

Shantanu Sanjay Hundekari vs Union Of India on 28 March, 2024

Author: G.S. Kulkarni

Bench: G. S. Kulkarni

2024:BHC-OS:5302

WPL30198_2023 &

Vidya Amin

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

WRIT PETITION (L) NO. 30198 OF 2023

Shantanu Sanjay Hundekari

... Petitioner

Versus

1. Union of India, through Secretary, Ministry of Finance, North Block, New Delhi.
2. State of Maharashtra, through Principal Secretary, Finance Department, Government of Maharashtra, Mumbai.
3. Joint Director, Director General of Goods and Service Tax Intelligence, 6th & 7th floor, "I-the Address:", Opp. H.C.G. Hospital, Near Sola Flyover, Sola, Ahmedabad, Gujarat.
4. The Additional/Joint Commissioner, Thane Commissionerate, Accel House, Road No. 22, MIDC, Wagle Industrial Estate, Thane (West).

... Respondents

WITH

WRIT PETITION (L) NO. 30199 OF 2023

Vikas Agarwal

... Petitioner

Versus

1. Union of India, through Secretary, Ministry of Finance, North Block, New Delhi.
2. State of Maharashtra, through Principal Secretary, Finance Department, Government of Maharashtra, Mumbai.
3. Joint Director, Director General of Goods and Service Tax Intelligence, 6th & 7th floor, "I-the Address:",

Opp. H.C.G. Hospital, Near Sola Flyover,
Sola, Ahmedabad, Gujarat.

4. The Additional/Joint Commissioner,
Thane Commissionerate,
Accel House, Road No. 22, MIDC,
Wagle Industrial Estate, Thane (West). ...Respondents

WITH

WRIT PETITION (L) NO. 30200 OF 2023

Yogesh Agarwal ... Petitioner

Versus

1. Union of India, through Secretary, Ministry of
Finance, North Block, New Delhi.
2. State of Maharashtra, through Principal Secretary,
Finance Department, Government of Maharashtra,
Mumbai.
3. Joint Director, Director General of Goods and
Service Tax Intelligence,
6th & 7th floor, "I-the Address: ,
Opp. H.C.G. Hospital, Near Sola Flyover,
Sola, Ahmedabad, Gujarat.
4. The Additional/Joint Commissioner,
Thane Commissionerate,
Accel House, Road No. 22, MIDC,
Wagle Industrial Estate, Thane (West). ...Respondents

WITH

WRIT PETITION (L) NO. 30241 OF 2023

Mamta Gupta ... Petitioner

Versus

1. Union of India, through Secretary, Ministry of
Finance, North Block, New Delhi.
2. State of Maharashtra, through Principal Secretary,
Finance Department, Government of Maharashtra,
Mumbai.

3. Joint Director, Director General of Goods and Service Tax Intelligence,
6th & 7th floor, "I-the Address:",
Opp. H.C.G. Hospital, Near Sola Flyover,
Sola, Ahmedabad, Gujarat.
4. The Additional/Joint Commissioner,
Thane Commissionerate,
Accel House, Road No. 22, MIDC, ...Respondents
Wagle Industrial Estate, Thane (West).

Mr. Harish Salve, Senior Advocate a/w. Ms. Anuradha Dutt, Ms. Fereshte Setha, Mr. Tushar Jarwal, Mr. Pranav Bansal, Mr. Rahul S., Mr. Mohit Tiwari, Ms. Mrunal P., Mr. Ameya Pant, Mr. Abhishek Tilak, Ms. Snigdha Mishra, Mr. Ashish Mishra, Coral Shah i/b. DMD Advocates for the petitioners.

Mr. M.P. Sharma a/w. Ms. Mamta Omle for respondent nos. 1, 3 and 4.

Mr. Vishal Thadani, Addl. G.P. for respondent no. 2 in WPL/30198/2023.

Ms. Jyoti Chavan, Addl. G.P. for the State in WPL/30199/2023.

Mr. Himanshu Takke, AGP for the State in WPL/30200/2023.

Smt. Jaymala J. Ostwal, Addl. G.P. for State in WPL/30241/2023.

CORAM: G. S. KULKARNI &
FIRDOSH P. POONIWALLA, JJ.

DATED: 21 February, 2024
PRONOUNCED ON 28 March, 2024

Judgment : (Per G.S. Kulkarni, J.)

1. Rule. Returnable forthwith. Respondents waive service. By consent of the parties, heard finally.

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2. These are four petitions which involve a common challenge. The facts in all these petitions are similar, hence they can be disposed of by this common judgment.

3. At the outset we may state that this case before the Court is quite peculiar unto itself. The petitioners in each of these petitions are individuals. They are employees of a shipping company, who have been foisted with a show cause notice under Section 74 of the Central Goods and Services Tax Act, 2017 whereupon a demand of Rs.3731,00,38,326/- towards penalty is being demanded from them being the tax amount stated to be defaulted by the employer.

4. Thus briefly the challenge as mounted in these petitions is to the demand cum show cause notice dated 19 September, 2023 issued by respondent no. 3-Joint Director, Director General of Goods and Service Tax Intelligence, whereby the petitioners alongwith other noticees are called upon to show cause as to why penalty equivalent to the tax alleged to be evaded by M/s. Maersk (being noticee nos. 1 to 10 in the show cause notice) amounting to Rs.3731,00,38,326/- as detailed in paragraph 5.19.1 of the said notice, be not imposed upon the petitioners inter alia applying the provisions of section 122(1A) and Section 137 of the Central Goods and Services Tax Act, 2017 (for short "CGST Act") and the corresponding provisions of the Maharashtra 28 March, 2024 WPL30198_2023 & ORS.DOC Goods and Services Tax Act, 2017 (for short "MGST Act") and other State Acts.

