IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 189 OF 2014

1. All Goa Contractors Association,
An Association registered under
The Societies Registration Act,
having its registered office at,
33, third floor, Midas touch Bldg,
Opp Margao Session Court
Margao, Goa, through its President
Shri Prakash R. Volvotkar, major of age

2. M/s. Souza Engineers and Contractors Pvt. Ltd.
Curpavado, Cortalim, Goa, through its Director
Shri Anthony Souza, major of age,

3. M/s. Ultracon Constructions Pvt Ltd
Margao-Quepem Road, Navelim
Salcete, Goa, through its Director
Shri Manoj Srinivas Dukle, Major of age,

4. M/s. Aspolite Engineers India Pvt Ltd
Sancoale Indusrial Estate,
Zuarinagar, Goa, through its Director
Shri Suyog Anand Pawar,
major of age.

5. Madanant Constructions (Goa) Pvt. Ltd
Chandor, Goa through its Director,
Shri Sudin Verenkar,
Major of age, … Petitioners

Versus

1. The State of Goa,
Through its Chief Secretary,
Government of Goa,
having its office at Secretariat,
Porvorim, Bardez, Goa.

2. The Commissioner of Commercial Taxes,
Having office at Panaji, Goa. … Respondents

Ms. Nikita Badhekar and Mr. A. T. Kamat, Advocate for the Petitioners

Mr. S. D. Lotlikar, Advocate General with Mr. D.Lawande, Addl. Advocate General and Mr. P. Dangui, Addl. Government Advocate for the Respondents.

Coram :- **F. M. REIS,**
NUTAN D. SARDESSAI, JJ.

Date: **1st August, 2016**

JUDGMENT *(Per F. M. Reis, J.)*

Heard Ms. Nikita Badhekar, learned Counsel appearing for the Petitioners and Mr. S. D. Lotlikar, learned Advocate General, appearing for the Respondents.

2. The above Petition, inter alia, seeks for a direction to declare the insertion of Rule 4A by Notification dated 30.12.2008 is ultra vires and unconstitutional and for a declaration that inserting entry C-14 by Notification dated 07.07.2009 is ultra vires and unconstitutional and further that the amendment made to Section 28(1) by the Goa Value Added Tax (Seventh Amendment) Act 2013 (Goa Act 12 of 2013) i.e. the TDS provisions to be unconstitutional, invalid and ultra vires and further to declare that all assessments made based on said Amendment to be illegal and to declare the Amendment made thereafter dated 30.03.2012 to be clarificatory and retrospectively operative to the extent it relates to amendment to entry at serial no. 14 of the Schedule ‘C’.

3. The Petitioner nos. 2 to 5 are contractors duly registered under the Goa Value Added Tax Act, 2005 as also registered with the State Government as PWD Contractors and Water Resource Department Contractors. After the Value Added Tax 2005 came into force on 01.04.2005, Rule 4A of the Goa Value Added Tax Rules 2005 was introduced on 31.12.2008. By virtue of such Rule, adjustments was allowed from the total receipts at serial no. 14 of Schedule 'C" was introduced to the said Act of 2005 on 09.07.2009 whereby for the first time, by the said entry, 8% tax on works contract was introduced. Thereafter, on 01.04.2011, said entry at serial no. 14 of Schedule 'C' was substituted enhancing the rate on work contracts from 5% to 8%. The challenge in the above Petition is to the validity of Rule 4A introduced on 04.05.2005 being unreasonable, illegal and unconstitutional as also the insertion made at serial no. 14 of Schedule 'C' of the said Goa Value Added Tax Act of 2005 is unconstitutional and in violation of the prohibition of Sections 14 and 15 of the Central Sales Tax Act. The Petitioner also challenges the TDS provisions by way of amendment to Section 28(1) introduced by the Goa Value Added Tax (Seventh Amendment) Act, 2013 (Goa Act 12 of 2013) whereby 5% is to be deducted from the total value of works contract payable to the contractor.

