IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 1350 of 2021

With
R/SPECIAL CIVIL APPLICATION NO. 6840 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 5052 of 2022

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J.B.PARDIWALA

and
HONOURABLE MS. JUSTICE NISHA M. THAKORE

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	**YES**
2	To be referred to the Reporter or not ?	**YES**
3	Whether their Lordships wish to see the fair copy of the judgment ?	**NO**
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	**NO**

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MUNJAAL MANISHBHAI BHATT
Versus
UNION OF INDIA

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Appearance:
MR UCHIT N SHETH(7336) for the Petitioner(s) No. 1
MR DEVANG VYAS(2794) for the Respondent(s) No. 1
MR UTKARSH SHARMA, AGP for the Respondent No.2
MR PRIYANK P LODHA(7852) for the Respondent(s) No. 3
NOTICE SERVED for the Respondent(s) No. 2,4

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CORAM:**HONOURABLE MR. JUSTICE J.B.PARDIWALA**
and
HONOURABLE MS. JUSTICE NISHA M. THAKORE

Date : 06/05/2022

COMMON CAV JUDGMENT

(PER : HONOURABLE MS. JUSTICE NISHA M. THAKORE)

1 Since the issues raised in all the captioned writ applications are the same, those were taken up for hearing analogously and are being disposed of by this common judgement and order.

2 For the sake of convenience, the Special Civil Application No.1350 of 2021 is treated as the lead matter.

3 By this writ application under Article 226 of the Constitution of India, the writ applicant has prayed for the following reliefs:

> *"A. This Hon'ble Court may be pleased to strike down and declare Entry 3(if) of Notification No. 11/2017-Central Tax (Rate) as well as Entry 3(if) of Notification No. 11/2017 – State Tax (Rate) along with paragraph no. 2 of both the notifications as being ultra-vires Section 7(2) of the GST Acts read with Entry No. 5 of Schedule III to the GST Acts as well as ultra-vires Section 9(1) and Section 15 of the GST acts;*
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> *B. In any case this Hon'ble Court may be pleased to strike down and declare Entry 3(if) of Notification No. 11/2017-Central Tax (Rate) as well as Entry 3(if) of Notification No. 11/2017 – State Tax (Rate) along with paragraph no. 2 of both the notifications as being manifestly arbitrary, grossly discriminatory and violating Article 14 of the Constitution of India as well as ultra-vires Article 246A of the Constitution of India;*
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> *C. Without prejudice to the above and in the alternative this Hon'ble Court may be pleased to declare that impugned paragraph no. 2 of Notification No. 11/2017-Central Tax (Rate) and Notification No. 11/2017 – State Tax (Rate) is applicable only qua sale of flats/building units wherein undivided share in land is transferred along with constructed flats/units without separate consideration being fixed towards sale of land;*
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> *D. This Hon'ble Court may be please to declare that tax under the GST Acts cannot be imposed on consideration expressly receivable/payable towards sale/purchase of land;*

E. This Hon'ble Court may be pleased to issue writ of mandamus or writ in the nature of mandamus or any other appropriate writ or order directing the 4th Respondent not to collect tax under the GST Acts on consideration fixed for sale of land;

F. Pending notice, admission and final hearing of this petition, this Hon'ble Court may be pleased to allow the Petitioner to deposit the tax amount under the GST Acts qua purchase of land under protest with the 4th Respondent and such deposit may please be treated as refundable to the Petitioner subject to the outcome of the present Petition;

G. Ex parte ad interim relief in terms of prayer F may kindly be granted;

H. Such further relief(s) as deemed fit in the facts and circumstances of the case may kindly be granted in the interest of justice for which act of kindness your petitioner shall forever pray.

4 The facts giving rise to this writ application may be summarized as under:

4.1 The writ applicant is a practicing advocate in this High Court. The writ applicant entered into an agreement dated 29th September 2020 with the Navratna Organisers & Developers Pvt. Ltd., i.e. the respondent No.4 herein, for the purchase of a plot of land admeasuring about 1021 square metres located at the Unit No. 937, "Kalhar Blues and Greens", Bopal-Sanand Bypass Road, Ahmedabad. The said agreement also encompassed construction of bungalow on the said plot of land by the respondent No.4 for the writ applicant.

4.2 It appears that separate and distinct consideration was agreed upon between the parties to the agreement for (i) the sale of land and (ii) construction of a bungalow on the land.

4.3 Further, as per the said agreement, the writ applicant was liable to pay all taxes including the Goods and Services Tax (for short "GST"). The writ applicant bona fide believed that by virtue of such clause he

would be liable to pay tax under the Central/Gujarat Goods and Services Tax Act, 2017 (for short "the GST Acts") on the consideration payable for construction of bungalow in as much as it would constitute supply of construction service under the GST Acts.

4.4 The respondent No.4 however, relying upon the impugned entry no. 3(if) of the Notification No. 11/2017-Central Tax (Rate) dated 28th June 2017 read with para 2 of the said notification informed the writ applicant that he would be liable to pay tax at the rate of 9% CGST + 9% SGST under the GST Acts on the entire consideration payable for land as well as construction of bungalow after deducting 1/3rd of the value towards the land in accordance with the impugned paragraph 2 of the said notification. The respondent No.4 raised an invoice on the writ applicant to collect such tax from the writ applicant.

4.5 Thus it appears that, because of the impugned notification, the entire consideration towards the sale of land has not been excluded for the purpose of computing tax liability under the GST Acts. 1/3rd of the total consideration has been deemed to be land value as per paragraph 2 of the impugned notification.

5 In such circumstances referred to above, the writ applicant is here before this Court with the present writ application.

- **SUBMISSIONS ON BEHALF OF THE WRIT APPLICANT:**

6 Mr. M. R. Bhatt, the learned Senior Counsel appearing on behalf of the writ applicant submitted that Section 9 (1) of the GST Act is the charging Section which imposes tax on the "supply" of the goods and services. The scope of "supply" is defined in Section 7. By virtue of Section 7 (2) of the GST Act, the transactions as specified in the Schedule III to the GST Act are excluded from the purview of supply.

Sale of land is included in the Entry No. 5 of the Schedule III to the GST Acts. Thus, the sale of land is neither supply of goods nor services. The imposition of tax on consideration received towards the sale of land by virtue of delegated legislation is therefore *ultra-vires* Sections 7 and 9 resply of the GST Acts.

7 It was further pointed out by Mr. Bhatt that the copy of the booking agreement between the writ applicant and the land owner/developer clearly indicates that the consideration towards land is separately fixed and agreed. Mr. Bhatt took us through the various relevant clauses of the agreement. Clause (C) provides for separate consideration towards the price of land and towards the cost of construction. Clause (h) fastens the tax liability on the writ applicant. Clause (Q) provides that no right, title or interest in the other development, namely, Golf Course, Club House, other facilities is agreed to be given nor any right, title or interest is given in the common development. The Schedule to the property clearly demarcates the area of land agreed to be sold by the respondent No.4 to the writ applicant. It was contended that the agreement of the writ applicant is clearly severable and the sale of land being made for separate consideration, the entire amount of consideration relating to land is outside the scope and purview of the GST Acts. It was also pointed out that the booking agreement was entered after the land was fully developed and that no further activity was required to be done by the land owner/developer in respect of the land after entering of the booking agreement with the writ applicant.

8 The learned Senior Counsel contended that the “Total amount” has been defined in the Explanation provided in the impugned notification and by deeming fiction, though there is a separate and identifiable value of land, only 1/3rd amount of the total amount is

given towards abatement. It is averred that the liability sought to be fixed by way of deeming fiction so as to presume only 1/3rd of total consideration towards land is *ultra-vires* the provisions of the GST Acts.

9 Mr. Bhatt gave the following illustrations to demonstrate how the impugned notification could be said to be *ultra-vires* the provisions of the GST Acts:

> *"If the consideration for sale of land is Rs.85/- and for construction is Rs.15/- (approximately as in the present case);*
>
> ***As per the provisions of the Act***
> *On Rs.85/- GST would not be applicable and on the consideration for construction of Rs.15/-, 18% GST would come to Rs.2.70/-.*
>
> ***As per Notification***
> *Rs.85 + Rs.15 = Rs.100*
> *Less Rs.33 (1/3rd treated as deemed value of land) = Rs.67 GST @ 18% = Rs.12.06."*

It was argued out that the tax liability by virtue of deeming fiction by way of delegated legislation far exceeds the tax liability as computed in accordance with the provisions of the statute which is otherwise impermissible.

10 It was submitted that it is a settled legal position that a delegated legislation cannot travel beyond the scope of the parent legislation. Strong reliance was placed in this regard on the following decisions of the Supreme Court:

1. Indian Express Newspapers (Bombay) Private Limited v. Union

of India & Ors.; (1985) 1 SCC 641

2. Kerala Financial Corporation v. Commissioner of Income Tax; (1994) 4 SCC 375

3. ITW Signode India Ltd. v. Collector of Central Excise; (2004) 3 SCC 48

4. Deputy Commercial Tax Officer v. Sha Sukraj Peerajee; AIR 1968 SC 67

11 Mr. Bhatt further relied upon the minutes of the 14th GST Council meeting to demonstrate that before the issuance of the impugned Notification, deliberations were made only with regard to sale of Apartments/ Flats wherein the undivided interest in the land would also be passed on to the purchaser. It was pointed out that in fact, in respect of the proposed abatement for the land value, the Deputy Chief Minister of Gujarat had also expressed apprehension. It was discussed that for all intent and purpose, the abatement of 1/3rd value towards the land was thought of only in respect of sale of Flats / Apartments and not in respect of the transactions where land was separately sold and separate value of land was specifically so available. However the entry of the notification was couched in wide terms so as to even include the sale of plots of land along with the construction of bungalows which is arbitrary and contrary to the object sought to be achieved by the deeming fiction.

12 Mr. Uchit Sheth, the learned counsel appearing on behalf of the writ applicant contended that the legislative history of tax on construction contracts which has culminated into incorporation of the GST Acts is required to be looked into closely for understanding the true scope and purport of the statutory provisions of the GST Acts.

13 According to Mr. Sheth the legislative history can be broadly divided into two parts - (1) History relating to taxing the "goods" element of the construction contract which includes levy of sales tax/value added tax and (2) History relating to taxing the "services" element of the construction contract which includes levy of service tax

14 Mr. Uchit Sheth narrated at length the legislative history pertaining to the goods element of construction contract as under:

(a) Entry 54 of List II to the Constitution of India empowered the State legislatures to impose tax on sale or purchase of goods. Under such entry, many state legislatures imposed tax on goods used in the course of execution of works contracts such as works contracts. The legislative competence of the State legislatures to impose tax on goods used in the course of execution of indivisible works contracts came up for scrutiny before the Supreme Court of India in the case of **State of Madras v/s Gannon Dunkerley and Co. (Madras) Ltd. (1958) 9 STC 353** (herein after referred to as **"the 1st Gannon Dunkerley's case").** The Supreme Court observed that in case of building construction contract the property in goods passes to the buyer by the theory of accretion as and when the goods are embedded into the earth. The property in goods does not pass as chattel pursuant to the agreement of sale and therefore it is not sale as per the Sale of Goods Act, 1930. Thus it was held that the State legislatures did not have the competence to impose sales tax on the goods element of a construction contract.