5. For convenience, we advert to the facts of the first petition which was argued as the lead matter.

Writ Petition (L) No. 30198 of 2023 (Shantanu Sanjay Hundekari Versus Union of India & Ors.)

6. Briefly the case of the petitioner as set out in the petition is as follows:

The petitioner is a citizen of India, who is stated to be an employee of M/s. Maersk Line India Pvt. Ltd. (for short "MLIPL") a company incorporated under the Companies Act, 1956, having its principal place of business at Mumbai. He was employed as a Taxation Manager with MLIPL with effect from 12 December, 2013. MLIPL was appointed as Steamer agent of Maersk A/S (for short "Maersk"), a company incorporated under the laws of Denmark, which is inter alia engaged in the shipping business involving containerized transportation of goods, through vessels across the globe.

7. The petitioner in his capacity as a Taxation Manager rendered assistance to Maersk in its compliances with taxation laws including the GST. The petitioner also holds power of attorney to represent Maersk before the Tax Authorities. It is contended that the petitioner was not in-charge of the day-to-day business of Maersk. The petitioner acting on behalf of Maersk also 28 March, 2024 WPL30198_2023 & ORS.DOC volunteered, to assist the investigations being conducted by the tax authorities, in responding to the summons that were issued to Maersk, to present its evidence and to furnish list of witnesses whose statements could be recorded. It is contended that after such inquiry, the respondents have made allegations as set out in the show cause notice that a sum of Rs.1561 crores was wrongly utilized as Input Tax Credit (for short "ITC") by Maersk. It is also alleged that there was wrongful distribution of ITC by Maersk and that Maersk had legitimately claimed the credit after making payments that included GST to third party vendors.

8. The petitioner has categorically contended that there was no question of the petitioner personally availing the benefit of any ITC, nor does the show cause notice allege that any personal benefit is achieved by the petitioner. It is contended that the show cause notice making such allegations against Maersk incidentally invokes the provisions of Section 122(1A) and Section 137 of the CGST Act so as to threaten imposition of penalty of Rs.3731 crores on the petitioner and to initiate prosecution against the petitioner, who is an individual. It is thus the petitioner's case that the said provisions of the CGST Act, as invoked, per se do not apply to the petitioner, absent a suggestion

that any personal benefit was availed by the petitioner.

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9. The petitioner contends that MLIPL had entered into an Agency Agreement dated 1 August, 2011 ("Agreement") with one AP Moller - Maersk to act as its Steamer Agent in the territory of India and Nepal. The said Agreement was novated in favour of Maersk Line A/S with effect from 1 February, 2015 vide Novation Agreement dated 1 October, 2014. Thereafter, the name of 'Maersk Line A/S' was changed to 'Maersk A/S'. It is contended that Maersk had a centralized service tax registration in India with multiple addresses spread across different States. It is stated that with the introduction of GST with effect from 1 July, 2017, due to the concept of a distinct person and the specific requirement under the GST laws, Maersk had no option but to avail registration in each State where MLIPL had offices. The GST registrations accordingly were obtained on the basis of 'No Objection' from MLIPL to take GST registrations at MLIPL offices in different States.

10. It is contended that Maersk is a foreign company which does not have any employee or fixed establishment in India. Accordingly, solely for the purpose of representing and acting on behalf of Maersk, in tax matters before the Indian tax authorities, the petitioner as also the companion petitioners as also several other individuals were given the power of attorney. The petitioner's power of attorney was renewed from time to time.

11. The petitioner states that from July, 2021 onwards, respondent no. 3 initiated investigations against Maersk, which pertained to distribution of input 28 March, 2024 WPL30198_2023 & ORS.DOC tax credit, which Maersk had availed for three primary input services - port handling, terminal handling and transportation services, provided by third parties in relation to Maersk's shipping business. It is contended that Maersk had legitimately claimed such credit after making payments to third party vendors, which included GST.

12. The petitioner also has a contention on the department's allegation that credit should have been proportionately allocated among eleven different registrations of Maersk in ten States, which according to the petitioner is made on the basis of investigation that had commenced in July 2021 and continued till September 2023, for which the investigating authority had issued summons to Maersk/MLIPL (as an agent of Maersk) to furnish documents/evidence and record statements on behalf of Maersk. In this regard it is contended by the petitioner that since the petitioner was one of the power of attorney holders for one of the tax matters, with an intention to cooperate with the investigations, the petitioner from time to time had volunteered to appear before respondent No.3. It is stated that he had accordingly appeared on six different occasions from 2 December, 2021 upto May 9, 2023, and had tendered six statements.

13. It is the petitioner's case that the petitioner was not the decision making authority on Maersk's businesses, and was not in-charge of or responsible for the business of Maersk, as the petitioner is in India and was merely 28 March, 2024 WPL30198_2023 & ORS.DOC representing Maersk before respondent No.3 to provide factual information and data as requested by respondent from time to time. It is also contended that as a matter of fact, the legal issues which were put to the Petitioner

were replied by the petitioner as per the legal opinion obtained by Maersk. Also, the petitioner was neither a legal expert nor had any in-depth legal understanding of GST laws or its interpretation. Thus, the role of the petitioner was essentially to assist and cooperate with the investigation authorities and had given clarifications relating to distribution of input tax credit, legitimately taken by Maersk on payments made to third party vendors on procurement of services.

