

**%** **Date of Decision: 3<sup>rd</sup> March, 2011**

## VERSUS

**Writ Petition (Civil) No. 12228/2009**

## VERSUS

**Writ Petition (Civil) No. 7773/2010**

## VERSUS

**Writ Petition (Civil) No. 7774/2010**

## VERSUS

UNION OF INDIA & ANR. ....Respondents  
Through Mr. Mukesh Anand and

Mr. Satish Kumar for respondent. 2.

**CORAM:**

**HON'BLE THE CHIEF JUSTICE**

**HON'BLE MR. JUSTICE SANJIV KHANNA**

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ? Yes.
3. Whether the judgment should be reported in the Digest ? Yes.

**Sanjiv Khanna, J.**

These four writ petitions have been filed by Interocean Group of Companies/concerns and as common issues/contentions have been raised, they are being disposed of by this common order. For the purpose of convenience, Writ Petition (Civil) No. 9394/2009 filed by Interocean Shipping (I) Pvt. Ltd., is being treated as the lead case.

2. The aforesaid W.P.(C) No. 9394/2009 was filed on 27<sup>th</sup> May, 2009. Vide order dated 14<sup>th</sup> July, 2009, notice to show cause was issued in the writ petition and on the interim application, it was directed that the proceedings on the basis of impugned show cause notice could continue but the final order shall not be given effect to without leave of the Court. The said interim order has continued till date. The aforesaid writ petition was amended after the assessment order dated 26<sup>th</sup> October, 2010 was passed by the Commissioner of Service Tax, Delhi and in

the amended writ petition the assessment order has been made subject matter of challenge. It may, however, be noted that in Writ Petition (Civil) Nos. 7773/10 and 7774/10, only show cause notices have been issued but no assessment order has been passed.

3. The petitioner companies/concerns are engaged in ship broking and other activities. It is submitted that as a ship broker the petitioners assists, guides and supports the ship owner and the ship charterer to negotiate a deal and conclude a fixture. Brokerage is paid by the ship owner and sometimes through a charterer. The petitioners also undertake distinct activities like ship agency, services to clients for loading/unloading of cargo, act as port agents, facilitate and procure berth hiring, etc. The petitioners are registered with the Service Tax Department under the category of 'Steamer Agent Service' and have been filing returns and paying service tax. 'Steamer Agent Service' was brought into the service tax net by the Finance Act, 1997 with amendment and enactment in form of Clause (i) to Section 65(105) read with Section 65(100). The aforesaid Sections have to be read along with Sections 65(96) and 65(97). The said clauses read as under:-

**“Section 65(105)(i)\_:** Taxable service means any service provided or to be provided, to a shipping line, by a steamer agent in relation to a ship's husbandry or dispatch or any administrative work related thereto

as well as the booking, advertising or canvassing of cargo, including container feeder services.”

**“Section 65(100):** Steamer agent means any person who undertakes, either directly or indirectly, --

(i) to perform any service in connection with the ship’s husbandry or dispatch including the rendering of administrative work related thereto; or

(ii) to book, advertise or canvass for cargo for or on behalf of a shipping line; or

(iii) to provide container feeder services for or on behalf of a shipping line.”

**“Section 65(96) :** Ship means a sea-going vessel and includes a sailing vessel”.

**“Section 65(97) :** Shipping line means any person who owns or charters a ship and includes an enterprise which operates or manages the business of shipping.”

4. We are not concerned with the said clauses and the liability of the petitioners to service tax under the aforesaid sections. It is accepted by the petitioners that they are liable to pay service tax on the services mentioned therein.

5. The dispute raised pertains to whether the petitioners are covered and liable to pay service tax under the head ‘Business Auxiliary Services’. The said services became taxable by the Finance Act, 2003, whereby sub-section (zzb) to Section 65(105) was enacted. The said

clause has to be read with Section 65(19). The aforesaid provisions at the time of enactment were as under:-

**“Section 65(105)(zzb):** any service provided, to a client, by a commercial concern in relation to business auxiliary service.”

**“Section 65(19) :** “business auxiliary service means any service in relation to, --

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) promotion or marketing of service provided by the client; or

(iii) any customer care service provided on behalf of the client; or

(iv) any service incidental or auxiliary support service such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer, public relation services,

and includes services as a commission agent, but does not include any information technology service.”