(b) The 46th Constitutional Amendment was effected to overcome the judgement of the Supreme Court in the case of **Gannon Dunkerley and Co. (supra).** Article 366(29A) of the Constitution was introduced whereby the transfer of property in goods (whether as goods or in some

other form) involved in the course of execution of works contract was deemed to be sales. Thus the State legislatures were conferred with the power to impose tax on the goods element of a works contract.

(c) Thereafter, a question arose as to on what amount such tax could be imposed as a works contract would even contain some element of labour. This issue was addressed by the Supreme Court in the case of **Gannon Dunkerley and Co. v/s State of Rajasthan (1993) 1 SCC 364** (herein after referred to as **"the 2nd Gannon Dunkerley 's case").** It was held that tax could be imposed only on the value of goods incorporated in the works contract and that the labour expenses and profit thereon was to be excluded. It was observed that the value of goods was to be ascertained from the books of account of the assessee. Only in the event where it was not possible to ascertain the actual value, it was held that the State could prescribe a formula on the basis of fixed percentage of value of contract. It was however clarified that such prescribed value should not appreciably differ from the actual value.

(d) Various States formulated the valuation procedure for the works contract in tune with the decision of the Supreme Court in the **2nd Gannon Dunkerley's case (supra).** In so far as the State of Gujarat was concerned, Section 2(30)(c) of the Gujarat Value Added Tax Act, 2003 provided that the "taxable turnover" in case of works contract was to be determined after deducting charge towards the labour, service and like charges. It was further provided in the Proviso to Section 2(30)(c) of the Vat Act that where the amount of charges towards the labour, service and like charges was not ascertainable from the terms and conditions of the contract, the amount was to be calculated in the prescribed manner. Rule 18AA of the Gujarat Value Added Tax Rules, 2006 provided the manner of determining taxable value of works contract. It was provided that the actual value was to be taken if value was ascertainable from the

books of account of the dealer. If value was not ascertainable then the said Rule provided fixed percentage of deduction depending on the type of works contract.

(e) Various States also provided an option of paying lumpsum tax on the total value of the works contract. However, as such mechanism was at the option of the dealer, its validity was upheld by the Supreme Court in the case of **State of Kerala v/s Builders Association of India (1997) 2 SCC 183** as well as **Mycon Construction Ltd. v/s State of Karnataka and Another (2003) 9 SCC 583.**

(f) Thereafter the question arose as to whether even a tripartite agreement between the landowner, developer and prospective buyer would constitute a works contract even though property in such agreement would subsequently pass by way of a registered sale deed. The Supreme Court held in the case of **K. Raheja Development Corporation vs State of Karnataka (2005) 5 SCC 162** that even a tripartite agreement involving construction of flats for prospective buyer would constitute sale in the course of the execution of works contract.

(g) The correctness of the decision of the Supreme Court in the case of **K. Raheja Development Corporation (supra)** was doubted and referred to a larger bench. The larger bench in the case of **Larsen and Toubro Ltd. v/s State of Karnataka (2014) 1 SCC 708 (herein after referred to as "the 1st Larsen and Toubro case")** affirmed the view taken in the case of **K. Raheja Development Corporation (supra).** It was however clarified in para 110 of the judgement that the activity of construction undertaken by the developer would be works contract only from the stage the developer enters into a contract with the flat purchaser and that 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 Government. It was further observed in para 112 of the judgement that if at the time of construction and until the construction was completed, there was no contract for construction of building with the flat purchaser, the goods used in the construction could not be deemed to have been sold by the builder since at that time there was no purchaser. It was held that the fact that the building was intended for sale ultimately after construction did not make any difference. Further, the Rule 58(1A) of the Maharashtra Value Added Tax Rules which provided a cap of 70% of the agreement value for deduction towards land was read down and it was held that taxing the sale of goods element in a works contract was permissible provided that the tax was directed to the value of goods at the time of incorporation and it did not purport to tax transfer of immovable property.

(h) While conceiving the impugned notification regarding deduction towards land, the aforementioned judgement of the Supreme Court in the case of **1st Larsen and Toubro Ltd. (supra)** was discussed in the GST council meeting. However the principles laid therein were not followed and an adhoc deduction of 1/3rd towards land value was proposed.

15 Mr. Sheth contended that the Entry No. 5 of the Schedule III to the GST Acts which provides for exclusion of land and building thus has a historical perspective. It was held by the Supreme Court in the case of **1st Larsen and Toubro Ltd. (supra)** that sale in the course of execution of works contract would commence only from the stage when the contract is entered into during the course of construction. It was further observed that the sale of a fully constructed property would also not attract levy of tax. Hence, the sale of land and fully constructed building has been excluded even from the purview of tax under the GST Acts. What is taxable under the GST Acts is supply of goods or services to a recipient. It is only when the recipient enters into a contract with the supplier that

the supply can commence. If the land has already been developed by the developer and thereafter if the contract for construction of bungalow is entered into with the prospective buyer, then the supply of goods or services is only to the extent of construction undertaken pursuant to contract with such a prospective buyer. For something done by the developer prior to execution of contract with prospective buyer, such activity is not a supply at all as defined under Section 7 of the GST Acts and thus there is no charge of tax on such activity.

16 According to Mr. Sheth, a collective reading of the provisions would indicate, that the sale of any land, whether developed or not, would not be exigible to tax under the GST Acts and the tax liability has to be restricted to construction undertaken pursuant to the contract with the prospective buyer. If that be so, then deduction of entire consideration charged towards land has to be granted and the same cannot be restricted to only 1/3rd of the total value as is sought to be done by the impugned notification.

17 Mr. Sheth further argued that it was held by the Supreme Court in the **2nd Gannon Dunkerley's case (supra)** that tax is to be imposed on the actual taxable value of the works contract and the Government could prescribe fixed percentage only for cases where actual value was not ascertainable. It was further observed by the Supreme Court that even the fixed percentage was to be prescribed depending on the type of works contract and that it should not appreciably differ from the actual value. If at all an optional scheme was floated by the State then the same was held to be valid by the Supreme Court in the case of **Builders Association of India (supra)** and **Mycon Construction Ltd. (supra).** The impugned notification prescribing fixed percentage deduction of 1/3rd without giving option for deducting the actual value of land as well as without taking into consideration the different variants of contracts as

also the size of land vis-à-vis the consideration is contrary to the said judgement of the Supreme Court in the case of **2nd Gannon Dunkerley's case (supra).**

18 Mr. Sheth, thereafter, narrated the legislative history pertaining to the services element of construction contract as under:

(a) Service tax was introduced for the first time by the Finance Act, 1994 by way of a positive list of taxable services.

(b) Section 65(105) of the Finance Act, 1994 contained a list of taxable services which were amended from time to time. Clause (zzq) and (zzh) of the said provision included construction service within the ambit of service tax.

(c) Clause (zzzza) was introduced in Section 65(105) of the Finance Act, 1994 by the Finance Act, 2007 which included services in relation to the execution of works contract excluding the contracts in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

(d) A question arose as to whether composite contract for the supply of goods and services could be taxed prior to 1st April 2007 under the head of construction service even though works contract service became taxable only from 1st April 2007. It was held by the Supreme Court in the case of **Commissioner, Central Excise and Customs, Kerala v/s Larsen and Toubro Ltd. (2016) 1 SCC 170** that the works contract service became taxable only after the Finance Act, 2007 and therefore no service tax could be imposed on composite contracts under the head of construction service which could be utilized for imposing tax only on pure services.

(e) In the meantime, clause (zzzh) of Section 65(105) of the Finance Act, 1994 relating to construction service was amended by the Finance Act, 2010 and an Explanation was added whereby construction of a complex intended for sale was deemed to be service by builder to the buyer unless entire consideration was received after grant of completion certificate by the competent authority.

(f) Such explanation and imposition of service tax on service by a builder was challenged before the Delhi High Court *inter-alia* on the ground that there was no mechanism for computing service tax in case of a transaction involving transfer of land. Such contention was accepted by the Delhi High Court in the case of **Suresh Kumar Bansal v/s Union of India (2016) 92 VST 330 (Del.)** wherein it was held that the valuation rules did not provide any mechanism for deriving value of services in case the transaction involved sale of land. It was therefore held that no service tax could be demanded in the absence of any computation mechanism. The argument of the revenue that there was an abatement notification to take care of deduction for land was rejected on the ground that mere abatement by way of notification could not be a substitute for statutory valuation mechanism which was absent.

(g) To overcome the judgement of the Delhi High Court in the case of **Suresh Kumar Bansal (supra),** the Service Tax (Determination of Value) Rules, 2006 were retrospectively amended. Clause (i) of Rule 2A of such rules expressly provided for deduction of amount charged for land or undivided share of land. Clause (ii) of Rule 2A provided for lumpsum deduction only in a case where value is not determined under clause (i) which provides for deduction on actual basis.

19 Mr. Sheth contended that the judgement of the Delhi High Court in the case of **Suresh Kumar Bansal (supra)** clearly held that there need

to be a specific statutory provision excluding the value of the land from the taxable value of the works contract and mere abatement by way of notification is not sufficient. Such dictum has even been complied with by the Government by way of retrospective amendment of the Service tax valuation rules so as to provide for specific deduction for consideration charged for land. It is only in the event of such actual value not being available that the alternative methods of fixed percentage deduction were to be adopted. The impugned notification under the GST Acts giving only fixed percentage of deduction for land by way of abatement is thus contrary to the judgement of the Delhi High Court in the case of **Suresh Kumar Bansal (supra).**

20 It was emphatically submitted by Mr. Sheth that the GST Acts have been enacted with a view to merge and consolidate earlier laws relating to indirect taxes. This is expressly stated in the Statement of Objects and Reasons in enacting the GST Acts. Moreover, while enacting the impugned notification, the GST Council has specifically referred to the judgement of the Supreme Court in the context of works contract in the case of **Larsen and Toubro Ltd. (supra)**. Thus the legislative history of the earlier laws has to be referred to while deciding the validity of the impugned notification. If the legislative history is seen, it clearly indicates that the intention is to only impose tax on construction undertaken for a buyer from the stage when the contract is executed between the developer and buyer. It is in this context that Entry No. 5 of the Schedule III to the GST Acts needs to be interpreted. Moreover, it is clearly held that when the actual value can be ascertained then fictional value cannot be taken into consideration. Considering such aspects, the impugned notification is clearly contrary to the statutory provisions and therefore *ultra-vires* and illegal.