4. Learned Counsel appearing for the Petitioners has taken us through the relevant provisions of the said Act of 2005 as well as the Rules to

point out that Rule 4A introduced is unconstitutional, unreasonable and ultra vires the act and, as such deserves to be struck down. Learned Counsel has taken us through different Judgments of the Apex Court in support of his submissions that by introducing such Rule, the petitioners would end up paying much higher taxes than otherwise they would be liable to pay. The learned Counsel has further pointed out that the TDS which has been deducted is much more than the ultimate tax on liability of the Petitioners. We shall refer to the Judgments relied upon by the learned Counsel appearing for the Petitioners.

Builders Association of India & anr. vs. Union of India & Ors. reported in ***73 STC 370, Builders Association of India & anr. vs. State of Karnataka*** reported in ***88 STC 248 (SC), Steel Authority of India Ltd. vs. State of Orissa & anr.*** reported in ***118 STC (297), Larsen & Toubro Ltd. & anr. vs. State of Karnataka & anr.*** reported in ***(2013) 65 VST (1)(SC), Kone Elevator India Pvt. Ltd. vs. State of Tamil Nadu & anr.*** reported in ***(2014) 71 VST (1) (SC), Sunil Chandra Dey & Partner vs. Food Corporation of India & anr.*** reported in ***(2013) 60 VST 491 (Gauhati), Nagarjun Construction Co. Ltd. & anr. vs. State of Karnataka & Ors.*** reported in ***(2011) 45 VST 390 (Karn) and Neoluxe India Pvt. Ltd. & anr. vs. Commissioner of Sales Tax & anr.*** reported in ***(2008) 13 VST 157 (Bom).***

5. On the other hand, Shri S. D. Lotlikar, learned Advocate

General appearing for the Respondents, has pointed out that Rule 4A of the said Rules introduced can be read down to mean that it will have effect only when the value of the goods cannot be ascertained on the basis of the records maintained by the respective contractors. It is further pointed out that if any excess TDS is deducted, the same is liable to be refunded in accordance with the relevant provisions of law. It is further pointed out that the contention that Rule 4A is ultra vires is misconceived and as such the above Petition deserves to be rejected. It is further submitted that the assessments are being carried out in accordance with the relevant provisions of law and, as such, the contention of the learned Counsel appearing for the Petitioner has no substance.

6. On the basis of the rival contentions, we would have to take note of some of the relevant provisions of the said Act. Section 2(ac) defines sale under the Goa VAT Act of 2005 which reads thus :

> "(ac) "sale", with all its grammatical variations and cognate expressions means every transfer of the property in goods (other than by way of a mortgage, hypothecation, charge or pledge) by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration, and includes
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> (j) transfer of property in goods (whether as goods or in some other form) involved in

execution of a works contract:

7. The definition of "Sale Price" in Section 2(ad) which was amended on 8th October 2008, reads thus :

> "Section 2(ad) "sale price" means the amount of valuable consideration received or receivable by a dealer for the sale or any goods less any sum allowed as cash discount, according to the practice normally prevailing in the trade, but inclusive of any sum charged for anything done by the dealer in respect of the goods at the time of or before delivery thereof, excise duty, special excise duty or any other duty or taxes except the tax imposed under this Act:
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> After amendment a proviso was added :
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> "Provided that in case of transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract, the sale price of such goods shall be determined in the prescribed manner by making such deductions from the total consideration for the works contract as may be prescribed and such price shall be deemed to be the sake price for the purpose of this clause."

8. Works Contract is defined under Section 2(aq) of the said Act as under :

> "(aq) "Works Contract" shall include any

> agreement for carrying out for cash, deferred payment or other valuable consideration, the building, construction, manufacturing, processing, fabrication, erection, installation, fitting out improvement, modification, repair or commissioning of any movable or immovable property."

