.....

(f) **"Effective Date"** means the last of the dates on which all the conditions and matters referred to in Clause 16 hereof have been fulfilled. References in this Scheme to the date of "coming into effect of this Scheme" or "effectiveness of the Scheme" shall mean the Effective Date.

In Clause 2 of the said arrangement, it is mentioned as:

2. Date of Coming into Effect:

The scheme shall be deemed to be effective from the appointed date, but shall be operative from the Effective date.

29. The Hon'ble Bombay High Court by order dt.29.03.2012, allowed the said Scheme and directed the petitioner company to lodge copy of the order and the scheme with the concerned Registrar of Companies within 30 days from the date of issue of the order by the Registrar. It is the contention of the Appellant that the appointed date i.e.31.03.2009 be considered as deemed transfer date of the Appellant Company and not the effective date, whereas Revenue's contention is that the scheme of amalgamation would come into force only on submission of the Hon'ble High Court's order and receipt of new certificate of incorporation from the Registrar of Companies, i.e. 22.06.2012 as per clause 16 of the scheme dealing with conditionality of the Scheme.

30. The learned Advocate, in support of their contention that the appointed date be considered as the date of transfer of brewing business of the Appellant Company and merging with M/s Skol, placed reliance on the judgment of Hon'ble Supreme Court in the case of Marshal & Sons & Co India Ltd Vs ITO

(1997) 2SCC 302, CIT Vs. Swastic Rubber Products Ltd, 1983 (140) ITR 304 (Bom.), State of Andhra Pradesh Vs Jindal Strips,(2007) 10 VST 777; Usha International Ltd. Vs CCE 2016 (43) STR 552 (Tri.-Del), CIT Kanpur Vs Reliance Media Works Ltd.(2017) 394 ITR 427;Gujrat High Court Order dt. 16.7.2012 in Cadilla Healthcare Ltd Vs Dy.Commissioner of Sales Tax, National Organic Chemical Industries Ltd Vs State of Maharashtra 2004 (135) STC (Bom.).

31. Revenue, on the other hand, placed the judgment of Hon'ble Patna High Court in the case of Tata Iron and Steel Co Ltd Vs. Presiding officer and others (2001) IIILLJ 66 Pat., Tribunal decisions in the case of Technocraft Industries India Ltd Vs CCE Mumbai 2000(120) ELT 106 (T), CCE Chandigarh Vs Nahar Industries Pvt. Ltd. 2009(236) ELT 206 (T) Marigo Paints Ltd Vs CCE Vadodara 2014(308) ELT421(T),and also the Hon'ble Gujarat High Court judgment in the case Indus Tower Ltd Vs State of Gujarat 2017-TIOL-1845-HC-AHM-VAT.

32. The principle in this regard has been considered in the context of Income Tax Act,1961 by Hon'ble Supreme Court in Marshal & Sons Co. India Ltd's case(supra). Their Lordships at Para 14, observed as follows:-

> "14. 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. 1.1.1982. 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 sanction sanctions the

scheme prescribed 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 and 394-A 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 1.1.1982. This is also the ratio of the decision of the Privy Council in Raghubar Dayal Vs Bank of Upper India Ltd."

33. The Hon'ble Andhra Pradesh High Court in Jindal Strips Ltd.'s case, while considering the issue whether the merger of two companies was w.e.f. 01.04.1995 or from the effective date i.e. 19.09.1996, for the purpose of demand of sales tax/VAT, following the ratio laid down by Hon'ble Supreme Court in Marshal Sons & Co.'s case, held that while approving the scheme if the Court has not fixed any specific date as the effective date, then the date agreed upon by the parties would be the effective date of amalgamation.

34. This Tribunal in the case of ITC Hotels Ltd.'s case (supra) was confronted with the question whether the amalgamation of M/s ITC Hotels Ltd and M/s Ansal Hotels Ltd with the parent company M/s ITC Ltd. was as on 01.04.2004,i.e. the appointed date as per the Amalgamation schemeduly approved by the Hon'ble High Courts or the effective date of amalgamation, when the application filed with Registrar of companies that is 23.03.2005. Following the judgment of Hon'ble Supreme Court in Marshall Sons & Co. Ltd.'s case, it is held that the date of amalgamation would be the 'appointed date' presented in the scheme. Further, the Tribunal has observed that even though the said judgment was delivered in the context of Income Tax law, but binding relating to the issues arising under Central Excise Act or under Chapter 5 of Finance Act, 1994.It is observed as:

