd respondent i.e. VAT Officer, (Ward 202) has passed separate orders of assessment demanding tax and interest under section 32 of the Act and penalty under Section 33 of the said Act for each month commencing from April 2008 to March, 2009. This resulted in 12 assessment orders dated 02.02.2012 and 12 penalty orders dated 02.02.2012 challenged by way of 24 writ petitions.

(b) The petitioners moved an application for rectification under Section 74B of the DVAT Act against both orders of assessment and penalty proceedings. The 3rd respondent, passed 12 orders of rectification dated 6.3.2012 against assessment orders demanding tax and interest and separate 12 orders for penal proceedings dated 6.3.2012. These are again challenged by way of 24 further writ petitions.

(c) Besides the above, the petitioners have filed 4 more writ petitions, two consolidated writ petitions (one for tax and interest and the other for penalty proceedings) against the original assessment orders and penalty proceedings and two more consolidated writ petitions - one for tax and interest and the other for penalty proceedings, against the rectification orders.

2. It is thus clear that in all these petitions, common issues have been raised. Precisely for this reason all these petitions were heard together and can conveniently be disposed of by a common judgment with which we are proceeding hereunder.

3. A gist of various petitions narrated herein above would disclose that primarily two issues arise for consideration namely;

- (i) Vires of Section 5 (2) of the DVAT Act, 2004 and Rule 3 (2) of the DVAT Rules, 2005 which is challenged as unconstitutional, essentially on the ground that it does not provide for a proper mechanism to compute the taxable turnover after deducting 'turnover of sub contractors' and does not conform to the law laid down by the Supreme Court in the judgment titled '*State of Andhra Pradesh Vs. Larsen & Toubro Limited*' reported in 2008 (9) SCC 1.
- (ii) Validity of the impugned orders passed by the respondent no.3 which is questioned on the premise that have been passed in gross violation of the principles of natural justice inasmuch as respondent no.3 had neither issued notice nor afforded an opportunity of hearing in deciding the exemption and exclusion on labour and service

charges, incurred by the petitioner in execution of the works contract.

4. In order to appreciate the controversy which has arisen in the form of aforesaid two issues, it would be apposite to scan through the material facts. We can cull out these facts from Writ Petition (C) 1907/2012 which was referred to at the time of arguments by the counsel for both the parties inasmuch as paper book of this writ petition contains all the material facts which form part of basis for filing other writ petitions as well:-

- (a) The respondent no.3 issued notice dated 20.7.2011 irregular claim of exemption on branch transfer/incorrect claim of concessional rate of tax without 'C' form, short payment of tax due to wrong determination of taxable turnover/wrong application of tax rate. As per the department there was irregular grant of exemption claimed by the petitioner on transit sale without furnishing E-I & II forms. It was premised on the assertion that Section 6(2) of CST Act 1956 read with rule 12(4) of the central Sales Tax (Registration and Turnover) Rules, 1957 provides that the dealer should obtain a certificate in form EI or EII as the case may be from the selling dealer and submit it along with evidence about the sale effected when the goods are in transit from one state to another in order to avail of exemption on sale in transit. Further there was incorrect claim of concessional rate of tax without furnishing form-C and department alleged so on the ground that Section 8(4) of the CST Act read with rules made there under stipulates that sale of goods by one registered dealer to another registered dealer may be allowed at the concessional rate of tax by

three per cent if the dealer furnishes a declaration of sales, otherwise tax is leviable at the rate of applicable to local sale in the State. The petitioner was asked to furnish certain records maintained there.

- (b) One more notice was issued on 13.10.2011 giving another opportunity as records were not produced pursuant to earlier notice.
- (c) This was followed by two more show cause notices both dated 11.11.2011 wherein it was mentioned that the additional information sought for under Section 59 of the DVAT Act vide notice dated 20.7.2011 and 13.10.2011 were not supplied by the petitioner. Still, yet another opportunity was granted to the petitioner to furnish the required information documents on 21.11.2011 and 20.8.2011 respectively. It was specifically mentioned that if the petitioner failed to do so, it would be presumed that the petitioner was not interested in submitting the documents and was deliberately avoiding. The petitioner was put to notice that in such an eventuality, the ex parte penalty assessment i.e. best judgment assessment would be made. It was also stated that no further opportunity shall be given. The petitioner was also put to notice that as per Section 88 (14) of the DVAT Act penalty could also be attracted.
- (d) It is an admitted fact that even thereafter the information as required by the respondent no.3 was not furnished on the dates fixed. The representative of the petitioner appeared on those dates and the proceedings were recorded in the daily order sheets. The order sheet dated 30.1.2012 records the appearance of the advocate of the petitioner. It is further mentioned that default notice had already been

issued on the basis as AGCR order passed and since there was mistake apparent on record, a *suo moto* rectification order was required. In the circumstances, following recording was made in the said order sheet:-