6. The Finance (No. 2) Act, 2004, w.e.f. 10<sup>th</sup> September, 2004, expanded the scope of ‘Business Auxiliary Services’ by including activities relating to procurement of inputs, processing of good (not amounting to manufacture), or provisions of services on behalf of clients by including them in the definition of ‘Business Auxiliary

Services’. The Finance Act, 2005, w.e.f. 16<sup>th</sup> June, 2005, made further amendments and expanded the scope of ‘Business Auxiliary Service’ by including commission agents. Presently Sections 65(105)(zzb) and 65(19) read as under:-

**“Section 65(105)(zzb) :** Taxable services means any services provided or to be provided, to a client, by any person in relation to business auxiliary service.”

**“Section 65(19) :** business auxiliary service means any service in relation to ,--

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) promotion or marketing of service provided by the client; or

Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, “service in relation to promotion or marketing of service provided by the client” includes any service provided in relation to promotion or marketing of games of chance, organized, conducted or promoted by the client, in whatever form or by whatever name called, whether or not conducted online, including lottery, lotto, bingo;

(iii) any customer care service provided on behalf of the client; or

(iv) procurement of goods or services, which are inputs for the client; or

Explanation —For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, “inputs” means all goods or services intended for use by the client.

(v) Production or processing of goods for, or on behalf of the client; or

(vi) Provision of service on behalf of the client; or

(vii) A service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance or accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services management or supervision,

and includes services as a commission agent, but does not include any information technology service and any activity that amounts to “manufacture” within the meaning of clause (f) of section 2 of the Central Excise Act, 1944”

Explanation.—For the removal of doubts, it is hereby declared that for the purpose of this clause.—

(a) “commission agent” means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person, who, while acting on behalf of another person—

(i) deals with goods or services or documents of title to such goods or services; or

(ii) Collects payment of sale price of such goods or services; or

(iii) Guarantees for collection or payment for such goods or services; or

(iv) Undertakes any activities relation to such sale or purchase of such goods or services.”

7. The question raised by the petitioners is whether they were/are providing ‘business auxiliary services’ as defined in the aforesaid

clauses. It is their contention that they were/are not acting as commission agents. Their activities and earnings cannot be categorized as activities and earnings of a 'commission agent'. It is submitted that the term 'commission agent' was defined by the Finance Act, 2005 w.e.f. 16<sup>th</sup> June, 2005 and prior to the said date, the definition as per Section 2(aaa) of the Central Excise Act, 1944 was applicable. Another contention in the alternative, raised by the petitioners is that they were/are providing services by way of export. In this connection, it may be noted that Export of Service Rules, 2005, came into force w.e.f. 15<sup>th</sup> March, 2005. These rules have also been amended from time to time and criteria/conditions have been specified for determination whether an assessee is engaged in export of taxable services.

8. We have examined the contentions raised by the petitioners in the writ petitions, their reply to show cause notice and the defence of the respondents, including the Commissioner of Service Tax, which is reflected in their counter affidavit as well as the assessment order which has been passed. A perusal of the reply and the assessment order shows that the primary and core issue raised was/is with regard to the actual nature and character of the activity undertaken by the petitioners. The contention of the petitioners is that they do not act as an agent of any party i.e. ship owner or ship charterer. This necessarily

requires a factual examination of the nature of activities undertaken by the petitioners generally or in a particular case. On the basis of the factual finding it has to be decided and determined whether generally or a particular transaction or activity can be classified as a 'business auxiliary service' activity as per the provisions of the Finance Act as amended from time to time. This of course, will require interpretation of the provisions of the Finance Act relating to taxability of 'business auxiliary service' but without first ascertaining and deciding the factual dispute about the nature of the activity, interpretation will be in vacuum. Some or many issues may remain unanswered. Thus, to fully resolve and decide all matters/issues appellate remedy under the statute is required to be resorted to. It may be noted here that as per the petitioners as well as the assessment order, ship brokerage activities have been classified into three categories, situations 1, 2 and 3. Situation 1 is where the ship owner and the ship charter both are located outside India and it has been held in the assessment order, that the payments received in foreign currency are not taxable. However, in situation 2 when either the ship owner or the ship charterer is located/based in India or in situation 3 when both of them are located in India have been held to be taxable, regardless of fact that the brokerage was received in foreign currency. We do not

