

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CIVIL APPLICATION NO. 11308 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 11208 of 2019
With
CIVIL APPLICATION (FOR DIRECTION) NO. 1 of 2020
In R/SPECIAL CIVIL APPLICATION NO. 11208 of 2019
FOR APPROVAL AND SIGNATURE:
HONOURABLE MR. JUSTICE J.B.PARDIWALA
and
HONOURABLE MS. JUSTICE NISHA M. THAKORE

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

L AND T HYDROCARBON ENGINEERING LTD
Versus
UNION OF INDIA
Appearance:
MR V SRIDHARAN SENIOR COUNSEL WITH MR ANAND NAINAWATI(5970) for the Petitioner(s) No. 1,2
MR DEVANG VYAS(2794) ADDITIONAL SOLICITOR GENERAL OF INDIA for the Respondent(s) No. 1
MR NIKUNT K RAVAL(5558) for the Respondent(s) No. 2
CORAM: HONOURABLE MR. JUSTICE J.B.PARDIWALA
and
HONOURABLE MS. JUSTICE NISHA M. THAKORE

Date : 03/02/2022

COMMON ORAL JUDGMENT

(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)

1 Since the issues raised in both the captioned writ applications are the same and the challenge is also to the selfsame show cause notice, 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.11208 of 2019 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) writ of mandamus or certiorari or writ in the nature of mandamus or certiorari or any other appropriate writ, order or direction calling for records of impugned Show Cause Notice F. NO.XIV/233/2018 dated 31.12.2018 issued by the respondent No.2 and quashing and setting aside the same.

(b) Writ of mandamus or writ in the nature of prohibition restraining the respondents from proceeding further.

(c) pending the hearing and final disposal of the above petition, the respondents be directed by an interim order and injunction of this Hon Court not to proceed further in the show cause notice.

(d) for ad-interim relief in terms of prayer (c) above.

(e) for costs of the petition.

(f) such other and further order or orders as may be deemed just and proper in the facts and circumstances of the present case.”

4 The case put up by the writ applicant may be summarized as

under:

5 The writ applicant No. 1 was formerly known as the L&T Technologies Limited. The name of the Company was changed from the L&T Technologies Limited to the L&T Hydrocarbon Engineering Ltd. on 21st May 2013. The writ applicant was, however, not carrying on any effective business activity either prior to or after 21.5.2013 including during the Financial Year 2013–2014.

6 The Larsen & Toubro Ltd. is a public limited company. It comprises of the various divisions. One of the divisions was the Hydrocarbon Division. The hydrocarbon division carried out its activities as an independent business unit. The Hydrocarbon Division was engaged in the business of "design to build" engineering, procurement and construction solutions on the turnkey basis in the sectors like the oil and gas, petroleum refining, etc. The Hydrocarbon Division in turn had, *inter alia*, one factory/unit located at the Hazira Manufacturing Complex (MFF Block), Hazira Road, Mora, Surat – 394270. Since each factory has to be separately registered under the Central Excise Act, 1944, the factory obtained registration under the Central Excise Act, 1944 being the registration No.AAACL0140PXM012. Self-evidently, the Registration was in the name of the legal entity viz. The Larsen & Toubro Ltd.

7 Being a unit registered under the central excise, the factory complied with all the formalities under the Central Excise Act, 1944. Thus, for the removal of goods from the factory an invoice in a statutory format as required under the Rule 11 of the Central Excise Rules, 2002 was duly issued at the time of removal of the goods from the factory. The invoice contained description of goods, value, rate of duty, time and date of removal, quantity, duty payable, classification and all other particulars required under the Rule 11 of the Central Excise Rules, 2002.

8 The next requirement of the central excise law is to pay duty by around 5th of the following month against the treasury challan indicating the central excise registration number and the name of the assessee. The factory duly discharged the excise duty liability as applicable accordingly.

9 The next requirement of the central excise law is to file monthly return in the Form ER-1 by around 10th of the next month. The ER-1 return would indicate the goods cleared during the month, duty payable, exemption availed, serial number of excise invoices issued during the month etc. The factory also duly filed these monthly ER-1 returns regularly. Thus, the factory duly complied with all the formalities like issuing of invoice for each removal, monthly duty payment and filing of the monthly returns in the Form ER-1 return periodically.

10 The Central Government, in larger public interest, granted an exemption from the payment of excise duty. The exemption was based on the nature of the goods and status of the customer. Sl. No. 336 of exemption Notification 12/2012-CE dated 17.3.2012 conferred complete exemption for certain supplies effected under the International Competitive Bidding. In terms of this exemption notification, some of the clearances of the goods manufactured by the factory were exempted from the central excise duty. The factory duly followed the procedure prescribed in the exemption notification. The factory entered into certain contracts for supply under the International Competitive Bidding. Due intimation of the same was given to the central excise department vide the writ applicants letter dated 10th May 2012. Along with this letter, the central excise department was given a copy of the certificate issued by the Director General of Hydrocarbons being the project authority. In respect of such clearances from the factory also, the excise

invoice in the statutory form was issued declaring the rate of duty, as nil. These invoices duly showed that the clearances of these goods were exempt from duty.

11 The Larsen & Toubro Ltd. proposed to hive off/demerge its Hydrocarbon Division as a going concern to a separate legal entity. The demerger is governed by the procedure as prescribed under the Companies Act, 1956 particularly Section 394 thereof. As required under the said Companies Act, the Larsen & Toubro Ltd. filed the Company Scheme Petition on 28th June 2013 before the Bombay High Court.

12 The Scheme filed by the Larsen & Toubro Ltd. was approved by the Bombay High Court vide its Order dated 20th December 2013.

13 As per 1(a) of the Scheme, the appointed date meant opening of business hours on 1st April 2013.

1. Definition

(c) 'Appointed Date' means opening of business hours on April, 1 2013.

14 The effective date was defined in 1(g) of the scheme to have meaning as per the Clause 19.2 of the scheme. Para 19.2 of the scheme is reproduced below:

"19.2 This Scheme, although to come into operation from the Appointed Date, shall not become effective until the last of the following dates, namely, that on which the last of the aforesaid consents, approvals, permissions, resolutions and orders as mentioned in the above sub-clause 19.1 is obtained or passed. Such date shall be the "Effective Date" for the purpose of this Scheme."

15 The copy of the order dated 20th December 2003 passed by the

High Court was filed with the Registrar of companies on 16.1.2014. Therefore, 16th January 2014 became the effective date.

16 Pending the filing of the scheme with the High Court and its approval, the business of Larsen & Toubro Ltd. including its Hydrocarbon Division continued as in the past. Thus, the manufacture and dispatches of the goods continued from the factory. Under the central excise law, the procedural formalities regarding the issue of invoices, etc. are to be complied with at the time of removal. Therefore, the Larsen & Toubro Ltd. which was a legal entity registered with the central excise department for this factory, duly effected the dispatches on the strength of the excise invoices issued by it. The invoices duly contained the description of goods, value, rate of duty, time and date of removal, quantity, duty payable, classification, name of customer and all other particulars.

17 Further, pending the filing of the scheme with the High Court and pending approval of the same, the excise duty had to be paid by around 5th of the following month and the ER-1 return had to be filed before the 10th of the following month. The duty liability was so discharged, and the ER-1 returns, so filed by the legal entity Larsen & Toubro Ltd. qua the central excise registration held by it for this factory.

18 The writ applicant (i.e. the successor entity) vide the application dated 1st April 2014 formally applied to the jurisdictional central excise authority for the new central excise registration in its own name as a new legal entity. Along with the said application dated 1st April 2014, the writ applicant also submitted copy of the Order dated 20th December 2013 passed by the Bombay High Court sanctioning the scheme.

19 The Jurisdictional Central Excise officer accepted the said

application of the writ applicant and granted fresh central excise registration no. AABCL5967DEM001 on 7th April 2014.

20 After obtaining the formal fresh registration on 7th April 2014, all the dispatches were effected by the writ applicant by issuing statutory invoices in its own name. The monthly returns in the Form ER-1 were also duly filed in its own name by the writ applicant for the period after April 2014 onwards.

21 The Rule 10 of the CENVAT Credit Rules, 2004, permits transfer of the CENVAT credit lying unutilised in the account of manufacturer of final products (i.e. the transferor company) to the transferee company, under the circumstances specified in the said Rules.

22 Accordingly, the writ applicant filed an application dated 30th June 2014 to the central excise department. The writ applicant requested for transfer of the unutilised cenvat credit lying with the Larsen & Toubro Ltd to the writ applicant to the extent it related to the hydrocarbon engineering division. The jurisdictional Assistant Commissioner vide the order-in-original dated 30th April 2015 permitted transfer of the unutilised cenvat credit lying in the account of the predecessor Larsen & Toubro to the writ applicant.

23 The online facility for the filing of the monthly central excise returns in the Form ER-1 only enabled return to be filed in the very name under which the treasury challans for the payment of central excise duty stood. Since these challans were issued in or around 5th of every month for the payment of central excise duty, they were in the name of the predecessor entity i.e. the Larsen & Toubro Ltd. Hence, the revised returns in the Form ER-1 in the name of the new entity could not be filed by the writ applicant for the financial year 2013-14. This was a

procedural hitch in the online system developed and implemented by the central excise department.

24 For the financial accounting purposes, the balance sheet, profit loss account and other related documents were actually prepared much after the close of the financial year 2013 – 2014 by the Larson & Toubro Ltd. The same did not include the transactions of the Hydrocarbon Division. The Profit & Loss Account, Balance Sheet and other related documents prepared by the L&T Hydrocarbon Engineering Ltd. for the FY 2013-14 duly considered and took into account all the transactions carried out by the Hydrocarbon Division as a part of the Larsen & Toubro Ltd. for the financial year 2013 – 2014.

25 The Income tax return for the FY 2013-2014 was to be filed much after the closure of the FY 2013- 2014. The Income tax return filed by the Larsen & Toubro Ltd. for the financial year 2013-14 did not include the affairs of the Hydrocarbon Division. Those were duly incorporated in the income tax returns filed by the writ applicant for the financial year 2013-2014.

26 The Central excise audit of the factory popularly called as the EA 2000 Audit was undertaken for the Financial Years 2012-13 and 2013 – 2014 (upto February 2014) by the officers of the central excise department. During the course of audit, the departmental officers verified all the records maintained by the Hydrocarbon Division of the Larsen & Toubro Ltd. The Audit report dated 31st March 2014 raised diverse discrepancies perceived by the audit. None of those observations relate to the present demand or controversy. In other words, the audit did not raise any objection whatsoever (that payment of excise duty and following the procedure of central excise law by the Larsen & Toubro Ltd. during the FY 2013 – 2014 [upto February 2014]) was irregular or

incorrect. The Audit at no point of time said that the compliance should have been by the L&T Hydrocarbon Ltd. i.e., the successor entity.

27 Two summons dated 15th November 2018 and 5th December 2018 resply were issued by the officers of the central excise department (at the behest of DGCEI, Madras) to the writ applicant requesting to provide documents and give statement. The statement of Vaidyanath Shastri, DGM (Finance & Accounts) (writ applicant No.2) was recorded on 12th December 2018. The following queries were raised:

- (a) whether the writ applicant was registered with the central excise department and filed ER-1 returns during the financial year 2013 – 2014;
- (b) who was the main contractor / sub-contractor for the supply of goods to the projects made under the ICB during the FY 2013– 2014, etc.

Mr. Shastri, in his statement dated 12.12.2008 specifically clarified that all the contracts and invoices during the FY 2013 – 2014 were entered into and raised respectively by the Larsen & Toubro Ltd. It was also clarified that the payment of excise duty on the said clearances and filing of the ER–1 return was done by the Larsen & Toubro Ltd. during the FY 2013 – 2014. The writ applicant No.2 also stated in his statement that the hydrocarbon division acted on behalf of the Larsen & Toubro Ltd. till 16th January 2014 and thereafter on behalf of the L&T Hydrocarbon Engineering Ltd.

28 Ultimately, the impugned show cause notice dated 31st December 2018 came to be issued to the writ applicant raising the demand of Rs.19,61,06,399/- towards the excise duty as detailed in the Annexure A

to the show cause notice for the clearances between December 2013 and March 2014. The demand of excise duty of Rs.96,20,02,091/- as detailed in the Annexure B to the show cause notice for the clearances effected from December 2013 to March 2014 availing exemption for the supplies against the ICB contract was also sought to be raised.

29 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 APPLICANTS:**

30 The submissions canvassed by Mr. V. Sridharan, the learned Senior Counsel assisted by Mr. Nainawati, the learned advocate on behalf of the writ applicants may be broadly classified under the following heads:

(i) The absence of pre-show cause notice consultation in accordance with the CBEC master circular No.1053/2/2017-CX dated 10th March 2017 is fatal to the impugned show cause notice.

(ii) The extended period of limitation under Section 11A(4) of the Central Excise Act, 1944 is not applicable in the present case. The entire demand towards excise duty being beyond the normal period of limitation is barred by limitation and therefore, without jurisdiction.

(iii) The discharge of central excise duty by the Larsen and Toubro Limited is full, correct and in absolute compliance of the provisions of the Central Excise laws. The scheme of merger having been approved by the Bombay High Court, the payment of tax raising of invoice and filing of return by the Larsen and Toubro Limited and not by the writ applicant herein is in absolute

compliance of the Central Excise laws. There is no procedural breach in this regard by the Larsen and Toubro Limited and/or the writ applicant.