“Further on going through the sale – purchase summary / returns of the dealer it has been found that the dealer has claimed exemption on account of sub-contract turnover under work contract and also claimed exemption on labour, service charges during the year consideration and submitted a written explanation in this regard. On scrutiny it has been found that the dealer used the material in Delhi in the execution of work contract. The said work contract awarded by DIAL. However, as per rule 3 of DVAT 2005 no such exemption is mentioned. Further the dealer failed to file the documents in r/o labour/service charges claimed in the return, sale-purchase summary. The claim on both these accounts is hereby disallow & taxed u/s local act in the absence of documents claiming for exemption and also sub-contractor turnover claim of exemption not covered under Rule 3 of DVAT 2005 work contract. Accordingly case is kept for order.”

However, we may mention that vide letter dated 30.1.2012 the petitioner had made detailed submissions contending that it was entitled to have exemption in respect of the turnover on Import Sales and taxability of turnover of the sub-contractors again in their hands.

- (e) Thereafter, the respondent no.3 sent 12 notices dated 2.2.2012 under Section 32 of the DVAT Act of default assessment of tax with interest. In these notices, it was inter alia stated that on scrutiny of returns/sale purchase summary, it was found that the petitioner got the contract and used the material in the execution of works contract in

Delhi. The dealers had claimed sub-contractor's turn over deduction from the taxable turn over as the TDS @ 2% deducted by the petitioner. The notice mentioned that this practice of the dealer was not accepted as this deduction was not allowed under Rule 3 of DVAT Rules, 2005 and also keeping in view the determination under Section 84 of the Commissioner, VAT vide order dated 23.12.2009 in the matter of M/s Doshion Veolia Water Solutions Pvt. Ltd. wherein it was held that the turnover of the sub-contractor cannot be allowed as exemption from the turnover of the main contractor. The petitioner was accordingly directed to pay tax of the amount specified in these assessment orders.

- (f) On 22.2.2012 the petitioner filed rectification applications under Section 74B of the DVAT Act before the respondent no.3 in respect of all the aforesaid 12 assessment orders. These rectification applications, however, were dismissed vide impugned order dated 6.3.2012 which were passed in the presence of counsel for the petitioner.

5. The reasons stated in this order disclosed that as per Rule 3(2) where the amount of charges towards labour, service and other like charges are not ascertainable from the books of accounts of the dealer, the amount of such charges shall be calculated, at the rate of 25% of the total value of contract in respect of civil work. But in the original default assessment, 25% was allowed on labour, service and other like charges. This was, according to the adjudicating authority, a mistake apparent on the face of the record and to this extent, the rectification was allowed.

6. However, on the other aspect, the impugned order went on to say that on scrutiny of returns/sale purchase summary, it is found that the dealer got the contract and used the material in the execution of works contract in Delhi. Dealer has claimed sub-contractor's turnover deduction from the taxable turnover as the TDS @ 2% deducted by the dealer. This contention of the dealer is not accepted as this deduction is not allowed under Rule 3 of DVAT Rules, 2005, and also keeping in view of the Determination under Section 84 of the Commissioner, VAT vide order No. 246/CDVAT/2009/14 dated 23.12.2009 in the matter of Ms Doshion Veolia Water Solutions Pvt. Ltd, wherein it has been held that turnover of the Sub-contractor cannot be allowed as exemption from the turnover of the main contractor. With regard to labour, services and other charges, the dealer could not produce the documents related to deduction on this account. So the authority allowed only @ 25% of labour, services and other like charges of total value of contract and balance added in the taxable turnover @ 12.5% with interest.

7. It is thus clear from the above that the respondent no.3 proceeded to disallow the entire deduction on the sub-contractor's turnover on the ground that there was no provision under Rule 3 of the DVAT Act and DVAT Rules. Rule 3 of the DVAT Rule provides such an exclusion.

