<u>IN THE HIGH COURT OF JUDICATURE AT BOMBAY</u>
ORDINARY ORIGINAL CIVIL JURISDICTION

SALES TAX REFERENCE NO.55 OF 2014
IN
REFERENCE APPLICATION NO.80 OF 2010
IN
SECOND APPEAL NO.106 OF 2007

M/s.Permasteelisa (India) Pvt.Ltd.
at A-307, Boomrang Chandivali Farm Road,
Near Chandivali Studio, Andheri,
Mumbai – 400 072. ….. Applicant

V/s

1.State of Maharashtra
Department of Sales Tax
Vikrikar Bhavan, Mazgaon,
Mumbai – 400 010.

2. Assistant Commissioner of Sales-Tax (I-38)
B-6, 2nd Floor, Vikrikar Bhavan, Mazgaon,
Mumbai – 400 010.

3. Deputy Commissioner of Sales-Tax
(Appeals-VI), A Wing, 7th Floor,
Suburban Vikrikar Bhavan,
BKC, Bandra (E), Mumbai 400 051. ….. Respondents

Mr.F.B.Andhyarujina, Sr.Counsel a/w Mr.Ashish Sodhan i/b M/s.Nishith Desai Associates for the Applicant.
Ms.Naira Jeejeebhoy, Spl.Counsel a/w Mr.B.B.Shrama, AGP for the State-Respondent.

CORAM : S.C. DHARMADHIKARI &
A.A. SAYED, JJ.
RESERVED ON : 15 MARCH 2016
PROUNOUNCED ON : 06 MAY 2016

JUDGMENT: (PER A.A. SAYED, J.)

1 This Sales Tax Reference arises out of an order dated 7 March 2014 in a Reference Application under the Bombay Sales Tax Act passed by the Maharashtra Sales Tax Tribunal.

2 The following question of law is referred to this Court under section 9(1) of the Maharashtra Sales Tax on the Transfer of Property in Goods involved in the Execution of Works Contracts (Re-enacted) Act, 1989, (hereinafter referred to as the Works Contract Act) read with section 61(1) of the Bombay Sales Tax Act, 1959:

"Whether on the facts and in the circumstance of the case, the Tribunal was justified in holding that the contract for construction of glass curtain walls executed by the Applicant which was awarded to it by the employers, namely, ICICI Ltd. and M/s. Wockhardt Ltd. would not constitute contracts for construction of building nor would they constitute the contracts incidental or ancillary to the contracts mentioned in paragraph 'A' of the Notification dated 8 March 2000 issued for the purposes of section 6A (1) of the Works Contract Act."

3 It is the case of the Applicant that it is a registered dealer under the Works Contract Act as well as under the Bombay Sales Tax Act. The Reference Application was filed pursuant to the order dated 9 July 2010

passed by the Tribunal in the Applicant's own case in Second Appeal No.106 of 2007 under the Works Contract Act in respect of the period 01.04.1999 to 31.03.2000 in terms of which, the Tribunal held that the contract for construction of glass walls was not construction of building contract or incidental or ancillary contract to the contract for construction of building, and that consequently the Applicant was not entitled to composite/concessional rate of tax under the Notification dated 8 March 2000. The Appeal arose out of assessment proceedings under the Bombay Sales Tax Act and the transaction in question was under the Works Contract Act.

4 The Applicant is a Private Limited Company incorporated under the Companies Act, 1956. It is also a registered dealer under the MVAT Act. The Applicant is engaged in activity of fixation of glass walls. It is the case of the Applicant that these glass walls also known as curtain walls are used in the construction of modern buildings. These glass walls are permanent walls and are constructed instead of usual brick walls. In the modern age of architecture these glass walls have replaced the traditional brick walls and many buildings are constructed and developed using glass walls. If the glass walls are erected for a building then brick walls are not required as these glass walls have all the characteristics of traditional brick walls as a result of which there are modern highrise buildings and skyscrapers. In applying the rates as applicable under the

Work Contracts Act, the Applicant has relied upon the Notification dated 8 March 2000 in terms of which certain contracts specified therein are identified as construction contract eligible for beneficial rate of tax. According to the Applicant, the activities it undertakes are in respect of construction contracts or contracts incidental or ancillary to the construction contracts as set out in the Notification dated 8 March 2000 and it has raised invoices and filed returns accordingly.