> **"10.** The law declared by the Apex Court is binding and is required to be followed. The submission of the learned DR that the ratio of the above judgment given in the context of income tax would not be applicable to the facts of the present case as there is no specific provision to that effect under the Central Excise Act or under the Chapter V of the Finance Act, 1994 cannot be appreciated inasmuch as the law declared by the Supreme Court is binding on all the Courts, in terms of the Article 141 of the Indian Constitution. The Hon'ble High Court of Delhi and the Kolkata having held the date of amalgamation as 1-4-2004 has to be considered as the correct date of amalgamation. If that be so, admittedly, the appellant cannot be held to be providing services to itself. The Tribunal in the case of *Precot Mills* - 2006-TIOL-818-CESTAT-BANG. = 2006 (2) S.T.R. 495 (Tri.-Bang.), has held that for leviability of service tax, there should be a service provider and a service receiver. No one renders service oneself, as such, there can be no question of leviability of service tax. Having held that the amalgamation is effective from 1-4-2004, the service provided by the respondent has to be considered as provided to himself, in which case, no service tax would arise against them. The order of the Commissioner cannot be faulted upon on this ground. At this stage, we may take into consideration the learned DR's reference to clause 7 of the scheme of amalgamation which is as follows :
>
> "7. *Savings of concluded Transactions :* The transfer of the undertaking of the Transferor Companies under clause 4 above, the continuance of the proceedings under clause 5 above and the effectiveness of

contacts and deeds under clause 6 above, shall not effect any transaction or the proceeding already concluded by the transferor companies on or before the effective date and shall be deemed to have been done and executed on behalf of the Transferee Company."

By referring to the above clause, the contention of the learned DR is that any transaction or proceeding conducted by the transferor company on or before the effective date will not be affected by the scheme of amalgamation. However, we find that such clause stands incorrectly interpreted by the learned DR. A reading of the above clause is reflective of the fact that the action of the transferor company on or before the effective date shall be deemed to have been done and executed on behalf of the transferee company. As such, it is clear that the said clause supports the respondent's stand that any business conducted by the respondents is to be held as having been conducted on behalf of the transferee company. As such, the service tax provided to the ITC Ltd. and Ansal Hotels Ltd. have to be considered as having been provided on behalf of the transferee company viz. ITC. Ltd., in which case, no service tax liability would arise against the service provider."

35. Subsequently, this Tribunal, in Usha International Ltd.'s case, has considered all the aforesaid three judgments. The facts leading to the issue before the Tribunal was that a refund claim of Rs.84,76,586/- of service tax paid on royalty paid by the transferee company Usha International Ltd to M/s Joy Engineering Ltd, the transferor Company was filed on the basis of High Court's order dt.26.05.2008 approving the merger w.e.f. 01.04.2007 being the appointed date. This Tribunal, applying the principle laid down in Marshall Sons & Co. and that of Jindal Strips Ltd, held as follows:-

"7. In the light of the foregoing binding precedents there remains no scope for any debate that the date of amalgamation in the present case is to be held to be 1-4-2007 and not 20-6-2008. Obvious consequence of this is that the service rendered during the impugned period (1-4-2007 to 31-3-2008) became service to self and consequently service tax paid during the said period became eligible for refund. ....."

36. Revenue has referred to the judgment of Hon'ble Patna High Court in Tata Iron & Steel Co. Ltd's case. In the said case, there was merger/amalgamation of its subsidiary M/s

Indian Tube Co. Ltd with the holding company i.e M/s Tata Iron & Steel Co. Ltd. The issue before the Court was what pay scale, dearness allowance and other benefits the employees are entitled and from which the same shall be given to them. The Tube company merged with Tata Iron & Steel Co. Ltd with effect from 1.4 1983, the appointed date where as the Bombay High Court and Calcutta High Court had passed the Order on 15.5.1985 and the copy of the Orders were filed with the Registrar of Companies on 01.09.1985 and the scheme of amalgamation became effective from 01.10.1985. Taking note of the clauses relating to the effective date of operation of the scheme vis-à-vis clause 7 of the scheme which provides that the transferee company shall give a general notice of offer to the date preceding the effecting date offering employment to all the employees of the transferor company, the Hon'ble Patna High Court held that for the said purpose, the effective date would be considered for transfer of employees from the transferee company to transferor company as 01.10.1985. We do not find any relevance of the said judgment to the facts of the present case. The other judgments referred to by the Revenue viz. Technocrafts Industries India Ltd, Nahar Industrial Enterprises Ltd, which are passed while examining the question of extending the benefit of SSI exemption on amalgamation from the effective date as per the Order of the Court. The revenue has further argued that since the service tax was payable on the services rendered by the appellant to M/s Skol from 1/4/2009 to 22/6/2012, the said liability cannot be extinguished because of merger deemed to have been

applicable from the appointed date. In support, they referred to the recent judgment of Hon'ble Gujarat High Court in Indus Tower Ltd.'s case. In the said case a writ petition was filed under Article 226 of Constitution of India with prayer seeking declaration of Section 52 of GVAT Act 2003 as ultra vires to the Constitution of India. Their Lordships, distinguishing the judgment of Hon'ble Supreme Court in Marshall Sons & Co. Ltd case, observed as follows:-

