

Read: 1) Application dt.24/2/2005 from M/s. UltraTech CemCo Ltd., holder of BST RC No. No.44291/S/10 dt.10/5/2004 wef 14/5/2004 under the BST Act and CST RC no. 442917/C-4 wef 14/5/2004 under the CST Act.
2) Written submission dt.14/1/2008 filed by Shri C.B. Thakkar, Advocate.
Heard: Shri. C.B. Thakkar, Advocate & Shri R.P. Mody, CA.

PROCEEDINGS

(u/s. section 52(1)(c) and section 52(1)(e) of the Bombay Sales Tax act, 1959)
NO.DDQ-11/2005/Adm-5/12/B- 1 Mumbai, dt. 21.4.2008

The applicant, UltraTech Cemco Ltd., through application has referred the following questions for determination under section 52(1)(c) and section 52(1)(e) of the Bombay Sales Tax Act, 1959.

1. Whether by virtue of the de-merger of the cement business of Larsen & Toubro Ltd. (part transfer of the business) to the applicant from 14/5/2004 the despatches of the cement during the period 1/4/2003 to 13/5/2004 from the Awarpur Cement Works to ECC Division of Larsen & Toubro Ltd. would amount to sales by the applicant to Larsen & Toubro Ltd. under the BST Act, 1959 and/or the CST Act, 1956.
2. If such despatches are held to be sales to the applicant, whether the cement transferred from the Awarpur Cement Works would be taxable under the BST Act, 1959 and/or the CST Act, 1956 and if so, the rate thereof.
3. The applicant has referred to the following transactions:
 - a. Stock Transfer Note NO.ICDN 0255227 dt.10/10/2003 for 18.000 MT of cement transferred from the Awarpur Cement Works to M/s. L&T-ECC Division, Satara Kolhapur Road Project, Pune- Bangalore Road, Maharashtra.
 - b. Stock Transfer Note No.ICDN 031028 dt.27/3/2004 for 58.700 MT of cement transferred from the Awarpur Cement works to M/s. L&T-ECC Division, Dwarka.
 - c. Stock Transfer Note No.ICDN-207734 dt.23/4/2004 for 58.700 MT of cement transferred from the Awarpur Cement Works to M/s. L&T-ECC Division, Premier Pre-stressed Concrete Product, Andheri (W), Mumbai, Maharashtra.
 - d. Stock Transfer Note No. ICDN 206720 dt.20/4/2004, 58.700 MT of Cement transferred from the Awarpur Cement works to M/s. L&T - Delhi.

02. FACTS OF THE CASE

The applicant company was incorporated on 24/8/2000 under the name 'L&T Cement Ltd.' The name of the company was changed to 'UltraTech CemCo Ltd.' with effect from 19.11.2003. In terms of the Scheme of Arrangement between the applicant, Larsen & Toubro Ltd. and Grasim Industries Ltd. it was proposed to de-merge the cement business of Larsen & Toubro Ltd. to the applicant. The Scheme was approved by the Board of Directors of UltraTech CemCo Ltd. at its Board Meeting held on 24.9.2003 and by the Board of Directors of Larsen & Toubro Ltd. at the Board Meeting held on 24.09.2003.

Under the Scheme, the 'Appointed Date' for de-merger of the cement business was fixed as 1.4.2003. The Scheme of Arrangement was presented before the Bombay High Court on 7/2/2004. The High Court through its judgement dated 22/4/2004 approved the Scheme of Arrangement without any modification. The order of the Bombay High Court was filed with the Registrar of Companies, Maharashtra, on 14/5/2004, which is defined by the applicant as the 'Effective Date' under the Scheme. The 'Effective Date' of the Scheme of Arrangement has been defined in the

agreement as the last date on which all the conditions and matters referred to in clause 50 of the Scheme are fulfilled.

It is stated by the applicant that in terms of the provisions of sub-section (6) of section 19 of the Bombay Sales Tax Act, 1959 the applicant applied and obtained registration under the Bombay Sales tax 1959 and the Central Sales Tax Act, 1956 in respect of its Awarpur Cement Works, Awarpur, Chandrapur with effect from 14/5/2004 which is defined by them as the 'Effective Date' of the de-merger of the Cement Business to the applicants. It is also stated by the applicant that since the copy of the High Court Order was filed with the Registrar of Companies on 14/5/2004, the applicant has been granted/issued certificate No.44291/S/10 dt.10/5/2004 with effect from 14/5/2004 under the BST Act, and certificate No.442917/C-4 dt.10/5/2004 with effect from 14/5/2004 under the CST Act.