5 In respect of certain contracts pertaining to the year l999 and 2000 for ICICI Bank and Wockhardt for construction of glass wall work, the assessment order of 31 March 2005 held that the Applicant was not eligible for the benefit under the Notification dated 8 March 2000. The order of the Assessing Officer was upheld by the Deputy Commissioner of Sales Tax (Appeal). Aggrieved by the order of the Deputy Commissioner of Sales Tax (Appeal) the Applicant filed Appeal before the Tribunal. The Tribunal held that the activity undertaken by the Appellant was not construction and the contracts undertaken by the Applicant are not building construction contracts and would not be covered by the Notification dated 8 March 2000. Aggrieved by the order of the Tribunal, the Applicant preferred a Rectification Application which came to be dismissed by an order passed in February 2013. Prior thereto, on or about 9 October 2012, a search and seizure was conducted at the

business premises of the Applicant and an attachment order was passed and proceedings were initiated in respect thereof, which are not really material for the purpose of deciding the present Reference. Suffice it to say that in the meanwhile assessment proceedings were completed in April 2013 and a demand of Rs.14.17 crore (which includes penalty and interest) was made on the Applicant against which the Applicant has paid a sum of Rs.10.21 crore and a stay was granted to recovery.

6 We have heard learned Senior Counsel for the Applicant and the learned Special Counsel for the Respondent/State.

7 Learned Senior Counsel for the Applicant submitted that the contracts entered into by the Applicant are essentially contracts for building and the Applicant would be covered by the composition scheme at the rate applicable to construction contracts in terms of the Notification issued by the Government under the Works Contract Act dated 8 March 2000 wherein “building contract” has been specifically included. It is submitted that apart from brick walls, glass walls are erected in the entire building. Learned Senior Counsel contended that aluminum glazing contract is nothing but a construction contract of a building and would therefore qualify as 'construction contract' made for 'building' liable to composition rate at the relevant time i.e. 2%. He submitted that with the

passage of time and because of new inventions and adoption of new technology the term 'construction contract' has changed conceptually and these contracts should be considered as 'building' contracts. It is submitted in the alternative that the contract would be covered by paragraph ‘'B’ of the Notification dated 8 March 2000 as an incidental or ancillary contract to the contract for construction mentioned in paragraph ‘A’ of the Notification. It is submitted that glass wall is a technological advancement for walls in general constructed with bricks, sand, and cement, making its utility not only as a wall but for protecting the building from noise pollution, illumination, heat, light, wind and rains.

8 Learned Senior Counsel has also drawn our attention to the definition of “building” under the Regulation 2(3)(11) of the Development Control Regulation for Greater Mumbai, 1991 (DCR). The Regulation 2(3)(11) reads as follows:

> ‘Building’ means a structure, constructed with any materials whatsoever for any purpose, whether used for human habitation or not, and includes:-
>
> (i) foundation, plinth, walls, floors, roofs,chimneys, plumbing and building services, fixed platforms;
>
> (ii) verandahs, blaconies, cornices, projections;
>
> (iii) part of a building or anything affixed thereto;

(iv) any wall enclosing or intended to enclose any land or space, signs and outdoor display structures;

(v) tanks constructed for storage of chemicals or chemicals in liquid form;

(vi) all types of buildings defined in (a) to (p) below, but tents, shamianas and tarpaulin shelters erected for temporary purposes for ceremonial occasions, with the permission of the Commissioner, shall not be considered to be "Buildings".

9 Learned Senior Counsel submitted that in a building where curtain wall of glass is constructed, the design is prepared right at the inception and prior to the construction of the building and unless the building is constructed in a particular manner and as per specification, the curtain wall of glass cannot be constructed. The learned Senior Counsel tendered a compilation of literature and adverted to the following portions therefrom:

> *"A Curtain wall is a nonbearing wall of glass, metal, or masonry attached to a building's exterior structural frame[1]. A curtain wall is defined as thin, usually aluminum-framed wall, containing in-fills of glass, metal panels, or thin stone. The framing is attached to the building structure and does not carry the floor or roof loads of the building. The wind and gravity loads of the certain wall are transferred to the building structure,typically at the floor line[2].*

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1 Encyclopedia Britannica,2014.

2 Building Envelope Design Guide- Curtain Walls by Nik Vigener, PE and Mark A. Brown, Revised by

The term curtain wall is defined in most literature to be any building wall of any material that is designed to resist lateral loads due to wind or earthquake and its own self weight. In other words, the curtain wall is a non-load-bearing wall[3].