14. It is hence the petitioner's contention that the investigations ultimately led to the issuance of the impugned show cause notice, which primarily demands Rs. 3,731 crores from the foreign company Maersk. The allegations include the failure to distribute credit and utilization of certain credits, which according to the petitioner, have already been paid by Maersk along with interest and penalties.

15. The petitioner contends that the GST Council in its 38 th meeting held on 18 December 2019 had proposed insertion of sub-section (1A) to Section 122, to specifically address the cases of fake invoices. It is contended that accordingly, with effect from 1 January, 2021, the legislature introduced the penal provision being sub-section (1A) in Section 122 of the CGST Act, by an 28 March, 2024 WPL30198_2023 & ORS.DOC amendment, brought about by the Finance Act, 2020. Such provision ordains that a person shall be liable to a penalty of an amount equivalent to the tax evaded or input tax credit availed, or passed on, if he retains the benefit of certain fraudulent transactions, and when such transactions are conducted at his instance. In such context, the petitioner would contend that the petitioner is arraigned as Noticee No. 12 in the show cause notice, with an allegation been made against him only in one paragraph of the show cause notice, namely in paragraph 5.19.1, that the petitioner has "retained the benefit of the said evasion of GST by Maersk" and at the time of evasion of tax by Maersk, the petitioner was in-charge of and responsible for Maersk's business. It is the petitioner's contention that based on such allegation, the petitioner is called upon to show cause as to why a penalty under Section 122(1A) amounting to Rs. 3,731crores should not be imposed and as to why the petitioner should not be proceeded against under Section 137 of the CGST Act.

16. The petitioner's contention assailing the show cause notice is basically on the ground that the provisions of Section 122(1A) and Section 137 of the CGST Act do not apply to the petitioner, absent a suggestion that any personal benefit was availed by the Petitioner. On such premise, this petition has been filed praying for quashing and setting aside of the impugned show cause notice. The prayer as made in the petition reads thus:-

28 March, 2024 WPL30198_2023 & ORS.DOC "(a) That this Hon'ble Court be pleased to issue a Writ of Certiorari or any other appropriate writ, order, or direction in the nature of certiorari under Article 226 of the Constitution of India calling for all papers, records, and proceedings leading to the issuance of Show Cause Notice dated 19.09.2023 (Exhibit A) and, after examining their validity and propriety, quash and set aside the SCN;"

17. Mr. Harish Salve, learned senior counsel for the petitioners in support of the reliefs as prayed for in the petition, has made the following submissions:

(i) The impugned show cause notice as issued to the petitioner is wholly arbitrary and illegal, inasmuch as, in foisting on the petitioner a penalty of Rs.3,731 crores purportedly under section 122(1A) of the CGST Act, the basic ingredients of the said provision are not satisfied, as there was no material to the effect that primary benefit of the ITC was in any manner availed by the petitioner. The show cause notice is thus an abuse of the powers vested with the concerned officer, which is in fact designed to threaten and intimidate junior employees of the company, so that they do not assist the assessee in the proceedings initiated by the respondents.

(ii) The petitioner is merely a power of attorney holder of Maersk. In such situation it was arbitrary for the respondent that such a grossly disproportionate penalty of Rs.3731 crores could at all be foisted on the petitioner, more so, when there is no benefit of any credit which could 28 March, 2024 WPL30198_2023 & ORS.DOC be taken by the petitioner and when nothing of such act can be achieved by the petitioner.

(iii) Respondent no. 3 was certainly aware that the petitioner was neither in-charge nor responsible to Maersk for the conduct of its business and thereby section 137(1) or (2) had no application insofar as the petitioner was concerned, and in the facts as they stand. Also, there are no allegations in the show cause notice on which the invocation of Section 137 could be countenanced and sustained. Thus, the invocation of Section 137(1) against the petitioner is patently without jurisdiction, apart from being without application of mind, rendering the show cause notice bad, illegal and unsustainable in the eyes of law.

(iv) It is next contended that on the face of the show cause notice it is seen that none of the essential requirements under Section 122(1A) or under section 137 of CGST Act would stand attracted considering the only allegations as made in paragraph 5.19.1 of the show cause notice, as the petitioner is not a taxable person within the meaning of Section 2(107) of the CGST Act, who could be a person registered or liable to be registered under section 22 or 24 of the CGST Act. Thus, Section 122(1A) in any event was per se not applicable.

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(v) It is next submitted that when paragraph 5.19.1. of the show cause notice being the only content of the show cause notice pertained to the petitioner, which alleged that the petitioner had aided and abetted in the commission of an offence by Maersk A/S, it fails to consider, that there was no incriminating role or any reason in that regard contained in the show cause notice, to support such allegation. Also, when it was claimed that the petitioner has retained the benefit of GST evasion, and that the petitioner was in-charge of and responsible to Maersk, for the conduct of its business, there was no basis as set out to support such allegation. The show cause notice hence clearly lacked such basic requirements, necessary for invocation of the said provisions.