8. We may clarify at this stage that the CST proceedings on "E" and "C" declaration forms culminated in separate CST assessment orders dated 29.12.2011, as amended by Rectification Order dated 31.01.2002. This matter is not before this Court, as these are separate proceedings for which notices have been issued, opportunity granted and then orders passed. Here we are concerned only with the aforesaid rectification order dated 6.3.2012 passed by the respondent no.3 disallowing the deduction of sub-contractor's

turnover on the ground that there is no provision or mechanism under DVAT Rules or DVAT Act and further that the petitioner had failed to produce the books as records labour and service charges. The petitioner in fact accepts the position that there is no such provision under Section 5 of the DVAT Act or Rule 3 of DVAT Rules. It is because of this reason that the petitioner is challenging the vires of these proceedings.

9. Mr. N. Venkatramani, learned Sr.Counsel who appeared for the petitioner in all these cases condemned the omission in the aforesaid provisions submitting that it was against the spirit of the Constitutional provisions relating to work contract legislation. Highlighting the historical background of the work contract legislation, Mr. Venkatramani, argued that the Constitutional Bench, in the case of *State of Madras Vs. Gannon Dunkerley & Co.*, 1958 (9) STC 353 (SC) held that the expression “sale” in Nomen Juris would only mean and include transfer of property in goods as “Chattle Qua Chattle” and would not cover within its ambit, sale of goods in an indivisible works contract. The Constitutional Bench clearly held that a divisible contract of sale and service can be taxed on the ‘sale’ portion whereas an indivisible works contract cannot be taxed as ‘sale’. This necessitated the 46th Constitutional Amendment wherein a new sub-article 29A was introduced to Article 366 of the Constitution. Through this Article, six types of transactions which, under the conventional definition of sale, would not mean ‘sale’ had now become “Deemed Sale”. One such transaction is taxing the Indivisible Works Contract: Article 366 (29A) (B) reads as “Tax on the sale of purchase of goods” includes a tax on the transfer of property in goods (whether as goods or in some other form) involved in execution of works contract. Post the 46th Constitutional Amendment, the

Constitutional Bench in the judgment titled, '*Builders Association of India and Others Vs. Union of India*', reported in 1989 (73) STC 370 (SC) at page 73 was pleased to hold that prior to the 46th amendment, the supply/sale component in a divisible contract could be taxed. Whereas after the 46th amendment, it had become possible for the States to levy sales tax on the value of the goods involved in a works contract, in the same way in which the sale tax was leviable on the price of the goods and the material supplied in a building contract which had been entered into in two distinct and separate parts. Yet another Constitutional Bench, in the matter titled, '*Gannon Dunkerley & Co. Vs. State of Rajasthan*' (*Second Gannon Dunkerley*) reported in 1993 (88) STC 204 (SC) held that the expression 'tax on the sale of purchase of goods', in Entry 54 of the State List therefore includes a tax on the transfer of the property in goods (whether as 'goods' or in some other form) involved in the execution of works contract also. The tax leviable by virtue of sub clause (b) of Article 366 (29A) of the constitution thus becomes subject to the same discipline to which any levy under Entry 54 of the State List is made subject to under the Constitution. While dealing with the measure of tax, the Bench was pleased to hold that the value of goods, which can constitute the measure for the levy of the tax has to be the value of the goods at the time of incorporation of the goods, in the works and not the cost of acquisition of the goods by the Contractor. While deciding further, the Court catalogued a list of exclusions which cannot form part of the measure of taxation, while taxing works contract.

10. Predicated on the aforesaid Constitutional amendment and two Constitution Bench judgments Mr. Venkatramani argued that it was the constitutional obligation of all the States, while framing the rules to ensure

that all proper deduction are allowed so that they do not form part of measures of taxation and these deductions specifically include sub-contract turnover. He submitted that this was in fact done by all states which in their respective legislations provided a 'charging provision' for taxing work contracts and also framed rules permitting deduction of various services and other charges including deduction of sub contract turnover. According to him the State of Delhi could not be an exception. Rather under the erstwhile Delhi Works Contracts Act and Rules, 1999, deduction of amount paid to a sub-contractor was specifically allowed vide rule 5. However, this was omitted by introducing and DVAT Act and DVAT Rules which according to him was a sheer legislative lapse.