think that it will be appropriate and proper for a writ court in the present case to examine and go into the factual aspects about the actual nature of activity provided and undertaken by the petitioners. No doubt, certain questions of law have been raised but first and foremost need and requirement is to have clarity on the facts as to the nature of the transactions and the scope of the activity undertaken by the petitioners on which they have earned brokerage. This may require examination of each transaction on case to case basis. This we feel should be undertaken before the appellate authority i.e. the Tribunal. The statutory appellate remedy should not be allowed to be by-passed/avoided in the present cases. The petitioners should invoke the said remedy and should not be allowed to circumvent the same.

9. It may be noted here that the petitioners have not challenged the constitutional validity of Section 65(105)(zzb) or 65(19) of the Finance Act as amended from time to time. The questions raised relate to interpretation of the said sections and not constitutional validity. Questions relating to interpretation of a section/provisions in tax matters do arise in several cases but generally the parties are not encouraged or permitted to avoid the statutory appellate remedy and seek recourse to Writ remedies or invoke power of judicial review. Article 226 of the Constitution confers wide powers in the matter of

issuing writs but the remedy is discretionary and High Courts can refuse to exercise writ jurisdiction if the aggrieved party has an adequate or suitable alternative remedy. The remedy however should not be a mirage, futile exercise or an appeal from “Caesar to Caesar’s wife”. Other exceptions carved out are “at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the fundamental rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged” (refer ***Whirpool Corpn. Vs. Registrar of Trade Marks*, (1998) 8 SCC 1**). This is not a Rule of Law but a self imposed limitation, a matter of policy. In ***U.P. State Spg. Co. Ltd. v. R.S. Pandey*, (2005) 8 SCC 264**, it has been explained :

“17. Where under a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess can be the grounds on which the writ petitions can be entertained. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute. It was noted by this Court in *L. Hirday Narain v. ITO* that if the High Court had entertained a petition despite availability of alternative remedy and heard the parties on merits it would be ordinarily unjustifiable for the High Court to dismiss the same on the ground of non-exhaustion of statutory remedies, unless the High Court finds that factual disputes are involved and it would not be desirable to deal with them in a writ petition.

**18.** At this juncture, it would be appropriate to take note of the few expressions in *R. v. Hillington, London Borough Council* which seem to bring out the position well. Lord Widgery, C.J. stated in this case: (All ER pp. 648f-649b)

“It has always been a principle that certiorari will go only where there is no other equally effective and convenient remedy.

\* \* \*

The statutory system of appeals is more effective and more convenient than application for certiorari and the principal reason why it may prove itself more convenient and more effective is that an appeal to (say) the Secretary of State can be disposed of at one hearing whether the issue between them is a matter of law or fact or policy or opinion or a combination of some or all of these ... whereas of course an appeal for certiorari is limited to cases where the issue is a matter of law and then only it is a matter of law appearing on the face of the order.

\* \* \*

An application for certiorari has however this advantage that it is speedier and cheaper than the other methods and in a proper case therefore it may well be right to allow it to be used ... I would, however, define a proper case as being one where the decision in question is liable to be upset as a matter of law because on its face it is clearly made without jurisdiction or in consequence of an error of law.”

**19.** After all the above discussion, the following observations of Roskill, L.J. in *Hanson v. Church Comms.* may not be welcomed but it should not be forgotten also:

“There are a number of shoals and very little safe water in the uncharted seas which divide the line between prerogative orders and statutory appeals, and I do not propose to plunge into those seas....”

**20.** In a catena of decisions it has been held that writ petition under Article 226 of the Constitution should not be entertained when the statutory remedy

is available under the Act, unless exceptional circumstances are made out.

**21.** In *U.P. State Bridge Corpn. Ltd. v. U.P. Rajya Setu Nigam S. Karamchari Sangh* it was held that when the dispute relates to enforcement of a right or obligation under the statute and specific remedy is, therefore, provided under the statute, the High Court should not deviate from the general view and interfere under Article 226 except when a very strong case is made out for making a departure. The person who insists upon such remedy can avail of the process as provided under the statute. To same effect are the decisions in.....”.