(vi) It is submitted that more pertinently Section 137 had no application to the facts of the present case, hence, the show cause notice is issued in patent lack of jurisdiction when it fails to demonstrate

as to how the benefit of Rs.3,731 crores could stand retained by the petitioner, and as to how the alleged benefit was accrued through the transactions conducted by the petitioner. The impugned show cause notice is not only an abuse of the process of law but it is violative of Articles 21, 14 and 19(1)(g) of the Constitution. It would thus deserve to be quashed and set aside.

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18. On the other hand, Mr. Sharma, learned counsel for the respondents has made submissions supporting the impugned show cause notice. He relies on the reply affidavit of Mr. Shyam Kanu Mahanta, Additional Director General, DGGI, Ahmedabad Zonal Unit. At the outset, Mr. Sharma would submit that the petitioner needs to respond to the show cause notice by raising all such contentions. Hence, the show cause notice needs to be taken forward and adjudicated. For such reason, the writ petition is not maintainable and would deserve rejection.

19. It is Mr. Sharma's submission that the allegation in the show cause notice would show that there was responsibility fastened on the petitioner in regard to the affairs of Maersk, hence, the petitioner cannot disown his involvement in the loss of revenue in the manner as described in the show cause notice. He refers to the contents of paragraphs 9 and 10 of the reply affidavit which state that the petitioner had tendered statements on behalf of Maersk as its power of attorney holder and as a Senior Tax Operations Manager, qua 10 registrations of M/s Maersk, which was evident from the GST portal. Hence, the petitioner ought to have taken responsibility of the compliance of the statutory provisions of the GST laws. It is submitted that as a huge amount of GST was involved, there was certainly connivance of the petitioner in the evasion of tax by Maersk, as the petitioner was assigned the work of complying with the statutory provisions of the CGST Act. Mr. Sharma would next submit that the 28 March, 2024 WPL30198_2023 & ORS.DOC company is not coming forward to clear the tax dues and therefore, the show cause notice was rightly pressed against the petitioner, as the petitioner would be equally responsible for his actions, although in the capacity as a power of attorney holder. Mr. Sharma has drawn our attention to the statements as made in paragraph 30 of the reply affidavit, whereby the deponent has stated that the final determination of the show cause notice is to be made by the adjudicating authority, after considering petitioner's reply to the show cause notice. It is hence submitted that as the petitioner can raise all factual issues/objections in the adjudication of the show cause notice, no interference in the present proceedings is called for.

Analysis

20. We have heard learned counsel for the parties. We have also perused the record and the impugned show cause notice.

21. At the outset, we may observe that as a jurisdictional issue on the validity of the show cause notice is raised, it would be necessary to note the only allegation made against the petitioner in the show cause notice, which is contained in paragraph 20 thereof, which reads thus:

"20. Shri Shantanu Sanjay Hundekari (Noticee No. 12), Senior Tax Operations Manager cum Authorised Person of M/s Maersk (Noticee No. 1 to Noticee No. 10) is also called upon to show cause as to why penalty equivalent to the tax evaded by M/s Maersk (Noticee No. 1 to Noticee No. 10) amounting to 3731,00,38,326/- as detailed in Para 5.19.1 of this notice (supra), should not be imposed upon him under Section 122(1A) of the CGST Act, 2017 and like provisions of the Maharashtra GST Act, 2017, Gujarat GST Act, 2017, Haryana GST Act, 2017, Tamilnadu GST Act, 2017, Andhra Pradesh GST Act, 2017, West Bengal GST Act, 2017, Punjab GST Act, 2017, Karnataka GST Act, 2017, Kerala 28 March, 2024 WPL30198_2023 & ORS.DOC GST Act, 2017 and Telangana GST Act, 2017 read with Section 20 of the IGST Act, for the contraventions of the provisions of the CGST Act, 2017 and like provisions of the Maharashtra GST Act, 2017, Gujarat GST Act, 2017, Haryana GST Act, 2017, Tamilnadu GST Act, 2017, Andhra Pradesh GST Act, 2017, West Bengal GST Act, 2017, Punjab GST Act, 2017, Karnataka GST Act, 2017, Kerala GST Act, 2017 and Telangana GST Act, 2017 read with Section 20 of the IGST Act, 2017, as M/s Maersk (Noticee No. 1 to Noticee No. 10) have committed offences as discussed in Para 5.19.1 and in paras of this notice supra and as to why he should not be proceeded against for indulging into offences of the nature as prescribed under Section 137 of the CGST Act, 2017 and like provisions of the Maharashtra GST Act, 2017, Gujarat GST Act, 2017, Haryana GST Act, 2017, Tamilnadu GST Act, 2017, Andhra Pradesh GST Act, 2017, West Bengal GST Act, 2017, Punjab GST Act, 2017, Karnataka GST Act, 2017, Kerala GST Act, 2017 and Telangana GST Act, 2017 read with Section 20 of the IGST Act, 2017 for willful suppression of the facts resulting in huge evasion of GST by M/s Mearsk (Noticee No. 1 to Noticee No. 10).