Till 31/3/2003, the cement manufactured at the Awarpur Cement Works used to be sold to stockists within the State of Maharashtra as well as to stockists outside the State of Maharashtra. The cement manufactured was also stock transferred to the depots of Larsen & Toubro Ltd. for sale as well as to the other divisions of Larsen & Toubro Ltd. within as well as outside the State of Maharashtra for captive consumption. Such arrangement was also continued during the period from the appointed date to the Effective Date, that is, during the period 1/4/2003 to 13/5/2004.

It is stated by the applicant that he wants to know the tax liability on the transactions which have taken place during the period 1/4/2003 to 13/5/2004, more particularly, to the other divisions of Larsen & Toubro Ltd. for captive consumption. It is stated that since the Awarpur Cement-Works Division of Larsen & Toubro Ltd. has been de-merged only with effect from 14/5/2004, the applicant on obtaining sales tax registrations under both the Bombay Sales Tax Act, 1959 and the Central Sales Tax Act, 1956 has been discharging the sales tax liabilities on sales and purchases from 14/5/2004.

03. CONTENTION

According to the applicant, the de-merger of the cement business effective from 14/5/2004 would not have any impact on the transactions prior to that date. Their contention is that the de-merger should be held as effective from 14/05/04 and not from 1/4/03.

04. DOCUMENTS ATTACHED BY THE APPLICANT

The applicant has annexed the following for the purpose of the application.

- Stock Transfer Note NO.ICDN 0255227 dt.10/10/2003 for 18.000 MT of cement transferred from the Awarpur Cement Works to M/s. L&T - ECC Division, Satara Kolhapur Road Project, Pune Bangalore Road, Maharashtra. (Local stock transfer for use in works contract-captive consumption).
- Transfer Note No.ICDN 031028 dt.27/3/2004 for 58.700 MT of cement transferred from the Awarpur Cement works to M/s.L&T-ECC Division, Dwarka, (Stock transfer to other state for use in works contract carried out in other state)
- Stock Transfer Note No.ICDN 207734 dt.23/4/2004 for 58.700 MT of cement transferred from the Awarpur Cement works to M/s.L&T-ECC Division, Premier Prestressed Concrete Product, Andheri (W), Mumbai, Maharashtra. (local stock transfer for use in local works contract).
- Stock Transfer Note No.ICDN 206720 dt.20/4/2004 for 58.700 MT of cement transferred from the Awarpur Cement works to M/s.L&T-Delhi. (stock transfer to other state for use in works contract).
- Copy of order of the Hon'ble Bombay High Court dt.22/4/2004.

- Copy of receipt/acknowledgment for the High court order filed with the Registrar of Companies, Maharashtra on 14/5/2004.

04. HEARING

The applicant was called for hearing on 1/1/2008. Shri C.B. Thakkar, Chartered Accountant, and Shri R.P. Mody, Chartered Accountant, attended the hearing. Shri. C.B. Thakkar, submitted that L&T had several divisions with a cement division amongst them. The applicant company, Ultra Tech Cement was de-merged from L&T and the cement division was given to Ultra Tech Cement. The scheme of arrangement was approved by High Court on 14/5/2004. As per the scheme, the High Court approved the de-merger from the appointed date i.e. 1/4/2003. It is stated by him that in the intervening period i.e. 1/4/2003 to 14/3/2004 L&T was in charge of the cement business and had transferred cement to the other units. No tax is collected by L&T on the transfer of cement to other divisions. According to them, the special provision dealing with obtaining of registration in case of succession obliges the dealer to take registration within sixty days. According to them, the date of succession would be on 14/5/2004. It is their contention that although the High Court has approved the scheme from the appointed date, the date of de-merger is 14/5/2004. The registration certificate is also granted from 14/5/2004. They also referred to the provision under the VAT Act wherein it is stated that in a situation of de-merger, the date of de-merger is the date of the High Court order. A plea for prospective effect was also made.

The applicant also gave a written submission dt.15.1.08. The submission is as follows:

M/s. Larsen & Toubro Ltd. is a corporate entity having several divisions like, Engineering division, Cement division etc. So far as the cement division is concerned it was de-merged and was taken over by Ultra Tech CemCo Ltd. This was done by way of a scheme of arrangement. Since this scheme of arrangement was between two corporate entities it was required to be approved amongst others, by the High Court as per sections 391 to 394 of Companies Act, 1956. Accordingly, the scheme of arrangement was submitted to the Hon. High Court. As per the Scheme, 1/4/2003 was the appointed date i.e. this is the date from which the effect of demerging should come into effect. However, the actual order of approval of the Bombay High court was passed on 22/4/2004. Thereafter the applicant i.e. Ultra Tech Cement Ltd. had to file the approval order to the registrar of companies and that was done on 14/5/2004. This is the final compliance as per the scheme of arrangement. Therefore, there are two dates for considering the effect of demerger, 1/4/2003 and 14/5/2004.