(iv) The excise duty has been discharged by the Larsen and Toubro Limited i.e. the transferor / demerged entity. Even if it is considered as discharge of excise duty by a wrong person, such duty so paid should be adjusted against the duty payable if any by the correct person. Asking the writ applicant herein to discharge the very same liability of payment of excise duty i.e. the very duty paid by the Larsen and Toubro Limited would amount to double taxation of the same transaction, and therefore, manifestly illegal.

(v) The respondent No.2 has wrongly presumed that the writ applicant started carrying on its business from 1st April 2013 i.e. “the appointed date” as per the scheme. The relevance of “appointed date” has been thoroughly misunderstood by the respondent No.2. Issuance of the impugned show cause notice without proper investigation is illegal.

(vi) The respondents are bound by the order dated 20th December 2013 passed by the Bombay High Court approving the scheme. The respondents cannot raise any objection in this regard and that too, on their own. The case of the department, as reflected in the show cause notice, that any scheme of demerger approved by any stipulating date prior to the effective date as the appointed date is contrary to the Central Excise Act, 1944.

(vii) The impugned show cause notice proposes to deny the benefit of Sl. No.336 of the Notification No.12/2012-CE on the ground that the benefit of the said notification is available only to

the contractor / sub-contractor in respect of the ICB contract is perverse. The benefit of the notification is available with respect to the goods supplied under the ICB contract.

31 Shri Sridharan has placed reliance on the following documents and case law:

<i>Sr. No.</i>	<i>Particulars</i>
1	<i>Sl. No.336 of Notification No.12/2012-CE dated 17.3.2012</i>
2	<i>Para 8.2 of chapter 8 of foreign Trade Policy</i>
3	<i>CBEC Master Circular No.1053/2/2017-CX, dated 10.3.2017 para 5</i>
4	<i>CBIC Circular NO.1076/02/2020-CX dated 19.11.2020</i>
5	<i>Circular F. No.2/1/2014 dated 15.1.2014 issued by Ministry of Corporate Affairs</i>
	<u><i>Tax discharged by the wrong person is to be adjusted against the tax liability of the correct person.</i></u>
6	<i>ITO vs. Bachu Lal Kapoor AIR 1966 SC 1148</i>
7	<i>Trustee of Late Sir R. J. Vakil vs. CIT 1958 136 ITR 517 (Bom)</i>
8	<i>CIT vs. Ramanand Sachdeva 1982 136 ITR 440 (Delhi)</i>
9	<i>Modipon Ltd vs. Dy. CIT 1995 54 ITD 433 (Delhi)</i>
	<u><i>Once Court sanctions the scheme of amalgamation, it has statutory force and becomes binding on the statutory authorities.</i></u>
10	<i>J. K. (Bombay) Private Ltd. vs. New Kaiser-I-Hind SPG. & WVG. Co. Ltd AIR 1970 SC 1041</i>
11	<i>Pentamedia Graphics Ltd & Ors vs. ITO 2010 (1) TMI 753 – Madras High Court</i>
	<u><i>Once the scheme is sanctioned, it cannot be questioned in the collateral proceeding</i></u>
12	<i>Sadanand Varde and others vs. State of Maharashtra (2001) 247 ITR 609 (Bom)</i>
13	<i>Electrocast Sales India Ltd vs. DCIT, CC-XXI (2018) 170 ITD 507 (Kol)</i>
	<u><i>Pre-show cause notice consultation is mandatory.</i></u>
14	<i>Amadeus India Pvt. Ltd vs. Principal Commissioner 2019 (25) GSTL 486 (Del.)</i>
15	<i>Tube Investment of India Ltd. vs. UOI 2018 (16) GSTL 376 (Mad.)</i>

	<u><i>Writ Petition challenging the validity of a notice being barred by limitation, is maintainable.</i></u>
16	<i>State of Punjab vs. Bhatinda District Cooperative Milk P. Union Ltd. (2007) 11 SCC 363</i>

32 In such circumstances referred to above, Shri Sridharan, the learned Senior Counsel prays that there being merit in his both the writ applications, those be allowed by quashing and setting aside the impugned show cause notices.

● **SUBMISSIONS CANVASSED ON BEHALF OF THE REVENUE:**

33 Mr. Devang Vyas, the learned Additional Solicitor General of India assisted by Mr. Nikunt Raval, the learned Standing Counsel appearing for the respondents, on the other hand, has vehemently opposed the present writ application.

34 The principal submission canvassed by Mr. Vyas is that this writ application may not be entertained as it seeks to challenge the legality and validity of a show cause notice. Mr. Vyas would submit that the writ applicant has not made out any case for quashing the impugned show cause notice issued by the respondent No.2. Mr. Vyas would submit that the adjudicating authority is yet to decide the matter on merits. There are certain vital issues to be decided by the adjudicating authority on the basis of the materials on record. Mr. Vyas would submit that since a *prima facie* case has been made out for initiating the proceedings against the writ applicant, there is no question of interdicting the proceedings during the show cause stage.

35 Mr. Vyas first invited the attention of this Court to para 5 of the CBEC master circular No.1053/02/2017-CX dated 10th March 2017, which reads as under:

“5.0 Consultation with the noticee before issue of show cause notice: Board has made pre show cause notice consultation by the Principal Commissioner / Commissioner prior to issue of show cause notice in cases involving demands of duty above Rs.50 lakhs (except for preventive / offence related SCN's) mandatory vide instruction issued from F No.1080/09/DLA/MISC/15 dated 21st December 2015. Such consultation shall be done by the adjudicating authority with the assessee concerned. This is an important step towards trade facilitation and promoting voluntary compliance and to reduce the necessity of issuing show cause notice.”

36 Relying on the aforesaid, Mr. Vyas would submit that pre-consultation with the noticee before issuance of the show cause notice is not mandatory, more particularly, when the impugned show cause notice is for preventive / related to an offence. Mr. Vyas would submit that the impugned show cause notice originated from the intelligence gathered from the Additional Director General, Directorate General of Goods and Service Tax Intelligence, ADG, DGGI.

37 Mr. Vyas would submit that the contention canvassed on behalf of the writ applicant that the extended period of limitation is not invocable in the case on hand is without any merit. He would submit that the writ applicant could be said to have contravened the various provisions relating to the registration of invoices, furnishing of returns, and payment of applicable central excise duty.

38 Mr. Vyas would submit that the stance of the writ applicant No.1 herein that the applicable central excise duty was paid by M/s. LT-HCIC prior / post approval by the Bombay High Court is without any merit because although M/s. LT-HCIC had raised the invoices manufactured and cleared the goods on payment of duty and filed ER-1, yet the consideration was received in the financial of the writ applicant No.1 herein. Mr. Vyas also questioned the very approval of the scheme of arrangement by the Bombay High Court. He would submit that the Bombay High Court endorsed the scheme only keeping one thing in

mind that the same was not opposed to the public policy.

39 Mr. Vyas further submitted that the impugned show cause notice has been issued on the ground that the writ applicants have contravened the provisions contained in Rule 11 of the Central Excise Rules, 2002 inasmuch as they failed to make proper invoices indicating the amounts to be paid towards the central excise duty and also Rule 12 of the Rules, 2002 inasmuch as they failed to file the monthly return within the prescribed time.

40 Mr. Vyas would submit that the writ applicant No.1 has not discharged its liability towards payment of the central excise of Rs.115,81,08,490/- deliberately on clearance of their finished goods required to be recovered from it under the provisions of Section 11A(4) of the Central Excise Act, 1944.

41 In such circumstances referred to above, Mr. Vyas prays that there being no merit in the present writ application, the same may be rejected.

● **ANALYSIS:**

42 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 show cause notice is sustainable in law.

43 The relevant portion of the impugned show cause notice based on which the excise duty demand has been proposed is extracted as under:

6. In view of foregoing pares it appears that M/s. LTHE have contravened various provisions pertaining to registration, issue of invoices, furnishing of returns and payment of applicable central excise duty, M/s. LTHE have consistently responded that the applicable central excise duty had been paid by M/s LT-HCIC prior/ post approval

by Bombay High court. M/s. LTHE have obtained registration on 07.04.2014 but M/s. HC1C had raised invoices, manufactured goods and cleared the goods on payment of duty and filed ER-I but the consideration was received in the financials of M/s. LTHE.

7. On examination of the operative portion of the order dated 20.12.2013 of the Hon'ble High Court of Bombay (RUD-I I), it appears that the proposed scheme of arrangement was endorsed by the Hon'ble High Court only because it appeared fair and reasonable and was not violate of any provision of law and not contrary to the public policy and also not because none of the parties concerned had come forward to oppose the scheme. However, in the instant case, the parries concerned were the holding company (Transferor) and their subsidiary company (Transferee), both being related persons. Therefore, the question of not opposing or contesting the scheme does not seem to arise. Further, Hon'ble Court was made to believe that the scheme was not in contravention of any of the provisions of the Laws. However, as stated supra in the entire notice, it can be seen that how the said scheme of arrangement had contravened various provisions of the Central Excise Act, 1944 and the Rules made thereunder.

8. Whereas, it appears that M/s LTHE have not paid central excise duty liability of Rs. 19,61,06,399/- deliberately on clearance of their finished goods as detailed in Annexure A to the show cause notice, which is required to be recovered from them under the provision of section 11(A)(4) of Central Excise Act, 1944 alongwith interest under section 11AA of Central Excise Act, 1944.

9. In view of foregoing paras, it also appears that M/s. LTHE is also liable to pay duty in relation to finished goods cleared under Notification No.12/2012-CE dated 17.03.2012 without fulfilling the conditions of the said notification and para 8.2 of chapter 8 of Foreign Trade policy 2009-2014. It appears that LTHE has not paid central excise duty amounting to Rs. 95,20,02,0911- as detailed in Annexure B to the show cause notice, which is required to be recovered from them under the provision of Section 11A.(4) of Central Excise Act, 1944 alongwith interest under section 11AA of Central Excise Act, 1944.

10. In view of the above, it appears that LTHE have contravened the provisions of Rule 9 of the Central Excise Rules, 2002 read with Section 6 of Central Excise Act, 1944 in as much as they have failed to apply for registration.

10.1. LTHE have also contravened the provisions of Rule 4 and 8 of Central Excise Rules, 2002, in as much as they failed to discharge their duty liability correctly and in appropriate manner on clearances of their excisable goods and removed the excisable goods in contravention.

10.2. Further, they have also contravened the provisions contained in Rule 11 of Central Excise rules, 2002 in as much as they failed to make proper invoices showing the amounts of central excise duty and Rule 12 of Central Excise rules, 2002 in as much as they failed to file monthly returns within prescribed time. They contravened the provisions of Central Excise Act, 1944 and rules made thereunder by recourse to suppression of facts and willful mis-statement with an intent to evade the central excise duty amounting to Rs. 15,81,08,490/- totally as per Annexure A & B so evaded is therefore required to be recovered from them under section 11(A)(4) of the central excise act, 1944 along with interest under Section 11 AA of the Central Excise Act, 1944.

10.3. All these acts of contravention on their part have been committed by them by recourse to suppression of facts and willful misstatement and all acts of contravention committed by them constitute an offence of the nature described under section 11A C of the Central Excise Act, 1944 and thereby LTHE has also rendered themselves liable for penal action under Section 11A C (1) (a) of the Central Excise Act, 1944. M/s. LTHE have violated the provision of Rule 27 of Central Excise Rules, by not taking registration, raising proper invoices, non payment of central excise duty, non filing of ER-I returns and thereby violating the provisions of Rule 8,9,11 and 12 of Central Excise Rules 2002.

44 The details enumerated in the Annexure A to the show cause notice is as follows:

- (a) The unnumbered column 2 of the Annexure-A refers to the invoice no.
- (b) The unnumbered column 3 of the Annexure-A refers to the invoice date.
- (c) The unnumbered column 7 of the Annexure-A refers to the amount.
- (d) The unnumbered column 8 of the Annexure-A refers to the excise duty.
- (e) The unnumbered column 9 of the Annexure-A refers to the cess.
- (f) The unnumbered column 10 shows the total excise duty.

All the above details referred to in the Annexure A, are as per the statutory invoice issued by the predecessor entity viz. Larsen & Toubro Ltd. in terms of the Rule 11 of the Central Excise Rules, 2002. The details given in Annexure B to the show cause notice follow the same pattern. Thus, the demand raised in the impugned show cause notice is on the very same clearances/invoices already issued by the predecessor entity, in its name i.e. Larsen & Toubro Ltd. at the time of the removal from the goods of the factory.

45 The Demand raised is for the period from December 2013 and not from April, 2013. Obviously, this appears to be for a simple reason. Under Section 11A of the Act, the demand can be raised for a period of five years. Hence, the impugned show cause notice dated 31st December 2018 restricted the demand for the period from December 2013.

46 A bare perusal of the Paras 6 to 10 respaly of the impugned show cause notice would indicate that the sole basis of the notice is that the central excise registration and issue of invoices should have been by the successor entity itself in its own name from 1st April 2013 onwards and the excise duty liability discharged accordingly. Effectively, according to the impugned notice, the compliance of the central excise law by the Larsen & Toubro Ltd. for the FY 2013-14 is irrelevant and non-consequential.