9. After the said Act came into force and until the introduction of Rule 4A by the Notification dated 30.12.2008, the records revealed that there was no prescribed Rule for determining the sale price of the goods involved in the execution of the works provided under the Goa Value Added Tax Act. In such circumstances, the calculation of the liability to pay such tax was by following the law laid down by the Constitution Bench of the Apex Court in the case of second ***Gannon Dunkerly*** case reported in ***88 STC 204(SC)***, whereby the Apex Court affirmed the decision in the case of ***Builders Association*** reported in ***(73 STC 370) (SC)*** and held thus :

> "In exercise of its legislative power to impose tax on sale or purchase of goods under entry 54 of List II of Schedule VII to the Constitution of India read with article 366(29-A)(b), the State Legislature, while imposing a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract is not competent to impose a tax on such a transfer (deemed sale) which constitutes a sale in the course of inter-State

trade or commerce or a sale outside the State or a sale in the course of import or export. The legislature power of the State Legislatures under entry 54 of the State List is subject to two limitations-one flowing from the entry itself which makes the said power "subject to the provision of entry 92-A of List I", and the other flowing from the prohibition contained in article 286.

As a result of the Forty-sixth Amendment, the contract which was single and indivisible has been altered by a legal fiction into a contract which is divisible into one for sale of goods and other for supply of labour and services and as a result such a contract which was single and indivisible has been brought at part with a contract containing two separate agreements. Since the provisions of Section 3, 4 and 5 of the Central Sale Tax Act, 1956, are applicable to such contracts containing two separate agreements, there is no reason why the said provision should not apply to a contract which, though single and indivisible, by legal fiction introduced by the Forty-sixth Amendment, has been altered into a contract which is divisible into one for sale of goods and other for labour and services. If the legal fiction introduced by article 366(29-A)(b) is carried to its logical end it follows that even in a single and indivisible works contract there is a deemed sale of the goods which are involved in the execution of a works contract. Such a deemed sale has all the incidents of sale of goods involved in the execution of works contract where the contract is divisible into one for sale for goods and the other for supply of labour and services. Even in the absence of any amendment having been made in the Central Sales Tax Act (after the Forty-sixth Amendment) expressly including transfers of property in goods involved in execution of a works contract, the provision contained in section 3, 4 and 5 would be applicable to such transfers and the legislative prowers of the State Legislature to impose tax on such transfers under entry 54 of the State List will have to be exercised keeping in view of the provisions contained in sections 3, 4 and 5. For the same reasons sections 14 and 15 would also be applicable to the deemed sales resulting from transfer for property in goods involved in he execution of a works contract and the legislative power under entry 54 in State List will have to be exercised subject to the restrictions and conditions prescribed in those sections in respect of goods that have been declared to be of special importance in inter-State trade or commerce. The absence of any amendment in the definition of "sale" contained in section 2(g) of the Central Sale Tax Act, 1956, so as to include transfer of property in goods involved in the execution of a works contract does not in any

> way effect the applicability of the sections 3, 4 and 5 and sections 14 and 15 to such transfers. The measure for the levy of the tax contemplated by article 366(29-A)(b) is the value of the goods involved in the execution of a works contract. It is wrong to say that the value of such goods for levying tax can be assessed only on the basis of the cost of acquisition of the goods by the contractor. Since 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 can constitute the measure for the levy of the tax has to be value of the goods at the time of the incorporation of the goods in the works and not the cost of acquisition of the goods by the contractor. Incorporation of the goods in the works forms part of the contract relating to work and labour which is distinct from the contract for transfer of property in goods and, therefore, the cost of incorporation of the foods in the works cannot be made a part of the measure for levy of tax contemplated by article 366(29-A)(b)."

10. Thus, the value of the goods involved in the execution of the works contract was determined by taking into account the value of the entire work contract and deducting therefrom the charges towards labour and

services.

11. These aspects have been further reiterated in the Judgment in the case of ***Larson and Turbo*** reported in ***65 VST (1) SC*** of the Larger Bench and held that tax under the Works Contract can be levied only on the value of goods at the time of incorporation into Works Contract. The challenge in the present Petition is to the introduction of Rule 4A to the said Rules.

12. Rule 4A of the Goa VAT Rules 2005 reads thus :

> "4A. Determination of sale price in respect of Works Contract- In case of transfer or property in goods (whether as goods or in some other form) involved in execution of works contract, the sale price of such goods shall be determined by making deductions to the extent as specified in column (3) of the Table below for the Works Contract as specified in column (2) of the said Table."