The American Architectural Manufacturers Association, the most widely referenced industry source with respect to metal walls, provides the following definitions in their Aluminum Curtain Wall Design Guide Manual: Metal Curtain Wall- An exterior curtain wall which may consist entirely or principally of metal, or may be a combination of metal, glass and other surfacing materials supported by or within a metal framework.

Facade is a French origin word meaning the front face. The use of glass in the exterior facades provided more of light and good ambience to the occupant of the building which gave rise to the increasing use of glass. For the architectural point of view the use of glass gave aesthetic view to the building itself. A structure supported by aluminum frame work which is made up for Mullion and Transom is called as a curtain wall[4].

After World War II, low energy costs gave impetus to the concept of the tall building as a glass prism, an idea originally put forth by Le Corbusier and Ludwig Mies van der Rohe in their visionary projects of the 1920s. The UN's Secretariat Building (1949), with its green-tinted glass walls, helped set a worldwide standard for skyscrapers, still more elegantly revealed in the iconic Seagram Building by Mies van der Rohe and Phillip Johson."

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the Chairs of the Building Enclosure Councils with assistance from Richard Keleher and Rob Kistler. The Facade Group, LLC.Development and review supported through a grant from the American Architectural Manufacturers Association.

3 Glass and Metal Curtain Walls, Best Practice Curtain Walls, Public Works of Government Services Canada

4 Structural Design of a Glass Facade, Pallavi Taywade, Santosh Shejwal, Intenational Journal of Scientific and Research Publications, Volume 5. Issue 3 March 2015.

On the aforesaid premise, it is contended that the contracts awarded to the Applicant be treated as 'building construction contracts' covered by Notification dated 8 March 2000 and the Applicant would be entitled to the composite/concessional rate of tax under the said Notification.

10 Learned Special Counsel on behalf of the Respondent on the other hand submitted that the contracts undertaken by the Applicant cannot be termed as 'construction contracts' but they have to be treated as 'non-construction contracts'. She submitted that the contracts enumerated in the Notification dated 8 March 2000 are contracts for construction of buildings, roads, buildings, runways, etc. These contracts are illustrative in nature. The contracts for 'construction of building' are required to be construed strictly and not liberally since the provision contained in section 6A of Works Contract Act are meant for composition of tax at a lesser rate, thereby the Applicant gets exemption to certain extent and the Notification dated 8 March 2000 has to be construed strictly. The learned Special Counsel submitted that the word 'building' is not defined in the Act and has to be construed in its ordinary grammatical sense. She has placed reliance on the following judgments:

(i) Ghansyamdas vs. Deviprasad & Anr, AIR 1966 SC 1998

(ii) Mohammad Umar Anr. vs. Fayazoddin, AIR 1924 Lah. 172.

11 We have considered the rival contentions and perused the material on record. At the outset, it would be necessary to reproduce the extract of the Notification dated 8 March 2000. It reads as under:

*"**Notification No.WCA-25.00/C.R.-39/Taxation-1 dated the 8th March, 2000.***

In exercise of the powers conferred by sub-section (1) of Section 6A of the Maharashtra Sales Tax on the Transfer of Property in Goods involved in the Execution of Works Contracts (Re-enacted) Act, 1989 (Mah.XXXVI of 1989), the Government of Maharashtra hereby notifies the following contracts to be the construction contracts for the purpose of sub-section (1) of the said section 6A, namely:-

A. Contracts for construction of,-

(1) Building, (2) Roads, (3) Runways, (4) Bridges, Flyover bridges, Railway overbridges, (5) Dams, (6) Tunnels, (7) Canals, (8) Barrages, (9) diversions, (10) Rail tracks, (11) Causeways, Subways, Spillways, (12) Water supply schemes, (13) Sewerage Works, (14) Drainage works, (15) Swimming pools, (16) Water purification plants.

***B.** Any contract incidental or ancillary to the contracts mentioned in paragraph A above, if such contracts are awarded and executed before the completion of the said contracts mentioned in A above.*

…. …. …."