47 The respondents have filed their affidavit-in-reply dated 5th March 2021 opposing the present petition. It has been contended by the learned A.S.G. that there was no need of pre-consultation before the issuance of the impugned show cause notice in the present case. According to him, the present case originated from the investigation by the ADG, DGGST and therefore hit by the exclusion clause as provided in the Circular dated 10th March 2017. It has been contended that the

circular excludes the preventive and offence related show cause notice from pre-consultation. It has been further contended that the extended period of limitation under the provisions of Section 11A(4) of the Central Excise Act, 1944 has been rightly invoked on the basis of the grounds as alleged in the impugned show cause notice. The learned A.S.G. also contend that the writ applicants should have approached the adjudicating authority before filing the petition before this Court.

● **CONCEPT OF APPOINTED DATE AND EFFECTIVE DATE IN A SCHEME OF DEMERGER.**

48 Ordinarily, the assessee needs to have audited financial records before applying for the scheme of arrangement since the valuation of the assets and investments getting transferred and share price has to be done.

49 The appointed date is the date with effect from which the Scheme shall upon sanction of the same by the High Court, be deemed to be operative.

50 Since, the business has to continue, pending the approval of scheme, the provisions of the scheme take care of these aspects also. It is significant to note that the actual application for demerger will be on a date subsequent to the latest available balance sheet. Usually, by the time the scheme itself is lodged, the business would have been carried on by the old entity even for the period after the appointed date but pending the filing/grant of scheme.

51 The effective date denotes the date on which the demerger is completed in all respects after having gone through the formalities involved, and a copy of the High Court's order sanctioning the scheme is filed with the Registrar of Companies. With that, the process of

demerger is completed, and the corresponding division of the transferor - company stands demerged.

52 The appointed Date is of no significance under the law till the final demerger order is received from the Court and filed with the ROC to give effect to the scheme, therefore, until the transfer as a result of demerger is completed, the liability of the transferor remains. The Transferor Company continues to pay the tax, file returns as if there is no proposal for demerger as the case may be. Therefore, the Court would also provide for the Effective Date.

53 The relevant portion of judgement of Supreme Court in **Marshal and Co. Vs. ITO - [1997] 223 ITR 809 (SC)** is reproduced below:

“Every scheme of amalgamation has to necessarily provide a date with effect from which the amalgamation/transfer shall take place. The scheme concerned herein does so provide, viz., January 1, 1982. It is true that while sanctioning the scheme, it is open to the court to modify the said date and prescribe such date of amalgamation/transfer as it thinks appropriate in the facts and circumstances of the case. If the court so specifies a date, there is little doubt that such date would be the date of amalgamation/date of transfer. But where the court does not prescribe any specific date but merely sanctions the scheme presented to it---as has happened in this case---it should follow that the date of amalgamation/date of transfer is the date specified in the scheme as " the transfer date ". It cannot be otherwise. It must be remembered that before applying to the court under section 391(1), a scheme has to be framed and such scheme has to contain a date of amalgamation/transfer. The proceedings before the court may take some time; indeed, they are bound to take some time because several steps provided by sections 391 to 394A and the relevant rules have to be followed and complied with. During the period the proceedings are pending before the court, both the amalgamating units, i.e., the transferor company and the transferee company may carry on business, as has happened in this case, but normally provision is made for this aspect also in the scheme of amalgamation. In the scheme before us, clause 6(b) does expressly provide that with effect from the transfer date, the transferor company (subsidiary company) shall be deemed to have carried on the business for and on behalf of the transferee company (holding company) with all attendant consequences. It is equally relevant to notice that the courts have not only sanctioned the

scheme in this case, but have also not specified any other date as the date of transfer/amalgamation. In such a situation, it would not be reasonable to say that the scheme of amalgamation takes effect on and from the date of the order sanctioning the scheme. We are, therefore, of the opinion that the notices issued by the Income-tax Officer (impugned in the writ petition) were not warranted in law. The business carried on by the transferor company (subsidiary company) should be deemed to have been carried on for and on behalf of the transferee company. This is the necessary and the logical consequence of the court sanctioning the scheme of amalgamation as presented to it. The order of the court sanctioning the scheme, the filing of the certified copies of the orders of the court before the Registrar of Companies, the allotment of shares, etc., may have all taken place subsequent to the date of amalgamation/transfer, yet the date of amalgamation in the circumstances of this case would be January 1, 1982. This is also the ratio of the decision of the Privy Council in Raghubar Dayal v. Bank of Upper India Ltd., AIR 1919 PC 9.”

54 The scheme in the present case was filed under the Companies Act, 1956. Section 394 thereof did not refer to the appointed date/effective date etc. the corresponding provision of Companies Act, 2013 i.e. Section 232(6) mandate the same.

● **SALIENT PORTIONS OF SCHEME OF DEMERGER IN THE PRESENT CASE AS APPROVED BY THE BOMBAY HIGH COURT VIDE ORDER DATED 20TH DECEMBER 2013.**

55 The present Scheme is not one where the exemption, concession or benefit under the provisions of Central Excise Act, 1944 otherwise not available becomes available to the transferor or transferee or vice versa. The tax position of the predecessor and successor (i.e. the writ applicant) has remained the same both pre and post demerger on every aspect whether substantive or procedural, including the value of dutiable goods, rate of duty, time of payment of tax, cash flow, etc.

56 The relevant clause of the Scheme of demerger as approved by the High Court of Bombay vide the order dated 20.12.2013 is extracted for ease of reference.

4.2 CONTRACTS

(a) All contracts, deeds, bonds, agreements schemes, arrangements and other instruments of whatsoever nature in relation to the Transferred Undertaking to which the Transferor Company is a party or to the benefit of which the Transferor Company may be eligible, and which are subsisting or have effect immediately before the Effective Date, shall continue in full force and effect against or in favour of, as the case may be, the Transferee Company in which the Transferred Undertaking vests by way of business transfer hereunder and may be enforced as fully and effectually as if instead of the Transferor Company, the Transferee Company had been a party or beneficiary or oblige thereto or thereunder; and

(b) Without prejudice to the other provisions of this Scheme and notwithstanding the fact that vetting of the Transferred Undertaking occurs by virtue of this Scheme itself, the Transferee Company may, at any time after the coming into effect of this Scheme in accordance with the provisions hereof, if so required under any law or otherwise, take such actions and execute such deeds (including deeds of adherence), confirmations or other writings or tripartite arrangements with any party to any contract or arrangement to which the Transferor Company is a party or any writings as may be necessary in order to give formal effect to the provisions of this Scheme. The Transferee Company shall, under the provisions of this Scheme, be deemed to be authorised to execute any such writings on behalf of the Transferor Company in relation to the Transferred Undertaking and to carry out or perform all such formalities or compliances referred to above on the part of the Transferor Company to be carried out or performed.”

4.3 LIABILITIES

(a) All debts, liabilities, contingent liabilities, duties and obligations of every kind, nature and description of the Transferred Undertaking shall also, under the provisions of Section 391 to 394 and all other applicable provisions, if any, of the Act, without any further Act or deed, be transferred to or be deemed to be transferred to the Transferee Company, so as to become from the Appointed Date the debts, liabilities, contingent liabilities, duties and obligations of the Transferee Company and it shall not be necessary to obtain the consent of any third party or other person who is a party to any contract or arrangement by virtue of which such debts, liabilities, contingent liabilities, duties and obligations have arisen in order to give effect to the provisions of this sub-clause.

(b) Where any of the loans raised and used, liabilities and obligations incurred, duties and obligations of the Transferor Company as on the

Appointed Date deemed to be transferred to the Transferee Company have been discharged by the Transferor Company after the Appointed Date and prior to the Effective Date, such discharge shall be deemed to have been for and on account of the Transferee Company, and

(c) All loans raised and used and all liabilities and obligations incurred by the Transferor Company for the operations of the Transferred Undertaking after the Appointed Date and prior to the Effective Date, shall subject to the terms of the Scheme, be deemed to have been raised, used or incurred for and on behalf of the Transferee Company and to the extent they are outstanding on the Effective Date, shall also without any further act or deed be and stand transferred to and be deemed to be transferred to the Transferee company and shall become the debts, liabilities, duties and obligations of the Transferee Company which shall meet discharge and satisfy the same.

4.5. LICENSES AND PERMISSIONS

(a) Any statutory licenses, permissions or approvals or consents held by the Transferor Company required to carry out operations of the Transferred Undertaking shall stand vested in or transferred to the Transferee Company without any further act or deed, and shall be appropriately mutated by the statutory authorities concerned therewith in favor of the Transferee Company and the benefit of all statutory and regulatory permissions, environmental approvals and consents, registration or other licenses, and consents shall vest in and become available to the Transferee Company as if they were originally obtained by the Transferee Company. In so far as the various Incentives, subsidies, rehabilitation schemes, special status and other benefits or privileges enjoyed, granted by any Governmental Authority or by any other person, or availed of by the Transferor Company relating to the Transferred Undertaking, are concerned, the same shall vest with and be available to the Transferee Company on the same terms and conditions as applicable to the Transferor Company, as if the same had been allotted and/or granted and/or sanctioned and/or allowed to the Transferee Company.

10. CONDUCT OF BUSINESS UNTIL THE EFFECTIVE DATE

10.1. With effect from the Appointed Date and upto and including the Effective Date, the Transferor Company shall be deemed to have been carrying on and to be carrying on all business and activities relating to the Transferred Undertaking for and on account of and in trust for the Transferee Company.

10.2. All profits accruing to the Transferor Company or losses, arising

or incurred by the Transferor Company in relation to the Transferred Undertaking for the period commencing from the Appointed Date to the Effective Date shall, for all purposes, be treated as the profits or losses, as the case may be, of the Transferee Company.

10.3. Any income or profit accruing or arising to the Transferor Company in relation to the Transferred Undertaking and all costs, charges, expenses, losses or taxes (including but not limited to advance tax, tax deducted at source, service tax, VAT, other indirect taxes, etc.), arising or incurred by the Transferor Company in relation to the Transferred Undertaking for any period commencing on or after the Appointed Date shall for all purposes be treated as income, profits, charges, expenses, losses or taxes, as the case may be, of the Transferee Company.

10.4 All compliances with respect to advance tax, withholding taxes or tax deduction at source, service tax, VAT, other indirect taxes, etc. to be done or done by the Transferor Company in relation to the Transferred Undertaking shall for all purposes be treated as compliances to be done or done by the Transferee Company. ...”

12. SAVING OF CONCLUDED TRANSACTIONS

The transfer and vesting of the assets, liabilities and specific identified reserves of the Transferred Undertaking as per this Scheme and the continuance of the Proceedings by or against the Transferee Company shall not affect any transaction of proceedings already completed by the Transferor Company for any period commencing on or after the Appointed Date to the extent that the Transferee Company accepts and adopts all acts, deeds and things done and executed by and/or on behalf of the Transferor Company as acts, deeds and things done and executed by and on behalf of the Transferee Company.

20. COMPLIANCE WITH TAX LAWS

20.1 Upon coming into effect of the Scheme, the Transferee Company may, if it considers necessary or expedient, revise (with retrospective effect if applicable) its income tax returns, TDS returns, service tax returns, sales tax returns, and other tax returns, and claim refunds and/or credits, etc. pertaining to the Transferred Undertaking pursuant to the provisions of the Scheme.

20.2 Upon coming into effect of the Scheme, the Transferor Company is also expressly permitted to revise with retrospective effect if applicable) its income tax returns, TDS returns, Service Tax returns, sales tax returns and other tax returns, and to claim refunds and/or credits, etc. pertaining to the Remaining Business pursuant to the provisions of the Scheme.”

57 The relevant portion of the order dated 20th December 2013 of the Bombay High Court, approving the scheme of demerger is extracted below.

10. Some objectors had come forward to object to the Scheme. By the orders passed earlier it was noted that the most of the Objections were settled, The Counsel for NPCC states that they have filed an Affidavit dated 29th November 2013 requesting this Court for permission to withdraw its earlier affidavit of opposition dated 18th November 2013. NPCC is accordingly allowed to withdraw the same. The learned counsel appearing for, the ONGC states that there are certain contracts which are in existence between the petitioner companies and the ONGC and they will be affected if the Scheme is sanctioned. The learned counsel for the petitioners states that this apprehension is not warranted as so far as 15 contracts are concerned, the transferee company has given Parent Company Guarantee. The learned counsel for the petitioner further submits that if there are any other contracts which would be transferred to the transferee company and similar guarantees will be given. This statement is accepted by the learned counsel for the ONGC.

11. From the material on record, the Scheme appears to be fair and reasonable and is not violative of any provisions of law and is not contrary to public policy. None of the parties concerned has come forward to oppose the Scheme.

12. Since all the requisite statutory compliances have been fulfilled, Company Scheme Petition No. 651 of 2013 and 652 of 2013 filed by the Petitioner Companies are made absolute in terms of prayer clause (a) of the Petition.

13 The Petitioner Companies to lodge a copy of this order and the Scheme duly authenticated by the Company Registrar, High Court (O.S), Bombay, with the concerned Superintendent of Stamps, for the purpose of adjudication of stamp duty payable, if any, on the same within 60 days from the date of receipt of this order.

14. Petitioner is directed to file a copy of this order along with a copy of the Scheme of Arrangement with the concerned Registrar of Companies, electronically, along with E-Form 21 in addition to physical copy as per provisions of law.

● **WRIT JURISDICTION OF THE HIGH COURT UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA AT THE STAGE OF SHOW CAUSE NOTICE: -**

58 Ordinarily, in any tax matter, a writ petition under Article 226 against a show cause notice may not be maintainable. However, in special and peculiar facts of the case, this principle may not apply.