21 The learned counsel for the writ applicant further contended that

the value of land is deemed to be 1/3rd of total consideration irrespective of the nature of the structure to be constructed on the land. In the case of the writ applicant the construction portion is only about 15-20% of the total agreement which is coterminous with the extent of construction to be made on the land. While the plot size is 1021 sq mts, the built up area is only 160 sq mts. Even then as per the notification the value of land is deemed to be 1/3rd of the total agreement value.

22 It was urged that the deeming fiction is *ex-facie* discriminatory in as much as persons like the writ applicant who are getting a bungalow constructed on the 10-20% of the land get the same deduction as a buyer of a flat unit in a multistoried building who merely gets an undivided share in the land and the major portion of the agreement value is towards construction cost. Further, as a result of the impugned entry, there is higher taxability in cases such as that of the writ applicant where construction is to be done by the same person who is the seller of land vis-à-vis cases where sale of land and construction is by separate individuals. It was pointed out that in the present case the seller and the developer are different persons. It was therefore canvassed that the deeming fiction introduced in the notification is without any valid basis, completely arbitrary, discriminatory and therefore violating Article 14 of the Constitution of India.

23 The learned counsel placed strong reliance upon the judgement of the Supreme Court in the case of **Wipro Ltd. v/s Assistant Collector of Customs and Others (2015) 14 SCC 161.** In this case the Rule provided for adding 1% of the FOB value of goods towards loading, unloading and handling charges even though the actual value of such charges was ascertainable. Moreover, such adhoc addition was prescribed without taking into account the different factual eventualities. Such rule was held to be *ultra-vires* the provisions of the Customs Act, 1961 as well as

arbitrary, irrational and violating Article 14 of the Constitution of India.

24 The learned counsel for the writ applicant also relied upon the judgement of the Supreme Court in the case of **Commissioner of Central Excise, Pondicherry v/s Acer India Ltd. (2004) 8 SCC 173.** In this case while the software was not liable to excise duty, duty was chargeable on computer hardware. The authorities sought to impose tax on the entire value of computer by including the value of software in the value of the computer. It was held by the Supreme Court that tax could not be indirectly levied on software by including its value in the value of computers. Such judgement was thereafter approved by the Constitution bench of the Supreme Court in the case of **Commissioner of Central Excise, Indore v/s Grasim Industries Ltd. (2018) 7 SCC 233.**

25 It was urged by Mr. Sheth that the ratio of judicial pronouncements with reference to different taxing statutes has been embodied in the GST Acts in as much as the primary principle of valuation as contained in Section 15(1) of the GST Acts is to consider the actual price paid or payable in respect of the transaction. Even when such actual price is not ascertainable, detailed valuation rules are provided in the Central Goods and Services Tax Rules, 2017 (for short "the GST Rules"). Rule 27 of the GST Rules provides for valuation for cases where consideration is not wholly in the form of money. Rule 28 of the GST Rules deals with transactions with related parties. Rule 29 of the GST rules deals with supplies between principal and agent. Rule 30 of the GST Rules provides for valuation by adding 10% profit margin to cost of production/manufacture/procurement. Rule 31 of the GST Rules, which is the residuary rule, provide for valuation using reasonable means which have to be consistent with the provisions of Section 15 as well as the valuation rules. Thus, detailed valuation mechanism is available in the statute which is primarily based on actual consideration

and such provisions cannot be ignored by simply providing adhoc and arbitrary abatement for land by way of a notification.

26 It was further submitted that strong reliance is being placed on the affidavit in reply filed by the respondents on Section 15(5) of the GST Acts. However, according to the learned counsel for the writ applicant, such provision empowers fixing of value of supply of goods or services. The sale of land being neither supply of goods nor services, its value cannot be prescribed under Section 15(5). Moreover, Section 15 (5) provides that the value of deemed supplies shall be determined in such manner as may be "prescribed". The term "Prescribed" is defined under Section 2 (87) as follows: "2 (87) "prescribed" means prescribed by rules made under this Act on the recommendations of the Council;" It was therefore argued that prescription of value even for the purpose of Section 15 (5) can only be by way of Rules and not by Notification.

27 In any case it was argued that a notification has to be in consonance with the scheme of the GST Acts and the rules made thereunder and it also has to be rational and sensible. An arbitrary notification, as in the present case, could not be saved simply on the ground that the Government had power to issue such notification. The learned counsel strongly relied upon the judgement of the Supreme Court in the case of **Wipro Ltd. (supra).**

28 It was further argued by the learned counsel for the writ applicant that the main fulcrum of the argument of the respondents revolves around Entry 5(b) of Schedule II to the GST Acts. However, according to the learned counsel such contention is totally misconceived. It was pointed out that when the GST Acts were originally implemented, Section 7 of the GST Acts which defines scope of supply included activities to be treated as supply of goods or services as referred to in

Schedule II by way of clause (d) of sub-section (1). However such clause was retrospectively deleted w.e.f. 1st July 2017 by the Central Goods and Services Tax (Amendment) Act, 2018. A new sub-section (1A) was introduced in Section 7 by the same Amendment Act providing that where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II. Thus the sole purpose of Schedule II is to provide whether a supply will be a supply of goods or supply of services. It does not provide for any deeming fiction so as to enlarge the scope of supply. Hence it was argued that Entry 5(b) of Schedule II to the GST Acts cannot be relied upon to justify the impugned notification.

29 In the last it was urged by Mr. Sheth that it is well established that the measure of tax must have a nexus with the subject matter of tax. Reference was made to the judgement of the Supreme Court in the case of **State of Rajasthan v/s Rajasthan Chemists Association (2006) 6 SCC 773** wherein it was observed that tax cannot be imposed on a value unconnected with the subject of tax. It was argued that the impugned notification leads to a consequence whereby tax is imposed on land which is never sought to be taxed by the statute. It was therefore contended that the impugned notification is ultra-vires the provisions of the GST Acts as well as arbitrary and violating Article 14 of the Constitution of India.

- **SPECIAL CIVIL APPLICATION NO. 6840 OF 2021 AND SPECIAL CIVIL APPLICATION NO. 5052 OF 2022**

30 Mr. Tushar Hemani, the learned Senior Counsel assisted by Mr. Avinash Poddar, the learned advocate for the writ applicants submitted that the writ applicants are developers who have sold/intending to sell

developed parcels of land. The advance ruling applications were filed seeking a ruling on the question whether there was any tax liability under the GST Acts on supply of developed land. The advance ruling authority held that the deduction for sale of land was admissible only to the extent of 1/3rd of the total consideration on the basis of the impugned notification. Such ruling has been affirmed by the appellate authority for advance ruling. Hence, the validity of the notification as well as the advance ruling appellate order have been challenged by filing the writ applications before this Court.

31 It was argued by Mr. Hemani that once a particular consideration was agreed for the sale of land between two parties, it was not open for the taxing authorities to rewrite the terms of the agreement. The learned counsel relied upon the judgement of the Apex Court in the case of **Mangalore Ganesh Beedi Works v/s Commissioner of Income Tax (2015) 378 ITR 640 (SC)** wherein it was observed that the taxing authorities do not have the power or jurisdiction to re-write the terms of the agreement arrived at between the parties with each other at arm's length and with no allegation of any collusion between them and that the commercial expediency of the contract was to be adjudged by the contracting parties as to its terms. For similar proposition of law, reliance was also placed on the judgements of this Court in the cases of Mohit Marketing v/s CIT Tax Appeal No. 157 of 2000 decided on 21st April 2005 and **Commissioner of Income Tax v/s Parle International Ltd. Tax Appeal No. 1905 of 2009** decided on 8th August 2016.

32 Reference was also made to the judgement of the Supreme Court in the case of **Commissioner of Income Tax, Hyderabad v/s Motor and General Stores (P) Ltd. AIR 1968 SC 200** wherein it was observed that if a document in question was intended to be acted upon and there was no suggestion of malafides or bad faith or fraud, then the taxing statute

was required to be applied in accordance with the legal rights of the parties to the transaction. It was further observed that when the transaction is embodied in a document the liability to tax depends upon the meaning and content of the language used in accordance with the ordinary rules of construction.

33 In so far as the meaning of the term "land" is concerned, it was sought to be urged that developed land would also be included within the meaning of the term "land". In this regard reliance was placed on the definition of the term "land" contained in Section 3(a) of the Land Acquisition Act, 1894 wherein land is defined to include the "benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth."

34 In was then argued by Mr. Hemani that even if the impugned Notification is not to be struck down as *ultra-vires,* the same is required to be read down as inapplicable where separate value of land was ascertainable. In this regard the learned counsel relied upon the judgement of the Supreme Court in the case of **Arun Kumar and Others v/s Union of India and Others (2007) 1 SCC 732.**

35 In the last it was contended that since the advance ruling appellate order took the view that only 1/3rd deduction was available in respect of developed land because of the impugned notification, such orders were also required to be quashed and set aside.

- **SUBMISSIONS OF THE RESPONDENTS**

36 Mr. Devang Vyas, the learned Additional Solicitor General of India assisted by Mr. Priyank Lodha, the learned Senior Standing Counsel, on the other hand, has vehemently opposed the writ applications.

37 Mr. Vyas pointed out that the writ applicant has filed the captioned petition, *inter-alia,* challenging the vires of entry 3 (if) of the Notification No. 11/2017 along with paragraph No. 2 read with Notification No. 3/2019 Central Tax (Rate) dated 29/3/2019 ("said Notifications"). The said notifications were issued under sub-sections (1), (3) and (4) of section 9, sub-section (1) of section 11, sub-section (5) of section 15, sub- section (1) of section 16 and section 148 of the Central Goods and Services Tax Act, 2017, wherein entry 3 (if) is with respect to the construction of a complex, building, civil structure or a part thereof for which the rate of duty i.e. CGST is mentioned as 9% and the value for such transaction shall be the transaction value minus one third of the transaction value, which is disputed by the petitioner that such deduction must be of the land value as declared under the contract and tax must be imposed only on the construction amount.

38 It was argued that Article 246A(l) of the Constitution empowers the Parliament and the legislature of every State to make law in respect of the Goods and Services Tax to be imposed by the Central or State Government. Section 9 of the CGST Act, 2017 provides for levy of Central Goods and Services Tax on the supply of goods or service at such rates as may be notified by the Government on the recommendations of the GST Council which is a constitutional body. Further, as per Article 279A (4), the Council shall make recommendations to the Union and the States on the issues related to the GST. Section 9(l) of the CGST Act, 2017 provides that there shall be levied a tax called the central goods and services tax on all intra-State supplies of goods or services or both, except on the supply of alcoholic liquor, for human consumption, on the value determined under section 15 and at such rates, not exceeding twenty per cent., as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person. Thus, the levy of

CGST shall be on the value as determined under Sec. 15 of the Act. Section 15(5) of the CGST Act, 2017 provides that notwithstanding anything contained in sub- section (1) or sub-section (4), the value of such supplies as may be notified by the Government on the recommendations of the Council shall be determined in such manner as may be prescribed.

