IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.4505 OF 2022

Kalpataru Power Transmission Ltd.,
Having its office at, 101, Kalpataru Synergy,
Opposite Grand Hayat Hotel,
Santacruz (E), Mumbai – 400 055. ...Petitioner

Versus

1. **State of Maharashtra,**
Main Building, Mantralaya,
Madam Cama Road, Hutatma Rajguru
Chowk, Mumbai – 400 032.

2. **Commissioners of Sales Tax,**
Maharashtra State, Having his office at
GST Bhavan, Mazgaon, Mumbai – 400 010.
Investigation Division – E – 005,
Investigation – A, Mazgaon,
Mumbai – 400 010.

3. **Deputy Commissioner of State Tax**,
Investigation Division-E-005,
Investigation-A, Mazgaon,
Mumbai-400010. ...Respondents

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Ms. Nikita Badheka a/w. Mr. Parth Badheka, Ms. Lata Nagal for the Petitioner.
Mr. Dushant Kumar, AGP for the Respondent (State).

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CORAM : G. S. KULKARNI,
JITENDRA JAIN, J.J.

RESERVED ON : 17th JULY, 2023.
PRONOUNCED ON : 3rd AUGUST, 2023

Oral Judgment (Per Jitendra Jain, J.)

1. Rule. Rule made returnable forthwith. Heard finally by consent of the parties.

2. This petition under Article 226 of the Constitution of India challenges review order dated 8th March 2021, passed by Respondent No.3 under Section 25 of the Maharashtra Value Added Tax Act, 2002 (hereinafter referred as "MVAT Act") and order dated 6th July 2021, passed by Respondent No.3 on rectification application filed by the Petitioner, to rectify review order, under Section 24 of the MVAT Act for the financial year 2006-07.

3. **Narrative of the relevant events:-**

(i) During the financial year 2006-07, the Petitioner executed two projects of electricity distribution line for Maharashtra State Electricity Distribution Company Limited (MSEDCL) and one works contract project for Gas Authority of India Limited (GAIL) for laying down the pipeline of gas between Dabhol to Panvel.

(ii) The Petitioner with respect to two contracts with MSEDCL claimed deduction from the contract price @ 25% as per Table

prescribed in Rule 58 of the MVAT Rules for arriving at value of transfer of property in goods. However, with respect to contract with GAIL, the Petitioner claimed deduction under Rule 58(1)(a)-(h) on actual basis aggregating to Rs.30,59,93,405/-.

(iii) On 18th February 2013, Deputy Commissioner of Sales Tax issued a notice to the Petitioner for verification of books of accounts to examine discrepancies found in the course of the business audit conducted by the revenue. The said notice records discrepancies found by the revenue after verification of the books of accounts. The said notice was made returnable on 25th February 2013.

(iv) On 28th February 2013, the Petitioner replied to the aforesaid notice and annexed copies of ledger in support of its submission.

(v) On 18th March 2013, the Petitioner filed further submission pursuant to the above notice giving its explanation as to why the service tax of Rs.1,05,41,933/- should be allowed as a deduction under Rule 58.

(vii) On 27th April 2013, further submission was made wherein it is recorded that the Deputy Commissioner has verified all the

documents filed by the Petitioner.

(viii) On 11th December 2015, an assessment order under Section 23 (3) came to be passed by the Assistant Commissioner of Sales Tax, Investigation Branch-A, Mumbai. In the assessment order, the Assistant Commissioner of Sales Tax records that the Petitioner has produced relevant books of accounts. The said order also records the contract executed by the Petitioner with GAIL. The Assistant Commissioner of Sales Tax also records that out of three contracts, the Petitioner has claimed deduction @ 25% under Rule 58 for two contracts issued by MSEDCL and for one contract of pipeline project with GAIL, the Petitioner has claimed deduction under section 58 of the MVAT Act on actual basis aggregating to Rs.30,59,93,405/-. The assessment order records that the deduction is allowed after verification of books of accounts i.e., trial balance, expenses, ledger copies, contract copies, sample copies, etc. The assessment order, however, raises a demand of Rs.8,27,465/- on some other issue.