59 The impugned Show cause notice has been issued on 31st December 2018, raising duty demand for the period December 2013 to March 2014. This is beyond the normal period of limitation of two years prescribed under Section 11A(1) of the Central Excise Act, 1944. The Extended/longer period of limitation of 5 years has been prescribed under Section 11A(4) of the Central Excise Act, 1944. The extended period of limitation of 5 years, applies when the duty of excise had not been levied or paid or short levied or short-paid by reason of either fraud or collusion or wilful misstatement or suppression of facts or contravention of any provisions of the Act or the Rules made thereunder with an intent to evade payment of duty.

60 If in a given case, ex-facie, the ingredients for invoking the extended period of limitation are not attracted based on the very averments in the show cause notice, the notice would be ex-facie barred by limitation.

61 It is now well settled that the question of limitation is a question of jurisdiction.

62 In **Pandurang Dhoni Chougule Vs. Maruti Hari Jadhav AIR 1966 SC 153**, the Supreme Court observed that:

It is well settled that a plea of limitation or a plea of res judicata is a plea of law which concerns the jurisdiction of the court which tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the court, and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of Section 115 of the Code.

63 In **State of Punjab Vs. Bhatinda District Cooperative Milk P. Union Ltd.** reported in 2007 (217) ELT 325 (SC) = (2007) 11 SCC 363 the Supreme Court held that the question of limitation being a jurisdictional question, a writ petition challenging the validity of a notice of revision of an order of assessment of sales tax, on the ground of the same being barred by limitation, would be maintainable, notwithstanding availability of an alternative statutory remedy. Relevant portion of the decision is extracted hereunder:

“23. Question of limitation being a jurisdictional question, the writ petition was maintainable.

24. We are, however, not oblivious of the fact that ordinarily the writ court would not entertain the writ application questioning validity of a notice only, particularly, when the writ petitioner would have an effective remedy under the Act itself. This case, however, poses a different question. The Revisional Authority, being a creature of the statute, while exercising its revisional jurisdiction, would not be able to determine as to what would be the reasonable period for exercising the revisional jurisdiction in terms of Section 21(1) of the Act. The High Court, furthermore in its judgment, has referred to some binding precedents which have been operating in the field. The High Court, therefore, cannot be said to have committed any jurisdictional error in passing the impugned judgment.” [emphasis supplied]

64 In **ITW Signode India Ltd. Vs. CCE - 2003 (158) ELT 403 (SC)**, in the context of Section 11A itself, the Supreme Court held as under:-

62. The question of limitation involves a question of jurisdiction. The findings of fact on the question of jurisdiction would be a jurisdictional fact. Such a jurisdictional question is to be determined having regard to both fact and law involved therein. The Tribunal, in our opinion, committed a manifest error in not determining the said question, particularly, when in the absence of any finding of fact that such short-levy of excise duty related to any positive act on the part of the appellant by way of fraud, collusion, wilful mis-statement or suppression of facts, the extended period of limitation could not have been invoked and in that view of the matter no show cause notice in terms of Rule 10 could have been issued.

65 In **Deputy CCE Vs. Sushil & Company – 2016 (42) STR 625 (SC)**,

the Supreme Court held that the High Court was correct in entertaining the writ petition as no disputed questions of fact were involved and the legal issue was to be decided on the basis of the facts, as admitted by the parties. The relevant portion of the decision is extracted hereunder:

“3. The respondent challenged this show cause notice by filing a writ petition in the High Court, inter alia, contending that no services were provided by the respondent by entering into the aforesaid contract, as it was only supplying labour and the labour was not doing any work of packing, unpacking, loading and unloading of any cargo. The High Court, by the impugned Judgment, has accepted the plea of the respondent, resulting into allowing the writ petition and quashing the show cause notice. It is this Judgment of the High Court, the validity of which is questioned by the appellant-Department in the present appeal.

4. Before coming to the issue at hand, we may record the statement of Mr. A. K. Sanghi, learned senior counsel appearing for the appellant-Department, that it was not appropriate for the High Court to deal with the said writ petition, bypassing the adjudicatory machinery provided under the Act, more so when the statutory appeals against the adjudication orders are also provided. However, we find that the High Court has simply gone by the contract in question, which was entered into between the respondent and M/s Birla Corporation Ltd. and taking into consideration all the averments, which were made in the show cause notice, on the basis of admitted facts, it has come to a conclusion that even when the allegations in the show cause notice are accepted, the said contract does not amount to providing any 'Cargo Handling Service' as defined under Entry 23 of Section 65 of the Act. Therefore, we are of the opinion that the High Court did not commit any mistake or illegality in entertaining the writ petition when no disputed questions of fact were involved and the legal issue was to be decided on the basis of the facts, as admitted by the parties, which were so specifically recorded by the High Court itself.” [emphasis supplied]

66 In **Ahmedabad Manufacturing and Calico Printing Co. Ltd. v. S. G. Mehta, Income-tax Officer** - [1963] 48 ITR (SC) 154, it is held that

It must be remembered that if the Income-tax Act prescribes a period during which the tax due in any particular assessment year may be assessed, then on the expiry of that period the department cannot make an assessment. Where no period is prescribed that assessment can be completed at any time but once completed it is final. Once a final assessment has been made, it can only be reopened to rectify a mistake

apparent from the record (section 35) or to reassess where there has been an escapement of assessment of income for one reason or another (section 34). Both these sections which enable reopening of back assessments provide their own periods of time for action but all these periods of time, whether for the first assessment or for rectification, or for reassessment, merely create a bar when that time passed against the machinery set up by the Income-tax Act for the assessment and levy of the tax. They do not create an exemption in favour of the assessee or grant an absolution on the expiry of the period. The liability is not enforceable but the tax may again become exigible if the bar is removed and the taxpayer is brought within the jurisdiction of the said machinery by reasons of a new power. This is, of course, subject to the condition that the law must say that such is the jurisdiction, either expressly or by clear implication. If the language of the law has that clear meaning, it must be given that effect and where the language expressly so declares or clearly implies it, the retrospective operation is not controlled by the commencement clause.

67 In **Calcutta Discount Co. Vs. ITO – 1961 (2) SCR 241 = (1961) 41 ITR 191 (SC)**, the Supreme Court observed as under:

“In the present case the company contends that the conditions precedent for the assumption of jurisdiction under section 34 were not satisfied and came to the court at the earliest opportunity. There is nothing in its conduct which would justify the refusal of proper relief under article 226. When the Constitution confers on the High Courts the power to give relief it becomes the duty of the courts to give such relief in fit cases and the courts would be failing to perform their duty if relief is refused without adequate reasons. In the present case we can find no reason for which relief should be refused.”

68 In **Lupin Ltd. Vs. UOI – 2013 (293) ELT 354 (Guj.)** it was held as under:

38. In the present case, as we have held earlier, first show cause notice resulted in dropping of the proceedings. The Tribunal held that there was no material to establish that the product was marketable. On the same set of facts, a fresh show cause notice has been issued. Such notice is based on no new material which would even prima facie suggest that the product can be treated to be marketable. Permitting the Department to proceed with such show cause notice proceedings would be wholly futile, would cause prejudice to the petitioners and would amount to abuse of the process of law. In that sense of the matter, issuance of second show cause notice on same set of facts on

which the first show cause notice had been terminated, would also be without jurisdiction.

40. In the present case, facts are different. The petitioners have approached at a stage where show cause notice has been issued. Such show cause notice, we have held, is lacking inherent jurisdiction. Question of driving the petitioners to avail of alternative remedy, therefore, would not arise.

41. With respect to invocation of extended period of limitation, we find no substance whatsoever in the stand of the Department. The petitioners have been manufacturing the drug in question since years, utilizing intermediate chemical by way of captive consumption. Such process is known to the Department since decades. Contention of the petitioners is that such intermediate chemical is not a marketable goods and therefore, not exigible to excise duty. Whatever be the legal validity of such a stand, surely, it is highly a debatable and arguable point. Particularly when the Department has full knowledge that the petitioners are manufacturing such drugs, it can clearly be stated that there is any fraud, concealment or wilful misstatement on the part of the petitioners. In fact, the very premise of the second show cause notice is that in the first round of litigation, the Tribunal having observed that there is no evidence to hold that the product is marketable, and on further investigations, the Department has issued the second show cause notice. If this be so, we are left to wonder on what basis does the Department contend that the evasion of duty if at all is on account of fraud, collusion or wilful misstatement on the part of the petitioners so as to invoke extended period of limitation.

42. Looking from any angle, we are of the opinion that the petition must succeed. The same is, accordingly, allowed. The impugned show cause notice dated 1-8-2001 issued by the Commissioner of Central Excise, Surat, is hereby quashed and set aside. Rule is made absolute with no order as to costs.

69 In **Godrej Foods Ltd. Vs. UOI - 1993 (68) ELT 28 (MP)**, it was held under:

8. This court in Universal Cables Ltd. v. Union of India & Others [1978 (2) E.L.T. (J632)] has relying on decisions of the Supreme Court in Calcutta Discount Co. v. I.T. Officer (AIR 1961 SC 372). East India Commercial Co. v. Collector of Customs [AIR 1962 SC 1893 = 1983 (13) E.L.T. 1342 (S.C.)] and N.B. Sanjana v. E.S.W. Mills [AIR 1971 SC 2039 = 1978 (2) E.L.T. (J 339) (S.C.)] held that it is settled law that if a notice issued by Tribunal or Authority threatening to initiate proceedings prejudicial to a person is on admitted facts, in excess of

jurisdiction, the Tribunal or Authority can be prohibited from further proceeding in the matter under Article 226 to save unnecessary harassment of the person concerned. In Hindustan Electro Graphites Ltd. v. Union of India [1990 (50) E.L.T. 15 (M.P.)] this court has followed the decision in Universal Cables Ltd. case. There is therefore no doubt that if it is shown that the Respondents were not entitled to apply extended limitation of 5 years under the proviso to Section 11A of the Act, this court can interfere and quash the show cause notice on the ground that it was issued beyond limitation and was therefore without jurisdiction.

9. That brings us to the applicability of the extended limitation under proviso to Section 11A of the Act. In **Collector of Central Excise v. Chemphar Drugs & Liniments – 1989 (40) E.L.T. 276 (S.C.)** in Para 8 the law has been laid down in clear terms as follows :-

“In order to make the demand for duty sustainable beyond a period of six months and up to a period of 5 years in view of the proviso to sub-section (1) of Section 11A of the Act, it has to be established that the duty of excise has not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or wilful mis-statement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, beyond the period of six months. Whether in a particular set of facts and circumstances there was any fraud or collusion or wilful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case.” (emphasis supplied)

This passage has been quoted and applied by Division Bench of this Court in Hindustan Electrographite Ltd. v. Union of India (supra).

10. The Supreme Court again had an occasion to pronounce on the point in *Padmini Products v. Collector of Central Excise [1989 (43) E.L.T. 195 (S.C.)]*. Reiterating the observations made in the case of *Collector of Central Excise v. Chemphar Drugs & Liniments (supra)* it was observed that in order to claim the extended period of limitation of 5 years, it had to be established that the duty of excise had not been levied or paid or short levied or short-paid by reason of either fraud or collusion or wilful misstatement or suppression of facts or contravention of any provisions of the Act or the Rules made thereunder with an intent to evade payment of duty. It was further

observed that mere failure or negligence on the part of the producer or manufacturer either not to take out a licence in case where there was scope for doubt as to whether licence was required to be taken or where there was scope for doubt whether the goods were dutiable or not would not attract Section 11A of the Act. In the facts and circumstances of that case the Supreme Court found that there were materials on record to suggest that there was scope for confusion and the assessee believing that the goods came within the purview of concept of handicrafts were exempt. The court observed that if there was scope for such a belief or opinion, then failure either to take out a licence or to pay duty on that belief, when there was no contrary evidence that the producer or the manufacturer knew that the goods were excisable or required to be licensed, would not attract the penal provisions of Section 11A of the Act.

11. From the aforesaid discussion it is clear that for applying Section 11A of the Act in the case i.e. for applying the proviso to that section to extend the limitation to 5 years, it is necessary for the Excise Authorities to establish that the duty of excise had not been levied or paid or short-levied or short-paid by reason of either fraud or collusion or wilful misstatement or suppression of facts or contravention of any of the provisions of the Act or rules made thereunder, with intent to evade payment of duty. It is also clear that a mere mechanically repetition of the language of the provision in the show cause notice would not confer jurisdiction on the Collector of Central Excise to issue a show cause notice under Section 11A of the Act beyond period of six months taking advantage of the proviso to the Section.

12. Examining the impugned show cause notice in the light of the aforesaid position of law, we find that beyond the allegation that the notice suppressed true and correct description of flavoured soya milk beverages in the classification list submitted during the period of notice i.e. 1987-88 and list No. 2/87-88 and No. 3/87-88, there is no other material to show that there was any fraud played upon the Department. In the show cause notice it has been stated that on information dated 16-5-1988 the Collector came to know that instead of soya milk as declared vide their letter dated 5-5-1987 the noticee are engaged in manufacture and clearance of beverages of soya milk waste product without obtaining a valid central excise licence and payment of duty of excise levied thereon.