(emphasis supplied)

22. As paragraph 20 (supra) of the show cause notice incorporates a reference to paragraph 5.19.1 of the show cause notice, it would be appropriate to note the contents of paragraph 5.19.1, which reads thus:

"5.19.1 In the instant case, Shri Yogesh Agarwal (Noticee No. 11), Manager of M/s Maersk (Noticee No. 1 to Noticee No. 10), Shri Shantanu Sanjay Hundekari (Noticee No. 12), Senior Tax Operations Manager cum Authorised Person of M/s Maersk (Noticee No. 1 to Noticee No. 10), Shri Vikash Agarwal (Noticee No. 13), Area Managing Director of M/s Maersk (Noticee No. 1 to Noticee No. 10) and Smt. Mamta Gupta (Noticee No. 14), Area Finance Manager of M/s Maersk (Noticee No. 1 to Noticee No. 10) have committed offences of the nature as described under the provisions of Sections 122(1)(i) of the CGST Act, 2017 read with 122(1)(i) of the Maharashtra GST Act, 2017, Gujarat GST Act, 2017, Haryana GST Act, 2017, Tamilnadu GST Act, 2017, Andhra Pradesh GST Act, 2017, West Bengal GST Act, 2017, Punjab GST Act, 2017, Karnataka GST Act, 2017, Kerala GST Act, 2017 and Telangana GST Act, 2017 which led to the evasion of GST by M/s Maersk (Noticee No. I to Noticee No. 10) as the invoices raised M/s Maersk (Noticee No. I to Noticee

No. 10) on account of supplies of support services among distinct persons appears to be incorrect as the said invoices are not in consonance with the provisions of Section 31 of the CGST Act, 2017 read with Rule 47 of the CGST Rules, 2017 read with Section 13 of the CGST Act, 2017 and further read with Section 20 of the IGST Act, 2017 and the rules made thereunder. Further, the ITC availed and subsequently utilized on the strength of the invoices raised belatedly by Noticee No. 1 to Noticee No. 10 among distinct persons appears to be inadmissible in terms of the provisions of Section 13, Section 16(2), Section 16(4), Section 17(5)(1) and Section 31 of the CGST Act, 2017 and the rules made under the said sections read with Section 20 of the IGST Act, 2017, as detailed in this notice supra. Further, the invoices raised by M/s Maersk (Noticee No. 1 to Noticee No. 10) in respect of supplies of services of Ocean freight rendered to their clients culminated to short payment of tax @13% (18%-5%), as 28 March, 2024 WPL30198_2023 & ORS.DOC detailed in this notice supra. Therefore, it appears that the invoices raised for such supplies are incorrect and ITC availed and subsequently utilized is inadmissible and thereby, they aided and abetted in commission of offences as described above in Para 5.3 to Para 5.18 of this notice supra and thereby, they have rendered themselves liable to penalty equivalent to the tax evaded by M/s Maersk amounting to Rs.3731,00,38,326/ (Rs. 1561,03,97,298 + Rs.1561,03,97,298 + Rs.608,92,43,730/-) as discussed in table (iv) of Para 6.1.2, table of Para 6.2.6 and table of Para of 7.3.5 respectively, under Section 122(1A) of the CGST Act, 2017 and like provisions of the Maharashtra GST Act, 2017, Gujarat GST Act, 2017, Haryana GST Act, 2017, Tamilnadu GST Act, 2017, Andhra Pradesh GST Act, 2017, West Bengal GST Act, 2017, Punjab GST Act, 2017, Karnataka GST Act, 2017, Kerala GST Act, 2017 and Telangana GST Act, 2017 and further read with Section 20 of the IGST Act, 2017 for the violation of provisions of CGST Act, 2017 and the rules made thereunder and like provisions of the Maharashtra GST Act, 2017, Gujarat GST Act, 2017, Haryana GST Act, 2017, Tamilnadu GST Act, 2017, Andhra Pradesh GST Act, 2017, West Bengal GST Act, 2017, Punjab GST Act, 2017, Karnataka GST Act, 2017, Kerala GST Act, 2017 and Telangana GST Act, 2017 and the rules made thereunder and further read with Section 20 of the IGST Act, 2017 and the rules made thereunder, as mentioned in para Para 5.3 to 5.18 supra of this notice, as they have retained the benefit of the said evasion of GST committed by Noticee No. 1 to Noticee No. 10. At the time of evasion of tax by Noticee No. 1 to Noticee No. 10, they were in charge of, and were responsible to, the companies (Noticee No. 1 to Noticee No. 10) for the conduct of business of the companies (Noticee No. 1 to Noticee No. 10). Thus, they were very well aware about the willful omissions and commissions of the acts of suppression of material facts which ultimately resulted in evasion of tax, in addition to suppression of their value of outward tax payable in respect of supplies of support services among distinct persons and in respect of supplies of services of Ocean freight and the wrong availment and subsequent utilisation of ITC on the strength of the invoices raised by Noticee No. 1 to Noticee No. 10 on supplies of support services among distinct persons during the period from October-2021 to April-2022, from the tax department resulting in tax (GST) evasion by Noticee No. 1 to Noticee No. 10. Thus, they have rendered themselves liable to

proceedings Section 137(1) and Section 137(2) of the CGST Act, 2017 and like provisions of the Maharashtra GST Act, 2017, Gujarat GST Act, 2017, Haryana GST Act, 2017, Tamilnadu GST Act, 2017, Andhra Pradesh GST Act, 2017, West Bengal GST Act, 2017, Punjab GST Act, 2017, Karnataka GST Act, 2017, Kerala GST Act, 2017 and Telangana GST Act, 2017 read with Section 20 of the IGST Act, 2017."