In the intervening period i.e. between 1.4.2003 to 14.5.2004, Larsen and Toubro was handling the cement division as it was handling previously. From its cement division it had transferred cement to its other units for self-consumption. It is argued that being part of the same entity these transfers were not treated as sale and no sales tax was considered on the same. It is further stated that if the effect of the demerging for the sale tax purpose is taken from 1.4.2003 then Ultra Tech Cement Ltd. becomes the owner from 1.4.2003 and therefore the cement transferred to the other unit of L & T, which was treated as branch transfer by that entity, may be considered as a transfer of property from Ultra Tech Cement Ltd. to L & T and it may amount to sale.

Under the above circumstances, the applicant has submitted that the effect of de-merger for BST Act should be given from 14.5.2004. In other words, the situation as was considered by L & T upto 14.5.2004 should be allowed to prevail.

It is stated that as far the BST Act is concerned the situation is governed by section 19(4) & 19(6). The said sections are reproduced below for ready reference.

19. Special provision regarding liability to pay tax in certain cases.-

"(4) Where a dealer, liable to pay tax under this Act, transfers or otherwise disposes of his business in whole or in part, or effects any change in the ownership thereof, in consequence of which he is succeeded in the business or part thereof by any other person, the dealer and the person succeeding shall jointly and severally be liable to pay the tax [including any penalty and interest] due from the dealer under the Act or under any earlier law, upto the time of such transfer, disposal of charges, whether such tax including any penalty and interest has been assessed before such transfer disposal or change but has remained unpaid, or is assessed thereafter."

"(6) Where a dealer, liable to pay tax under this Act, is succeeded in the business by any person in the manner described in clause (a) of sub-section 3, be liable to pay tax on the sales or purchases of goods made by him on and after the date of such succession, and shall (unless he already holds a certificate of registration) within sixty days thereof apply for registration:

Provided that, where such person resells any goods purchased by the dealer while carrying on business before such succession, he shall be entitled to such deductions in respect thereof as are permissible under [section 7,8 or 9] as the case may be, had the resale been effected by the dealer himself."

It is argued that if there is a change in the constitution, which is the position in their case, then the transferee or purchaser is required to apply for registration within 60 days from the date of transfer or the purchase. The transfer is actually taking place on 14.5.2004. It is stated that the reason for the same is available from the scheme of arrangement itself. The applicant has drawn attention to clause 50 in the said scheme. The said clause 50 reads as under:

"50. This scheme is conditional upon and subject to:

This scheme being agreed to by the respective requisite majorities of the various classes of members and creditors (where applicable) of the Demerged Company and the Resulting Company as required under the Act and the requisite orders of the High Court referred to in Clause 48 hereof being obtained;

Such other sanctions and approvals including but not limited to in principle approvals, sanctions of any Government Authority (in relation to transfer of mining leases/prospecting licenses, sales tax benefits or entitlements or loans) as may be required by law in respect of this scheme being obtained; and

The certified copies of the orders of the High Court referred to in this scheme being filed with the Registrar of Companies, Maharashtra)."

It is stated that from sub-clause (c) it is quite clear that the de-merger will not be effective unless the scheme is filed with Registrar of Companies, which has been done on 14.5.2004. Therefore, the applicant argues that for the purpose of BST Act the transfer will be considered only from 14.5.2004 even though for Companies Act etc. it may be earlier i.e. from 1.4.2003.

It is further argued that it is also quite impossible that a dealer will be made to apply within 60 days from 1.4.2003 when he is not in a position to apply on or before 14.5.2004 and the Registration authority of Sales Tax Department will never accept their scheme of arrangement unless it has been approved as per law by the proper forum and the further process required as per the said scheme has been done. Therefore, the applicant argues, the situation as per section

19(4) and section 19(6) is very clear that the transfer as per scheme should be considered from 14.5.2004.