70 In Hindustan Construction Company Ltd. Vs. State of Haryana - [2005] 141 STC 119 (P&H), the High Court held as under:

8.. We have given our anxious consideration to the preliminary objection raised by the respondents with regard to the maintainability of the present petition and also the contentions raised by the learned

*counsel for the petitioner-company. The rule that the High Court will not entertain writ petition under article 226 of the Constitution of India if an effective alternative remedy is available to the petitioner is not a statutory rule, but is a rule of self-imposed restraint evolved by the courts and there are well recognised exceptions to this Court some of which have been noticed in **Baburam Prakash Chandra Mahesweri v. Antarim Zila Parishad (Now Zila Parishad, Muzaffar Nagar) AIR 1969 SC 556, State of U.P. v. Bridge & Roof Co. (India) Ltd. [1997] 104 STC 78 (SC); (1996) 6 SCC 22 and Kerala State Electricity Board v. Kurien E. Kalaithil AIR 2000 SC 2573.** One of the exceptions carved out by the Courts is that if the order under challenge is per se without jurisdiction, the aggrieved party may not be relegated to the alternative remedy of appeal, etc. In the present case, the petitioner has challenged the impugned order mainly on the ground that respondent No. 2 did not have the jurisdiction to initiate the proceedings under the 1973 Act. Therefore, we do not find any justification to non-suit it on the ground of availability of alternative remedy.*

The above decision has been referred to by the Supreme Court in **State of Haryana Vs. Hindustan Construction Company Ltd. - (2017) 9 SCC 463.**

71 In **Famina Knit Fabs Vs. UOI – 2020 (371) ELT 97 (P&H)**, the Punjab and Haryana High Court held as under:

9. Q. No. (i) Whether writ petition under Article 226 is maintainable against impugned show cause notice?

The primary issue involved is demand of Duty Drawback, an export incentive. The petitioner has raised question of limitation, repeal of Drawback Rules, 1995, absence of mechanism to raise demand of drawback and jurisdiction of respondent to reassess value of goods already exported.

We are not oblivious of the fact that question of limitation is a mixed question of law and facts. In the present case the dates of export of goods, release of drawback, realisation of export proceeds and issue of show cause notice are undisputed, thus pure question of limitation in law i.e. reasonable period within which a show cause notice may be issued, being question of jurisdiction is involved. As per respondent no period has been prescribed under Rule 16 of the Drawback Rules, 1995 so no limitation period can be read into said Rule. Hon'ble Supreme Court in umpteen numbers of cases as cited by both sides has enunciated that in the absence of period prescribed, every action should

be initiated within reasonable period which would depend on facts and circumstances of each case. The authorities appointed under Customs Act, 1962 cannot decide that what is reasonable period of limitation and it is only Courts which can decide said question. Para 24 of judgment of Hon'ble Supreme Court in the case of Bhatinda District Co-Op. Milk (supra) directly deals with this question which is reproduced as under :

“24. We are, however, not oblivious of the fact that ordinarily the writ Court would not entertain the writ application questioning validity of a notice only, particularly, when the writ petitioner would have an effective remedy under the Act itself. This case, however, poses a different question. The Revisional Authority, being a creature of the statute, while exercising its revisional jurisdiction, would not be able to determine as to what would be the reasonable period of exercising the revisional jurisdiction in terms of Section 21(1) of the Act. The High Court, furthermore in its judgment, has referred to some binding precedents which have been operating in the field. The High Court, therefore, cannot be said to have committed any jurisdictional error in passing the impugned judgment.”

This Court in the case of Hindustan Construction Company Ltd. v. State of Haryana (supra) while deciding question of maintainability of writ where issue involved was repeal of statute and effect of saving clause, in Para 8 has dealt with similar objection. Para 8 reads as under :

“8. We have given our anxious consideration to the preliminary objection raised by the respondents with regard to the maintainability of the present petition and also the contentions raised by the Learned Counsel for the petitioner-Company. The rule that the High Court will not entertain writ petition under Article 226 of the Constitution of India if an effective alternative remedy is available to the petitioner is not a statutory rule, but is a rule of self-imposed restraint evolved by the Courts and there are well recognised exceptions to this course, some of which have been noticed in Babu Parkash Chandra Maheswari v. Antrim Zila Parishad (Now Zila Parishad Muzaffarnagar), AIR 1969 Supreme Court 556: State of U.P. and others v. Bridge & Roof Company (India) Ltd., 1996 (83) A.I.R. (SC) 3515 : (1996) 6 SCC 22. and Kerala S.E.B. v. Kurien E. Kalaithil, 2000 (4) S.C.T. 242 : AIR 2000 Supreme Court 2573. One of the exceptions carved out by the Courts is that if the order under challenge is per se without jurisdiction, the aggrieved party may not be relegated to the alternative remedy of appeal, etc. In the present case, the petitioner has challenged the impugned order mainly on the ground that respondent No. 2 did not have the jurisdiction to initiate the proceedings under the 1973 Act.

Therefore, we do not find any justification to non-suit it on the ground of availability of alternative remedy.”

Applying the ratio of afore-cited judgments and having regard to the fact that all the questions raised by petitioner are question of jurisdiction, we find it appropriate to entertain present writ petition under Article 226 of the Constitution of India and accordingly proceed to answer other questions.

72 Thus, in the case on hand, the facts are not in dispute. A pure question of law is to be decided based on the very averments made by the Respondent in the show cause notice. Therefore, in our view the present writ application could be said to be maintainable.

73 In so far as the demand of excise duty of Rs.19,61,06,399/- as detailed in Annexure A to the show cause notice is concerned, the excise invoice has been duly issued by the predecessor entity. On such clearances, the applicable excise duty liability was discharged by the Larsen & Toubro Ltd. This is also evident from the ER-1 return filed by the predecessor. These facts are duly noted and accepted in para 3.8, 3.9, 4.3, 4.5 and 6 resply of the impugned show cause notice. In other words, the demand is raised on the very same dispatches on which same amount of excise duty has been duly discharged by the predecessor. The demand of excise duty from the successor entity is exactly of the same amount as already paid by predecessor. Hence, the present case is a clear case of double taxation.

74 In the aforesaid context, we have in hand an interesting judgement delivered by the Income Tax Appellate Tribunal, Delhi Bench 'D' in the case of **Modipn Ltd vs. Deputy Commissioner of Income Tax reported in (1995) 54 ITD 433 (Delhi)**. In the above case, the board of directors of the assessee- company, namely, MPL, passed a resolution for the merger of another company, viz., ICL, with it, subject to necessary approvals. The appointed date was fixed as 1st July 1982. The

Department of Company Affairs approved the scheme of amalgamation vide the letter dated 18th January 1985. The Allahabad and Bombay High Courts resply approved the scheme of amalgamation vide the orders dated 9th July 1985 and 16th September 1985, respectively. The Controller of Capital issues granted the approval for the issue of share capital to the shareholders of the ICL vide the letter dated 18th November 1985. The RBI approved the issue of shares to non-resident shareholders vide the letter dated 1st February 1986. Thus, the last of the approvals required for completion of the scheme of amalgamation was given on 1st February 1986, which was beyond the date on which the relevant previous year ended, i.e. 30th June 1985. For the assessment year 1986-87, the assessee filed its return of income including the income of the ICL as its income, claiming that the ICL had amalgamated with it from 1st July 1982. However, the Assessing Officer assessed the income of the ICL in the assessee's hands only on protective basis, holding that, since necessary formalities for the amalgamation had not been completed during the year under consideration, therefore, the Assessing Officer also disallowed the benefit of adjustment of advance tax and TDS paid in the name of ICL. On appeal, the Commissioner (Appeals) confirmed the orders of the Assessing Officer.

75 The assessee went in appeal before the Appellate Tribunal. The pivotal issue before the Tribunal was whether the benefit of adjustment of the advance tax and TDS paid in the name of the ICL which was denied to the assessee, in the protective assessment should have been given to it in the substantive assessments to be made as directed. The Tribunal relied upon the decision of the Supreme Court in the case of **ITO vs. Bachu Lal Kapoor (1966) 60 ITR 74 (SC)** and held as under:

“12. In clause 20 referred to above, two expressions have been used, namely, appointed date and effective date. 'Appointed Date' is the date from which the scheme of amalgamation is operative ie., 1-7-1982. 'Effective Date' is the date on which all the formalities referred to above

are completed. The effective date has not to be confused with the appointed date. Whereas the scheme of amalgamation would not be effective until all the formalities referred to in clause 20 of the scheme were completed but after the completion of the formalities the scheme would be effective from 1-7-1982.

13. As in the case of transfer of immovable property, sale deed is not effective till it is registered in accordance with the Registration Act. Once the document is registered, the transfer relates back to the date of execution. On the same analogy the scheme of amalgamation would not be effective until and unless all the formalities required under law for amalgamation of the two companies are completed. However, once the formalities are completed, the amalgamation is effective from the appointed date as indicated in the scheme of amalgamation and approved by the High Court. In this case, it is not disputed that by March 1986 all the formalities relating to the amalgamation of the two companies had been completed. It is also not disputed that the effective date referred to in the scheme of amalgamation is 1-7-1982. The Hon'ble Allahabad and Bombay High Courts have also indicated the appointed date as 1st July, 1982. Thus, the amalgamation, in our considered view, is effective from 1-7-1982. We, therefore, hold that the income of Indofil Chemicals Ltd. for the previous year relevant to assessment year 1986-87 is assessable in the hands of the assessee on substantive basis as the scheme of amalgamation was effective from 1-7-1982.

14. The next related issue is as to whether the tax recovered/paid by the IFCL is to be adjusted in the hands of the assessee-company. A sum of Rs. 65,10,495 has been paid as advance-tax and TDS by erstwhile IFCL. Assessing Officer has not adjusted the amount in the assessment of the assessee. Since the income of the IFCL had been assessed on protective basis and the income was said to be assessable in the hands of IFCL, adjustment of taxes paid in the name of IFCL was not allowed. Since we have held the income of the IFCL to be assessable in the hands of the assessee on substantive basis, the taxes paid in the name of IFCL are adjustable against the demand in the name of the assessee. Where the income of another person is included in the income of the assessee the taxes paid in the name of the person whose income is assessed with the income of the assessee are adjustable in the hands of the assessee. We derive support for this view from the decision of the Supreme Court in the case of **ITO v. Bachu Lal Kapoor [1966] 60 ITR 74** as also from the decision of the Delhi High Court in the case of **CIT v. Ramanand Sachdeva [1982] 136 ITR 440**. Respectfully following the afore-mentioned decisions, we direct the Assessing Officer to adjust the sum of Rs. 65,10,494 being the tax deducted at source and the advance-tax paid in the name of IFCL for the assessment year under appeal subject to verification of payments.

76 The principle of law as explained by the Supreme Court in the case of **Bachu Lal Kumar (supra)** and also by the Delhi High Court in the case of **Ramanand Sachdeva (supra)** is directly applicable to the case on hand.

77 The effective ground or rather the jurisdictional fact urged by the respondents in the impugned show cause notice is that every scheme of demerger retrospectively effective from the appointed day would always be and without exception contrary to the provisions of Central Excise Act, 1944 and the rules made thereunder. This involves a very important question about the interpretation of the Companies Act, more particularly relating to the schemes of demerger. This may not be a problem peculiar to the central excise law alone. This dispute can equally arise under the GST laws also, which is the current indirect tax law in force in the country. The legal position needs to be settled by the High Court. The issue has general application across the country as this is applicable to every scheme of demerger.

78 The relevant portion of order dated 20th December 2013 of High Court approving the scheme reads as under:-

11. From the material on record, the Scheme appears to be fair and reasonable and is not violative of any provisions of law and is not contrary to public policy. None of the parties concerned has come forward to oppose the Scheme.

12. Since all the requisite statutory compliances have been fulfilled, Company Scheme Petition No. 651 of 2013 and 652 of 2013 filed by the Petitioner Companies are made absolute in terms of prayer clause (a) of the Petition.

79 Then the relevant portion of impugned show cause notice reads as under:

7. On examination of the operative portion of the order dated 20.12.2013 of the Hon'ble High Court of Bombay (RUD-I I), it appears

that the proposed scheme of arrangement was endorsed by the Hon'ble High Court only because it appeared fair and reasonable and was not violate of any provision of law and not contrary to the public policy and also not because none of the parties concerned had come forward to oppose the scheme. However, in the instant case, the parties concerned were the holding company (Transferor) and their subsidiary company (Transferee), both being related persons. Therefore, the question of not opposing or contesting the scheme does not seem to arise. Further, Hon'ble Court was made to believe that the scheme was not in contravention of any of the provisions of the Laws. However, as stated supra in the entire notice, it can be seen that how the said scheme of arrangement had contravened various provisions of the Central Excise Act, 1944 and the Rules made thereunder.

80 One of the issues is the question of jurisdiction of the Central Excise authorities to question the legality and validity of the scheme approved by the High Court.

81 In the present case, the Central Government was a party to the scheme through the Office of the Regional Director, Ministry of Corporate Affairs, Western Region Mumbai. Thus, the respondent No. 1 was aware of the Scheme at all times. Once, the Scheme has been approved by the High Court and has attained finality, the Respondent is now barred to raise any objection to the said scheme in the present proceeding.

82 In **Sadanand Varde and Others Vs. State of Maharashtra - (2001) 247 ITR 609 (Bom)**, the Bombay High Court held as under:

“.....

The amalgamation order made by the company court in any event clarifies that the ninth respondent would issue 7,227 shares for each share of the sixth respondent. The said order has become final and binding and has in fact been acted upon. The only persons who could have raised objections, namely, the shareholders of both the companies, the Central Government, the official liquidator and the two companies, are all bound by the said order. The petitioners, by a side wind in the name of public interest litigation, cannot challenge the amalgamation scheme which has been sanctioned and validly carried out in

accordance with the provisions of the Companies Act.