39 It was submitted that in the 34th GST Council meeting, the Council agreed to apply tax at new rates to be applicable to the new projects or ongoing projects. Consequently, the Notification No. 03/2019-Central Tax (Rate) dated 29.03.2019 (amending Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017) was issued by the Government on the recommendation of the GST Council. It provided for deemed valuation of the land as provided in the 2nd para of the notification.

40 Thus, according to Mr. Vyas, government has express power to determine the deemed value of such supply on recommendation of the GST Council. In pursuance of the above provisions, on recommendation of the Council, deemed value of land has been ascertained to be one third of the total amount charged for such supply. Thus, the contention that determination of value of the supply by subordinate legislation, even though, actual price paid / payable in respect of the construction service is available, is *ultra vires* Section 15 of the CGST act does not hold ground. Also, contention that deemed value of land to be deducted for the purpose of arriving at the value of the construction service is beyond the scope of delegation under Section 9(1) of the CGST Act, 2017 has no legal basis at all.

41 Reliance was placed by the learned Additional Solicitor General on the decision of the Apex Court in the case of **Union of India v. Nitdip**

Textile Processors Pvt. Ltd. (2012) 1 SCC 226, wherein it is observed that the legislature enjoys very wide latitude in classification for taxation. Further, it was observed that the State is allowed to pick and choose districts, objects, persons, methods and even rates for taxation, if it does so reasonably. In general, larger discretion is given to the legislature in taxing statutes than in other spheres. Reference was also made to the judgment of the Supreme Court in the case of **Anant Mills Co. Ltd. vs. State of Gujarat & Ors., (1975) 2 SCC 175.**

42 Thus, it was submitted by Mr. Vyas that the Central Government is empowered to decide the rate with conditions as applicable, in public interest on the basis of recommendation of GST council and GST council is well within its power to recommend such reduction with restrictions as applicable. Government is empowered to levy tax, prescribed conditions/ restrictions. It enjoys wide latitude in classification for taxation and is allowed to pick and choose rates of taxation. The concerned notifications have been issued in the pursuance of the recommendation of the GST Council. Therefore, question of impugned entry in the Notification being ultra vires Section 7(2), Section 9(1), section 15 of the CGST Act. 2017 and Article I4 and 246A of the Constitution of India does not arise at all. Reliance was placed the learned Additional Solicitor General on the following judgements:

(a) Union of India (UOI) and Ors. Vs. VKC Footsteps India Pvt. Ltd. AIR 2021 SC 4407, 2021 [52] G.S.T.L. 513,

(b) Spences Hotel Pvt. Ltd. and Ors. Vs. State of West Bengal and Ors. (1991) 2 SCC 154

(c) Khyerbari Tea Co. Ltd. and Ors. Vs.The State of Assam AIR 1964 SC 925.

43 Mr. Vyas further submitted that Schedule III under Section 7 of the GST Acts provides a list of activities or transactions which shall be treated neither as a supply of goods nor a supply of services. In the said schedule item 5 is “Sale of Land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building.” Further, Schedule II of the CGST act is also under Section 7, it provides list of activities or transactions which are to be treated as supply of goods or supply of services. Paragraph 5 (b) of the said Schedule specifies that, “construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.”

44 On the basis of such statutory provisions it was submitted by Mr. Vyas that in case if a transaction is of sale and purchase of (1) Land, and (2) Land and Building (wherein entire consideration has been received after completion certificate is issued to such building), then such transaction shall be treated neither as supply of goods nor services under Schedule III and hence, the same would not be amenable to any tax under GST. However, in case of a transaction that involves construction of a building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, wherein the completion certificate with respect to such constructions has not been received, such transactions shall be treated as services under Paragraph 5(b) of Schedule II and therefore, shall be taxed as per the aforestated Notifications.

45 Mr. Devang Vyas further contended in so far as the facts are concerned the writ applicant has entered into a booking agreement with

the developer i.e. the respondent No. 4 dated 29th September 2020 whereby the writ applicant agreed to purchase the residential plot together with a bungalow / apartment thereon in the scheme called as the "Kalhaar Blues and Greens", subject to the various terms, conditions, covenants, prohibitions, restrictions and limitations as more specifically provided therein.

46 It was contended that the nature of transaction is a transaction concerning the land, construction of the bungalow (to be constructed only by the developer) and the development of various amenities, facilities, common areas etc. which the writ applicant shall have a right to use along with the other occupiers of the aforesaid scheme to the exclusion of others. None of these components of the transaction can be separated and are integral part of the transaction.

47 It was argued that the writ applicant shall be subjected to many conditions, limitations, prohibitions and restrictions with respect to the concerned property as the writ applicant has no right to construct on the plot, no right to change the plan / layout out of all the plans provided by the developer, no right to get the construction done by any other person other than the developer, no right to divide the plot area from the scheme, no right to deal with the plot area alone and other such conditions, limitations, prohibitions and restrictions, except without the consent of the Developer and the concerned local authority.

48 It was contended that the concerned transaction is for sale of a developed piece of land and not of a plain land and therefore, it is subjected to many conditions, limitations, prohibitions and restrictions unlike a transaction of sale of land. The Supreme Court of India in **Narne Construction P. Ltd. and Ors. Vs. Union of India (UOI) and Ors. (2012) 5 SCC 359**, was dealing with an issue wherein the basic question to be

answered was that in case if sale of a developed plot is considered to be sale of land then the said transaction shall be out of scope of the Consumer Protections Act, and the Buyer / purchaser shall be not a consumer and consequently will have no relief under the said act and in case if it is declared as service / not only a sale of land, then the Buyer / purchaser shall be a consumer and consequently will have relief under the said act. The Apex Court concluded in the above matter that the sale of a Developed Plot is not sale of land only, it is a different transaction than a mere sale of land.

49 Mr. Vyas therefore contended that in view of the Schedules to the GST Act, the proposed transaction is not one of sale and purchase of Land, or, Land and Building (wherein completion certificate is procured) and therefore, it would not fall under the Schedule III. The present transaction is one of development and construction of a building, civil structure or part thereof, intended to be sold to the writ applicant and therefore, the present transaction falls squarely under Paragraph 5(b) of Schedule II.

50 Mr. Devang Vyas further contended that the impugned Notification has been issued in exercise of the powers conferred by sub-sections (1), (3) and (4) of section 9, sub-section (1) of section 11, sub-section (5) of section 15, sub-section (1) of section 16 and section 148 resply, wherein Serial No. 3 – notifies the rate of tax on the intrastate supply of services with respect to construction services.

51 It was submitted that the present transaction with respect to the sale and purchase of a developed / developing plot shall fall under the Entry 5(b) of the Schedule II and therefore, the said Notifications shall be applicable with respect to the rate of tax to be charged on such services.

52 It was submitted that Paragraph 2 of the said Notification stipulates the formula in order to arrive at the value of the supply. Paragraph 2 therein stipulates that the value of supply shall be equivalent to the total amount charged less the value of land / undivided land, as the case may be, in such supply. It further stipulates that the value of land / undivided land shall be equal to 1/3 of the total amount charged for such supply. It is pertinent to note that the deeming fiction is used only to ascertain the value of supply to be taxed and in order to consider the land portion in the supply, apart from construction and other development services, the GST Council recommended the aforestated method / formula to arrive at such calculation of value of supply.

53 Mr. Vyas further submitted that the consideration as provided in the booking agreement with respect to the land and construction are decided *inter se t*he parties and the same might not reflect the actual value of the land involved. The consideration provided in the booking agreement is only for the purpose of calculating the final consideration value and nothing beyond that. The final sale / conveyance deed shall also be reflecting only the final consideration amount and the stamp duty also will be paid on such consideration amount and not separately.

54 It was further submitted that the component of land as provided in the booking agreement is not only land, it is a developed land as being a part of the plotting scheme. The developer shall have to get the plans approved by the concerned local development authority. The developer shall develop common amenities and facilities like the roads, water lines, drainage, greens, electricity and transmission lines, security services etc. Thus, the land component is not only land but also consist of such development being a part of the plotting scheme and such

benefits are exclusive to the occupants of the plotting scheme including the the writ applicant and the same are not available to any outsider and thus, only by virtue of owning a plot in the plotting scheme, all such benefits are available to the writ applicant and not otherwise. Hence, land includes these developments also and the value of such development cannot be ascertained as the same are to be enjoyed with all the occupants of the scheme.

55 Mr. Vyas submitted that in the event if the contention of the writ applicant is accepted that the value of the land must be taken as one being declared in the agreement, then it may lead to absurd results wherein in an attempt to save tax, the developer and buyer may mutually decide that 99% of the total consideration would be the value of land and the balance would be construction. This may lead to huge losses to the public exchequer and against the basic concept of tax. Even in the realm of Stamp Duty, the duty is applicable on the value of transaction, however, such value is not left to the parties to be decided, a minimum value is taken as deemed value of the transaction (jantri value) and in cases wherein the transaction value is less than the Jantri value then the jantri value is taken as deemed transaction value and the stamp duty is paid accordingly. Similarly, the value of developed land cannot be left to be decided / declared by the parties to the transaction.

56 It was further argued that the inequities cannot render a provision susceptible to challenge to its legality / constitutionality. Reliance was placed on the judgement of the Supreme Court in the case of **Union of India & Ors. vs. VKC Footsteps India Pvt. Ltd. AIR 2021 SC 4407.** It was contended that the Supreme Court, after referring to many of its earlier decisions, has held that a formula is to be evolved / read down by the Courts only if it leads to absurd results or is unworkable. Merely because some inequities may result from practical effect of the formula cannot be

a ground to replace the wisdom of the legislature or its delegate. On such basis it was contended that when a calculation / method / formula is devised as per the powers granted under an Act, the same cannot be held illegal or unconstitutional just because it may result into certain inequities. Certainly recommendations can be made to the concerned authority to revisit the concerned provision with respect to the resulting inequities, but on this ground alone the said provision cannot be held illegal / unconstitutional.

57 In so far as the writ applications challenging the advance ruling orders are concerned, it was additionally argued by Mr. Vyas that writ application under Article 226 of the Constitution of India is not maintainable against such orders under the advance ruling appellate orders.

- **ANALYSIS:**

58 Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the impugned notification providing for 1/3rd deduction with respect to land or undivided share of land in cases of construction contracts involving element of land is *ultra-vires* the provisions of the GST Acts and/or violative Article 14 of the Constitution of India?

- **STATUTORY PROVISIONS:**

59 The GST Acts were enacted in our country w.e.f. 1st July 2017 with the sole intention to consolidate and streamline the earlier indirect tax laws. The provisions of the Central Goods and Services Tax Act, 2017 (for short "the CGST Act") and the Gujarat Goods and Services Tax Act, 2017, in so far as the present controversy is concerned, are identical and hence the provisions of the CGST Act are referred to for the sake of

convenience.