It is stated that as per said understanding the applicant had applied for registration in the name of Ultra Tech Cement Ltd. at its two places of business in Maharashtra. It is stated that the copies of registration certificates are also placed on record. The applicant has stated that it can be seen that the registration authority also, applying the provisions of section 19(4) and 19(6), gave the effect to the registration certificates from 14/5/2004, taking that date as the date of transfer under section 19(4) & 19(6). It is argued that had it been taken as 1/4/2003, then certainly their applications would have been considered as delayed applications and the registration certificates would have been granted from the date of application and not from 14/5/2004. It is argued that this whole procedure duly supports their submission that so far as BST Act is concerned, the effective date for transfer will be 14/5/2004 and not 1/4/2003.

It is stated that though this situation is clear from above narrated facts and legal position, attention is drawn to the judgment of Bombay High court in case of Copper Rollers P. Ltd. V. State of Maharashtra (36 STC 391). It is stated that though there were terms and conditions in the agreement as taking over business from earlier date, the High Court in light of section 19(4) and section 19(6) of the Bombay Sales Tax Act, 1959 held that for the purpose of BST Act, the effective date is the date on which the agreement is made, i.e. the date on which actual transfer is done.

The applicant has stated that similar is the judgment of Supreme Court in case of O. Chinappa Reddy; B.C. Ray and K.N. Singh, JJ. (AIR 1986 SC 1218). In this case also though for the Companies Act the amalgamation was from the retrospective date, for the purposes of Tenancy Act the Supreme Court held that it will be as per the provisions of the Tenancy Act.

Attention is drawn by the applicant to section 33C of the BST Act. It is stated that the intention of this section is to see that the two amalgamating companies, who have acted independently for all the periods from the appointed date till date of the High Court sanction order should also remain same in spite of the retrospective approval of the scheme. This is done to ensure that dealers do not have to disturb their transactions inter-se and they will be considered as done in normal course as if there is no amalgamation. Thus, this protects them from unexpected hardships.

The applicant has argued that a similar position should be applied also to the de-merger situation. Even if under the BST Act, the reference is made only to the amalgamation, the same logic should also be applied to the de-merger scheme. The applicant has drawn attention to the Maharashtra Value Added Tax Act, 2002 which is in operation from 1/4/2005. It is stated that in this Act there is section 47, where both amalgamation and de-merger are taken care of and it has been provided that irrespective of the retrospective date of effect as per the amalgamation scheme or as per the order of High Court etc. for MVAT Act, 2002 the effect will be given from the date of the order and not from the earlier date. It is stated that under BST Act, it may appear that amalgamation is taken care of to avoid the loss of revenue to the Government. However this is not the correct situation. The applicant has argued that if that was the intention then under the MVAT Act also the same situation would have been allowed to remain. However, the contrary has been done and in spite of loss of revenue the legislature thought it fit to provide for the same treatment. This is done as a fair and reasonable policy. Therefore, it is submitted that under the BST Act the same interpretation has to be given and even in case of de-merger also the scheme should be made effective only from the date of order of the High Court and not from the earlier date.

The applicant has drawn notice to the fact that the de-merger is also a part of amalgamation scheme. It is stated that as per section 391 to 394 of Companies Act, 1956, there are no specific provisions for amalgamation and de-merger. All are referred to as a 'scheme of arrangement'. In such circumstances applying the meaning given in Companies Act, it is submitted, that

amalgamation in section 33C will also include de-merger and accordingly the case will be covered in section 33C.

In light of above submission, it is submitted that the effective date should be considered as from 14/5/2004 and prior transactions, considered as branch transfer, should be allowed to remain as it is without attracting any tax liability. It is further stated that though judgment in Marshall & co. (223 ITR 809) has clarified the position about amalgamation of the Company and its date of effect etc. it be noted that it was related to Income Tax Act, 1961. It is further submitted that secondly, there was no specific provision under Income Tax Act, 1961 where as under BST Act, 1959 there is specific provision like, section 19(4) and 19(6). It is argued that in case of Marshall and Co. the case was of amalgamation, where the amalgamating company vanished from the respective date of scheme and therefore in any case it could not have been taken as existing company to treat it separately. Therefore, the applicant argues that their case is of de-merger, where the original company is also existing and hence here the situation is different. It can be separately assessed which was not possible in case of amalgamation. The applicant concludes that under above circumstances and in light of above submission the judgment in case of Marshall and Co. is not applicable.

It is submitted that if for any reason it is held that the effective date for the de-merger should be taken as from 1/4/2003 and hence the branch transfer made to Larsen & Toubro Ltd. should be considered as sale by Ultra Tech Cement Ltd. then liability should be protected U/s.52(2). In other words, prospective effect be given to this Determination order saving liability up to 14.5.2004. The reasons for the same are as under:

The applicant has stated that the registration department of sales tax department, which is first authority to whom the applicant has approached, has also given the same understanding that the date of effect of the transfer is 14.5.2004. The registration certificate is granted accordingly. Therefore, the applicant has been guided by the said decision of the registration branch and the situation has also been allowed to remain as it is without any corrective action on the part of the higher authority. Therefore, it is stated that when both the parties were under *bona fide* impression, the liability should be protected.