We are of the view that the amalgamation, which has become final and binding, cannot be permitted to be challenged by the petitioners, without locus standi, in a collateral proceeding in the present writ petition. An amalgamation order can only be challenged under the Companies Act by an appeal under section 391(7) by any one of the parties, but no such appeal was ever filed. From 1993 onwards, no one (except the writ petitioners by the present writ petition) has complained that the amalgamation order was vitiated for any reason whatsoever. It is also of interest to note that " the appropriate authority under Chapter XX-C of the Income-tax Act (i.e., the fifth respondent) had also sought clarifications from the ninth respondent which were forwarded by the letters dated June 2, 1994, June 9, 1994 and June 14, 1994, written by K. K. Ramani and Co., chartered accountants, on behalf of the ninth respondent. The appropriate authority had also called the ninth respondent for a hearing which was held some time in June, 1994. Even in the affidavit of Prayag Jha dated October 17, 1994, in which the omission in clause (11) of the amalgamation scheme has been highlighted and detailed reference has been made to the order of the company court, issuance of shares by the ninth respondent and so on, there is no prayer made that the order of amalgamation be set aside or reviewed or recalled, nor were any steps taken by the fifth respondent to set aside the amalgamation order on the ground of misrepresentation, suppression of facts or fraud, as contended before this court.

● **ABSENCE OF MANDATORY PRE-SHOW CAUSE NOTICE CONSULTATION IS FATAL TO THE PRESENT SHOW CAUSE NOTICE.**

83 In view of the Circular No. 1053/2/2017-CX., dated 10th March 2017, it is clear that the Board had made the pre-show cause notice consultation mandatory for the Principal Commissioner/Commissioner prior to the issuance of show cause notice in cases involving the demands of duty above Rs.50 lakh. Such consultation is required to be done by the adjudicating authority with the assessee as an important step towards reducing the necessity of issuing show cause notice.

84 The contention of the learned A.S.G. that since the present case originated from the intelligence gathered from the DGGI such pre-consulting is not required. The said contention runs contrary to the

recent clarification issued by the Board. For the very objection now being raised, a clarification was sought by the DGGI office from the Board as to whether the DGGI formations will fall under the exclusion category of the master circular dated 10th March 2017 read with the circular dated 19th November 2020. The Board vide the Circular No. F.No.116/13/2020-CX-3 Dated 11.11.2021 clarified that the exclusion from the pre-show cause notice consultation is case specific and not formation specific. Therefore, merely because in the present case, the case originated on account of investigation of the DGGI will not be a sufficient ground for not following the mandatory procedure prescribed by the Board which is binding on the department. Therefore, it was mandatory for the adjudicating authority in the present case to conduct the pre-show cause notice consultation and in absence of the same the present proceedings could be said to be bad in law and deserves to be quashed and set aside.

85 (i) Amadeus India Pvt Ltd Vs. Principal Commissioner – 2019-TIOL-1027-HC-DEL-ST

12. It will be immediately noticed that there are two exceptions carved out for the Respondent to engage in a pre-SCN consultation. The first is that the SCN is preventive and the second is that it is related to an offence in terms of the Finance Act, 1994.

13. In the present case, as is evident from the impugned SCN, the alleged non-payment of service tax pertains to period between 2012-2013 to 2016-2017. Consequently, there is no 'preventive' aspect involved in the SCN and this is not even disputed by learned counsel for the Respondent. However, what is urged before the Court by the Respondent is that since the SCN was preceded by a search that was conducted in the business premises of the Petitioner, and the Petitioner also rendered itself liable for penal action 'for suppression of facts and contravention of various statutory provisions with intent to evade payment of due service tax' and other incidental levies, the SCN partakes of the character of an 'offence related' SCN and therefore falls within the exceptions carved out under para 5.0 of the Master Circular.

14. The above submission runs contrary to the very object of para 5.0

which is to narrow down the scope of the dispute by engaging the Assessee on specific areas where the Respondent may require information/clarification from the Assessee regarding alleged evasion of service tax. In the context of the present case, in relation to documents recovered during the search and statements recorded of representatives to the Petitioner in that process, several questions may have arisen for consideration by the Respondent which may require a clarification from the Petitioner as to its conduct. It is to facilitate this very exercise that para 5.0 finds place in the Master Circular. The mere possibility that at the end of the adjudication process, the Petitioner may have to face consequences for having committed an 'offence' under Finance Act, 1994 need not per se render the SCN itself as an 'offence related' SCN. If that were to be the logic, then in every case para 5.0 can be dispensed with on the ground that the adjudication of the SCN is likely to be lead to the noticee facing proceedings for having committed an offence. The exception would then become the rule and not vice versa, and the need for any pre-notice consultation being rendered redundant. Further, without the conclusion of the adjudication on the SCN, the Respondent would not be in a position to decide whether an offence is made out.

(ii) Tube Investment of India Ltd. Vs. Union of India – 2018-TIOL-330-HC-MAD-CX

7. Admittedly, the above referred procedure, which has been held to be a mandatory by C.B.E. & C., has not been adhered to in the instant case. That apart, when the petitioner had been given an opportunity to submit the reply to the Audit Slip, which they had submitted by reply dated 16-12-2016, the same ought to have been considered by the fourth respondent prior to issuance of the show cause notice. If, for some reasons, the fourth respondent was of the opinion that the reply given by the petitioner to the Audit Slip is not satisfactory, then at least the same should have been dealt with in the impugned show cause notice, which has not been considered.

8. Thus, for the above reasons, this Court is inclined to entertain the present writ petition, challenging the show cause notice. In the result, the writ petition is allowed, the impugned notice is set aside and the matter is remanded to the fourth respondent, for fresh consideration. The fourth respondent is directed to afford an opportunity of personal hearing to the authorized representative(s) of the petitioner, consider the reply given by the petitioner dated 16-12-2016 to the Audit Slip and after affording full and effective opportunity, consider the case and then proceed in accordance with law. No costs. Consequently, connected miscellaneous petition is closed.

86 The above judgement of the Delhi High Court in **Amadeus (Supra)** also negatives the stance taken in the reply affidavit dated 5th March 2021 of the respondents, wherein, it has been urged by the Respondent that the offence/preventive cases are outside the purview of the procedure relating to the pre-show cause consultation.

87 It would be appropriate at this stage to reproduce the relevant provisions of Sub-sections (1) and (4) of Section 11A of the Excise Act and they are as follows:

“11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.-

(1) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, for any reason, other than the reason of fraud or collusion or any wilful mis-statement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,-

(a) the Central Excise Officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty which has not been so levied or paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;

(4) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by the reason of-

(a) fraud; or

(b) collusion; or

(c) any wilful mis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty.

by any person chargeable with the duty, the Central Excise Officer shall, within five years from the relevant date, serve notice on such person

requiring him to show cause why he should not pay the amount specified in the notice along with interest payable thereon under section 11AA and a penalty equivalent to the duty specified in the notice.”

88 The case on hand by any stretch of imagination cannot be described as an offence/preventive case whatsoever. This is not a case where the goods have been removed illicitly without a statutory invoice. In the cases of offence, there is no dispute about the dutiability or taxability of the transaction. The only dispute is whether the transaction is put through. In other words, the only question is whether, the goods have been actually manufactured or removed. The dispute is whether on facts, the assessee has manufactured or cleared those goods. Those are offence/preventive cases mentioned in the circular dated 10th March 2017.

89 The impugned show cause notice has proposed to invoke the extended period of limitation on the ground stated in para 10 of the show cause notice. The relevant portion of Show Cause Notice is extracted below:

“10. In view of the above, it appears that LTHE have contravened the provisions of Rule 9 of the Central Excise Rules, 2002 read with Section 6 of Central Excise Act, 1944 in as much as they have failed to apply for registration.

10.1. LTHE have also contravened the provisions of Rule 4 and 8 of Central Excise Rules, 2002, in as much as they failed to discharge their duty liability correctly and in appropriate manner on clearances of their excisable goods and removed the excisable goods in contravention of the provisions of Central Excise Rules, 2002 and condition of Notification No.12/2012-CE dated 17.03.2012.

10.2. Further, they have also contravened the provisions contained in Rule 11 of Central Excise rules, 2002 in as much as they failed to make proper invoices showing the amounts of central excise duty and Rule 12 of Central Excise rules, 2002 in as much as they failed to file monthly returns within prescribed time. They contravened the provisions of Central Excise Act, 1944 and rules made thereunder by recourse to

suppression of facts and willful mis-statement with an intent to evade the central excise duty amounting to Rs. 115,81,08,490/- totally as per Annexure A & B so evaded is therefore required to be recovered from them under section 11 (A)(4) of the central excise act, 1944 along with interest under Section 11 AA of the Central Excise Act, 1944.”

90 The primary ground of the show cause notice is that as per the scheme approved by the Bombay High Court on 20th December 2013, the appointed date is 1st April 2013. Hence, the writ applicants ought to have registered itself with the central excise department from 1st April 2013. The writ applicants should have issued invoices for removals from 1st April 2013 itself. It should have paid excise duty on removal of goods from 1st April 2013 and should have filed the return in the Form ER-1 from 1st April 2013 itself. Failure to do so attracts the extended period of limitation.

91 In the aforesaid context, there are two things which are relevant: (i) Order of Bombay High Court dated 20th December 2013 approving the scheme with 1st April 2003 as the “appointed date” and (ii) the writ applicants not being registered in its own name with the Central Excise Department during the period 2013-14. It is difficult for us to believe that the department had no idea of these two aspects. The record reveals that the writ applicant on its own had applied to the department on 1st April 2014 for obtaining the central excise registration in the name of the new entity. It appears that along with the said application, the order passed by the Bombay High Court dated 20th December 2013 was also enclosed. The Central Excise Department granted registration on 7th April 2014.

92 The Central Excise Department could be said to be aware of the fact that the new entity applied for registration in April 2014. The department could also be said to be aware of the fact that for the earlier period (F. Y. 2013-14), the old registration continued and the old entity

i.e. the predecessor had issued invoices and filed monthly ER-1 return for the factory with the department for F. Y. 2013-14. It was within the knowledge of the department that the dispatches and payment of duty for the F. Y. 2013-14 had been done by the Larsen & Toubro. The writ applicant herein also applied for the transfer of the CENVAT Credit balance on 30th June 2014 and the same was allowed vide the order-in-original dated 30th April 2015.

93 With all the aforesaid, we fail to understand why the department did not raise any objection as early as in the month of April or May 2014 itself.

94 The clause 4.5 (a) of the Scheme provided that the benefit of all the statutory and regulatory permissions, registration or other licenses, and consents shall vest in and become available to the Transferee Company as if they were originally obtained by the Transferee Company

95 The clause 4.5(a), clause 10.4 and clause 12 resply of the scheme approved by the Bombay High Court are reproduced below:

“4.5(a) Any statutory licenses, permissions or approvals or consents held by the Transferor Company required to carry out operations of the Transferred Undertaking shall stand vested in or transferred to the Transferee Company without any further act or deed, and shall be appropriately mutated by the statutory authorities concerned therewith in favor of the Transferee Company and the benefit of all statutory and regulatory permissions, environmental approvals and consents, registration or other licenses, and consents shall vest in and become available to the Transferee Company as if they were originally obtained by the Transferee Company. In so far as the various Incentives, subsidies, rehabilitation schemes, special status and other benefits or privileges enjoyed, granted by any Governmental Authority or by any other person, or availed of by the Transferor Company relating to the Transferred Undertaking, are concerned, the same shall vest with and be available (of the Transferee Company on the same terms and conditions as applicable to the Transferor Company, as if the same had been allotted and/or granted and/or sanctioned and/or allowed to the Transferee Company.

10.4 All compliances with respect to advance tax, withholding taxes or tax deduction at source, service tax, VAT, other indirect taxes, etc. to be done or done by the Transferor Company in relation to the Transferred Undertaking shall for all purposes be treated as compliances to be done or done by the Transferee Company. ...”

12. SAVING OF CONCLUDED TRANSACTIONS

The transfer and vesting of the assets, liabilities and specific identified reserves of the Transferred Undertaking as per this Scheme and the continuance of the Proceedings by or against the Transferee Company shall not affect any transaction of proceedings already completed by the Transferor Company for any period commencing on or after the Appointed Date to the extent that the Transferee Company accepts and adopts all acts, deeds and things done and executed by and/or on behalf of the Transferor Company as acts, deeds and things done and executed by and on behalf of the Transferee Company.”

96 In view of the above, the writ applicants could be said to have had a bonafide belief and that since the predecessor has discharged the excise duty liability wherever applicable and complied with the central excise provisions like issuing the invoice and filing of returns during the period in dispute, the writ applicant itself is not required to do so in its own name. Also, in terms of the Clause 4.5(a), the excise registration in the name of the predecessor stood vested in name of the writ applicant automatically and without anything more. Hence, none of the ingredients of Section 11A(4) are applicable to the present case.

97 The Supreme Court has construed the proviso to Section 11A(1) as it stood prior to the amendment dated 8th April 2011 and held that in order to invoke the extended period of limitation, the intention to evade payment of duty and suppression on the part of assessee has to exist.

98 The Supreme Court in the case of **Cosmic Dye Chemical Vs. Collector of Central Excise – 1995 (75) ELT 721 (SC)** observed as under:

“7.....Now so far as fraud and collusion are concerned, it is evident that

the requisite intent, i.e., intent to evade duty is built into these very words. So far as mis-statement or suppression of facts are concerned, they are clearly qualified by the word “wilful” preceding the words “mis-statement or suppression of facts” which means with intent to evade duty. The next set of words “contravention of any of the provisions of this Act or Rules” are again qualified by the immediately following words “with intent to evade payment of duty”. It is, therefore, not correct to say that there can be a suppression or mis-statement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11A. Mis-statement or suppression of fact must be wilful.”