60 The charging provision of the CGST Act is contained in Section 9 of the CGST Act. Section 9(1) reads thus:

> *"9. (1) Subject to the provisions of sub-section (2), there shall be levied a tax called the central goods and services tax on all intra-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under section 15 and at such rates, not exceeding twenty per cent., as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person."*

61 Thus the charge of tax is on the "supply" of goods or services. The scope of "supply" is defined under Section 7(1) of the CGST Act as under:

> *"7. (1) For the purposes of this Act, the expression "supply" includes–*
> *(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;*
> *(aa) the activities or transactions, by a person other than an individual, to its members or constituents or vice versa, for cash, deferred payment or other valuable consideration.*
> *Explanation. – For the purpose of this clause, it is hereby clarified that, notwithstanding anything contained in any other law for the time being in force or any judgement, decree or order of any Court, tribunal or authority, the person and its members or constituents shall be deemed to be two separate persons and the supply of activities or transactions*

inter se shall be deemed to take place from one such person to another;
(b) import of services for a consideration whether or not in the course or furtherance of business; and
(c) the activities specified in Schedule I, made or agreed to be made without a consideration."

62 The reference to Schedule II to the GST Acts is given in sub-section (1A) to Section 7 which reads thus:

"7(1A) Where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II."

63 The reference to Schedule III to the GST Acts is given in sub-section (2) of Section 7 which is as under:

"7(2) Notwithstanding anything contained in sub-section (1),—
(a) activities or transactions specified in Schedule III; or
(b) such activities or transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities, as may be notified by the Government on the recommendations of the Council,
shall be treated neither as a supply of goods nor a supply of services."

64 Hence, supply includes all forms of supply made or agreed to be made for a consideration by a person in the course or furtherance of business. If a transaction qualifies as "supply" then it shall be treated as supply of goods or services as referred to in the Schedule II. If the activities or transactions are specified in the Schedule III or if they are notified as such by the Government, then they shall be treated as neither

supply of goods nor supply of services.

65 The relevant extract of Schedule II to the GST Acts reads as under:

"SCHEDULE II

[See section 7]

ACTIVITIES OR TRANSACTIONS TO BE TREATED AS SUPPLY OF GOODS OR SUPPLY OF SERVICES

5. Supply of services

The following shall be treated as supply of services, namely:—

Xxxx

(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.

Explanation.—For the purposes of this clause—

(1) the expression "competent authority" means the Government or any authority authorised to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely:—

(i) an architect registered with the Council of Architecture constituted under the Architects Act, 1972; or

(ii) a chartered engineer registered with the Institution of Engineers (India); or

(iii) a licensed surveyor of the respective local body of the city or town or village or development or planning authority;

(2) the expression "construction" includes additions, alterations, replacements or remodelling of any existing civil structure;

6. Composite supply
The following composite supplies shall be treated as a supply of services, namely:-
(a) works contract as defined in clause (119) of section 2; and

xxxx"

66 The relevant extract of Schedule III to the GST Acts reads thus:

"SCHEDULE III
[See section 7]
ACTIVITIES OR TRANSACTIONS WHICH SHALL BE TREATED NEITHER AS A SUPPLY OF GOODS NOR A SUPPLY OF SERVICES
xxxx
5. Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building.

67 It is not in dispute that the sale of land and building are not liable to tax under the GST Acts. However, as the exclusion of sale of building from the tax net is subject to clause (b) of paragraph 5 of Schedule II, the transaction with respect to the sale of building is taxable qua the construction services unless the entire consideration is received by the supplier after the receipt of completion certificate or first occupation whichever is earlier.

68 The applicable rate of tax for all supply of services is stipulated by the Notification No. 11/2017-Central Tax (Rate). The rate of tax for construction services is provided in the Entry 3 of the said notification.

The relevant clause in so far as the writ applicant in Special Civil Application No. 1350 of 2021 is concerned reads thus:

Sl No.	*Chapter, Section or Heading*	*Description of Service*	*Rate (per cent.)*	*Condition*
(1)	*(2)*	*(3)*	*(4)*	*(5)*
3	*Heading 9954 (Construction services)*	*(if) Construction of a complex, building, civil structure or a part thereof, including,-* *(i) commercial apartments (shops, offices, godowns etc.) by a promoter in a REP other than RREP,* *(ii) residential apartments in an ongoing project, other than affordable residential apartments, in respect of which the promoter has exercised option to pay central tax on construction of apartments at the rates as specified for this item in the manner prescribed herein,* *but excluding supply by way of services specified at items (i), (ia), (ib), (ic), (id) and (ie) above intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.* *Explanation. -For the removal of doubt, it is hereby clarified that, supply by way of services specified at items (i), (ia), (ib), (ic), (id) and (ie) in column (3) shall attract central tax*	*9*	*Provided that in case of ongoing project, the registered person shall exercise one time option in the Form at Annexure IV to pay central tax on construction of apartments in a project at the rates as specified for item (ie) or (if), as the case may be, by the 10th of May, 2019;* *Provided also that where the option is not exercised in Form at annexure IV by the 10th of May, 2019, option to pay tax at the*

		prescribed against them in column (4) subject to conditions specified against them in column (5) and shall not be levied at the rate as specified under this entry. *(Provisions of paragraph 2 of this notification shall apply for valuation of this service)*		

69 It has been mentioned at the end of the entry in a bracketed portion that the provision of paragraph 2 of the notification shall apply for valuation of this service. Paragraph 2 of the notification which is the epicentre of the entire controversy and the validity of which is under challenge reads as under:

> *"2. In case of supply of service specified in column (3), in item (i), (ia), (ib), (ic), (id), (ie) and (if) against serial number 3 of the Table above, involving transfer of land or undivided share of land, as the case may be, the value of such supply shall be equivalent to the total amount charged for such supply less the value of transfer of land or undivided share of land, as the case may be, and the value of such transfer of land or undivided share of land, as the case may be, in such supply shall be deemed to be one third of the total amount charged for such supply.*
>
> *Explanation. –For the purposes of this paragraph and paragraph 2A below, "total amount" means the sum total of,-*
> *(a) consideration charged for aforesaid service; and*
> *(b) amount charged for transfer of land or undivided share of land, as the case may be including by way of lease or sublease.".*

70 It is thus provided by way of notification that in so far as the construction services involving transfer of land or undivided share of

land are concerned, the deduction for such transfer of land or undivided share of land will be given to the extent of one-third of the total consideration charged for the entire transaction. In other words the value towards the transfer of land or undivided share in land is deemed to be one-third of the total consideration.

71 It is the validity of such mandatory deeming fiction sought to be imposed by way of delegated legislation which is being tested by this Court vis-à-vis the provisions of the CGST Act as well as the Constitution of India.

- **WHAT IS SOUGHT TO BE TAXED BY THE PARLIAMENT/STATE LEGISLATURES ?**

74 In order to determine whether the impugned portion of the notification is contrary to the CGST Act or not, it is first necessary to understand what is sought to be taxed by the Parliament.

75 For this purpose it is necessary to glance through the legislative history of imposition of indirect tax on construction service as explained by Mr. Uchit Sheth since all the erstwhile indirect tax laws have been merged into the GST law. A controversy with respect to taxability of construction contracts first erupted with the decision of the Supreme Court in the **1st Gannon Dunkerley's case (supra)** wherein it was held that the State legislatures do not have the legislative competence to impose sales tax on indivisible works contracts since they did not involve sale of goods as understood under the Sales of Goods Act, 1930. The nature of a building construction contract was very succinctly explained by the Supreme Court in the judgement. Relevant observations are as under:

"27. The nature and incidents of works contracts have been the subject of consideration in numerous decisions of the English Courts, and there is a detailed consideration of the points now under discussion, insofar as building contracts, are concerned, in Hudson on Building Contracts, 7th Edn., pp. 386-89 and as regards chattels, in Benjamin on Sale, 8th Edn. pp. 156-68 and 352-55. It is therefore sufficient to refer to the more important of the cases cited before us. In Tripp v. Armitage [(1839) 4 M & W 687 : 150 ER 1597] one Bennett, a builder, had entered into an agreement with certain trustees to build a hotel. The agreement provided inter alia that the articles which were to be used for the structure had to be approved by the trustees. Subsequently, Bennett became bankrupt, and the dispute was between his assignees in bankruptcy, and the trustees as regards title to certain wooden sash-frames which had been approved on behalf of the trustees but had not yet been fitted in the building. The trustees claimed them on the ground that property therein had passed to them when once they had approved the same. In negativing this contention.

Lord Abinger, C.B., observed:

"… this is not a contract for the sale and purchase of goods as movable chattels; it is a contract to make up materials, and to fix them; and until they are fixed, by the nature of the contract, the property will not pass." Parke, B., observed:

"… but in this case, there is no contract at all with respect to these particular chattels — it is merely parcel of a larger contract. The contract is, that the bankrupt shall build a house; that he shall make, amongst other things, window-frames for the house, and fix them in the house, subject to the approbation of a surveyor; and it was never intended by this contract, that the articles so to be fixed should become

the property of the defendants, until they were fixed to the freehold."

76 Thus, in a building construction contract the contract is for getting the building constructed and not for sale of goods used in the course of construction of contract. It was further observed that the property in goods would pass to the buyer by the theory of accretion i.e. as and when the building is actually constructed for the buyer. The relevant observations of the Supreme Court in this regard are as under:

"33. Another difficulty in the way of accepting the contention of the appellant as to splitting up a building contract is that the property in materials used therein does not pass to the other party to the contract as movable property. It would so pass if that was the agreement between the parties. But if there was no such agreement and the contract was only to construct a building, then the materials used therein would become the property of the other party to the contract only on the theory of accretion. The position is thus stated by Blackburn, J., at pp. 659-60 in ***Appleby v. Myres [(1867) LR 2 CP 651] :***

"It is quite true that materials worked by one into the property of another become part of that property. This is equally true, whether it be fixed or movable property. Bricks built into a wall become part of the house; thread stitched into a coat which is under repair, or planks and nails and pitch worked into a ship under repair, become part of the coat or the ship."

When the work to be executed is, as in the present case, a house, the construction imbedded on the land becomes an accretion to it on the principle quicquid plantatur solo, solo cedit, and it vests in the other party not as a result of the contract but as the owner of the land. Vide Hudson on Building Contracts, 7th Edn., p. 386. It is argued that the

maxim, what is annexed to the soil goes with the soil, has not been accepted as a correct statement of the law of this country, and reliance is placed on the following observations in the Full Bench decision of the Calcutta High Court in Thakoor Chunder Poramanick v. Ramdhone Bhuttacharjee[(1866) 6 WR 228] :

"We think it should be laid down as a general rule that, if he who makes the improvement is not a mere trespasser, but is in possession under any bona fide title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil, — the option of taking the building, or allowing the removal of the material, remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess."