12 We are of the view that the contracts for construction of glass walls executed by the Applicant would not constitute 'contracts for construction of buildings' as mentioned in paragraph 'A' of the Notification dated 8 March 2000 nor would they constitute contracts incidental or ancillary to any contract as mentioned in paragraph 'B' of the Notification dated 8 March 2000 issued under section 6A(I) of the Works Contract Act and

would not be covered by the said Notification. In the judgment and order dated 9 July 2010 of the Tribunal in Second Appeal No.106 of 2007, the case of the Applicant is interalia recorded. In paragraph 3 it is stated as follows:

> "… The work is carried out as under:
>
> "i) Contract for structural glazing is entered into on completion of foundation and plinth.
>
> ii) On signing of the contracts intensive planning and designing is undertaken by Architect and Structural Engineers.
>
> iii) Aluminum, silicon and glass of the desired prescription is ordered.
>
> iv) Upon completion of 5th Slab, structural glazing commences from the bottom i.e. first slab.
>
> v) Structural glazing gets completed alongwith concrete construction.
>
> vi) Instead of convention brick wall, glass walls are used.
>
> vii) Structural glazing of the building is something without `brick walls'. Instead of "brick wall" a "glass wall" is constructed.

It is further recorded in paragraph 4 that in respect of the assessment, the Applicant's case was that it had undertaken the contract of fabrication and erection of structural glazing works and the work of aluminum glazing contract would qualify as a construction contract made for building liable to composition rate of tax. Being aggrieved by the Assessment Order passed by the Sales Tax Officer, the Applicant had filed an Appeal before the Deputy Sales Tax Commissioner (Appeals) and in the order dated 1 November 2006, the Commissioner of Sales Tax (Appeals) has recorded that the Applicant contended that “he is a dealer dealing in structural glazing aluminum cladding, doors and windows and doors of buildings in Corporate Offices.”

13 We have perused the Additional Paperbook Compilation produced by the Applicant, to which are annexed what is stated to be the contract with ICICI and contract with Wakhardt. It cannot be disputed that the essential raw materials like glass and aluminum for the work of structural glazing are procured by the Appellant from third parties. In one of the letters at page No.143 of the Compilation it is stated that “the procurement of glass, double sided tapes and structural silicone sealants will also be undertaken overseas”. In the said letter it is further stated that “the period for completion of glazing is dependent on factors such as: (i) your decision on the glass, (ii) your schedule for civil work and period for handing over the building to us for receiving the glazing. For the best performance of the unutilised curtain wall system it is imperative that civil jobs such as RCC, flooring, ceiling and all wetwork of cement or POP should be completed prior to the fixing of the curtain wall so as not to damage the curtain wall system”. It is further stated in the said letter that “we confirm that it will be our responsibility to procure the glass in consultation with the architects and clients, however some paper

formalities of import will be channelled through you for which we solicit your co-operation, being actual users".

14 The conditions of contract for the "Aluminium and Glazing Work" between the Applicant and ICICI (page Nos.148 to 150 of Compilation) are relevant. Clauses 4,7, 9, 11, 12 and 13 thereof are extracted hereunder:

"4. The proposed structure is ground plus 11 floors each 3.3m. high and column spacing is generally 5.565m. Module will be so worked out that the wastage of glass is minimum. Aluminium sections/extrusions will be designed and provided accordingly. Contractor will furnish detailed sketches/drawings showing mode of fixing and fixtures, aluminium sections/extrusions with profile and sectional weight and detailed calculations for weight of aluminum per Sm. for each tender item. Total aluminium weight will be worked out for all tender items and procurement from foreign collaborator and its factory will be given a long with detailed time schedule. Monthly production capacity of aluminium extrusions and location of factory shall be given in the tender letter. All wastage, and breakage of glass will be borne by the contractor. Contractor will have to provide necessary scaffolding for his work.

7. The glazing/panelling work carried out by the contractor has to be in true line, level & Plumb. He will give details and the accuracy, that can and will be achieve at site. He will also furnish details of brackets, inserts and sub-frame *to be embedded in concrete during execution or by dash fasteners.*

9. It is proposed to have structural glazing by unitised system with double glazing (6+12+6) for window area with 6mm heat reflective glass with soft coat and heat strengthed glass of approved make and shade for outside and 6 mm thick plain clear Modi/Asahi float glass for inside. For spandrel area, 8mm/6mm. heat reflective glass with soft coat and heat strengthened may be provided with opacifaer film and 50mm thick insulation. Some portion of spandrel area is provided with Alucobond/Reynobond composite aluminium panels with PVF2 painting on a aluminium framework as shown in elevations. Some area is also provided with granite panels supported on aluminium framework as shown in elevations. All wastage and breakage will be borne by the Contractor. Double glazing by unitised system will be factory made and sealed properly. The fixing will be done with imported structural silicon sealant and guarantee the proper bond and water tightness. Contractor will clearly state in his tender letter the detailed methodology to be adopted for procurement, fabrication and erection of structural glazing.