99 In **Tamil Nadu Housing Board Vs. Collector – 1994 (74) ELT 9 (SC)**, the Supreme Court held as under:

“A bare reading of the proviso indicates that it is in nature of an exception to the principal clause. Therefore, its exercise is hedged on one hand with existence of such situations as have been visualised by the proviso by using such strong expression as fraud, collusion etc. and on the other hand it should have been with intention to evade payment of duty. Both must concur to enable the Excise Officer to proceed under this proviso and invoke the exceptional power. Since the proviso extends the period of limitation from six months to five years, it has to be construed strictly. The initial burden is on the Department to prove that the situations visualised by the proviso existed. But once the Department is able to bring on record material to show that the appellant was guilty of any of those situations which are visualised by the Section, the burden shifts and then applicability of the proviso has to be construed liberally. When the law requires an intention to evade payment of duty then it is not mere failure to pay duty. It must be something more. That is, the assessee must be aware that the duty was leviable and it must deliberately avoid paying it. The word ‘evade’ in the context means defeating the provision of law of paying duty. It is made more stringent by use of the word ‘intent’. In other words the assessee must deliberately avoid payment of duty which is payable in accordance with law.”

100 We may also refer to a decision of the CESTAT in the **Geep Industrial Syndicate Ltd. vs. CCE – 1999 (114) ELT 850**. In the said case, the benefit of exemption notification was available to the assessee, subject to following the procedure specified in the notification. The assessee failed to follow that procedure. The Revenue invoked the extended

period of limitation. In that context, the CESTAT held as under:

“failure to follow procedure may be an error or omission on the part of the assessee, but it cannot amount to suppression and the question of suppression will arise only when an assessee wants to obtain a benefit not available to him under the law and will not arise when any exemption conferred by law is sought to be denied due to non-fulfilment of procedural requirement.”

101 The ratio of the **Collector of Central Excise vs. Chemphar Drugs & Liniments (supra)** is similar to the situation hereunder. The only difference is the availability of the exemption under different notifications etc. The Supreme Court held that the exemption under the Notification Nos.71/78-C.E., and 80/80-C.E. respily is available if the total value of clearances of all the excisable goods did not exceed a specified limit. The assessee while claiming exemption in respect of the Patent and Proprietary medicines falling under the Tariff Item 14E did not indicate in the declaration the value of clearances of exempted goods falling under the Tariff Item 68. But according to Revenue it was necessary to do so. Accordingly the extended period of limitation of five years as provided in Section 11A was invoked by the Department. The assessee produced the Classification List duly approved by the Excise Authorities and Survey Registrar showing visit of the excise officer to the factory hence the Department had full knowledge of fact about the manufacture of all the goods. The value of clearance of the exempted goods was not indicated under the belief that it was not required to be indicated. The case for wilful mis-statement, suppression of facts or contravention of any provisions of the Act, was not found to be sustainable and the period of limitation available to the Department under Section 11A of the Central Excises and Salt Act was only six months and not five years. From **1989 (43) E.L.T. 195 (S.C.) (Padmini Products v. Collector of Central Excise)**, we find again that the Supreme Court held that for invoking the extended period of five years the duty

should not have been paid, short-levied or short-paid or erroneously refunded because of either any fraud, collusion or wilful mis-statement or suppression of material facts or contravention of any provision of the Act or Rules made thereunder being the are essential ingredients. These ingredients postulate a positive act, therefore, failure to pay duty or take out a licence is not necessary due to fraud or collusion or wilful misstatement or suppression of facts or contravention of any provisions of the Act. Likewise suppression of facts is not failure to disclose the legal consequences of a certain provision.

102 In the case **(Pushpam Pharmaceuticals Company v. Collector of C. Ex., Bombay)** (supra), it was held that Section 11A empowers the department to reopen the proceedings if the levy has been short-levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different then what has been explained in various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact, it is the mildest expression used in the proviso. Yet the surroundings in which it has been used should be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from the payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it as suppression. So far as the Classification List which has already been given in **(Tata Iron & Steel Co, Ltd. v. Union of India and Ors.)** it is held

in paragraph 7 therein as follows :

"In fact, it is common ground that right from 1962 the appellant was filing classification lists containing the description of the items and showing them as liable to the payment of excise duty only under Item No. 26AA(ia) and these lists were accepted and approved by the excise authorities. In these circumstances, we fail to see how it could be said that the appellant was guilty of any suppression or misstatement of facts or collusion or violation of the provisions of Central Excise Act as contemplated under the proviso to Section 11A of the said Act. In view of this, the period of limitation would clearly be only six months prior to the service of the show cause notice. The demand for excise duty against the appellant on the said composite units under Item No. 68 of the Excise Tariff, to the extent that it exceeds the period of six months prior to the service of the show cause notice must, therefore, be struck down".

103 Thus, it is clear that for applying Section 11A of the Act i.e. for applying the proviso to extend the limitation to five years it is necessary for the Excise Authorities to establish that the duty of excise had not been levied or paid or short-levied or short-paid by reason of either fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of the Act or Rules made thereunder, with intent to evade payment of duty. It is also clear that a mere mechanical repetition of the language of the provision in the show cause notice would not confer jurisdiction on the Collector of Central Excise to issue a show cause notice under Section 11A of the Act beyond the period of six months taking advantage of the proviso to the Section.

104 The decision of the Supreme Court in **Pushpam Pharmaceuticals (supra)** was followed by the Supreme Court in **Anand Nishikawa Co. Ltd. Commissioner of Central Excise, Meerut [(2005) 7 SCC 749]** and the relevant paragraph is as follows:

"27. Relying on the aforesaid observations of this Court in the case of Pushpam Pharmaceuticals Co. v. CCE we find that "suppression of facts" can have only one meaning that the correct information was not

disclosed deliberately to evade payment of duty. When facts were known to both the parties, the omission by one to do what he might have done and not that he must have done, would not render it suppression. It is settled law that mere failure to declare does not amount to wilful suppression. There must be some positive act from the side of the assessee to find willful suppression. Therefore, in view of our findings made hereinabove that there was no deliberate intention on the part of the appellant not to disclose the correct information or to evade payment of duty, it was not open to the Central Excise Officer to proceed to recover duties in the manner indicated in the proviso to Section 11-A of the Act. We are, therefore, of the firm opinion that where facts were known to both the parties, as in the instant case, it was not open to CEGAT to come to a conclusion that the appellant was guilty of "suppression of facts." (emphasis supplied)

105 In **Easland Combines, Coimbatore Collector of Central Excise, Coimbatore [(2003) 3 SCC 410]**, the Supreme Court observed that for invoking the extended period of limitation, duty should not have been paid because of fraud, collusion, wilful statement, suppression of fact or contravention of any provision. These ingredients postulate a positive act and, therefore, mere failure to pay duty which is not due to fraud, collusion or wilful misstatement or suppression of facts is not sufficient to attract the extended period of limitation.

106 The aforesaid decisions of the Supreme Court were relied upon by the Supreme Court in **Uniworth Textiles Ltd. Commissioner of Central Excise, Raipur [2013 (288) ELT 161(SC)]** and the relevant portion of the judgment is reproduced below:

*"12. We have heard both sides, Mr. R.P. Batt, learned senior counsel, appearing on behalf of the appellant, and Mr. Mukul Gupta, learned senior counsel appearing on behalf of the Revenue. We are not convinced by the reasoning of the Tribunal. **The conclusion that mere non-payment of duties is equivalent to collusion or wilful misstatement or suppression of facts is, in our opinion, untenable.** If that were to be true, we fail to understand which form of non-payment would amount to ordinary default? Construing mere non-payment as any of the three categories contemplated by the proviso would leave no situation for which, a limitation period of six months may apply. **In our opinion, the main body of the Section, in fact, contemplates ordinary default in***

payment of duties and leaves cases of collusion or wilful misstatement or suppression of facts, a smaller, specific and more serious niche, to the proviso. Therefore, something more must be shown to construe the acts of the appellant as fit for the applicability of the proviso.” (emphasis supplied)

107 The Supreme Court in **Continental Foundation Joint Venture vs. Commissioner of Central Excise, Chandigarh** [[2007 (216) ELT 177 (SC)] also observed in connection with section 11A of the Central Excise Act, that suppression means failure to disclose full information with intention to evade payment of duty and the observations are as follows:

“10. The expression “suppression” has been used in the proviso to Section 11A of the Act accompanied by very strong words as “fraud” or “collusion” and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under Section 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a wilful misstatement. The latter implies making of an incorrect statement with knowledge that the statement was not correct.” (emphasis supplied)

108 The Annexure A to the impugned show cause notice indicates that duty has been paid for these very clearances against various invoice as detailed in the Annexure-A, though by the predecessor in interest. Therefore, there cannot be any intention to evade the excise duty in respect of the clearances covered under Annexure-A. The Annexure-B is concerned with the clearances which are otherwise exempted from duty, whether the removal is effected by predecessor or successor. This very exemption has been duly given by the department for all the supplies effected against the very contracts with the customer prior to the F. Y. 2013 – 2014 qua the predecessor and post 1st April

2014 to the writ applicant itself.

109 There is one another submission canvassed by Shri Sridharan which merits consideration. It was submitted that the taxable event for the levy of excise duty is manufacture. In that sense, it is not even a tax on goods. Demanding excise duty once again on the same taxable event, even on the ground that the liability towards the excise duty ought to have been discharged only by the transferee would amount to double tax.

110 As per the charging Section 3 of the Central Excise Act, 1944, the excise duty is a tax on the production or manufacture of excisable goods produced or manufactured within the country. The taxable event is the manufacture of goods. In one sense, tax is not even on the goods but on the taxable event if manufacture.

111 In the case of **Re: The Bill To Amend Section 20 Of The ... vs Unknown (1964) 3 SCR 787 : (AIR 1963 SC 1760)**, arising under the Sea Customs Act, 1878, the Supreme Court, *inter alia*, observed as under:

“23. This will show that the taxable event in the case of duties of excise is the manufacture of goods and the duty is not directly on the goods but on the manufacture thereof. We may in this connection contrast Sales Tax which is also imposed with reference to goods sold, where the taxable event is the act of sale. Therefore, though both excise duty and Sales Tax are levied with reference to goods, the two are very different imposts; in one case the imposition is on the act of manufacture or production while in the other it is on the act of sale. In neither case therefore can it be said that the excise duty or Sales Tax is a tax directly on the goods for in that event they will really become the same tax. It would thus appear that duties of excise partake of the nature of indirect taxes as known to standard works on economics and are to be distinguished from direct taxes like taxes on property and income.

24. Similarly in the case of duties of customs including export duties

though they are levied with reference to goods, the taxable event is either the import of goods within the customs barriers or their export outside the customs barriers. They are also indirect taxes like excise and cannot in our opinion be equated with direct taxes on goods themselves. Now, what is the true nature of an import or export duty? Truly speaking, the imposition of an import duty, by and large, results in a condition which must be fulfilled before the goods can be brought inside the customs barriers i.e. before they form part of the mass of goods within the country. Such a condition is imposed by way of the exercise of the power of the Union to regulate the manner and terms on which goods may be brought into the country from a foreign land. Similarly an export duty is a condition precedent to sending goods out of the country to other lands. It is not a duty on property in the sense of Article 289(1). Though the expression “taxation”, as defined in Article 366(28), “includes the imposition of any tax or impost, whether general or local or special”, the amplitude of that definition has to be cut down if the context otherwise so requires. The position is that whereas the Union Parliament has been vested with exclusive power to regulate trade and commerce, both foreign, and inter-State (Entries 41 and 42) and with the sole responsibility of imposing export and import duties and duties of excise, with a view to regulating trade and commerce and raising revenue, an exception has been engrafted in Article 289(1) in favour of the States, granting them immunity from certain kinds of Union taxation. It therefore becomes necessary so to construe the provisions of the Constitution as to give full effect to both, as far as may be. If it is held that the States are exempt from all the taxation in respect of their export or imports, it is not difficult to imagine a situation where a State might import or export all varieties of things and thus nullify to a large extent the exclusive power of Parliament to legislate in respect of those matters. The provisions of Article 289(1) being in the nature of an exception to the exclusive field of legislation reserved to Parliament, the exception has to be strictly construed, and therefore, limited to taxes on property and only income of a State. In other words, the immunity granted in favour of States has to be restricted to taxes levied directly on property and income. Therefore, even though import and export duty or duties of excise have reference to goods and commodities, they are not taxes on property directly and are not within their exemption in Article 289(1).”

112 The demand of Rs.19,61,06,399/- as detailed in the Annexure A to show cause notice is proposed in respect of the goods cleared during the period December 2013 to March 2014. Indisputably, in respect of these clearances, the predecessor Larsen & Toubro Ltd. effected dispatches, issued excise invoices containing description of

goods, value, rate of duty, time and date of removal, quantity, duty payable, classification and all other particulars. All applicable excise duty liability was discharged by the Larsen & Toubro Ltd. ER-1 return has also been filed by predecessor. These facts are duly noted and accepted in the following paras of show cause notice:

3.8 He further stated that though LTHE had neither registered under central excise law nor filed mandatory ER-1 returns for the year 2013-14 and LT-HCIC discharged applicable Central Excise duty and filed the ER-1 returns for and on behalf of LTHE for the year 2013-2014

3.9 On being asked whether LTHE have paid the applicable Excise duty during the financial year 2013-2014, he stated that the excise duty liability was paid by LT-HCIC for and on behalf of LTHE as per Article 10.4 of the 'Scheme of Arrangement' under Section 391 read with Section 394 of the Companies Act, 1956.