(ix) On 22nd October 2018, Respondent No.3 issued a notice in Form No.309 under Section 25 of the MVAT Act to review the assessment order passed under Section 23(3) of the Act. The

relevant extract of the show cause notice dated 22nd October 2018, reads as under:-

> *"For the period 2006-2007, wrongful deduction u/r 58 of MVAT Act allowed in assessment order in respect of M/s. GAIL Project on profit of Supply of labour and services at Rs.9,41,22,626/-. This profit on sale of labour only permissible* ***[if there were two contract agreement by the dealer for the work with principal].*** *One for labour supply for which deduction of Rs.22,42,00,786/- was allowed and another for rest of the work for which deduction for profit on supply of labour & service was allowed at Rs.9,41,22,646/-. Hence, deduction on account of profit on supply of labour & service is not allowable."*
>
> (emphasis supplied)

(x) On 2nd November 2018, the Petitioner filed detailed submissions objecting to the notice issued under Section 25 of the MVAT Act. The Petitioner submitted that the issue raised in the show cause notice was also raised by Sales Tax Revenue Audit Team, which was duly replied by the Petitioner. The Petitioner further submitted that for a turnkey projects, there cannot be two separate agreements, one for sale of the goods and another for supply of labour and services. The Petitioner relied upon the decision in the case of **Builders Association of India**[1] and **Gannon Dunkerley & Co. Vs. State of Rajasthan**[2] in support of its contention that

1 73 STC 370 (SC)
2 (1993) 88 STC 204 (SC)

turnkey project is indivisible. The Petitioner requested Respondent No.3 to close the proceedings initiated under Section 25 of the MVAT Act pursuant to the said submissions.

(xi) On 23rd November 2020, the successor of Respondent No.3 issued a similar show cause notice to review the assessment order on the ground that deduction under Rule 58 amounting to Rs.9,41,22,626/- on profit of supply of labour and services has been wrongly allowed. According to Respondent No.3, under Rule 58(1)(h) deduction in respect of profit earned by the contractor to the extent related to the supply of said labour and service is only allowable, whereas profit of Rs.9,41,22,626/- was alleged to be the profit earned by the Petitioner for carrying out all the activities of completion of the job work. The said show cause notice, therefore, proposed to withdraw the deduction of Rs.9,41,22,626/-.

(xii) On 26th November 2020, the Petitioner replied to the aforesaid notice and reiterated its detailed submissions made on earlier occasions. The Petitioner stated that the assessing officer has verified the facts in the course of the assessment proceedings and, thereafter, allowed the deduction. The Petitioner also relied upon the proceedings under Section 22, wherein, these issues were examined by the audit team of the

Respondents. The Petitioner challenged the jurisdiction of Respondent No.3 to initiate proceedings under Section 25 of the MVAT Act. The Petitioner prayed for dropping off the review proceedings in the light of the said submissions.

(xiii) On 29th December 2020 and 31st December 2020, further submissions were made by the Petitioner reiterating what was submitted earlier and prayed for dropping of the proceedings.

(xiv) On 8th February 2021, the Petitioner once again filed the submissions and submitted that the books of accounts have been verified by all statutory authorities of the country and further placed reliance on various decisions praying for dropping the proceedings. The Petitioner also gave a working of the taxable turnover from the contracts with MSEDCL and GAIL.

(xv) On 17th February 2021, Respondent No.3 sent an email to the Petitioner stating that Rule 58(1)(h) of MVAT Rules does not allow deduction on proportionate basis and, therefore, the tax liability is proposed to be worked out as per the table annexed to the said email.

(xvi) On 8th March 2021, Respondent No.3 passed an order in review under Section 25 of the MVAT Act rejecting the

submissions made by the Petitioner. Respondent No.3 in the said order held that since the Petitioner has failed to submit correct amount of deduction of profit, they are not eligible to get the deductions provided under Rule 58(1)(a) to (h) and, therefore, the Petitioner will be allowed to claim deduction only as per Table under Rule 58(1) of the MVAT Rules. Respondent No.3, therefore, allowed deduction not on the actual basis with respect to GAIL project, but by applying a rate of 20% as per Serial No.11 of Table to Rule 58(1).