The statement of the law was quoted with approval by the Privy Council in Beni Ram v. Kundan Lall [(1899) 26 IA 58] and in Narayan Das Khettry v. Jatindranath[(1927) LR 54 IA 218] . But these decisions are concerned with rights of persons who, not being trespassers, bona fide put up constructions on lands belonging to others, and as to such persons the authorities lay down that the maxim recognised in English law, quicquid plantatur solo, solo cedit has no application, and that they have the right to remove the superstructures, and that the owner of the land should pay compensation if he elects to retain them. That exception does not apply to buildings which are constructed in execution of a works contract, and the law with reference to them is that the title to the same passes to the owner of the land as an accretion thereto. Accordingly, there can be no question of title to the materials passing as movables in favour of the other party to the contract. It may be, as was suggested by Mr Sastri for the respondents, that when the

> *thing to be produced under the contract is movable property, then any material incorporated into it might pass as a movable, and in such a case the conclusion that no taxable sale will result from the disintegration of the contract can be rested only on the ground that there was no agreement to sell the materials as such. But we are concerned here with a building contract, and in the case of such a contract, the theory that it can be broken up into its component parts and as regards one of them it can be said that there is a sale must fail both on the grounds that there is no agreement to sell materials as such, and that property in them does not pass as movables.*

77 It was thus held by the Supreme Court that in case of a building construction contract, the property in goods passed as immovable property as and when the goods were embedded into the earth pursuant to the construction contract and therefore the construction contract could not be treated as involving sale of goods.

78 The 46th Constitutional amendment was thereafter passed whereby, *inter-alia,* the transfer of property in goods involved in the course of execution of a works contract was deemed to be a sale of goods under the clause (b) of Article 366(29A) of the Constitution of India.

79 By virtue of such Constitutional Amendment the State legislatures derived power to impose tax on the goods element of the works contract. Thereafter, a question arose as to how the value of the goods could be determined in case of indivisible works contract. The Supreme Court in the **2nd Gannon Dunkerley's case (supra)** held that the expenses pertaining to labour element of the contract and profit thereon was required to be excluded for determining sale value of goods involved in the works contract. Certain observations were also made by the Supreme

Court with regard to fixing of deemed value which will be referred to at a later stage.

80 Thus sales tax became payable on sale value of goods involved in the course of execution of works contract. However, it appears that such contracts were simplicitor construction contracts and not development agreements which would also involve an element of transfer of land.

81 In so far as tripartite development agreements involving transfer of land are concerned, it was held by the Supreme Court in the case of **K. Raheja Development Corporation (supra)** that even such agreements would constitute works contracts and they would involve deemed sales of goods. The correctness of such decision was doubted and it was referred to a larger bench. Larger bench of the Supreme Court in its decision in the **1st Larsen and Toubro case (supra)** observed as under:

> *"88.The question is: whether taxing sale of goods in an agreement for sale of flat which is to be constructed by the developer/promoter is permissible under the Constitution? When the agreement between the promoter/developer and the flat purchaser is to construct a flat and eventually sell the flat with the fraction of land, it is obvious that such transaction involves the activity of construction inasmuch as it is only when the flat is constructed then it can be conveyed. We, therefore, think that there is no reason why such activity of construction is not covered by the term "works contract". After all, the term "works contract" is nothing but a contract in which one of the parties is obliged to undertake or to execute works. Such activity of construction has all the characteristics or elements of works contract. The ultimate transaction between the parties may be sale of flat but it cannot be said that the characteristics of works contract are not involved in that transaction. When the transaction involves the activity of construction,*

the factors such as, the flat purchaser has no control over the type and standard of the material to be used in the construction of the building or he does not get any right to monitor or supervise the construction activity or he has no say in the designing or layout of the building, in our view, are not of much significance and in any case these factors do not detract the contract being works contract insofar as construction part is concerned."

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106. In the development agreement between the owner of the land and the developer, direct monetary consideration may not be involved but such agreement cannot be seen in isolation to the terms contained therein and following development agreement, the agreement in the nature of the tripartite agreement between the owner of the land, the developer and the flat purchaser whereunder the developer has undertaken to construct for the flat purchaser for monetary consideration. Seen thus, there is nothing wrong if the transaction is treated as a composite contract comprising of both a works contract and a transfer of immovable property and levy sales tax on the value of the material involved in execution of the works contract. The observation in the referral order that if the ratio in Raheja Development [K. Raheja Development Corpn. v. State of Karnataka, (2005) 5 SCC 162] is to be accepted then there would be no difference between works contract and a contract for sale of chattel as chattel overlooks the legal position which we have summarised above."

82 Thus it was held that even a tripartite agreement between the land owner, developer and buyer involved construction of flats at the behest of the buyer and hence it involved taxable deemed sale of goods. It is however important to note that the Supreme Court clarified in para 110 of the judgement as under:

> *"110. It may, however, be clarified that activity of construction undertaken 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."*

83 Hence only the construction which was undertaken after agreement with the purchaser was held to involve works contract. The argument of the State that even construction prior to agreement which was ultimately intended for sale would be taxable was specifically rejected as under:

> *"112. The submission of Mr K.N. Bhat that the view in Raheja Development [K. Raheja Development Corpn. v. State of Karnataka, (2005) 5 SCC 162] that when a completed building is sold, there is no works contract and, therefore, no liability to tax is not correct statement of law, does not appeal to us. If at the time of construction and until the construction was completed, there was no contract for construction of the building with the flat purchaser, the goods used in the construction cannot be deemed to have been sold by the builder since at that time there is no purchaser. That the building is intended for sale ultimately after construction does not make any difference."*

84 When the impugned notifications came to be conceptualized by the Goods and Services Tax Council, the decision of the Supreme Court in the **1st Larsen and Toubro Ltd. case (supra)** was specifically referred to in the minutes of the 14th GST Council meeting. The relevant extract of the minutes of the 14th GST Council meeting which are part of the record of the writ application read thus:

"24.2. The Secretary stated that in the construction sector Works contracts have been deemed as service and GST would be applicable for supply of work contract services before completion of construction of building but there would be no GST on the sale of a ready built building or flat. He stated that as per the decision of the Supreme Court, no tax could be charged on the value of land, and therefore, the Fitment Committee recommended that in a supply of works contract service where the value of land was included in the amount charged from the service recipient (along with the value of building materials and the services given by the contractor), one-third of the total consideration amount could taken as the value of land for abatement purpose. He stated that full ITC on works contract would encourage purchase of building materials from registered suppliers but no refund of input tax credit overflow would be permitted. He stated that presently the approximate combined incidence of tax was around 9% -10% but the headline rate of tax would now become 12% with the benefits of ITC. He added that the overflow of input tax credit in this sector would not be refunded. He stated that building materials would be mostly in the rate slab of 12% and due to benefit of ITC, the prices of flats should become cheaper. He stated that consumer education would be required on this subject.

23.3 The Hon'ble Minister from Telangana stated that two different schemes of taxation in construction sector could lead to confusion and suggested that sale of finished flats should also get ITC as otherwise there was a risk of builder selling finished flats under construction. The Hon'ble Deputy Chief Minister of Gujarat stated that this possibility had become remote after the enactment of the Real Estate (Development and Regulation) Act (RERA). The Hon'ble Minister from Maharashtra stated that abatement regarding value of land should be kept out of the

current proposal as in his State, in 12 Corporations, the land value was about 50% of the value of the flat and abatement of 30% would lead to litigation. He suggested that abatement should be given as per ready reckoner of the land value or on the basis of the stamp duty value. He also referred to the Supreme Court Judgment in the case of M/s Larsen & Tourbro Limited, decided in September 26, (para 115) which was as follow: "It may, however be clarified that activity of construction undertaken 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. In view of this, he made the following proposal for abatement for the part transfer of property in goods or services used in construction, before the contract between buyer and the developer came into existence.

Sr. No.	*Stage during which the developer enters into a contract with the purchaser.*	*Rate of Abatement*
a)	*Before issue of the Commencement Certificate.*	*NIL*
b)	*From the Commencement Certificate to the completion of plinth level.*	*5%*
c)	*After the completion of plinth level to the completion of 100% of RCC framework*	*15%*
d)	*After the completion of 100% RCC framework to the Occupancy Certificate.*	*45%*
e)	*After the Occupancy Certificate*	*100%*

He added that for determining the value of supply of services as per the above Table, it shall be necessary for the dealer to furnish a certificate from the Competent Authority. This would make the levy compliant with Law laid down by Hon'ble Courts and such deduction would avoid hardship to people in Maharashtra (mainly MMRDA

region). He further proposed exemption from levy of Maharashtra SGST on ongoing construction of complex, building etc. services, where lump sum amount was already paid on full consideration under the Maharashtra Value Added Tax Act. He stated that the Government of Maharashtra proposed to grant exemption from levy of tax for such construction services where the full amount in lieu of tax was already deposited in the Government treasury along with the return for the tax period preceding the appointed day. The Hon'ble Minister from Maharashtra sought a recommendation from the Council for grant of exemption under Section 11 of the SGST Act from levy of State GST on such construction services. The Hon'ble Deputy Chief Minister of Gujarat also expressed apprehension that if Courts gave adverse judgments regarding the proposed abatement for land value, it could create problems. The Secretary stated that taking land value as per ready reckoner would create complications as flats would be of different sizes and common areas would also need to be allocated. He stated that if an option was given for abatement on the basis of ready reckoner of the land value, this would lead to exercise of discretion and could affect revenue. After discussion, the Council agreed to the proposal on the rate of tax on construction service proposed in Annexure VIII and also the other taxation proposals in Annexure VIII.

85 Hence, it is not as if the very base of the levy was sought to be changed under the CGST Act. While earlier VAT and service tax were imposed on tripartite agreements, such taxes were sought to be consolidated under the CGST Act with a specific exclusion of land element. In other words the construction which was carried out by the developer in accordance with the agreement with the prospective buyer, which was earlier taxable under the Vat/service tax law is now sought to be taxed under the CGST Act and therefore deduction is given for sale of land.

86 Even otherwise "supply" under Section 7 of the CGST Act includes supply of goods or services made or agreed to be made for a consideration. Thus the factum of supply would be initiated only once the agreement is entered into between the supplier and recipient and such agreement is for consideration. This is in consonance with the observation of the Supreme Court in the case of the 1st Larsen and Toubro Ltd. (supra) that there cannot be a sale in respect of construction undertaken prior to agreement with the buyer.

87 Thus the legislative intent is to impose tax on construction activity undertaken by a supplier at the behest of or pursuant to contract with the recipient. There is no intention to impose tax on supply of land in any form and it is for this reason that it is provided in the Schedule III to the GST Acts that the supply of land will be neither supply of goods nor supply of services.

- **RELEVANCE OF DEVELOPED VIS-À-VIS UNDEVELOPED LAND:**

88 If the statutory provisions are interpreted from this perspective then the difference sought to be drawn by the learned A.S.G. between developed and undeveloped land pales into insignificance. As such, when the entry in the Schedule III says "sale of land" then it can be land in any form. In any case the charge of tax is on supply of goods or services made or agreed to be made for a consideration and therefore even in a case of a tripartite agreement for sale of land and building, the imposition of tax can only be on the construction activity which is undertaken by the supplier at the behest of the proposed buyer. Thus, if a tripartite agreement is entered into after the land is already developed by the developer, then such development activity was not undertaken for the prospective buyer and therefore there is no question of imposition of GST on the developed land.