4.3. LTHE had obtained registration under central excise law for their office in Hazira, Surat on 07.04.2014. The central excise duty liability for the year 2013-2014 in respect of LTHE was discharged by LT-HCIC for and on behalf of LTHE and the same was carried out in terms of Article 10.4 of the Scheme of Arrangement under Section 391 read with Section 394 of the Companies Act, 1956 which was approved by Hon'ble High Court of Bombay which reads as under:

'All compliances with respect to advance tax, with holding taxes or tax deduction at source, service tax, VAT, other indirect taxes, etc. to be done or done by the Transferor Company in relation to the Transferred Undertaking shall for all purposes be treated as compliances to be done or done by the Transferee Company.'

4.5. It may not be out of place to point out that for the financial year 2013-14, income tax returns pertaining to business and financial transactions and profit and loss made by LTHE were initially filed on 29.11.2014 and later revised income tax returns were filed on 30.03.2016. LTHE had requested all customers to revise their Income Tax TDS returns for 2013-2014, for transferring TDS. However, no such attempts appeared to have been made to discharge Central excise duty and file ER-1 returns, even belatedly, though they had admittedly clearing the finished goods and received consideration in respect of such sale of goods supplied to various customers. LTHE have been consistently stating that LT-HCIC had made central excise duty payments and filed ER-1 returns on their (LTHE's) behalf. During the course of investigations and the depositions made by Shri Shastri, it appears that LTI-1E, Hazira had been relying heavily on the order of the

Hon'ble High Court, Bombay.

6. In view of foregoing pares it appears that M/s. LTHE have contravened various provisions pertaining to registration, issue of invoices, furnishing of returns and payment of applicable central excise duty, M/s. LTHE have consistently responded that the applicable central excise duty had been paid by M/s LT-HCIC prior/ post approval by Bombay High court. M/s. LTHE have obtained registration on 07.04.2014 but M/s. HC1C had raised invoices, manufactured goods and cleared the goods on payment of duty and filed ER-I but the consideration was received in the financials of M/s. LTHE. [emphasis supplied]

113 The Revenue received the duty on the very same dispatches covered under the Annexure A to the show cause notice at the time of initial clearance by the predecessor. Whether it be predecessor or successor, the excise duty liability is identified to both. There is no difference in the excise duty or interest in the present matter. There is no claim by anybody (including in particular by the predecessor) for any refund of duties already paid by the predecessor). Hence, the duty paid by predecessor ought to have been adjusted against the central excise duty, if any, payable by the writ applicant. Declining to do so, would lead to double taxation of the same transaction & clearly impermissible.

● **DEMAND OF EXCISE DUTY OF RS.96,20,02,091/-**

114 The demand of Rs.96,20,02,091/- is proposed in respect of the goods cleared availing the benefit of exemption as detailed in Annexure – B to the show cause notice.

115 The predecessor i.e., Larsen & Toubro Ltd. had been awarded contract by the Gujarat State Petroleum Corporation Ltd. (GSPCL) and the Oil And Natural Gas Corporation Ltd. (“ONGC”) for supply under the International Competitive Bidding. The supplies against these contract were exempt from the excise duty vide Sl. No. 336 of Notification No.12/2012-CE dated 17th March 2012.

116 For the supplies pursuant to the ICB contracts to these customers, goods were always allowed to be cleared without payment of the excise duty by availing the above exemption provided under Sl. No. 336 of Notification 12/2012-CE dated 17th March 2012 as discussed hereinafter.

117 For the period prior to 1st April 2013, the predecessor Hydrocarbon Division of the Larsen & Toubro supplied goods against this very ICB contract without payment of the central excise duty. The necessary certificate received from the Directorate General of the Hydrocarbon recommending grant of exemption was filed with the central excise department as is evident from the letter dated 10th May 2012 (Annexure-1 to the rejoinder affidavit) filed by the Larsen & Toubro Ltd. to the central excise department. The Central Excise Invoice No. 1000001893 dated 27th September 2012 (Annexure-2 of Rejoinder affidavit) issued by the predecessor against the Contract Note No. 300005 dated 7th June 2010 also establishes this position. This invoice is part of Sr. No.7 of the statutory ER-1 return filed by predecessor i.e., Larsen & Toubro for the month of September 2012. In such circumstances, the department duly allowed the predecessor to dispatch the goods under the ICB contracts without payment of excise duty.

118 Also, for the period post 1st April 2014, while recording the statement of Mr. Vaidyanath Shastri on 5th December 2018, the department specifically asked for the invoices raised by the writ applicant post demerger. Accordingly, the writ applicant submitted the copies of Invoice Nos. 1100000001 and No.1100000002 respy both dated 10th April 2014 (Annexure-3 to Rejoinder affidavit) issued by the writ applicant against the Contract Note No. 300068 dated 31.12.2012 to the department. It is apparent from both the invoices that the writ

applicant supplied goods against the ICB post 1st April 2014 without payment of the excise duty. The department has not raised any central excise demand in respect of the goods supplied against ICB by the Petitioner post 1st April 2014.

119 During the Financial year 2013–2014 also, the predecessor i.e., the Larsen & Toubro supplied goods against the very same ICB contracts by availing exemption and cleared the goods without payment of the central excise duty. This is evident from the Excise Invoice No. 1000003536 dated 4th March 2014 (Annexure-4 of Rejoinder affidavit) issued by the predecessor against the Contract Note No.300068 dated 31st December 2012. This invoice is part of the Annexure B to the present show cause notice. However, the department has now raised the present demand in respect of the goods supplied against the very same ICB contracts during the F. Y. 2013–2014.

120 The above would indicate that the sole basis to demand the excise duty of Rs.96,20,02,091/- is that the writ applicant should have issued the invoice instead of the predecessor i.e., Larsen & Toubro Ltd..

121 The above objection is totally baseless and incorrect in view of the Order of Bombay High Court approving the scheme of demerger. The relevant clause of the scheme is extracted hereunder for ease of reference:

“4.5 (a) Any statutory licenses, permissions or approvals or consents held by the Transferor Company required to carry out operations of the Transferred Undertaking shall stand vested in or transferred to the Transferee Company without any further act or deed, and shall be appropriately mutated by the statutory authorities concerned therewith in favor of the Transferee Company and the benefit of all statutory and regulatory permissions, environmental approvals and consents, registration or other licenses, and consents shall vest in and become available to the Transferee Company as if they were originally obtained by the Transferee Company. In so far as the various Incentives,

subsidies, rehabilitation schemes, special status and other benefits or privileges enjoyed, granted by any Governmental Authority or by any other person, or availed of by Iha Transferor Company relating to the Transferred Undertaking, are concerned, the same shall vest with and be available to the Transferee Company on the same terms and conditions as applicable to the Transferor Company, as if Iho seme had been allotted and/or granted and/or sanctioned and/or allowed to the Transferee Company.

“10.3. Any income or profit accruing or arising to the Transferor Company in relation to the Transferred Undertaking and all costs, charges, expenses, losses or taxes (including but not limited to advance tax, tax deducted at source, service tax, VAT, other indirect taxes, etc.), arising or incurred by the Transferor Company in relation to the Transferred Undertaking for any period commencing on or after the Appointed Date shall for all purposes be treated as income, profits, charges, expenses, losses or taxes, as the case may be, of the Transferee Company.

10.4 All compliances with respect to advance tax, withholding taxes or tax deduction at source, service tax, VAT, other indirect taxes, etc. to be done or done by the Transferor Company in relation to the Transferred Undertaking shall for all purposes be treated as compliances to be done or done by the Transferee Company. ...”

12. The transfer and vesting of the assets, liabilities and specific identified reserves of the Transferred Undertaking as per this Scheme and the continuance of the Proceedings by or against the Transferee Company shall not affect any transaction of proceedings already completed by the Transferor Company for any period commencing on or after the Appointed Date to the extent that the Transferee Company accepts and adopts all acts, deeds and things done and executed by and/or on behalf of the Transferor Company as acts, deeds and things done and executed by and on behalf of the Transferee Company.”

122 The present impugned notice is raising excise duty demand on the very same goods on which the duty has already been paid by the L&T (albeit at nil rate availing the exemption) and accepted by the department. This also is a clear case of double taxation in the sense that same goods are being subject to excise duty against two person which is impermissible.

123 In view of the above, despite the appointed date being 1st

April 2013, the supplies already affected by the predecessor L&T Ltd. before 1st April 2013, to 16th January 2014 remain unaffected.

124 Para 4.5(a) of the scheme as approved by the Bombay High Court is reproduced below:

“4.5. LICENSES AND PERMISSIONS

(a) Any statutory licenses, permissions or approvals or consents held by the Transferor Company required to carry out operations of the Transferred Undertaking shall stand vested in or transferred to the Transferee Company without any further act or deed, and shall be appropriately mutated by the statutory authorities concerned therewith in favor of the Transferee Company and the benefit of all statutory and regulatory permissions, environmental approvals and consents, registration or other licenses, and consents shall vest in and become available to the Transferee Company as if they were originally obtained by the Transferee Company. In so far as the various Incentives, subsidies, rehabilitation schemes, special status and other benefits or privileges enjoyed, granted by any Governmental Authority or by any other person, or availed of by the Transferor Company relating to the Transferred Undertaking, are concerned, the same shall vest with and be available to the Transferee Company on the same terms and conditions as applicable to the Transferor Company, as if the same had been allotted and/or granted and/or sanctioned and/or allowed to the Transferee Company.”

125 In view of the above, without anything more, the registration granted by the central excise department to the predecessor Larsen & Toubro Limited could be said to have automatically stood vested as a registration in favour of the writ applicant. The formal application made on 1st April 2014 by the writ applicant for fresh registration could be said to be a compliance of the procedural requirement out of the abundant caution and was an unnecessary step. It is more in the nature of intimation of the department to formally correct the name of the writ applicant in its record. Hence, the objection that the writ applicant has not taken a registration in its name prior to 1st April 2014 is also invalid.

126 The following observation of the Supreme Court in **Mangalore Chemicals & Fertilizers Ltd. vs. Dy. Commissioner – 1991 (55) ELT 437 (SC)** are relevant and reproduced below:

“11.....A distinction between the provisions of statute which are of substantive character and were built-in with certain specific objectives of policy on the one hand and those which are merely procedural and technical in their nature on the other must be kept clearly distinguished. What we have here is a pure technicality. Clause 3 of the notification leaves no discretion to the Deputy Commissioner to refuse the permission if the conditions are satisfied. The words are that he "will grant". There is no dispute that appellant had satisfied these conditions. Yet the permission was withheld - not for any valid and substantial reason but owing to certain extraneous things concerning some inter-departmental issues. Appellant had nothing to do with those issues. Appellant is now told "we are sorry. We should have given you the permission. But now that the period is over, nothing can be done". The answer to this is in the words of Lord Denning: "Now I know that a public authority can not be estopped from doing its public duty, but I do think it can be estopped from relying on a technicality and this is a technicality" (See Wells v. Minister of Housing and Local Government, [1967] 1 WLR 1000 at 1007).

Francis Bennion in his "Statutory Interpretation", 1984 edition, says at page 683:

"Unnecessary technicality: Modern courts seek to cut down technicalities attendant upon a statutory procedure where these cannot be shown to be necessary to the fulfilment of the purposes of the legislation."

127 Our final conclusions may be summarized as under:

[a] The Revenue is not correct in its stance that in the case on hand, the pre-show cause notice consultation was not necessary as the impugned show cause notice is for preventive / related to an offence. Just because, the origin of the show cause notice is the intelligence gathered from the Additional Director General, the same by itself would not bring the show cause notice within the ambit of preventive / offence.

[b] The extended period of limitation under Section 11A(4) of the Act, 1944 is not applicable in the case on hand as it is the case of the Revenue that the goods were removed illicitly without a statutory invoice. The failure to follow any procedure may be an error or omission on the part of the assessee, but the same by itself would not amount to suppression. The question of suppression would arise only when an assessee makes an attempt to obtain a benefit not available to him under the law.

[c] The amalgamation has its origin in the statute and is statutory in character, the transfer and vesting is by operation of law and not an act of a transferor - company nor an assignment by it, but is the result of a statutory instrument. A scheme of amalgamation when sanctioned by the company court under the relevant provisions of the Companies Act is distinct and different from a mere agreement signed by the necessary parties. When an agreement takes place, the transfer of assets takes place by the force of the company's court order and/or by operation of law; it ceases to be a contractual or a consensual transfer. The respondents are bound by the order dated 20th December 2013 passed by the Bombay High Court approving the scheme of demerger.

[d] The writ application challenging the legality and validity of the show cause notice is maintainable as no disputed questions of fact are involved and the legal issues have been decided on the basis of the facts as admitted by the parties. The impugned show cause notice could be said to be lacking inherent jurisdiction and therefore, asking the writ applicant to avail of an alternative remedy, therefore, could not arise.

128 In the result, both the writ applications succeed and are hereby allowed. The impugned show cause notices are hereby quashed and set aside.

129 Consequently, the connected civil application stands disposed of.

(J. B. PARDIWALA, J)

(NISHA M. THAKORE, J)

CHANDRESH