(xvii) On 18th May 2021, the Petitioner made an application in form 307 for rectification of mistakes in the order in review dated 8th March 2021. The Petitioner also filed various submissions in support of its application for rectification of the order.

(xviii) On 6th July 2021, Respondent No.3 rejected the rectification application. In the said order, the Respondents justified the review order by placing reliance on proviso to Rule 58(1).

4. It is on this background that the Petitioner has approached this Court praying for quashing of the order dated 8th March 2021 passed under Section 25 of the Maharashtra Value Added Tax Act, 2002 (MVAT Act) and the order rejecting the

rectification application dated 6th July 2021 under Section 24 of the MVAT Act.

5. ***Submissions of the Petitioner*** :- The Petitioner submitted that they are challenging the very jurisdiction of the Respondents to pass the impugned order which is contrary to the decision of the Supreme Court in case of ***M/s.Gannon Dunkerley and Co. & Ors. Vs. State of Rajasthan & Ors.***[3] and contrary to the provisions of the Act and furthermore contrary to the principles of the natural justice and therefore, even though an alternative remedy is provided under the MVAT Act, the present petition is maintainable under Article 226 of the Constitution of India. The Petitioner further contended that show cause notice was issued only to disallow a sum of Rs.9,41,22,626/- under Rule 58(1)(h) of the MVAT Rules whereas in the impugned order, the Respondents have disallowed all deductions claimed under Ruled 58(1)(a) to (h), amounting to Rs.30,59,93,405/- and therefore, the impugned order has travelled beyond the show cause notice. The Petitioner further submitted that the basis of the show cause notice dated 22nd October 2018 is that profit on sale of labour is permissible deduction under Rule 58(1)(h) only, if there are two contract agreements by the dealer for the work with the principal and in the absence of the same, deduction on

3 (1993) 1 SCC 364

account of profit on supply of labour and service is not allowable. The Petitioner submitted that this is contrary to the decision in the case of ***M/s.Gannon Dunkerley and Co. & Ors. (supra)*** and also the very concept of the works contract which in the present case is indivisible and cannot be split into two agreements. The Petitioner also submitted that the impugned order is passed by the Deputy Commissioner of the Sales Tax when a business audit was already done under Section 22 of the Act by the Deputy Commissioner of the Income Tax, Business Audit and as per Section 25 of the MVAT Act, the Revisional Authority can review the order of subordinate authority and not the order of a coordinate officer. The Petitioner further stated that the application of 20% of the contract value as per Table under Rule 58(1) can be applied only if pre-conditions provided in proviso to Rule 58(1) is satisfied which is that the accounts are not maintained to enable a proper evaluation of the different deductions or the accounts maintained are not clear or intelligible. The Petitioner submitted that inasmuch as there is no satisfaction recorded under the said proviso on the books of accounts in the show cause notice, the Respondents were not justified in applying the rates prescribed in the Table under Rule 58(1) of the MVAT Rules but on the contrary, there are findings by the authority under the MVAT Act that books of accounts have

been maintained properly for arriving at the deductions under Rule 58 of the MVAT Rules. The Petitioner further relied upon the decision in case of ***Godrej Sara Lee Ltd. Vs. Excise and Taxation Officer-cum-Assessing Authority and Ors.***[4] to contend that writ is maintainable since an alternative remedy is not an efficacious remedy and they are challenging very jurisdiction of the authority in passing the review order and also violation of principles of natural justice.