13. Rule 4A inserted on 30th December, 2008 refers to the determination of the Sale Price in respect of the Works Contract. As per the said rule, in case of transfer of property in goods (whether as goods or in some other form) involved in the execution of Works Contract the sale price of such goods shall be determined by making deductions as specified in

column 3 of the Table given under the said Rule for the Works Contract as specified in corresponding Entry in Column 2 of the said Table. The deductions provided in this table prescribe for various percentage of deductions for Civil Contractors ranging from 30% to 35% of the Gross Receipts.

Reading the said provisions introduced by Rule 4A, we find that it becomes mandatory for the contractors to follow the standard deduction formula provided therein. There can be different percentages of the goods involved in the Works Contract and value of the labour etc., which would not be taken into consideration by following the standard deductions formula as specified in the said Rules. In such circumstances, in the ***Second Gannon Dunkerly case*** (supra) the Apex Court has prescribed this formula of standard deductions only when the dealers are not in a position to identify the value of the goods transferred in the execution of the Works Contract.

14. It was pointed out by learned Counsel appearing for the Petitioners that as far as the Petitioner is concerned, they have enough material to substantiate their claims with regard to the value of the goods at the time of the incorporation. Considering the ratio laid down by the Apex Court as referred to herein above and the contention of Mr. S. D. Lotlikar, learned Advocate General, we find that the Rule 4A would have to be read down to mean that the standard deduction formula would be exercised as provided therein only in cases where the dealers are not in a position to

identify the value of the goods transferred in the execution of the Works Contract. The contention of the Petitioners that the amendment to entry C-14 suffers from infirmity as the entire Work Contract is to be taxed at 8% irrespective of the value of the goods transferred in the execution of the Works Contract would no longer survive as it was not disputed that in view of the subsequent clarification such tax is to be paid after making necessary deductions and determining the value of the goods as enumerated while discussing the validity of Rule 4A as stated herein above.

15. The only aspect which now remains is to the challenge to the tax deducted at source. Section 28 of the said Act, reads thus:

> "**Section 28. Tax Deduction at Source :**
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> (1) Notwithstanding anything contained in this Act, any employer namely, the Central Government, the State Government, or an industrial, or a commercial or trading undertaking of the Central Government or of the State Government, any Company registered under the Companies Act, 1956, any local authority or any dealer registered under this Act or such other persons as may be notified shall deduct tax from,a nd out of the amounts payable by such employer to a dealer to whom a Works Contract has been awarded involving transfer of property in goods (whether as goods or in some other form), at the rate of [5%] on the value of the

> Works Contract undertaken by such dealer which shall be deemed to be on account of transfer of property in goods in the execution of such Works Contract.
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> Provided that, no such deduction shall be made where the amount or the aggregate of the amount payable to a dealer by such employer is less than one lakh rupees during a year or when the cost of material used in execution of the works contract is less than 10% of the contract value.
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> Explanation: (i) The deduction of tax under this section shall be effected when the payment is made to the contractor or his account is credited towards such payment, as the case may be.
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> (ii) The employer effecting such deduction shall deemed to be a dealer for the purposes of this section and shall get himself registered in the manner as prescribed."

16. The main challenge to the rate of tax deduction at source is that there may be situations wherein the tax deducted may be in excess to the actual tax payable by the Dealer. In such circumstances, we are not inclined to accept the contention of the learned Counsel appearing for the Petitioner that fixing of the rate of tax deducted at source is unconstitutional and unreasonable as, in any event, no prejudice shall occasion to the Petitioners on such payment as after the assessments, the Dealers would be entitled to

claim refund in accordance with law.

17. In view of the above, we dispose of the above Petition by holding that Rule 4A has to be read down to mean that the standard deduction formula referred to therein would be followed only in situations when the Dealers have no proper records and materials to establish the actual value of the goods at the time of the incorporation.

18. Rule is made absolute in the above terms.

NUTAN D. SARDESSAI, J. **F. M. REIS, J.**

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