23. On a cumulative reading of the aforesaid paragraphs of the show cause notice, it is seen that the allegation against the petitioner is in his capacity as a Senior Tax Operations Manager cum Authorised Person of Maersk. He is called upon to show cause as to why penalty equivalent to the tax evaded by Maersk amounting to Rs.3731,00,38,326/- as set out in Para 5.19.1 of the show 28 March, 2024 WPL30198_2023 & ORS.DOC cause notice (supra) be not imposed upon him under Section 122(1A) of the CGST Act, 2017 and the corresponding State Acts, on the allegation that as Maersk (described as Noticee No. 1 to Noticee no. 10) had committed offences under Section 122(1)(i) inter alia as set out in the notice, and as to why, the petitioner should not be proceeded against "for indulging" into offences of the nature as prescribed under Section 137 of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017, for willful suppression of the facts resulting in evasion of GST by Mearsk. In such context, it is alleged that the petitioner has committed offences, of the nature as described under the provisions of Sections 122(1)(i) of the CGST Act, 2017, which led to the evasion of the GST by Maersk, for the reason that the invoices raised by Maersk on its supplies were not in accordance with the provisions of Section 31 of the CGST Act, 2017 read with Rule 47 of the CGST Rules, 2017 read with Section 13 of the CGST Act, 2017 and further read with Section 20 of the IGST Act, 2017 and the rules made thereunder. It is also alleged that the ITC availed and subsequently utilized on the strength of the invoices raised belatedly by Maersk were inadmissible in terms of the provisions of Section 13, Section 16(2), Section 16(4), Section 17(5)(1) and Section 31 of the CGST Act, 2017 and the rules made thereunder, read with Section 20 of the IGST Act, 2017, as detailed in the impugned show cause notice. It is also alleged that the invoices raised by Maersk in respect of the supplies of services of Ocean freight rendered to its 28 March, 2024 WPL30198_2023 & ORS.DOC clients culminated into short payment of tax @13% (18%-5%). It is hence alleged that as the invoices raised for such supplies were incorrect and the ITC availed and subsequently utilized was inadmissible, which was indicative of the fact that the petitioner (and other employees) aided and abetted in commission of the offences as described in Para 5.3 to Para 5.18 of the show cause notice, which rendered them liable to a penalty equivalent to the tax evaded by Maersk amounting to Rs.3731,00,38,326/ (Rs. 1561,03,97,298 + Rs.1561,03,97,298 + Rs.608,92,43,730/-) as set out in table (iv) in Para 6.1.2, table at Para 6.2.6 and table at Para 7.3.5 respectively, under the provisions of Section 122(1A) of the CGST Act, 2017 and the like provisions of the State GST laws as applicable. It is further alleged that the benefit of the said evasion of GST was retained by the noticees (which includes the petitioner). It is also alleged that at the time of evasion of tax by Maersk, the petitioner and the other employees were in charge of, and were responsible to Maersk for the conduct of the business of Maersk (Noticee No. 1 to Noticee No. 10). Thus, the petitioner and other employees were very well aware about the willful omission and commission in the act of suppression of material facts which ultimately resulted in evasion of tax, in addition to suppression of their value of outward tax payable in respect of supplies of support services among distinct persons, and in respect of supplies of services of Ocean freight and the wrong availment and subsequent utilisation of ITC, on the strength of the invoices raised by Maersk

on supplies 28 March, 2024 WPL30198_2023 & ORS.DOC of support services among distinct persons during the period from October- 2021 to April-2022, from the tax department resulting in tax (GST) evasion by Maersk. It is hence alleged that the petitioner and such other employees had rendered themselves liable to proceedings under Section 137(1) and Section 137(2) of the CGST Act, 2017 and the like provisions of the State laws. From such contents of the show cause notice, it is quite clear that entire basis for issuance of the show cause notice to the petitioner is on the ground, as to what was being alleged, in regard to the evasion of the GST by Maersk and allegedly payable by Maersk i.e. by notice nos. 1 to 10 companies.

24. On the above conspectus, the question before the Court is whether the invocation of the provisions of Section 122(1-A) of the CGST Act as also Section 137(1) and 137(2) would stand attracted in their applicability to the petitioner, so as to confer jurisdiction on respondent no. 3, to issue the impugned show cause notice against the petitioner, who is merely an employee of MLPL and a power of attorney of Maersk. Such issue according to the petitioner, goes to the root of the show cause notice.

25. To appreciate the contentions as urged on behalf of the petitioner, it would be necessary to note the relevant provisions namely Section 2(94) and Section 2(107) , Section 122(1-A) and Section 137 of the CGST Act. For convenience, these provisions are extracted hereunder :-

28 March, 2024 WPL30198_2023 & ORS.DOC "Section 2(94) ☐registered person means a person who is registered under section 25 but does not include a person having a Unique Identity Number;

Section 2(107) ☐taxable person means a person who is registered or liable to be registered under section 22 or section 24;

Section 122. Penalty for certain offences -

(1) Where a taxable person who--

(i) supplies any goods or services or both without issue of any invoice or issues an incorrect or false invoice with regard to any such supply;

(ii) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act or the rules made thereunder;

(iii) collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;

(iv) collects any tax in contravention of the provisions of this Act but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;

(v) fails to deduct the tax in accordance with the provisions of sub-section (1) of section 51, or deducts an amount which is less than the amount required to be deducted under the said sub-section, or where he fails to pay to the Government under sub-section (2) thereof, the amount deducted as tax;

(vi) fails to collect tax in accordance with the provisions of sub-section (1) of section 52, or collects an amount which is less than the amount required to be collected under the said sub-section or where he fails to pay to the Government the amount collected as tax under sub-section (3) of section 52;