It is submitted that even otherwise also the liability is required to be protected. As stated earlier, though section 33C does not specifically refer to de-merger, the effect of intention of the Legislature has to be given in our case. Therefore, even if there is no specific provision, by utilization of the powers under section 52(2), the said purpose can be achieved and accordingly the prospective effect should be given considering the said intention of the legislature. The applicant has stated that it is also pertinent to note that L & T has branch transferred the goods without assigning any sale price. In fact there is no sale price. Now even if the transfers are to be considered as sale still there is no sale price and hence the transactions cannot be 'sale'. However the assessing authority may not appreciate this position and may treat the transfer as sale. It is submitted that under the above circumstances if the prospective is given it will save future unwarranted litigation.

05. DECISION

I have gone through the facts of the case. In the present case, although the applicant has posed the question as to whether the dispatches of cement from the Awarpur Cement Works to L&T would amount to sale by the applicant to L&T in the period 1/4/2003 to 13/5/2004, the real issue is to decide the date of de-merger of Ultra Tech from L&T. There are two dates involved in the scheme of arrangement of de-merger from L&T to the applicant. In the scheme of arrangement between L&T and Ultra Tech which was approved by the board of directors on 24/9/2003, the appointed day for de-merger of the cement business was fixed at 1/4/2003. The scheme of

arrangement was presented before the High Court on 7/2/2004. The High Court through its judgment dt.29/4/2004 approved the scheme of arrangement. The order of the High Court was filed with the ROC on 14/5/2004 which is the effective date under the scheme. The applicant has contended that since the copy of the High Court order is filed with the ROC on 14/5/2004 and the applicant has also been granted registration certificate from 14/5/2004, the date of de-merger should also be held to be 14/5/2004. If the effective date (14/5/2004) is held as the date of de-merger then it shall imply that Ultra Tech and L&T were a single company up to 14/5/2004 and the transfer of cement from Ultra Tech to L&T in the intervening period i.e from 1.4.2003 to 13.5.2004 would be stock transfer. On the other hand, if the appointed date (1.4.2003) is held as the date of de-merger, then the logical consequence would be that M/s Ultra tech came into being on 1.4.2003, and its transactions with L&T in the intervening period would not be stock transfer but a transaction of sale being transactions between two different companies. The transactions which have taken place in the intervening period thereby become liable to tax.

Since the whole scheme of arrangement involved a number of dates each of which is significant from the point of view of deciding the real date of de-merger, it would be necessary to look at all the definitions of the dates as given in the agreement. It is stated by the applicant that the appointed date for de-merger is 1/4/2003. The appointed date is defined in the agreement itself as "'appointed date "means April 1, 2003.' The agreement says that the order of the Bombay High Court was filed with the ROC on 14/5/2004, which according to the applicant, is the effective date under the scheme. The effective date is defined in the agreement "as the last of the dates of which the matter is referred under clause 50 occurs or have been fulfilled or waived". This definition refers to clause 50 and therefore clause 50 is reproduced as under:

Clause 50: This Scheme is conditional upon and subject to:

(a) this Scheme being agreed to by the respective requisite majorities of the various classes of members and creditors (where applicable) of the De-merged Company and the Resulting Company as required under the Act and the requisite orders of the High Court referred to in Clause 48 hereof being obtained;

(b) such other sanctions and approvals including but not limited to in principle approvals, sanctions of any Government Authority (in relation to transfer of mining leases/prospecting licenses, sales tax benefits or entitlements or loans), as may be required by law in respect of this Scheme being obtained; and

(c) the certified copies of the orders of the High Court referred to in this Scheme being filed with the Registrar of Companies, Maharashtra.

It is gathered from the submission that as the copies of the High Court order is filed with the ROC on 14/5/04, the date is taken by the applicant as the effective date. Thus there are two significant dates- the appointed date and the effective date. The effective date, according to the applicant, is 14/5/2004 because the order of the High Court was filed with the ROC on 14/5/2004. The appointed date is 1/4/2003 and it is the date given by the High Court as the date on which the agreement would come into effect. This issue involves a scheme of arrangement called de-merger which falls under section 391 to 394 of the Companies Act, 1956. Under the Companies Act, the scheme of arrangement between two companies whether de-merger or restructuring has to be approved by the High Court. In the present case the High Court has approved the de-merger of Ultra Tech from L&T on 22/4/2004. However, the Court in its order on page No.5 says that.....

