IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.9404 OF 2019

1. Larsen & Toubro Ltd.
(formely known as L And T
Hydrocarbon Engineering Limited)
a company incorporated under
the Companies Act, 1956
and having its Registered Office at
L & T House, N. M. Marg, Ballard
Estate, Mumbai – 400 001

2. Mr. Shri Shripad S. Borkar,
General Manager & Head – Finance,
Accounts & Indirect Tax,
M/s. L & T Hydrocarbon Engineering
Limited ...Petitioners

Versus

1. The Union of India,
through the Secretary Ministry of
Finance Department of Revenue,
North Block, New Delhi – 110 001

2. The Additional Director General,
having his office at Directorate General
of Goods & Services Tax Intelligence,
Chennai Zonal Unit, C-3, C-Wing,
II Floor, Rajaji Bhavan, Besant Nagar,
Chennai – 600 090

3. Principal Commissioner of CGST &
Central Excise, Mumbai South
Commissionerate, having office at
13th and 15th Floor, Air India Building,
Nariman Point, Mumbai – 400 021

4. Principal Commissioner of GST &
Central Excise, Mumbai East having
his office at 9th Floor, Lotus Infocentre,
Parel, Mumbai – 400 012.

5. Principal Commissioner of GST & Central Excise, Chennai South Commissionerate having his office at 5th Floor, 692 M.H.U. Complex, Anna Salai Nandanam, Chennai – 600 035

6. Principal Commissioner of GST & Central Excise, Vadodara – I Commissionerate having his office at GST Bhavan, Race Course Circle, Vadodara – 390 007

7. Principal Commissioner of GST & Central Excise, Chennai Outer Commissionerate having his office at No.2054-I, II Avenue, 12th Main Road, Newry Towers, Anna Nagar, Chennai – 600 040

8. Principal Commissioner of GST & Central Excise, Surat New Commissionerate having his office at Central Excise Building, Chowk Bazaar, Surat – 395 001 ...**Respondents**

Mr. V. Sridharan, Senior Advocate a/w Mr. Shanmuga Dev and Mr. Jay Cheeda i/b. Mr. Sriram Sridharan for Petitioners.
Ms. Neeta Masurkar a/w Mr. Ram Ochani for Respondent Nos.1, 3 and 4.
Mr. Ram Ochani for Respondent No.2.

CORAM : K. R. SHRIRAM &
JITENDRA JAIN, JJ.
DATED : 13th AUGUST 2024

JUDGMENT :- (Per Jitendra Jain, J.)

1. Rule. Since the pleadings are completed, by consent of the parties, petition is taken up for final disposal.

2. By this petition under Article 226 of the Constitution of India, Petitioner seeks to challenge a show cause notice No.127 of 2018 dated 23rd October 2018 issued to Petitioner-L & T Hydrocarbon Engineering Limited ("LTHE"), for the period 2013-14 to show cause why service tax demand should not be raised under the Finance Act, 1994 (hereinafter referred to as "Service Tax").

3. Larsen & Toubro Limited (L & T) is a public limited company comprising of various divisions such as, L & T Hydrocarbon Division, L & T Heavy Engineering Division, L & T Power Division and L & T Construction Groups. L & T decided to hive off of its Hydrocarbon Division as an independent business unit with identifiable revenue streams, dedicated employees etc. L & T filed a scheme of arrangement under Section 391 read with Section 394 of Companies Act, 1956 before the Company Court for approval of the said scheme of arrangement. The Company Court, vide its order dated 20th December 2013, approved the scheme from the appointed date which was 1st April 2013. As per the said scheme, for the period between appointed date and effective date, the transferor company (L & T) would be deemed to have been carrying on the business relating to the transferred undertaking for and on account of and in trust of the transferee company (LTHE) and all compliances with regard to was to be done by transferor company and same was deemed to have been done by transferee. The said order dated 20th December 2013 approving the

scheme has become final and there is no challenge to the same by any authority or any other person before any higher forum. Registration with service tax department was also granted in the name of LTHE, post approval of the scheme.