89 We are not dealing with a case where development is undertaken at the behest of another person. If that be so, then there could be imposition of tax under the CGST Act on the goods and services used in the course of development.

90 However, in the present case what is sought to be argued by the revenue is that the exclusion of sale of land will not be available since the land is a developed piece of land. It is difficult for us to accept such argument as at the point of time when the buyer entered into the picture, the land was already developed. Thus, even without going to Schedule III, the only service which is supplied by the supplier to the recipient is the construction undertaken for the buyer and it is such supply alone which can be taxed. Hence the fact that the land is not a plain parcel of land but a developed land cannot be a ground for imposing tax on the sale of such land.

91 In fact the argument of Mr. Vyas is not supported by the impugned notification itself. It is not as if deduction is not granted if land is not developed. Deduction is granted for any transfer of land. Mr. Vyas has also not contended that the deduction of 1/3rd as stipulated in the notification is not available to the writ applicants. Thus "sale of land" under Schedule III to the GST Acts covers sale of developed land even as per the impugned notification. Hence the only question which is to be determined is whether such artificial deeming fiction of 1/3rd deduction is *ultra-vires* the provisions of the CGST Act or the Constitution.

- **MEASURE OF TAX:**

92 Keeping the aforementioned background in mind, the validity of fixed deduction of 1/3rd for transfer of land or undivided share in land by the impugned notification needs to be decided. In other words when

the tax is imposable under the charging section on the supply of construction service to the recipient, the question is whether for determining the quantum of such tax, a flat deduction can be stipulated by delegated legislation?

93 In this regard Section 15(1) of the CGST Act which deals with valuation needs to be referred to. The said section reads thus:

> *"15(1) The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply."*

94 Thus, ordinarily the value of supply of goods or services or both should be the value which is the price actually paid or payable for the said supply of goods. Sub-sections (2) and (3) of Section 15 provide for certain inclusions and exclusions from value of supply which are not relevant for the present issue.

95 In the case of the writ applicant of the Special Civil Application No. 1350 of 2021, the booking agreement is a part of the record. There is specific consideration agreed for sale of land and for construction of bungalow. There is no averment in the affidavit in reply filed by the Respondents that such bifurcation is not acceptable. If that be so and if specific value of land and value of construction service is available, then can the notification provide for a fixed deduction towards land?

96 The answer has to be in the negative. When the statutory provision requires valuation in accordance with the actual price paid and payable for the service and where such actual price is available, then tax

has to be imposed on such actual value. Deeming fiction can be applied only where actual value is not ascertainable.

97 Such proposition is squarely supported by the judgement of the Supreme Court in the **2nd Gannon Dunkerley's case**. At that point of time only the goods element of the construction contract was taxable and therefore deduction was required to be given for labour element. In this context it was held and observed that if actual labour value was available then the same was to be deducted and if in case actual value was not ascertainable then deeming fiction could be applied which was required to be approximate to the actual value. Relevant observations of the Supreme Court read thus:

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

contract and to allow deduction of the amount thus determined from the value of the works contract for the purpose of determining the value of the goods involved in the execution of the works contract. It must, however, be ensured that the amount deductible under the formula that is prescribed for deduction towards charges for labour and services does not differ appreciably from the expenses for labour and services that would be incurred in normal circumstances in respect of that particular type of works contract. Since the expenses for labour and services would depend on the nature of the works contract and would not be the same for all types of works contracts, it would be permissible, indeed necessary, to prescribe varying scales for deduction on account of cost of labour and services for various types of works contracts."

98 Even in the case of the **1st Larsen and Toubro case (supra),** one of the points for consideration before the Supreme Court was whether a rule in the Maharashtra Value Added Tax Rules capping the value of land at 70% of the agreement value was permissible or not. Such rule was read down by the Supreme Court by observing as under:

"117. Sub-rule (1-A) was inserted into Rule 58 by a Notification dated 1-6-2009. 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(1-A) 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 ***[Maharashtra***

Chamber of Housing Industry v. State of Maharashtra, (2012) 4 Bom LR 2152 : (2012) 4 AIR Bom R 636] recorded the following reasons in repelling the challenge to Rule 58(1-A): (Bom LR p. 2176, para 35)

"35. The challenge to Rule 58(1-A), 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 Gannon Dunkerley (2)[Gannon Dunkerley and Co. v. State of Rajasthan, (1993) 1 SCC 364] 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. Similarly, the cost of the land is required to be excluded from the total agreement value. Sub-rule (1-A) stipulates that the cost 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 1st 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 (1-A) of Rule 58 is arbitrary. Rule 58(1-A) 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 v. Bombay Tyre International Ltd. [(1984) 1 SCC 467 : 1984 SCC (Tax) 17] , 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."

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

99 We are also supported by the judgement of the Supreme Court in the case of **Wipro Ltd. (supra)** wherein, in the context of valuation under the Customs Act, 1961 it was held that where actual amount of loading/ unloading charges is available, it was not permissible for the rule making authority to prescribe a flat rate of 1% addition to value.

100 Thus, mandatory application of deeming fiction of 1/3rd of total agreement value towards land even though the actual value of land is ascertainable is clearly contrary to the provisions and scheme of the CGST Act and therefore *ultra-vires* the statutory provisions.

- **ARBITRARINESS OF THE DEEMING FICTION BY THE IMPUGNED NOTIFICATION:**

101 Apart from being contrary to the statutory provisions contained in the CGST Act, one of the most glaring feature of the

impugned deeming fiction is its arbitrariness in as much as the same is uniformly applied irrespective of the size of the plot of land and construction therein. Two illustrations may be taken:

> a) Take a case of a plot of land admeasuring 5000 square yards and valued at say Rs. 2.5 crore. If suppose a buyer enters into an agreement with the developer for buying the plot of land along with getting bungalow constructed and the total area of the bungalow is say 500 square yards and the construction value is say Rs. 50 lakhs. Thus the total agreement value is Rs. 3 crores. Applying the impugned deeming fiction, deduction of 1/3rd i.e. Rs. 1 crores will be available towards land and the balance consideration of Rs. 2 crores will be taxable under the GST Acts.
>
> (b) Suppose the same bungalow is constructed on a plot of land of 2000 square yards of which the value is Rs. 1 crore. The construction value being Rs. 50 lakhs, the total agreement value is Rs. 1.5 crores. Applying the impugned deeming fiction, deduction of 1/3rd i.e. Rs. 50 lakhs will be available towards land and the balance consideration of Rs. 1 crore will be taxable under the GST Acts.

102 Thus even though in both the above illustrations the actual bungalow remains the same and it is the construction of this bungalow which is taxable under the GST Acts, the taxable value in the first illustration is double the taxable value in the second illustration because of the fact that the deduction rate is uniform irrespective of the size of the plot.

103 Moreover there is no distinction made even between a flat and bungalow. While a flat would have number of floors and the

transfer would only be undivided share in land, the same deduction which is available on supply of flats is made available on supply of bungalows without any regard to the vast different factual aspects.

104 In fact if the 14th GST Council meeting minutes which led to the insertion of the impugned Notification is perused, it becomes clear that the deduction was contemplated only in the context of flats wherein it was difficult to ascertain the value of the undivided share of land. However when it came to actual issuance of Notification, a standard rate of deduction came to be provided irrespective of the nature of the transaction or whether it is a case involving transfer of land itself or undivided share in land. Moreover the discussion in the GST council meeting minutes which is part of the record would show that there was an apprehension that a standard rate of deduction for land may not withstand judicial scrutiny. Interestingly, this was in fact mentioned by the Deputy Chief Minister of the State of Gujarat. This was even when the discussion was in respect of flats while the ultimate notification was issued and made applicable even to other transactions such as sale of land with construction of bungalow.

105 Such deeming fiction which leads to arbitrary and discriminatory consequences could be clearly said to be violative of Article 14 of the Constitution of India which guarantees equality to all and also frowns upon arbitrariness in law.

- **ARBITRARY DEEMING FICTION HAS LED TO MEASURE OF TAX HAVING NO NEXUS WITH CHARGE:**

106 The arbitrary deeming fiction by way of delegated legislation has led to a situation whereby the measure of tax imposed has no nexus with the charge of tax which is on supply of construction

service. It is well established that the measure of tax should have nexus with the charge of tax. Reference may be made to the judgement of the Supreme Court in the case of **State of Rajasthan v/s Rajasthan Chemists Association (2006) 6 SCC 773** wherein the following was observed after considering the dictum of the Supreme Court in the case of **Govind Saran Ganga Saran v/s CST:**

> *"23. This Court in Govind Saran Ganga Saran v. CST [1985 Supp SCC 205 : 1985 SCC (Tax) 447 : AIR 1985 SC 1041] on analysing Article 265 noted as follows : (SCC pp. 209-10, para 6 : AIR p. 1044, para 6)*
>
> *"The components which entered into tax are well known. The first is the character of the imposition known by its nature which prescribes the taxable event attracting the levy. The second is a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax. The third is the rate at which the tax is imposed and the fourth is the measure or value to which the rate will be applied for computing the tax liability."*
>
> *Obviously, all the 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 the tax can be applied can be altogether unconnected with the subject of tax, though the contours of the same may not be identified."*

- **SECTION 15(5) DOES NOT FURTHER THE CASE OF THE RESPONDENTS:**

107 Strong reliance has been placed by the Respondents on Section 15(5) of the CGST Act which reads as under:

> *"15(5) Notwithstanding anything contained in sub-section (1) or sub-*

section (4), the value of such supplies as may be notified by the Government on the recommendations of the Council shall be determined in such manner as may be prescribed."

108 It is the case of the Respondents that the impugned notification providing for a deeming fiction is issued in exercise of powers under Section 15(5) of the CGST Act. At the outset it is required to be noted that the term "prescribed" is defined under Section 2(87) of the CGST Act as under:

"2(87) "prescribed" means prescribed by rules made under this Act on the recommendations of the Council;"

109 Thus, the prescription under Section 15(5) of the CGST Act has to be by rules and not by notification. Be that as it may, wherever a delegated legislation is challenged as being *ultra-vires* the provisions of the CGST Act as well as violating Article 14 of the Constitution of India, the same cannot be defended merely on the ground that the Government had competence to issue such delegated piece of legislation. Even if it is presumed that the Government had the competence to fix a deemed value for supplies, if the deeming fiction is found to be arbitrary and contrary to the scheme of the statute, then it can be definitely held to be *ultra-vires*. We are fortified in our view by the judgement of the Apex Court in the case of **Wipro Ltd. (supra)** wherein it was observed as under:

"34. We find that the High Court, instead of examining the matter from the aforesaid angle, has simply gone by the powers of the rule-making authority to make rules. No doubt, rule-making authority has the power to make rules but such power has to be exercised by making the rules which are consistent with the scheme of the Act and not repugnant to

the main provisions of the statute itself. Such a provision would be valid and 1% FOB value in determining handling charges, etc. could be justified only in those cases where actual cost is not ascertainable. The High Court missed the point that ***Garden Silk Mills Ltd. case [Garden Silk Mills Ltd. v. Union of India, (1999) 8 SCC 744 : AIR 2000 SC 33]*** *was decided by this Court in the scenario where actual cost was not ascertainable. That is why we remark that the first amendment to the proviso to sub-rule (2) of Rule 9 which was incorporated vide Notification dated 19-12-1989 might be justified. However, the impugned provision clearly fails the test."*

- **WHAT IF THE SUPPLIER ARTIFICIALLY INFLATES THE PRICE OF LAND THEREBY DEFLATING THE VALUE OF CONSTRUCTION SERVICE?**

110 One of the contentions of the learned A.S.G., while defending the impugned Notification is that the valuation cannot be determined on the basis of the value fixed into agreement, which is decided *inter-se* between the parties as the parties may artificially fix a higher value for land so as to reduce tax the liability under the GST Acts.