"And this court doth hereby order that the **same shall be binding with effect from 1st day of April, 2003** hereinafter referred to as the appointed date on L&T and the petitioner's Company and the respective share holders and creditors and Grasim Industries Ltd. Share holders and all person concerned under the scheme....

Also,

.....and this court doth hereby further order that with effect from the appointed date to dates liabilities, duties and obligation of the de-merger undertaking shall without any further act, instrument or deed be and stand transferred to any or deemed to have been transferred to the petitioner so as to become the dates, liabilities, duties and obligation of the petitioner's Company.

The order of the Court and the directions given by it is very clear. The Court has explicitly stated that the de-merger of the Company from L&T shall be effective from appointed date i.e. 1/4/2003. This implies that with effect from 1/4/2003, Ultra Tech became an independent entity and the sale of cement by Ultra Tech to L&T become taxable as a transaction between two separate entities. Ultra tech Cement took birth from 1.4.2003-this is an unambiguous and definite fact, given the clear directions of the High Court in its order of approval.

The applicant has contended that the date of de-merger is the effective date and not the appointed date. In doing so, the applicant has relied upon certain facts – one being the provision dealing with merger under the BST Act as also the section for de-merger under the VAT Act. The contingency of de-merger has not been provided for in the BST Act, although the Act deals with 'merger'. The lacuna has been cured under the MVAT Act wherein section 47 provides both for merger and de-merger.

Section 33C. Amalgamation of companies.-(under the BST Act)

When two or more companies are to be amalgamated by the order of a court or of the Central Government and the order is to take effect from a date anterior to the date of the said order and any two or more of such companies have sold or purchased any goods to or from each other during the period commencing on the date from which the order is to take effect and ending on the date of the order, then notwithstanding anything contained in the said amalgamation order, such transaction of sale and purchase shall be included in the turnover of sales or, as the case may be, purchases of the respective companies and shall be assessed to tax accordingly, and for the purposes of this Act, the said two or more companies shall be treated as distinct companies and shall be treated as such for the entire period up to the date of the said order, and the registration certificates of the said companies shall be cancelled, or amended, where necessary, with effect from the date of the said amalgamation order.

(2) Words and expressions used in this section but not defined shall have the respective meaning assigned to them in the Companies Act, 1956 (1 of 1956).

In section 33C, a legal fiction has been introduced by the legislature by providing for a deeming provision to the effect that irrespective of the date laid down by the High Court as the date of merger or the date on which the merger shall come into effect, for the purpose of sales tax the date given by the High Court would not be the date of merger. For the purpose of sales tax the date of merger shall be the date of which the High court has issued the order of merger. Thus, in the case of merger the legal fiction introduced makes the date of order of the High Court as the date of merger. The applicant has argued that, following the same logic and in order to harmonize the provisions for both merger and de-merger, de-merger also should be effective from the date of High court order and not the date given by High Court. He also pointed out that, under the VAT

Act, a similar provision has been made wherein for de-merger the date of the High court order is made the date of de-merger. I have gone through the sub section introduced for de-merger under VAT. The section is as follows:

47. Amalgamation [or de-merger] of Companies

(1) When two or more companies are to be amalgamated by the order of Court or of the Central Government [passed after the appointed day and is to take effect] from a date, earlier to the date of the order and any two or more of such companies have sold or purchased any goods to or from each other in the period commencing on the date from which the order is to take effect and ending on the date of the order, then such transactions of sale and purchase shall be included in the turnovers of sale or purchase of the respective companies and shall be assessed to tax accordingly.

(2) Notwithstanding anything contained in the said order, for all of the purposes of this Act, the said two or more companies shall be treated as distinct companies for all the periods up to the date of the said order and the registration certificates of the said companies shall be cancelled, where necessary, with effect from the date of the said order.

(2A)(a) When any company is to be de-merged by the order of the Court or of the Central Government passed after the appointed day and is to take effect from a date earlier to the date of the order, then for all of the purposes of this Act, it shall be presumed that the two or more companies brought into existence by the operation of the said order have not sold or purchased any goods to each other from the date of effect of the order to the date of the order.

(b) Notwithstanding anything contained in the said order, for the purpose of this Act, the said two or more companies shall be treated as a single company for all the periods up to the date of the said order and the registration certificate of the company to be de-merged shall be cancelled with effect from the date of the said order and the said two or more companies shall, subject to rules, be granted registration certificates from the date of the said order]

(3) Words and expressions used in this section but not defined shall have the respective meaning assigned to them in the Companies Act, 1956 (1 of 1956).