11. Learned Senior Counsel referred to Section 36 (1A) of the DVAT Act which casts an obligation on the part of the main contractor to deduct TDS while making payments to the sub-contractor, over and above Rs. 20,000/- and TDS Certificates are issued in favour of the sub-contractor to enable them to seek adjustments at the time of payment of taxes at their end. Still the DVAT Act and Rules do not provide any mechanism for deducting the sub-contractor's turnover in the hands of the main contractor, which situation was incomprehensible. Learned Senior Counsel also took pain to demonstrate the adverse consequences in the absence of deduction mechanism of sub-contractors turn over which he narrated in the following sequence.:-

- (i) The Constitutional Bench, in both Builders Association and Gannon Dunkerley case, was pleased to hold that the limitations and discipline, which would prevail while taxing goods as chattle under Entry 54, List-II, would

prevail also to a works contract levy. In the second Gannon Dunkerley, the Constitutional Bench was pleased to hold that power of the States under Entry 54 of the State List is subject to two limitations – (1) flowing from the entry itself which makes the said power subject to provisions of Entry 92A of List-I and the other flowing from the prohibition contained in Article 286. Under Entry 92A of List-I, Parliament alone has the power to make the law, in respect of taxes on sale or purchase of goods, taking place in the inter state trade or commerce. The levy and collection of such tax is governed by Article 269 of the Constitution of India.

- (ii) Secondly, Article 286 of the Constitution prohibits the States from making a law, imposing or authorizing a tax on the sale or purchase of goods, when it takes place either outside the State or in the course of Import or export.
- (iii) The difference between a pure labour & service contract and a sub-contractor's turnover is, in the case of the former, there is only a pure rendition of service and there is no transfer of property in the goods, in the execution of the works contract, alongwith rendition of services.
- (iv) The transfer of property in goods, in the execution of Works Contract, by the sub-contractor, may include goods procured locally, inter-state or by way of import and may also include further sub-contracting. These are to be excluded while computing the taxable turnover of the sub-contractor, while passing the assessment order in the hands of the sub-contractor under the local legislation, in view of the mandate by the Constitutional Bench in second Gannon Dunkerley case.
- (v) Therefore, it would be consistent, appropriate, effective and legal to do the turnover assessment of works contract, executed by the sub-contractor, only in the hands of the sub-contractor and correspondingly give an exclusion in the hands of the main contractor. This

would achieve the purpose and spirit of Article 366 (29A) (b) in computing the correct quantum of tax liability in the hands of the main contractor in executing a works contract.

- (vi) If this is not done, it would result in multiple tax levies of the same turnovers, both in the hands of the sub-contractor and also the main contractor.
- (vii) This would be in clear conflict and gross violation of the mandate envisaged under Entry 54, List-II of the Constitution.
- (viii) The issue is plain and simple. When dealer “A” makes an ordinary sale to dealer ‘B’, Chattle Qua Chattle, the turnover of ‘B’ can never be grossed up or assessed in the hands of ‘A’, nor can the turnover of ‘B’ assessed twice both in the hands of ‘A’ and ‘B’, unless ‘A’ retransfers or re-sells the goods, which is an independent sale activity in the hands of ‘A’.
- (ix) Similarly, the turnover of sub-contractor B, cannot be assessed or grossed up in the turnover of main contractor “A” nor can the turnover of sub-contractor B assessed twice, both in the hands of B and A.
- (x) Considering all these, all the State Legislations including erstwhile “Delhi Works Contract Act, 1999” envisaged a deduction of sub-contractor’s turnover in the hands of the main contractor, which is conspicuous by its absence under the present DVAT Act, 2004 and DVAT Rules, 2005.

12. Mr. Venkatramani also argued that the multiple levy of tax i.e. both in the hands of the main contractor as well as in the sub-contractor was not permissible having regard to the judgment of the Apex Court in the case of *State of Andhra Pradesh Vs. Larsen & Toubro*, 2008 (9) SCC-I.

13. To sum up, the contention of the petitioner is that;

- (i) There is only one transfer of property in goods. There is no re-transfer or multiple/plurality of deemed sales.
- (ii) There can be incidence of levy, only once. When the property passes from the sub-contractor to the contractee or the customer, even though there is no privity of contract between the sub-contractor and the customer and the contract, if at all exists only between the customer and the main contractor.
- (iii) Consequently, it is not possible to tax the sub-contractor's turnover to the taxable turnover of the main contractor and assess the sub-contractor's turnover in the hands of the main contractor. It is also not possible to tax the transaction twice, both in the hands of the main contractor and the sub contractor, as property passes only once, through the principle of accretion and there is no re-transfer.