4. In August 2017, Director General of Goods and Services Tax Intelligence, Chennai initiated investigation against Petitioner on the ground that Petitioner-LTHE, as a legal entity had not paid service tax for the financial year 2013-14. Petitioner has stated in paragraphs 46 to 73 that they have given all the details called for in support of its contention that service tax on forward basis and reverse charge basis on domestic as well as import of service has been discharged by L & T, the transferor company on behalf of Petitioner-LTHE for the financial year 2013-14. Various statements of the officers of Petitioner were also recorded. Based on the investigation by Chennai Officer, the information was transferred to Gujarat Excise Officials who issued show cause notice for recovery of excise duty and Bombay Officers-Respondent Nos.3 and 4, issued show cause notice for recovery of service tax for the period of 2013-14.

5. On 23rd October 2018, the impugned show cause notice dated 23rd October 2018 was issued by Respondent No.2-Chennai Officer calling upon Petitioners to show cause to Respondent Nos.3 and 4 for recovery of service tax for the period 2013-14. The impugned show

cause notice also refers to the show cause notice issued by Respondent No.2 to show cause to Respondent Nos.6 and 8 for recovery of excise duty with respect to Gujarat Unit. The foundation of the impugned show cause notice is that the High Court has approved the scheme of arrangement on the basis that there is no contravention of any provisions of the law, whereas the scheme of arrangement has resulted into various contraventions of the provisions of the Finance Act, 1994 being service tax provision. It is further stated in the show cause notice that if this had been brought to the notice of the High Court, the Court would not have sanctioned the scheme. It is on this foundation that the whole show cause notice was issued. Similar show cause notice was issued by Gujarat Excise Officials to Petitioner which was challenged by Petitioner by filing a writ petition before the Gujarat High Court and the Gujarat High Court by an order and judgment dated 3rd February 2022 has quashed the show cause notice issued by Gujarat Excise Officials. The said order of the Gujarat High Court has not been challenged by any authority before the apex court and, therefore, has attained finality.

6. Mr. Sridharan, learned senior counsel for Petitioners submitted that the impugned show cause notice is without jurisdiction. He submitted that the foundation or the basis on which the show cause notice is contrary to the order passed by the Bombay High Court approving the scheme of arrangement. He also submitted that on similar facts, the Gujarat High Court has entertained a writ petition and

quashed the notice issued for recovery of excise duty by Excise Officials at Gujarat. Relying upon the averments made in the petition, Mr. Sridharan submitted that the transferor company (L & T) has discharged all the liability of the transferee company (LTHE) for the period 2013-14 and, therefore, any attempt to recover the same from the transferor company would amount to double taxation and also contrary to the scheme approved by the High Court. Petitioners, therefore, prayed for quashing of the impugned show cause notice dated 23rd October 2018.

7. Per contra, learned counsel for Respondent, Mr. Ochani submitted that the decision of the Gujarat High Court was with respect to the excise duty, whereas we are concerned with service tax provisions. However, he does not dispute that the genesis of issuing show issue notice under both the excise law as well as service tax law was the common investigation initiated by Chennai Officer. Learned counsel further submitted that Petitioners have not given the details as more particularly referred to in paragraph 7.9 of the show cause notice and, therefore, the present impugned show cause notice was issued. He further submitted that the petition involves disputed questions of fact and, therefore, this Court should not entertain the present petition and should relegate Petitioners to answer the show cause notice.

8. On a perusal of the show cause notice and more particularly paragraphs 7.14 to 7.16, it is clear that the whole basis of issuing show

cause notice is that High Court has approved the scheme of arrangement without considering that the scheme is in contravention to the provisions of the Finance Act, 1954 and the Rules made thereunder. In our view, if Respondents were aggrieved by order dated 20th December 2013 approving the scheme of arrangement then they ought to have challenged the same. However, it is undisputed that the order sanctioning the scheme has not been challenged by any authority and has attained finality. Therefore on this basis itself the show cause notice falls to ground.