It is true that under VAT the date of de-merger for the purpose is not the date given by the High Court but the date of order. It is also true that under the BST Act, merger for the purpose of sales tax takes effect from the date of order and not from the date given by the High Court. But the argument of the applicant that the provision under VAT for de-merger should be applied *en bloc* to a situation under the BST Act as also the argument that what is true for merger becomes applicable for de-merger, both fail to impress me.

- There is no principle of interpretation which says that a legal fiction introduced for a certain purpose and applicable to a part of the statute will also be extended to the other parts of the statute for which no legal fiction has been made. In section 33(C) of the BST Act, the provision provides that irrespective of the High court order the date of merger would be the date of the High court order. In a way, the provision has been brought in to nullify the directive given by the High Court and it is eminently a legal fiction brought in for a limited purpose to provide for the contingency of 'merger'. It is important to note that if the provision regarding 'merger' had not been brought in the statute, the date specified by the High Court would have been the date of merger for the purpose of merger. There is no such provision for de-merger under the BST Act. In absence of an analogous deeming provision for 'de-merger', the date laid down by the High court would necessarily be the date of merger. No legal fiction can be *introduced* or *seen* by me or the applicant or any

other person if the legislature has chosen not to do so. The applicant is practically suggesting that a legal fiction be read into when there is none.

- The applicant has also relied upon the VAT provisions in which the legislature has thought it fit to provide the effective date as the date of transfer. However, I am skeptical about the reference to the VAT provisions to decide about the question relating to the BST Act. While deciding about the determination as also for any interpretation one has to look into the statute under consideration for the relevant period. . It is a fairly important principle of interpretation that a reference to a later legislation to interpret a current provision is a dangerous tool and more so when the later legislation comprises a 'deeming provision' which makes it even more unreliable.
- The applicant has argued that the provision for 'de-merger' under VAT be made applicable to the current situation. This is a perilous suggestion, to say the least. It is for the legislature to legislate and if I decide upon 'de-merger' by referring to merger it would amount to inferring something which is not provided in the Act. It is not for me to legislate. There is no provision for de-merger under the Act and therefore I cannot and should not try to infer the legislative intention by referring to a later legislation and, moreover one in which a deeming provision has been provided. There are snares if I accept such a proposition. Firstly, there is no provision for de-merger under the BST Act. Secondly, a deeming provision is provided for merger and not for de-merger. The deeming provision is very often used to give artificial conception or meaning to a word or phrase and by that the meaning of that word or phrase may be extended to something else which that words or phrase does not ordinarily connote or implies. The deeming provision postulates that a thing deemed to be something is not in fact the thing it is deemed to be. A deeming provision is intended to include matters which may otherwise not fall within the main provision. Thus, in the case of these provisions of merger the deeming provision introduced says that the date of order shall be the effective date. This legal fiction cannot be extended to include de-merger as well. In doing so I would be transgressing the limits set before me. The deeming fiction is only for the limited purpose of merger and not for de-merger.
- The applicant has made an argument that the provision for amalgamation under section 33(C) would also include de-merger. This argument of the applicant is also factually erroneous. Section 33(C) is only for merger. Though the Company Law treats merger, de-merger and restructuring under a single provision, the same will not be the case for the purposes of sales tax. The section 33 (C) provides for the contingency of 'merger' and not for 'de-merger'. When no express mention is made of de-merger in the section for section merger the same cannot be read into it. '*Expressio unius est exclusio alterius* -The express mention of one thing excludes all others. Items not on the list are assumed not to be covered by the statute.

The long and short of the above discussion is that the date of de-merger in the instant case is the date specified by the High Court in its order of approval. The applicant -M/s Ultra Cemco became a separate company in the eyes of law with effect from 1.4.2003 and therefore the transactions effected with L & T from 1.4.2003 are not stock transfers but transactions of sale.

The Supreme Court in the case of Marshall and Sons and Co (India) Ltd (223 ITR SC 809) clinches the issue. It was held by the Apex Court that in absence of a date specified by the HC as the date of effect, the date of transfer as specified in the agreement would be the date of amalgamation. The SC did not hold the date of the order as the date of amalgamation. The SC made the following observations:

...""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. *It 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) will 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 issues 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 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. (*Emphasis added)*

The applicant had argued that the case law is not applicable as it pertains to the provisions under the Income Tax Act. I do not agree with this reasoning. The case is very much applicable as the provisions do not pertain to the IT Act as the applicant has mistakenly argued. The provisions in fact pertain to the provisions under the Companies Law and its applicability to the Income Tax Act and the Sales Tax act. The facts are similar and that is sufficient to decide the relevance of the judgement. Also, what is good law for merger is also good law for de-merger.