14. Per contra, ASG appearing for the respondent argued that the petitioner could not draw any sustenance from the judgment of the Apex Court in *State of Andhra Pradesh Vs. Larsen & Toubro* (supra) which was a case where the Supreme Court examined the provisions of the VAT Act in Andhra Pradesh. He argued that VAT being State subject, each State had its own separate laws and the validity of the legal provisions of DVAT and DVAT Rules could not be tested while contrasting these provisions with the State of A.P. He also tried to distinguish the aforesaid case by submitting that it was not in dispute that under the contract, Larsen & Toubro, with the consent of the contractee, was permitted to assign part of contract work to the sub-contractors. The overall work was done under the supervision of the consultant nominated by the contractee. The sub-contractors were registered dealers. The materials were brought to site. They remained the property of

the sub-contractors. The site was occupied by the sub contractors. The Apex Court noted at more than one place that it was not in dispute that the sub-contractors were registered dealers. In the present case the petitioner had not placed the copies of contracts with the sub-contractors before the assessing officers. Even as per the list of sub-contractors filed by the petitioner with the Writ Petition No. 1907/2012 shows that out of 96 sub-contractors, 38 are unregistered.

15. Defending the validity of the provisions of Section 5(2) of Delhi VAT Act and Rule 3 of Delhi VAT Rules, the learned ASG argued that grant of deduction or exemption is a matter of legislative prerogative. Whether to grant or not to grant exemption is entirely dependent upon the legislative wisdom which cannot be questioned. His submission was that in any case, even under the provisions of Delhi Value Added Tax Act, 2004 the turnover of sub-contract is not taxed in the hands of the contractor but through a different mechanism of allowing input tax credit of the tax paid by the sub-contractor to the main contractor. For example, if a contractor has been awarded a contract of Rs. 100/- and, in turn, he awards a sub- contract for Rs.60/- where the turnover of the sub-contractor is allowed to be deducted from the turnover of the contractor, the rate of tax assuming to be 10% contractor would be liable to pay tax of Rs. 4/- ($100-60=40 @ 10\% =Rs.4/-$) Under the Input Tax mechanism since the contractor is liable to pay net tax as per sub section (3) of Section 3 of DVAT Act , output tax on his turnover of Rs. 100 is Rs. 10/- but the input tax credit to which he is entitled on the turnover of Rs.60/- of sub contractor is Rs.6/- which he is entitled to adjust against his output liability and thus his net tax which he is required to pay is Rs.4/- which is the same. Hence, the bogey of double taxation raised by the

petitioner is without any substance. It was also argued that TDS provisions have nothing to do with the liability to pay tax. Tax deducted at source is for and on account of the person from whose payment tax has been deducted. Section 36A (6) specifically provides that any deduction made in accordance with the provisions of this section and credited into the appropriate Government treasury shall be treated as payment of tax on behalf of the person from whose bills or invoices the deduction has been made, and he shall claim the adjustment towards the payment of output tax of the amount so deducted in his return for the tax period in which certificate of such deduction was issued to him. It is also argued that the subject matter of tax in the case of works contract being transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract, deduction on account of charges towards labour and services is allowed from the total consideration to arrive at the taxable turnover of the contractor.

16. It was also submitted that Section 5 (2) of the Delhi Value Added Tax Act, 2004 read with Rule 3 of the Delhi Value Added Tax Rules, 2005 excludes charges towards labour, service and other like charges from the turnover arising from the execution of works contract subject to the dealer maintaining proper records. The proviso to sub-rule (2) provides that where the amount of charges towards labour, services and other like charges are not ascertainable from the books of account of the dealer, the amount of such charges is to be calculated at the percentages specified in the table appended thereto. In fact, in *Gannon Dunkerlay* (supra) and *Builders' Association of India* (supra), the Apex Court had approved the exclusion of fixed percentage on account of labour, services and other like charges

depending upon the type of the contract where the same are not ascertainable from the books of accounts of the contractor.