(vii) takes or utilises input tax credit without actual receipt of goods or services or both either fully or partially, in contravention of the provisions of this Act or the rules made thereunder;

(viii) fraudulently obtains refund of tax under this Act;

(ix) takes or distributes input tax credit in contravention of section 20, or the rules made thereunder;

(x) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information or return with an intention to evade payment of tax due under this Act;

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(xi) is liable to be registered under this Act but fails to obtain registration;

(xii) furnishes any false information with regard to registration particulars, either at the time of applying for registration, or subsequently;

(xiii) obstructs or prevents any officer in discharge of his duties under this Act;

(xiv) transports any taxable goods without the cover of documents as may be specified in this behalf;

(xv) suppresses his turnover leading to evasion of tax under this Act; (xvi) fails to keep, maintain or retain books of account and other documents in accordance with the provisions of this Act or the rules made thereunder;

(xvii) fails to furnish information or documents called for by an officer in accordance with the provisions of this Act or the rules made thereunder or furnishes false information or documents during any proceedings under this Act;

(xviii) supplies, transports or stores any goods which he has reasons to believe are liable to confiscation under this Act;

(xix) issues any invoice or document by using the registration number of another registered person;

(xx) tampers with, or destroys any material evidence or document; (xxi) disposes off or tampers with any goods that have been detained, seized, or attached under this Act, shall be liable to pay a penalty of ten thousand rupees or an amount equivalent to the tax evaded or the tax not deducted under section 51 or short deducted or deducted but not paid to the Government or tax not collected under section 52 or short collected or collected but not paid to the Government or input tax credit availed of or passed on or distributed irregularly, or the refund claimed fraudulently, whichever is higher. (1-A) Any person who retains the benefit of a transaction covered under clauses (i), (ii), (vii) or clause (ix) of sub-section (1) and at whose instance such transaction is conducted, shall be liable to a penalty of an amount equivalent to the tax evaded or input tax credit availed of or passed on."

(emphasis supplied) "Section 137. Offences by companies -

(1) Where an offence committed by a person under this Act is a company, every person who, at the time the offence was committed was in 28 March, 2024 WPL30198_2023 & ORS.DOC charge of, and was responsible to, the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any negligence on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. (3) Where an offence under this Act has been committed by a taxable person being a partnership firm or a Limited Liability Partnership or a Hindu Undivided Family or a trust, the partner or karta or managing trustee shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly and the provisions of sub-section (2) shall, mutatis mutandis, apply to such persons. (4) Nothing contained in this section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence. *Explanation*.--For the purposes of this section,--

(i) "company" means a body corporate and includes a firm or other association of individuals; and

(ii) "director", in relation to a firm, means a partner in the firm.

This clause provides that if the person who committed an offence is a company, the person who was in charge and responsible for the conduct of business of the company shall be deemed to be guilty of the offence and punished accordingly."

(emphasis supplied)

26. A plain reading of section 122 clearly implies that it provides for levy of penalty for "certain offences" by taxable person. Such taxable person would render himself liable for a penalty for acts provided in clauses (i) to (xxi) of sub-section (1). Insofar as sub-section (1-A) of Section 122 is concerned, it provides that any person (who would necessarily be a taxable person), retains the benefit of the transactions covered under clauses (i), (ii), (vii) or clause (ix) 28 March, 2024 WPL30198_2023 & ORS.DOC of sub-section (1), and at whose instance, such transaction is conducted, "shall be liable to a penalty of an amount equal to the tax evaded or input tax credit availed of or passed on". This necessarily implies that sub-section (1-A) applies to a taxable person, as it specifically speaks about the applicability of the provisions of clauses (i), (ii), (vii) or clause (ix) of sub-section (1), with a further emphasis added by the words as underscored by us. This clearly depicts the intention of the legislature that a person who would fall within the purview of sub-section(1-A) of Section 122 is necessarily a taxable person as defined under section 2(107) of the CGST Act read with the provisions of section 2(94) of the CGST Act and a person who retains the benefits of transactions covered under clauses (i), (ii), (vii) or clause (ix) of sub-section (1) of Section 122.

27. Further, as noted above, Section 122(1-A) also cannot be attracted qua the person, in a situation when any person does not retain the benefit of a transaction covered under clauses (i), (ii), (vii) or clause (ix) of sub-section (1) and/or it is applicable at whose instance such transactions are conducted, could be the only person, who shall be liable to a penalty of an amount equivalent to the tax evaded or input tax credit, wrongly availed of or passed on. The relevant provisions as discussed hereinabove would show that such person can only be a taxable person as defined under Section 2(107) of the CGST Act read with the provisions of section 2(94) of the CGST Act, who would be in a legal 28 March, 2024 WPL30198_2023 & ORS.DOC position, to retain the benefit of tax on the transaction covered under clauses

(i), (ii), (vii) or clause (ix) of sub-section (1), and at whose instance, such transaction is conducted. In the absence of these basic elements being present, any show cause notice of the nature as issued, would be rendered illegal, for want of jurisdiction as also would stand vitiated by patent non application of mind.