6. ***Submissions of the Respondents*** : Per contra, the Respondents contended that the petition is not maintainable since there is an alternative and adequate remedy of an appeal provided under the Act. The Respondents further contended that the order under Section 25 has not exceeded the show cause notice dated 22nd October 2018 since the said show cause notice refers to Rule 58 without specifying the clause of Rule 58 and therefore, dis-allowance of all the deductions under Rule 58(1) (a) to (h) are justified and the same cannot be said to have been passed without giving a show cause notice. The Respondents also relied upon the second notice dated 23rd November 2020 in support of their submission on this account. The Respondents relied upon the assessment order to justify the order passed under Section 25 of the MVAT Act and further submitted that

4 2023 SCC Online SC 95

since the deductions on account of profit on supply of labour is calculated on proportionate basis, the same cannot be allowed as deductions under Rule 58(1)(h) of the MVAT Rules. The Respondents relied upon page 11 of the Review Order to contend that the condition laid down in the proviso to Rule 58 before applying the rates prescribed in the table under Rule 58 has been considered and therefore, it cannot be said that the jurisdictional conditions are not satisfied before application of the rates prescribed in the Table under Rule 58(1) of the MVAT Rules. The Respondents therefore, have correctly invoked the jurisdiction to pass an order under Section 25 of the MVAT Act.

7. We have heard the learned counsels for the Petitioner and the Respondents and with the assistance of the counsels, we have perused the records of the present petition.

ANALYSIS AND REASONS :-

8. From the contention as urged on behalf of the parties. We are called upon to examine whether the orders impugned in the present petition passed by Respondent No.2 would satisfy the test of law when questioned on the ground of jurisdiction and illegality being attributed to it by the Petitioners, and in such context, whether, in the facts and circumstances of the case,

whether we are required to entertain this petition, by not accepting the objection urged on behalf of the revenue of an alternate remedy available to the Petitioners to file an appeal before the Tribunal. The following discussion would aid our conclusion on such issues.

9. To appreciate the controversy it would be necessary to note the relevant provisions of the MVAT Act and the MVAT Rules:-

> *"MVAT Act:*
>
> *Section 25. Review*
>
> *[(1) After any order including an order under this section or any order in appeal is passed under this Act, rules or notifications, by any officer or person subordinate to him, the Commissioner may, of his own motion or upon information received by him, call for the record of such order and examine whether:-*
>
> *(a) any turnover of sales or purchases has not been brought to tax or has been brought to tax at lower rate, or has been incorrectly classified, any claim is incorrectly granted or that the liability to tax is understated, or*
>
> *(b) in any case, the order is erroneous, in so far as it is prejudicial 1 to the interests of revenue, ...]"*

MVAT Rules:-

> **58. Determination of sale price and of purchase price in respect of Sale by transfer of property in Goods (whether as good or in some other form) involved in the execution of a works contract.**
>
> *(1) The value of the goods at the time of the transfer of property in the goods (whether as goods or in some other form) involved in the execution of a works contract may be determined by effecting the following deductions from the value of the entire contract, in so far as the amounts relating to the deduction pertain to the said works contract:-*

(a) labour [service tax collected separately and service charges] for the execution of the works;

(b) amounts paid by way of price for sub-contract, if any, to sub-contractors;

(c) charges for planning, designing and architect's fees;

(d) charges for obtaining on hire or otherwise, machinery and tools for the execution of the works contract;

(e) cost of consumables such as water, electricity, fuel used in the execution of works contract, the property in which is not transferred in the course of execution of the works contract;

(f) cost of establishment of the contractor to the extent to which it is relatable to supply of the said labour and services;

(g) other similar expenses relatable to the said supply of labour and services, where the labour and services are subsequent to the said transfer of property;

(h) profit earned by the contractor to the extent it is relatable to the supply of said labour and services:

Provided *that where the contractor has not maintained accounts which enable a proper evaluation of the different deductions as above or where the Commissioner finds that the accounts maintained by the contractor are not sufficiently clear or intelligible, the contractor or, as the case may be, the Commissioner may in lieu of the deductions as above provide a lump sum deduction as provided in the Table below and determine accordingly the sale price of the goods at the time of the said transfer of property.*

T A B L E

Sr. No.	Type of Works Contract	*Amount to be deducted from the contract price (expressed as a percentage of the contract price)
(1)	(2)	(3)
1	.....	.....
2	.....	.....
3	.....	.....
4	.....	.....
5	.....	.....