17. It is also submitted that at no stage the petitioner had produced the books of accounts or other records to show the extent of actual labour, services and other like charges. Even in the writ petition the petitioner has sought to give justification for non-production of records relating to labour services and other like charges on the ground that the records would run into 2-3 truckloads. In the absence of any records being produced by the petitioner, the assessing officer had no option but to allow the charges towards labour and services as per the table appended to the proviso to rule 3 (2) of the Delhi VAT Rules, 2005.

18. We have bestowed our anxious consideration to the submissions advanced before us by the learned counsel for the parties.

19. Section 5 defines ‘taxable turnover’ and reads as under:-

“5. **Taxable turnover-** (1) For the purposes of this Act, taxable turnover means that part of dealer’s turnover arising during the tax period which remains after deducting therefrom-

- (a) The turnover of sales not subject to tax under section 7 of this Act; and
- (b) The turnover of sales of goods declared exempt under section 6 of this Act.

(2) In the case of turnover arising from the execution of a works contract, the amount included in taxable turnover is the total consideration paid or payable to the dealer under the contract excluding the charges towards labour, services and other like charges, subject to such conditions as may be prescribed:

Provided that where the amount of charges towards labour, services and other like charges is not ascertainable from the books of account of the dealer, the amount of such charges shall be calculated at the prescribed percentages.”

As per sub-section (2) of Section 5 “taxable turnover” in the case of execution of works contract is the total consideration paid or payable to the dealer under the contract excluding charges towards labour, services and other like charges subject to such conditions as may be prescribed. The proviso lays down that where the amount of charges towards labour, services and other like charges is not ascertainable from the books of accounts of the dealer the amount of such charges shall be excluded at the prescribed percentage.

Rule 3 states that in the case of turnover arising from the execution of works contract, the amount representing the taxable turnover shall be the value at the time of transfer of property in goods whether as goods (or in some other form) involved in the execution of works contract and shall exclude the charges towards labour, services and other like charges etc. A combined reading of Section 5(2) of Delhi Value Added Tax Act, 2004 and rule 3 of Delhi Value Added Tax Rules, 2005 shows that, the subject matter of charge is the value at the time of transfer of property in goods.

20. It is in this context validity of these provisions namely 5(2) of Delhi VAT Act and Rule 3 of Delhi VAT Rules is to be examined.

21. First thing which needs to be determined is as to whether the absence of mechanism in the Rule viz. not allowing the deduction of the sub-contract turnover in the hands of the main contractor leads to multiple taxation? We

are afraid, we do not think so from the example given by the respondent. As noted above, the net tax liability remains the same. Furthermore, once such a tax is paid by the contractor, sub-contractor can always claim that tax stand paid at the hands of the contractor and, therefore, sub-contractor is not liable to make the payment all over again. To ensure this, the contractor like the petitioner while making payment to the sub-contractor can recover the tax from those payments and issue TDS Certificate on the basis of which sub-contractor can always claim credit.

22. Once we come to the conclusion that there is no basis for apprehension that mechanism provided under the DVAT Act and Rules can lead to double taxation, we find ourselves in agreement with the contention of the learned ASG that the manner in which deduction and exemptions are to be granted is the legislative prerogative.

23. It is a difficult proposition advanced by the learned Senior Counsel for the petitioner predicated on two constitution Bench judgments and the 46th Constitutional Amendment. The mileage which is sought to be drawn on the basis of the aforesaid judgments and the constitutional amendment is only to the effect that it becomes an obligation of the State, while framing the rules, to ensure that all proper deduction are allowed so that they do not form part of measures of taxation. However, that cannot be the basis of seeking to invalidate the provisions of a statute. The edifice of the petitioner's case questioning the validity of the impugned provision is built on the so called adverse consequences which may follow in the absence of deduction mechanism of sub-contractor turnover. On the basis of so called difficulties, a particular provision of a statute cannot be invalidated.

24. Learned counsel for the respondent is right in submitting that in *State of Andhra Pradesh Vs. Larsen And Toubro Ltd.* (supra), the Supreme Court found a specific provision in the Andhra Pradesh VAT Act and the validity of Delhi VAT Tax and Delhi VAT Rules cannot be tested while contrasting the provisions of this Act with other States Act. In that case, the facts were that the L&T was permitted to assign parts of construction work to the sub-contractors and the sub-contractors were the registered dealers. The sub-contractors purchased goods and chattel like bricks, cement etc. and supplied and erected equipment such as lifts, hoist etc. The materials were brought to site. They remained the property of the sub-contractors the site was occupied by sub-contractors. However, the decision rested on the interpretation of Section 4 (7) (a) of Andhra Pradesh VAT Act (which is a charging section), wherein there was no provision for inclusion of sub-contractor turnover in the turnover filed by the Company.