28. If this is the plain meaning and consequence of the provisions of section 122 (1A), then necessarily the provision would manifest that person like the petitioner, who is a mere employee of MLIPL which is although a group company of Maersk, cannot fall within the purview of the said provision, as the petitioner cannot be a 'taxable' or a 'registered person' within the meaning and purview of the CGST Act so as to retain such benefits as the provision ordains. Hence, there was no question of respondent no. 3 invoking section 122(1-A) against the petitioner. Thus, the designated officer (respondent no.3) invoking the said provision against the petitioner is an act wholly without jurisdiction, so as to issue the show cause notice. A provision, which ex-facie is inapplicable to the petitioner who is an individual, has been invoked and applied in issuing the impugned show cause notice.

29. It is, hence, difficult to accept the case of the revenue that the petitioner as an employee of MLIPL was in any legal position under the CGST Act, who 28 March, 2024 WPL30198_2023 & ORS.DOC could retain the benefit of a transaction, which would be covered under the said clauses of sub-section (1) as sub-section (1-A) of Section 122 would provide. At the cost of this imagination which would be too far-fetched, even assuming that the respondent is correct in its contention as raised in the show cause notice that the said provisions are applicable to an individual like the petitioner (when they are not), there is no material that it is at the instance of petitioner, transactions are conducted, so as to make the petitioner liable for such a penalty, that too of an amount equivalent to the tax alleged to be evaded or ITC availed or passed on. Thus, there is no material to support that any of the ingredients as specified in sub-section (1-A) of Section 122 would stand attracted so as to confer jurisdiction on respondent no. 3 to adjudicate any allegations/charges as made under sub-section (1-A) of Section 122. This is abundantly clear from the bare contents of paragraphs 20 and 5.19.1 of the show cause notice as noted by us hereinabove.

30. Similar is the position insofar as the applicability of Section 137 of CGST Act is concerned. Section 137 concerns " Offences by Companies". Sub- section (1) thereof would provide that when an offence committed by a person under the CGST Act is a company, every person who, at the time of the offence being committed, was in charge of and was responsible, to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against 28 March, 2024 WPL30198_2023 & ORS.DOC and punished accordingly. As to how Section 137 can form part of any invocation against the petitioner that too along with the provision of Section 122(1-A), qua the petitioner cannot be comprehended, this more particularly for the reason that the show cause notice is issued under section 74 of the CGST Act read with corresponding provisions of Section 74(2) of the State laws (MGST Act). Section 74 falls under Chapter XV of the CGST Act which pertains to "Demands and Recovery". Section 74 provides for " Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any willful misstatement or suppression of facts". Certainly Section 74 is not a penal provision, whereas Section 137 falls under Chapter XIX which provides for 'offences and penalties'.

31. Thus, as to how such penal provision in Section 137 could be foisted against the petitioner, when the show cause notice is itself a demand cum show cause notice, is also quite intriguing, which in our opinion, also touches the very jurisdiction in issuance of such notice. This aspect is not explained by the respondents much less satisfactorily. In any event, even assuming that Section 137 could be invoked or is made applicable against the petitioner, then certainly proceedings under section 137 cannot be the proceedings which could be made answerable in a demand cum show cause notice issued under section 74, as such proceedings would be in the nature of a prosecution 28 March, 2024 WPL30198_2023 & ORS.DOC necessarily involving the applicability of Section 134. There cannot be such intermixing of jurisdictions, and that too in foisting a monetary liability as demanded from the petitioner, which on the revenue's own showing in the show cause notice is alleged to be the liability of the companies (noticee Nos.1 to 10) who are the principal noticee's.

32. For the aforesaid reasons, it is clear from the relevant contents of the show cause notice that the basic jurisdictional requirements / ingredients, are not attracted for issuance of the show cause

notice under Section 74 of the CGST Act so as to inter alia invoke Section 122(1-A) and Section 137 against the petitioner. Even otherwise, it is ill-conceivable to read and recognize into the provisions of Section 122 and Section 137, of the CGST Act any principle of vicarious liability being attracted. There could be none. Thus, Respondent no. 3 clearly lacks jurisdiction to adjudicate the show cause notice in its applicability to the petitioner. Thus qua the petitioner, the impugned show cause notice is rendered bad and illegal, deserving it to be quashed and set aside.

33. The foregoing discussion would also lead us to conclude that it is highly unconscionable and disproportionate for the concerned officer of the Revenue to demand from the petitioner an amount of Rs.3731 crores, which in fact is clearly alleged to be the liability of Maersk, as the contents of the show cause notice itself would demonstrate. The petitioner would not be incorrect in 28 March, 2024 WPL30198_2023 & ORS.DOC contending that the purpose of issuing the show cause notice to the petitioner who is merely an employee, was designed to threaten and pressurize the petitioner.

34. It is clarified that the observations as made by us in this judgment are confined and are applicable in the context of the show cause notice issued to the petitioner and are no expression of any opinion, on the applicability of the show cause notice to any other noticees.

35. The petition accordingly succeeds. It is allowed in terms of prayer clause

(a). Rule is accordingly made absolute in such terms. No Costs. Writ Petition (L) Nos.30199 of 2023, 30200 of 2023 and 30241 of 2023

36. These petitions stand covered by our aforesaid judgment delivered on the first petition. In view of the discussion and reasons in our judgment on the first petition, these writ petitions would also required to be allowed. They are accordingly allowed in terms of prayer clause (a) of each of these petitions. Rule is made absolute in such terms. No costs.

(FIRDOSH P. POONIWALLA, J.)

(G. S. KULKAR)

Signed by: Vidya S. Amin

Designation: PS To Honourable Judge

Date: 28/03/2024 15:54:00

28 March, 2024