9. It is also important to note that on 6th February 2023, the Co-ordinate Bench of this Court passed an order regarding what transpired on 30th January 2023 when the matter was part heard before the said Bench. In the said order, it is recorded that the counsel for Respondent on instructions from Principal Commissioner had stated that there is no difference between the proceedings which were subject matter before Gujarat High Court and before this Court. It is also important to note that paragraph 7.14 of the show cause notice dated 23rd October 2018 is similar to paragraph 7 of the show cause notice dated 13th December 2018 which was the subject matter of adjudication before Gujarat High Court. Respondent themselves on an application made by Petitioner pursuant to the approval of the demerger scheme transferred the un-utilised Cenvat Credit from the transferor company to Petitioner, transferee company.

10. This very issue had come up for consideration under the excise law before the Gujarat High Court in the case of this very Petitioner in Special Civil Application No.11308 of 2019 and the Gujarat High Court by order and judgment dated 3rd February 2022 (said judgment) entertained the writ and quashed the show cause notice under the excise law. The basis of show cause notice before Gujarat High Court is similar to that which is impugned in the present petition. The Gujarat High Court after considering the scheme approved by this Court under the Companies Act quashed the show cause notice. The relevant Paragraphs of the said judgment is re-produced herein :-

> *"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.*
> *……*
> *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.

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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.

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95. The clause 4.5(a), clause 10.4 and clause 12 reply 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 cany 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.

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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.

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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.

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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.

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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."

11. Learned counsel for Respondents submitted that as per paragraph 7.9 of the show cause notice, Petitioners have not provided details to explain whether the expenditure incurred relates to output services provided to domestic customers or foreign customers and in the absence of documentary proof it is not possible to ascertain the actual recipient of service and their correct location on which tax is payable by them and, therefore, service tax on service imported into India is payable by Petitioner on reversed charge basis.

12. In our view, Petitioners in paragraphs 55 to 73 of the petition have made a positive statement that all the details were furnished during the course of investigation and it was established that service tax payable on outward services under forward charge basis and also under reverse charge basis relating to the period 2013-14 has been duly discharged by L & T, the transferor company. There is no rebuttal to the same. We have perused various letters being dated 5th June 2014, 23rd July 2017, 30th September 2014, 13th April 2017, 31st May 2017, 7th September 2017, 14th November 2017, 7th December 2017, 23rd January 2018, 15th February 2018 etc., which are annexed to the petition and the receipt thereof has also not been disputed by Respondents. These letters are also referred to in the body of the petition and it clearly demonstrates that all the details which in paragraph 7.9 of the show cause notice is alleged to have not been submitted were infact

submitted vide these letters. Respondents have rightly not disputed what was filed and submitted in these letters. Therefore, the allegation made in paragraph 7.9 of the show cause notice is without basis. Therefore, in our view even on this ground, we cannot sustain the show cause notice.

13. Respondents have filed an affidavit of one M. R. Mohanty affirmed on 20th February 2023, wherein he has accepted that Gujarat High Court has rightly set aside the show cause notice. We have already observed that the basis of show cause notice issued and which was subject matter before Gujarat High Court is similar to what is impugned in the present petition. Insofar as, the discharge of service tax liability in respect of expenditure to the tune of Rs.5921.33 crore is concerned, we have already observed above that Respondents have not rebutted the averments made by Petitioners from paragraphs 43 to 73, wherein it is stated all the details were filed with Respondents *qua* the expenditure and a positive statement was made that the transferor company L & T has discharged liability of service tax for the year 2013-14 on behalf of Petitioners transferee company.

14. In view of above, since show cause notice has been issued without jurisdiction we have exercised our discretion under Article 226 of the Constitution of India and further respectfully agreeing with the decision of the Gujarat High Court in case of this very Petitioners, we

quash and set aside the impugned show cause notice dated 23rd October 2018.

15. Rule made absolute in terms of prayer clause (a) which reads as under:-

> *"(a) that this Hon'ble Court be pleased to issue a writ of certiorari or writ in the nature of certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for records of Show Cause Notice No.127/2018 bearing reference F. No. INV/DGCEI/CHZU/ST/236/2017 dated 23.10.2018 issued by Respondent No.2 and after going into the validity and legality thereof to quash and setting aside the Show Cause Notice No.127/2018 bearing reference F. No. INV/DGCEI/CHZU/ST/236/2017 dated 23.10.2018."*

[JITENDRA JAIN, J.] [K. R. SHRIRAM, J.]