6	.....	.....
7	.....	.....
8	.....	.....
9	.....	.....
10	.....	.....
11	**Laying of pipes**	**Twenty Per cent.**
12	.....	.....
13	.....	.....
[1][14	.....	.....
15	.....	.....

(emphasis supplied)

10. On a perusal of the show cause notice dated 22nd October 2018 and on a complete reading of the said show cause notice which is reproduced above, it is very clear that the show cause notice was issued only to deny deduction on account of profit on supply of labour and service, amounting to Rs.9,41,22,626/- which would only fall under Rule 58(1)(h) and therefore, the reference to Rule 58 in the show cause notice although not specifying the sub-rule, should be read to mean that the show cause was only for disallowance of the item under Rule 58(1)(h) of the MVAT Rules and not all the deductions under Rule 58(1)(a) to (h). This is further fortified by the second show cause notice dated 23rd November 2020 which specifically refers to Rule 58(1)(h) only to deny the deduction of Rs.9,41,22,626/-. The figure of Rs.9,41,22,626/- in the show cause notice is only under Rule 58(1)(h). Therefore, in our view, the show cause notice was only for item to be disallowed under Rule 58(1)(h) and not all the

items under Rule 58(1)(a) to (h). However, in the review order dated 8th March 2021 under Section 25 of the MVAT Act, what is disallowed is all the items under Rule 58(1)(a) to (h), amounting to Rs.30,59,93,405/-. The Respondents have not brought to our notice any document which would show that the show cause notice was issued for disallowing all the items specified in Rule 58(1)(a) to (h). It is well settled that any order beyond the show cause notice is bad-in-law. The Supreme Court in case of ***Commissioner of Customs, Mumbai vs M/s. Toyo Engineering India Limited, 2006 (7) SCC 592*** noted that the Department cannot be allowed travel beyond the show cause notice. The Supreme Court further observed that it would be against the principles of natural justice that a person who has not been confronted with any ground is saddled with liability thereof and since the issue did not form the basis of the show cause notice and was not even confronted to the order passed beyond show cause notice is to be quashed.

11. The Supreme Court in case of ***Commissioner Of Central Excise, Nagpur vs. M/s. Ballarpur Industries Ltd., 2007 (8) SCC 89*** observed that if Rule 7 of the Valuation Rules 1975 have not been invoked in the show cause notice, it would not be open to the Commissioner to invoke the said rule in the remand proceedings.

The view expressed by the Supreme Court in cases of ***Commissioner of Customs, Mumbai vs. M/s.Toyo Engineering India Limited (supra)*** and ***Commissioner Of Central Excise, Nagpur vs. M/s. Ballarpur Industries Ltd. (supra)*** was applied in subsequent decisions of the Supreme Court in case of ***The Commissioner of Central Excise, Bhubaneswar-1 vs. M/S. Champdany Industries Ltd., 2009 (9) SCC 466*** and also in the case of ***Commissioner of Central Excise Vs. Gas Authority of India Limited, 2007 (15) SCC 91.*** Therefore, in our view, applying the ratio of the Supreme Court referred to hereinabove, the impugned order disallowing all the deductions under Rule 58(1)(a) to (h) without giving any show cause notice to the Petitioner would be rendered bad in law.

12. In our opinion such defect in the adjudication goes to the root of the matter and is an incurable defect. Further the Respondents in the review order have applied the rate of 20% specified in table under Rule 58(1). On a reading of Rule 58(1) of the MVAT Rules, the rates specified in the Table can be applied only if the contractor has not maintained accounts which would enable a proper evaluation of the different deductions as specified in Rule 58(1)(a) to (h) or where the Commissioner finds that the accounts maintained by the contractor are not sufficiently clear