> "21. The decision of the Hon'ble Supreme Court in the case of Marshall Sons & Company Limited V. ITO (supra) is concerned, their cannot be any dispute with respect to the proposition of law laid down by the Apex Court, however, the same shall not be applicable to the facts of the case on hand; more particularly, considering Section 52 of the GVAT Act. As observed hereinabove, neither Section 52 of the GVAT Act cannot be said to be an encroachment upon the powers of the Union Legislation, as envisaged under Section 246 of the Constitution nor the same can be said to be in conflict with the provisions of the **Companies Act, 1956**. Therefore, the decision of Hon'ble Supreme Court in the case of State of West Bengal &Ors Vs Committee for Protection of Democratic Rights, West Bengal & Ors. (supra) as well as UCO Bank &Ors. Vs Dipak Debbarma & Ors. (supra) relied upon by the learned Counsel for the petitioners shall not be of any assistance to the petitioners. As observed hereinabove, both the Acts operate in different fields and with respect to different eventualities. Therefore, considering the pith and substance of Section 52 of the GVAT Act, it cannot be said to be in conflict with the Union Legislation."

Consequently, upholding the constitutional vires Section 62 of GVAT Act, 2003, their Lordships observed as follows:-

> "28. In view of the above and for the reasons afore stated, it is held that Section 52 of the Gujarat Value Added Tax Act cannot be said to be beyond legislative competence, and therefore, the same cannot be said to be ultra vires to Article 246 & 252 of the Constitution of India. It is held that Section 52 of the GVAT Act is within the State legislative competence under Entry 52 of List II of Seventh Schedule and the same cannot be said to be encroaching upon the powers of the Union legislation. Therefore, challenge to the constitutional validity of Section 2 (23) (d) and 52 of the to the GVAT Act fails."

37. We do not find any relevance of the said judgment to the present case as no such enactment has been passed validating levy of collection of service tax under the Finance Act,1994 similar to that of Sec.52 of GVAT Act. Therefore, the 'appointed date' i.e. as on 31.3.2009 be taken as the date of amalgamation/merger of the Brewery Division with M/s SKOL as sanctioned by the Hon'ble Bombay High Court.

38. The learned Advocate for the Appellant has further submitted that the demand is barred by limitation as initiating investigation on the very same agreement dt.11.4.2007, periodical show cause notices were issued for the period September 2006 to March 2007 to M/s SKOL Breweries Ltd. demanding service tax of amount of Rs.27/- per case of 12 bottles under the category of Intellectual Property Right and alternatively under Franchise service. Therefore, the fact that the Appellant had manufactured beer, affixed the brand name of SKOL and supplied it to them or sold to the customers of M/s SKOL is known to the department. Therefore, there was no suppression of fact, hence, extended period of limitation cannot be invoked. We find substance in the argument of the learned Advocate for the Appellant. We have gone through the sample show cause notices annexed to the appeal memo and find that for the very same agreement, investigations have been initiated by the Appellant against M/s SKOL and demand was issued for recovery of service tax on the amount of Rs.27/- per case of 12 bottles by the Appellant to M/s SKOL as per the arrangement/agreement dated 11.04.2007. Therefore, the demand is barred by limitation.

39. We summarize are finding as follows:-

(i) During the relevant period, the Appellant had rendered services to M/s SKOL Beverages Ltd, falling under the amended definition of "Business Auxiliary Service" as laid down under Section 65 (19) of Finance Act, 1994 and the computation of demand ought to have been carried out taking note of Notification No.39/2009, dt.23.03.2009.

(ii) The appointed date in the scheme of amalgamation i.e. 31.03.2009 be considered as the date for considering the service tax liability and not the effective date when the certificate of incorporation was issued by the Registrar of Companies i.e. 21.06.2012.

(iii) Demand is barred by limitation.

40. In view of the above, the impugned order is set aside and the appeal is allowed. CO disposed off.

(Order pronounced in the open court on 11/7/2019)

17 JUL 2019

S D

(D.M. Misra)
Member (Judicial)

S D

(Sanjeev Srivastava)
Member (Technical)

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Bahalkar सहायक रजिस्ट्रार
Assistant Registrar
सीमाशुल्क उत्पादशुल्क और
सेवाशुल्क अपील अधिकरण
Custom Excise & Service Tax
Appellate Tribunal

सीमाशुल्क, उत्पादशुल्क और सेवा शुल्क अपील अधिकरण
Customs Excise & Service Tax Appellate Tribunal
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