11 The Contract will be awarded jointly to Indian contractor and foreign collaborator. The design and system, procurement of aluminium sections and glazing, method of fixing, water tightness completing the work in time and in line and level will be guaranteed by the foreign collaborator. In case of failure/partial failure by Indian contractor the balance work will be completed by the foreign collaborator in stipulated *time. The Indian contractor and foreign collaborator will jointly furnish performance guarantee for 5% of the contract amount by approved bank guarantee.*

12 The proposal elevation treatment shows aluminum frame work with glazing/patented aluminum panels/polished granite panels 25mm to 32mm thick with proper fixing/bonding arrangements in an approved design and pattern.

13 Contractor will make a mock up at site with different materials and showing fixing arrangements and get it approved before going ahead with work of procurement. The elevations will be finalised only after approval of mock up at site."

15 The Notification dated 8 March 2000 clearly mentions the contract for "construction of buildings". In our view the term "construction of buildings" would not involve the fixing of glass walls. Since the Applicant is seeking a lesser rate of tax, the burden is on the Applicant and the provisions of the Notification dated 8 March 2000 have to be construed strictly (See **Tata Iron and Steel vs. State of Maharashtra,** (**2005) 4 SCC 272)**. The word "construction" and the word "building" are not defined in the Act and are to be read in the context of their ordinary meaning. The work of fixing glass to a building in our view can in no manner said to be an activity which is covered under Notification dated 8 March 2000.

16 Pertinently, the Applicant had also sought advance ruling under section 60 of the Karnataka Value Added Tax Act. The observations made in order dated 21.08.2006 are relevant insofar as the nature of work undertaken by the Applicant. They are reproduced hereunder:

> "The transaction of the applicant comprises of entering into contract with his client for design, fabrication, supply and installation of "structural glazing works" (known as curtain walls). "Structural glazing works" or "Curtain walls" are typically designed and assembled aluminium frames filled with glass. The process involves fabrication and assembling of the specially designed extruded powder coated aluminium sections into a frame. On to the frame, the glazed panels are bounded. All these activities are done at the factory of the applicant. These fabricated structural glazings are transported to the work site where they are erected on to the building."
>
> … … … "The words "fabrication, erection and structure" are not defined under the Act and therefore they will assume the general meaning. The contract entered by the applicant comprises i) fabrication, means framing, constructing, manufacturing etc. ii) erection means construction by assembling parts or fixing something in upright position, iii) structure means, something which is constructed, such as building."
>
> … … … "The process involves fabrication and assembly of specially designed extruded powder coated aluminium sections into a frame on which glazed panels are bounded. These structures are then erected onto the building."

17 The fabricated structural glazings prepared by the Applicant are transported to the site by the Applicant and affixed on the exterior portion of the building, which building is constructed by the building contractor who is a third party. There is no dispute that Applicant is not a building contractor, in that, it is not in the business of construction and erection of buildings. The activity of affixing glass and erecting glass walls with aluminium frame work requires an altogether different expertise, and is ordinarily sub-contracted by the building contractor. The contention that some of the walls in the building are not required to be constructed by laying bricks and they are substituted by affixing the glass would not carry the case of the Applicant further. We are also unable to accept the contention that the work of the Applicant would be covered under the term "incidental or ancillary activity to the construction of the building" as that would have to have a direct nexus to the construction of the building itself. Therefore, the alternative argument that the contract would get covered by paragraph B of the said Notification which includes incidental or ancillary contract to the contract of construction also cannot be accepted. What meaning is to be attached to the word "building" as mentioned in the Notification would have to be determined considering the facts and circumstances of each case. In our view, the reliance on the definition of 'building' in the Regulation 2(3)(11) of DCR is misplaced and would not assist the Applicant in any manner. That definition is in the

context and purposes of DCR and cannot be imported and applied in the facts and circumstances of the present case.

18 All the aforesaid reasons, the question of law referred by the Tribunal is answered as under:

The contracts of construction of glass curtain wall executed by the Applicant would not constitute contracts for construction of buildings mentioned in para A of the Notification dated 8 March 2000 issued for the purpose of section 6A(1) of the Works Contract Act nor would it constitute contracts incidental for ancillary to the contracts mentioned in paragraph B of the said Notification.

19 The Reference to stand disposed of accordingly.

(A.A. SAYED, J.) **(S.C. DHARMADHIKARI, J.)**

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