The applicant has cited the case of the Bombay High Court in the case of Copper Rollers P. Ltd vs State of Maharashtra (36 STC 391) which held that for the purpose of BST Act the effective date is the date on which the agreement is made i.e the date on which the actual transfer is done. The facts in this case were entirely different. This was an agreement executed between partners and the agreement was not subject to any statutory approval as in the present case. When the HC itself approves a date as the date of transfer, there should be no scope for interpretation. The other judgement in the case of General Radio appliances (AIR 1986 SC 1218) quoted by the applicant is with reference to the specific provisions under the Tenancy Act and is not applicable to the present case.

The applicant has also referred to the fact that the Registration Department has granted certificate from 14/5/04 in conformity with the section 19(4) and section 19(6) and therefore the date of de-merger should be 14/5/04. However, the wordings of the section 19(4) and section 19(6) only lay down the limitation for filing the application- they do not determine the date of succession. Therefore, the argument is of no consequence.

The applicant has also requested determination of the rate of tax charged by them with respect to the transaction. However, in the course of hearing no submission was made on this fact. Also, the written submission is silent on it. It is seen from the documents that the applicant has transferred cement to L & T. Cement is specifically covered by schedule entry C-II-59 and is taxable @ 13% plus the consequential levy of turnover tax and additional tax.

06. PRAYER FOR PROSPECTIVE EFFECT

The applicant has prayed for the prospective effect to the order. The prayer for prospective effect is made so as to protect the liability of the applicant in case the order is not held in his favor. The applicant has prayed that decision given by the Commissioner would be with effect from the date of the determination order. However, I see no point in granting prospective effect to the dealer. The High Court order is very clear. The order gives 1.4.2003 as the appointed date from which the scheme would take effect and there should be no issue here. The applicant has argued that the registration certificate was granted with effect from 14.7.2004 in support of his plea for prospective effect. However, this could not be held as an indication of statutory misguidance. Statutory misguidance is one in which one is misguided by an authority who is in a position to interpret law, for e.g when one is misguided by a Circular or by a past determination order. Such is not the case here and therefore, it cannot be a case of statutory misguidance.

07. In conclusion to the discussion held in the preceding paragraphs, I pass order as follows:

ORDER

(u/s. section 52(1)(c) and section 52(1)(e) of the Bombay Sales Tax act, 1959)

NO.DDQ-11/2005/Adm-5/12/B-

Mumbai, dt.

- By virtue of the de-merger of the cement business of Larsen & Toubro Ltd. (part transfer of the business) to the applicant as an from 14/5/2004 the despatches of the cement during the period 1/4/2003 to 13/5/2004 from the Awarpur Cement Works to ECC Division of Larsen & Toubro Ltd. would amount to sales by the applicant to Larsen & Toubro Ltd. under the BST Act, 1959 and/or the CST Act, 1956.
- The transaction between the applicant and L & T cement as evidenced in the following transactions -
 - a. Stock Transfer Note NO.ICDN 0255227 dt.10/10/2003 for 18.000 MT of cement transferred from the Awarpur Cement Works to M/s. L&T-ECC Division, Satara Kolhapur Road Project, Pune- Bangalore Road, Maharashtra.
 - b. Stock Transfer Note No.ICDN 031028 dt.27/3/2004 for 58.700 MT of cement transferred from the Awarpur Cement works to M/s. L&T-ECC Division, Dwarks.
 - c. Stock Transfer Note No.ICDN-207734 dt.23/4/2004for 58.700 MT of cement transferred from the Awarpur Cement Works to M/s. L&T-ECC Division, Premier Pre-stressed Concrete Product, Andheri (W), Mumbai, Maharashtra.
 - d. Stock Transfer Note No. ICDN 206720 dt.20/4/2004, 58.700 MT of Cement was transferred from the Awarpur Cement works to M/s. L&T - Delhi are all held as

transactions of sale under the Bombay Sales Tax Act , 1959 and are taxable at the rate of 13% being covered by schedule entry C-II-59 along with the levies of additional tax and turnover tax.. The argument of the applicant that they are stock transfers is rejected for reasons given in the order.

- For reasons discussed in the order the plea for prospective effect is rejected.

(Sanjay Bhatia)
Commissioner of Sales Tax,
Maharashtra State, Mumbai