111 The aforesaid contention is also required to be rejected. At the outset in the present case the values as mentioned in the agreement are not challenged in the affidavit in reply and therefore such contention is not applicable. We are supported in this regard by the judgement of the Supreme Court in the case of **Mangalore Ganesh Beedi Works (supra).**

112 Even otherwise, the possibility of obtaining indirect consideration cannot be ruled out for any supply transaction. If in a

given case it is found that the value of construction service which is declared by the supplier is not the correct value in as much as other consideration has been indirectly received, then Section 15(4) of the CGST Act will apply which reads thus:

> *"15(4) Where the value of the supply of goods or services or both cannot be determined under sub-section (1), the same shall be determined in such manner as may be prescribed."*

113 Therefore, even in a case where the value of supply of goods or services or both cannot be determined under sub-section (1), then the same can be determined in the prescribed manner. The valuation rules framed pursuant to Section 15(4) are contained in the Rules 27 to 31 of the CGST Rules. Rule 27 deals with instances where consideration is not wholly in the form of money. Rule 28 deals with cases where the transaction is with a related person. Rule 29 is with regard to goods supplied or received through an agent. These rules are not relevant for the present writ applications. However Rule 30 and 31 resply of the GST Rules are relevant and read as under:

> *"30. Value of supply of goods or services or both based on cost.-Where the value of a supply of goods or services or both is not determinable by any of the preceding rules of this Chapter, the value shall be one hundred and ten percent of the cost of production or manufacture or the cost of acquisition of such goods or the cost of provision of such services.*
> *31.Residual method for determination of value of supply of goods or services or both.-*
>
> *Where the value of supply of goods or services or both cannot be determined under rules 27 to 30, the same shall be determined using*

reasonable means consistent with the principles and the general provisions of section 15 and the provisions of this Chapter:

Provided that in the case of supply of services, the supplier may opt for this rule, ignoring rule 30."

114 Hence, valuation by adding 10% profit to cost of production or manufacture or the cost of acquisition of goods or cost of provision of services is a statutorily accepted method of valuation. Even if such cost based valuation is not possible then the residual method is provided under Rule 31 of the GST Rules which also provides for using reasonable means consistent with the principles and general provisions of Section 15 as well as valuation rules.

115 Thus, the revenue is not remediless even in a case where it doubts the correctness of the value assigned in the contract towards construction. If it is established that such value was not the sole consideration for the service, then resort can be had to the valuation rules and value can be derived by applying the cost plus profit method or a reasonable value consistent with the principles and provisions of the Statute.

116 When such detailed statutory mechanism for determination of value is available then the impugned deeming fiction cannot be justified on the basis that it is meant to curb avoidance of tax when in fact such fiction is leading to arbitrary consequences.

- **ALREADY SIMILAR MECHANISM EXISTED UNDER SERVICE TAX LAW WHICH IS NOT REQUIRED TO BE DEVIATED FROM:**

117 When it was held by the Delhi High Court in the case of

Suresh Kumar Bansal (supra) that since the valuation rules in service tax did not provide for deduction for land value, tax was not quantifiable and hence not leviable, the service tax valuation rules were retrospectively amended to provide for deduction of land. Deduction at fixed percentage was made applicable only where the actual value was not ascertainable. When such workable mechanism for deduction of land was already in force under the service tax regime, the same ought to have been continued. Instead, the Government has chosen to fix a standard rate of deduction without any regard to different possible factual scenarios which is completely arbitrary and violating Article 14 of the Constitution of India.

- **ENTRY NO. 5(b) OF SCHEDULE II NOT RELEVANT FOR DETERMINING VALIDITY OF IMPUGNED NOTIFICATION:**

118 Considerable emphasis was laid by Mr. Vyas on Entry 5(b) of Schedule II to the GST Acts. At the outset it is required to be noted that while originally clause (d) of Section 7(1) included transactions enlisted in Schedule II to the GST Acts within the scope of supply, such clause was retrospectively deleted w.e.f. 1st July 2017 and instead a new sub-section (1A) was introduced which provides that if a transaction qualifies as a supply then it will be treated as supply of goods or services in accordance with Schedule II. Thus, it has been clarified by the Parliament that Schedule II to the GST Acts is not meant to define or expand the scope of supply but only to clarify whether a transaction will be supply of goods or service if such transaction qualifies as supply. Such clarification is required since there are different tax rates for goods and services.

119 In any case Entry 5(b) of Schedule II is not relevant for deciding the present controversy which has more to do with valuation

rather than chargeability to tax. It is not in dispute that construction of building is a taxable service unless the entire consideration is received after issuance of completion certificate. However the question is that if the transaction is taxable then what should be the value of service and whether deduction towards land value can be stipulated by way of uniform rate of 1/3rd. Detailed reasons have been given to show how such deeming fiction is not only contrary to the scheme of the GST Acts but also it is grossly arbitrary and violating Article 14 of the Constitution.

- **JUDGEMENT OF THE SUPREME COURT IN THE CASE OF VKC FOOTSTEPS IS INAPPLICABLE**

120 The reliance placed by the learned ASG on the decision of the Supreme Court in the case of VKC Footsteps Pvt. Ltd. (supra) is misplaced. In that case the Supreme Court came to a conclusion that Rule 89(5) of the GST Rules was not in conflict with Section 54(3) of the CGST Act. Thereafter it was observed that once the rule was valid, minor defects in the formula would not invalidate the rule itself and therefore the assessees were relegated to make representation before the GST Council. However, in the present case we find the impugned notification to be contrary to the provisions and scheme of the GST Acts as well as arbitrary and violative of Article 14 of the Constitution of India.

- **JUDGEMENT OF THE SUPREME COURT IN THE CASE OF NARNE CONSTRUCTION WHOLLY IRRELEVANT:**

121 The reliance placed by the revenue on the decision of the Apex Court in the case of **Narne Construction Pvt. Ltd (supra)** is completely misplaced. The said judgement was in the context of the

Consumer Protection Act, 1986 and is thus as such inapplicable while interpreting a taxing statute. In any case it was categorically observed by the Supreme Court that the development of land was assured to the buyers. We have already observed that in a given case there may be tax liability if the development of land is undertaken pursuant to contract with buyer. However, if the land is already developed and thereafter agreement is entered into with the buyer for sale of such developed land, then it would not involve any service.

- **CONCLUSION**

122 In the result, the impugned Paragpragh 2 of the Notification No. 11/2017-Central Tax (Rate) dated 28.6.2017 and identical notification under the Gujarat Goods and Services Tax Act, 2017, which provide for a mandatory fixed rate of deduction of 1/3rd of total consideration towards the value of land is *ultra-vires* the provisions as well as the scheme of the GST Acts. Application of such mandatory uniform rate of deduction is discriminatory, arbitrary and violative of Article 14 of the Constitution of India.

123 While we so conclude, the question is whether the impugned paragraph 2 needs to be struck down or the same can be saved by reading it down. In our considered view, while maintaining the mandatory deduction of 1/3rd for value of land is not sustainable in cases where the value of land is clearly ascertainable or where the value of construction service can be derived with the aid of valuation rules, such deduction can be permitted at the option of a taxable person particularly in cases where the value of land or undivided share of land is not ascertainable.

124 The impugned paragraph 2 of Notification No. 11/2017-Central Tax (Rate) dated 28th June 2017 and the parallel State tax

Notification is read down to the effect that the deeming fiction of 1/3rd will not be mandatory in nature. It will only be available at the option of the taxable person in cases where the actual value of land or undivided share in land is not ascertainable.

125 In so far as the writ applicant of the Special Civil Application No.1350 of 2021 is concerned, the value of land is available in the agreement to sale and the same is not challenged by the Respondents in the affidavit in reply. The writ applicant had deposited the amount of tax charged under the GST Acts by the supplier i.e. respondent No.4 under protest and it was clearly observed in the interim order passed by this Court that such payment would be subject to the final outcome of this writ application. Since we have declared the impugned deeming fiction to be *ultra-vires* and we have read it down to be inapplicable in cases where the actual value of land is unavailable, consequently we direct the concerned GST authority to refund the excess amount of tax under the GST Acts to the writ applicant which has been collected by the respondent No.4 and deposited with the Government treasury. Such refund shall be calculated by determining the actual GST liability on the basis of actual construction value as stipulated in the agreement and such actual liability will be deducted from the total tax charged from the writ applicant and paid into the Government treasury. Refund is to be granted along with the statutory interest at the rate of 6% per annum which is to be calculated from the date of excess payment of tax till the date of refund. The entire exercise of calculation of refund and disbursement of the same with interest shall be completed within 12 weeks from the date of receipt of this order.

126 We are conscious of the fact the writ applicant of the Special Civil Application No.1350 of 2021 is the recipient of service and not the supplier and that the tax has been collected by the supplier from

the writ applicant and deposited with the Government treasury. However since the writ applicant has actually borne the burden of tax and such tax was paid under protest by virtue of interim order of this Court, we are directing refund of such tax directly to the writ applicant. It will not be out of place to mention that in fact Section 54 of the CGST Act also envisages claim of refund directly by the recipient if he has borne the burden of tax. It has been so held by the Supreme Court in the case of **Mafatlal Industries Ltd. v/s Union of India (1997) 5 SCC 536.**

127 In so far as the other two writ applications numbered Special Civil Application No.6840 of 2021 and Special Civil Application No.5052 of 2022 resply are concerned, since the advance ruling appellate orders are based on the impugned notification providing for mandatory deeming fiction for deduction of value of land, the said orders are hereby quashed and set aside. The objection with regard to maintainability of writ applications against the advance ruling appellate orders is summarily overruled considering the fact that the challenge to such orders is incidental to the challenge of the impugned Notification. If at all during adjudication of such writ applications it is found that there is an element of supply of goods or services in the transactions undertaken by the writ applicants, then it is always open for the authority to adjudicate such liability in accordance with law.

(J. B. PARDIWALA, J)

(NISHA M. THAKORE,J)

CHANDRESH