25. Under the Andhra Pradesh Value Added Tax Act, Section 4 (7) reads as under:-

“4. Charge to tax.- (1)....

(7) Notwithstanding anything contained in the Act:-

(a) Every dealer executing works contracts shall pay tax on the value of goods at the time of incorporation of such goods in the works executed at the rates applicable to the goods under the Act:

Provided that where accounts are not maintained to determine the correct value of goods at the time of incorporation, such dealer shall pay tax at the rate of 12.5% on the total consideration received on receivable subject to such deductions as may be prescribed;

(b).....”

Rule 17 of Andhra Pradesh Value Added Tax Rules, 2005 in so far as relevant, was also to the same effect and read as under:-

“17. Treatment of works contracts- (1) Treatment of VAT dealer executing works contract:-

(a) In the case of contracts not covered by sub-rules (2), (3) and (4) of this rule, the VAT dealer shall pay tax on the value of the goods at the time the goods are incorporated in the work at the rate applicable to the goods;

(b).....”

26. This was noted by the Apex Court which held that Section 4(7) was the charging section and a complete code in itself This is what the Apex Court observed:-

“In this case we are concerned with the Andhra Pradesh Value Added Tax Act, 2005. Section 4 is the charging section. It comes in Chapter III which deals with “incidence, levy and calculation of tax”. In this case, we are concerned with the taxability of works contract. That subject is dealt with by Section 4 (7) of the said 2005 Act. In our view, Section 4(7) is a code by itself It begins with a non obstante clause. It, inter alia, states that every dealer executing a works contract shall pay tax on the value of goods at the time of incorporation of such goods in the works executed at the rates applicable to the goods under the Act. The point to be noted is that Section 4(7)(a) of the 2005 Act indicates that the taxable event is the transfer of property in goods involved in the execution of a works contract and the said transfer of property in such goods takes place when the goods are incorporated in the works, the value of the goods which constitutes the measure for the levy of the

tax is the value of the goods at the time of the incorporation of the goods in the works. What is stated hereinabove also finds place in rule 17(1)(a) of the APVAT Rules, 2005, quoted hereinabove. It is important to note that each of the sub-contractors of L& T is registered dealer. None of them are unregistered.”

27. It was on the basis of interpretation of that Section the Apex Court held that the turnover of the sub-contractor could not be added to the turnover of the L&T. It is clear from the following:-

“16. In this case we are concerned with Andhra Pradesh Value Added Tax Act, 2005. Section 4 is the charging section. It comes in Chapter III which deals with 'incidence, levy and calculation of tax'. In this case, we are concerned with the taxability of works contract. That subject is dealt with by Section 4(7) of the said 2005 Act. In our view, Section 4(7) is a Code by itself. It begins with a non-obstante clause. It, inter alia, states that every dealer executing works contract shall pay tax on the value of goods at the time of incorporation of such goods in the works executed at the rates applicable to the goods under the Act. The point to be noted is that Section 4(7)(a) of the 2005 Act indicates that the taxable event is the transfer of property in goods involved in the execution of a works contract and the said transfer of property in such goods takes place when the goods are incorporated in the works, the value of the goods which constitutes the measure for the levy of the tax is the value of the goods at the time of the incorporation of the goods in the works. What is stated hereinabove also finds place in Rule 17(1)(a) of the APVAT Rules 2005, quoted hereinabove. It is important to note that each of the sub-contractors of L&T is registered dealer. None

of them are unregistered. Under Section 4(7)(a) read with Rule 17(1)(c), quoted above, where VAT dealer awards any part of the contract to a sub-contractor, such sub-contractor shall issue a tax invoice to the contractor for the value of the goods at the time of incorporation in such sub-contract. The tax charged in the tax invoice issued by the sub-contractor shall be accounted by him in his returns. Therefore, the scheme indicates that there is a "deemed sale" by the dealer executing the work, i.e., the sub-contractor. It is only the sub-contractor who effects transfer of property in goods as no goods vests in the respondent company (contractor) so as to be the subject-matter of a retransfer. By virtue of Article 366 (29A)(b) of the Constitution once the work is assigned by the contractor (L&T), the only transfer of property in goods is by the sub-contractor(s) who is a registered dealer in this case and who claims to have paid taxes under the Act on the goods involved in the execution of the works. Once the work is assigned by L&T to its sub-contractor(s), L&T ceases to execute the works contract in the sense contemplated by Article 366(29A)(b) because property passes by accretion and there is no property in goods with the contractor which is capable of a retransfer, whether as goods or in some other form."