or intelligible. It is only under these circumstances that the Commissioner may in lieu of the deduction as prescribed under Rule 58(1)(a) to (h) of the MVAT rules on actual basis can apply the percentage specified in the Table to arrive at the sale price of the goods for the purpose of MVAT Act. On a reading of the proviso to Rule 58(1), the pre-condition for applying the rates specified in the Table is non-maintenance of accounts for proper evaluation of different deduction or the accounts maintained are not sufficiently clear or intelligible. In the instant case, the show cause notice dated 22nd October 2018 and 23rd November 2020 does not allege that the rates prescribed in the table is to be made applicable because the accounts maintained by the Petitioner are not clear or intelligible or the accounts are not maintained for proper evaluation of the different deductions prescribed under Rule 58(1)(a) to (h). Therefore, in the absence of satisfying the pre-condition prescribed under proviso to Rule 58(1) the application of rate specified in Table below Rule 58(1) in the final review order is without jurisdiction. In our view, there was no show cause notice invoking proviso to Rule 58(1) before being made applicable in the review order and, therefore, on this account also, the review order has been passed beyond the show cause notice and without jurisdiction.

13. Even otherwise, in the assessment order dated 11th December 2015, the Assistant Commissioner of Sales Tax has recorded a finding that he has verified the books of accounts with respect to the claim of the dealer under Rule 58 on actual basis. Insofar as the GAIL project is concerned, the assessment order records verification of trial balance, expense ledger copies, contract copies, sample invoices, sub-contractors works order, etc. The audit done under Section 22 of the Act by the Deputy Commissioner prior to the passing of the said assessment order also accepts the maintenance of the books of accounts by the Petitioner with respect to the works contract executed by the Petitioner.

14. In our view, therefore, even on this account, the jurisdictional condition required for applying the rates prescribed in the table to Rule 58(1) have not been complied with before passing the review order and, therefore, even on this account, the impugned order is without jurisdiction.

15. In the show cause notice, jurisdiction is sought to be assumed on the premise that for claiming deduction of profit on sale of labour, there has to be two contract agreements by the dealer for the work with principal. This in our view is contrary to the very concept of works contract. The works contract in the

present case was an indivisible contract without bifurcation of the goods and the service component which goes in for execution of the work awarded to the contractor. The show cause notice has been issued under a misapprehension that in a works contract with GAIL there has to be two different contracts, one for the material and the other for labour and service. Therefore, even on this account, the impugned show cause notice has been issued without application of mind.

16. Now coming to the objection as urged on behalf of the Revenue that the petition ought not to be entertained on the ground of an alternate remedy of an appeal being available to the Petitioner to assail the impugned order. In view of the above discussion, we are of the clear opinion that when our conclusion is that the impugned order is in patent breach of the principles of natural justice as also without jurisdiction the petition deserved to be entertained. It is a settled position in law that if the action of an authority is wholly without jurisdiction or contrary to the principles of natural justice, a writ petition would be required to be maintainable and the Petitioners should not be relegated to an alternative remedy. The Petitioners challenge to the review was clearly on the ground that the principles of natural justice are violated in as much as the same is passed without satisfying the pre-condition required for exercising power of review under

Section 25 of the MVAT Act and under Rule 58(1) of the MVAT Rules. The Constitution Bench of the Supreme Court in case of ***State of Uttar Pradesh Vs. Mohammad Nooh, 1958 SCR 595*** observed as under :-

> *"10. In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute, (Halsbury's Laws of England, 3rd Edn., Vol. 11, p. 130 and the cases cited there). The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies."*

17. The issue of exercising jurisdiction under Article 226 of the Constitution of India, when an alternate remedy is available has been a subject matter before the Supreme Court in the case of **Whirlpool Corporation Vs. Registrar of Trade Marks Mumbai**[5] and the also very recently in the case of **Godrej Sara Lee Limited** (supra) wherein, the principles laid down in the case of Whirlpool Corporation (supra) for exercising the jurisdiction under Article 226 of the Constitution of India have been reiterated on the ground of challenge to the very jurisdiction and principles of

5 (1998) 8 SCC 1.

natural justice.

18. For the reasons stated above, the impugned orders dated 8th March 2021 and 6th July 2021 are hereby quashed and aside. Since order has been passed in excess of the jurisdiction conferred by Section 25 of the MVAT Act and further the impugned order being beyond the show cause notice, the petition is required to be allowed in terms of prayer clauses (a), (b) and (c). No order as to costs.

[JITENDRA JAIN, J.] **[G. S. KULKARNI, J.]**