10. Recently in ***Raj Kumar Shivhare v. Directorate of Enforcement, (2010) 4 SCC 772***, it has been observed:

**“31.** When a statutory forum is created by law for redressal of grievance and that too in a fiscal statute, a writ petition should not be entertained ignoring the statutory dispensation. In this case the High Court is a statutory forum of appeal on a question of law. That should not be abdicated and given a go-by by a litigant for invoking the forum of judicial review of the High Court under writ jurisdiction. The High Court, with great respect, fell into a manifest error by not appreciating this aspect of the matter. It has however dismissed the writ petition on the ground of lack of territorial jurisdiction.

**32.** No reason could be assigned by the appellant’s counsel to demonstrate why the appellate jurisdiction of the High Court under Section 35 of FEMA does not provide an efficacious remedy. In fact there could hardly be any reason since the High Court itself is the appellate forum.

**33.** Reference may be made to the Constitution Bench decision of this Court rendered in *Thansingh Nathmal v. Supdt. of Taxes*, which was also a decision in a fiscal law. Commenting on the exercise of wide jurisdiction of the High Court under Article 226, subject to self-imposed limitation, this Court went on to explain:

“7. ... The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. *Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining*

*redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up.”* (emphasis added)

The decision in *Thansingh* is still holding the field.

**34.** Again in *Titaghur Paper Mills Co. Ltd. v. State of Orissa* in the background of taxation laws, a three-Judge Bench of this Court apart from reiterating the principle of exercise of writ jurisdiction with the time-honoured self imposed limitations, focused on another legal principle on right and remedies. In para 11, at AIR p. 607 of the Report, this Court laid down:

“11. ... It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in *Wolverhampton New Waterworks Co. v. Hawkesford* in the following passage:

‘... There are three classes of cases in which a liability may be established founded upon a statute. ... But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. ... The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.’

The rule laid down in this passage was approved by the House of Lords in *Neville v. London Express Newspapers Ltd.* and has been reaffirmed by the Privy Council in *Attorney General of Trinidad and Tobago v. Gordon Grant and Co. Ltd.* and *Secy. of State v. Mask and Co.* It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine.”

**35.** In this case, liability of the appellant is not created under any common law principle but, it is clearly a statutory liability and for which the statutory remedy is an appeal under Section 35 of FEMA,

subject to the limitations contained therein. A writ petition in the facts of this case is therefore clearly not maintainable.

**36.** Again another Constitution Bench of this Court in *Mafatlal Industries Ltd. v. Union of India* speaking through B.P. Jeevan Reddy, J. delivering the majority judgment, and dealing with a case of refund of Central excise duty held:

“77. ... So far as the jurisdiction of the High Court under Article 226—or for that matter, the jurisdiction of this Court under Article 32—is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment.”

In the concluding portion of the judgment it was further held: (*Mafatlal Industries Ltd. case*,)

“(x) ... The power under Article 226 is conceived to serve the ends of law and not to transgress them.”

**37.** In view of such consistent opinion of this Court over several decades we are constrained to hold that even if the High Court had territorial jurisdiction it should not have entertained a writ petition which impugns an order of the Tribunal when such an order on a question of law, is appealable before the High Court under Section 35 of FEMA.”

In the said case as an appeal under the relevant provisions was maintainable before the High Court and the Supreme Court has held that the Writ Petition should not have been entertained by applying the principle of alternative remedy.

11. Learned counsel for the petitioners, during the course of arguments, had submitted that the petitioners have challenged letter

F.No.332/41/2008-TRU dated 19<sup>th</sup> December, 2008 issued by Government of India, Ministry of Finance, Department of Revenue, Tax Research Unit. This letter was written pursuant to the letters of the petitioners dated 3<sup>rd</sup> November, 2008 and 21<sup>st</sup> November, 2008, seeking clarification on levability of service tax on ship broking activities. The letter expresses the view of the Ministry of Finance that activities undertaken by the ship brokers or commission agents are covered and are 'business auxiliary service' under Section 65(105)(zzb) of the Finance Act. The aforesaid letter, as noticed, was written in response to the queries raised by the petitioners, who had asked for the opinion and clarification from the Ministry of Finance, Department of Revenue. The aforesaid letter or clarification is not binding on the Tribunal. The Tribunal is not an 'authority' under the Finance Act and independently and uninfluenced by the said letter can go into the factual matrix and also interpret the relevant provisions. Tribunal will not be bound by the observations/opinion in the letter dated 19<sup>th</sup> December, 2008.