28. The Apex Court also made a reference to its decision in the case of ***Builders' Association of India*** (supra) as under:-

"Ordinarily unless there is a contract to the contrary, in the case of works contract the property in the goods used in the construction of a building passes to the owner of the land on which the building is constructed, when the goods or materials used re incorporated in the building."

Therefore, even in the case of works contracts, it would depend upon the terms of the contract as to when the parties intend to pass the property. That would depend upon the agreements between the petitioner and sub-contractor which are not produced here. As submitted by the respondents, the petitioner despite several opportunities did not produce copies of any of the contracts with the contractors or with the sub-contractors so much so that the petitioner had to be given even show cause notice dated 13.10.2011 and 11.11.2011 specifically pointing out that the petitioner had failed to provide information/documents asked for as per the notices which, *inter alia*, required the petitioner to explain short payment of tax due to wrong determination of taxable turnover and to give details of Gross turnover- Local and Central, Sale summary with trading account, details of purchases and sales in form DVAT-30 & DVAT-31, reasons for filing revised returns etc.

29. Learned counsel for the respondent has pointed out that one of the sub-contractors of the petitioner had sought advance ruling from the Commissioner under Section 84 of the Act and for that purpose had filed a copy of the contract between the petitioner and Delhi International Airport Pvt. Ltd. Clause 43.1 of the said contract deals with 'passing of property' and reads as under:-

“43.1 Passing of property

43.1.1 Equipment supplied or to be supplied pursuant to and in compliance with the terms of the Contract shall become the property of the Employer at whichever is the earliest of the following times:

(a) when any sum is included in a Certificate of Payment in respect thereof; or

- (b) when any item is delivered to the Project Site pursuant to the Contract; or
- (c) when a high seas purchase contract is executed by the Employer pursuant to Clause 30.1.1 (Delivery to the Project site).

As per this clause the property in the equipment [definition of which includes materials of the contract] passes when any item is delivered to the project site in pursuance to the contract. However, we are not giving our final view in the matter in as much as that is an aspect which is to be considered on merits in appropriate proceedings.

30. There is no provision like Section 4 (7) of the Andhra Pradesh VAT Act in Delhi VAT Act. The entire case of the petitioner is that there should have been a provision like this in Delhi VAT Act as well, otherwise it is leading to various difficulties. Even if we presume that the provision like Section 4 (7) in Andhra Pradesh VAT Act makes it a better legislation in comparison with Delhi VAT Act. In the absence of such a provision, we are afraid that also cannot be a ground for declaring statute as arbitrary or *ultra vires*. Bad legislative drafting, if at all, cannot furnish a ground for judicial review of the legislative action. It has to be shown that a particular provision is either beyond the legislative competence and is thus ultra vires or is unconstitutional viz. namely it offends some constitutional provision.

31. While we can only comment that it would be for the Legislature to look into this aspect and decide whether to incorporate any such provision or not, Section 5(2) of Delhi VAT Act and Rule 3 of Delhi VAT Rules cannot be declared to be invalid. Hence it is found that as per mechanism provided in Delhi VAT Act, the turnover of the sub-contractor is not taxed in the

hands of the contractor but through a different mechanism of allowing input tax credit of the tax paid by the sub-contractor to the main contractor and does not result in multiple taxation.

32. Since we are upholding the validity of the provisions, we are not examining the impugned orders on merits, it is for this reason that there is a provision for appeal and in fact appeals are even filed by the petitioner. We may also note that the petitioners have contended that the impugned order are passed in violation of principle of natural justice. That is again an argument which can be taken in the appeals filed by the petitioners against the impugned orders.

33. These writ petitions are accordingly dismissed. All pending CMs also stand disposed of. However, there shall be no order as to costs.

ACTING CHIEF JUSTICE

**(RAJIV SAHAI ENDLAW)
JUDGE**

JUNE 1, 2012

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