12. The third contention raised by the petitioner is in respect of brokerage received in foreign exchange/currency. It is stated that these should be treated as export of services within the meaning of Export of Service Rules, 2005 and, therefore, not subject to service tax. This plea

is raised in alternative. To decide the aforesaid question, we have to examine factual matrix of each case/transaction, classified as situation 2 in the assessment order. It has to be examined whether it would make any difference if the ship owner or ship charter was located outside India. Another question which may arise is with regard to the location of the ship and the journey/voyage which is a subject matter of the contract. This necessarily involves examination of the factual matrix. Sometimes, minor changes in facts may have and can result in substantially different legal consequences e.g. when the voyage/charter does not envisage the ship coming into Indian territorial waters. It may not be advisable to delve and interpret the provisions without being clear on the factual matrix on the basis of which the provisions have to be interpreted.

13. It is noticed that in large number of cases, parties rush to the High Court after a show cause notice is issued, why a particular activity is not covered and should not be subjected to service tax and a reply is required to be filed. Writ petition (C) No. 9394/2009 was filed by the petitioner when show cause notice was issued and even the assessment order had not been passed. Of course now the assessment order has been passed and after amendment, has been made subject matter of challenge. Similarly, in case of Writ Petition (Civil) No. 12228/2009, the

writ petition was filed immediately after the show cause notice was issued and the writ petition was amended after the assessment order was made. In Writ Petition (Civil) No. 7773/20010 and 7774/2010, assessment orders have not been passed and the petitioners have come to the Court on issuance of the show cause notice. It is well settled that the High Courts normally do not entertain writ petitions against issue of show cause notice. Entertaining such petitions is premature, unless vires of a provision is challenged or an exceptional case is made out and to prevent harassment, inference is required. It is not desirable and appropriate to stall enquiry or investigation, even if question of interpretation is involved and this directly or indirectly involves question of jurisdiction of the assessing officer. Resort to writ proceedings is disapproved, unless vires of a statutory enactment is involved or there is complete lack of inherent jurisdiction or the authorities ex- facie are acting malafidely with ulterior motives. In ***Union of India v. Hindalco Industries*, (2003) 5 SCC 194**, the Supreme Court has cautioned:

**“12.** There can be no doubt that in matters of taxation, it is inappropriate for the High Court to interfere in exercise of jurisdiction under Article 226 of the Constitution either at the stage of the show-cause notice or at the stage of assessment where alternative remedy by way of filing a reply or appeal, as the case may be, is available but these are the limitations imposed by the courts themselves in exercise of their jurisdiction and they are not matters of jurisdictional factors. Had the High Court declined to interfere at the

stage of show-cause notice, perhaps this Court would not have been inclined to entertain the special leave petition; when the High Court did exercise its jurisdiction, entertained the writ petition and decided the issue on merits, we do not think it appropriate to upset the impugned order of the High Court under Article 136 of the Constitution on a technical ground.”

14. In ***Special Director v. Mohd. Ghulam Ghouse***, (2004) 3 SCC 440, it

has been observed:

5. This Court in a large number of cases has deprecated the practice of the High Courts entertaining writ petitions questioning legality of the show-cause notices stalling enquiries as proposed and retarding investigative process to find actual facts with the participation and in the presence of the parties. Unless the High Court is satisfied that the show-cause notice was totally non est in the eye of the law for absolute want of jurisdiction of the authority to even investigate into facts, writ petitions should not be entertained for the mere asking and as a matter of routine, and the writ petitioner should invariably be directed to respond to the show-cause notice and take all stands highlighted in the writ petition. Whether the show-cause notice was founded on any legal premises, is a jurisdictional issue which can even be urged by the recipient of the notice and such issues also can be adjudicated by the authority issuing the very notice initially, before the aggrieved could approach the court. Further, when the court passes an interim order it should be careful to see that the statutory functionaries specially and specifically constituted for the purpose are not denuded of powers and authority to initially decide the matter and ensure that ultimate relief which may or may not be finally granted in the writ petition is not accorded to the writ petitioner even at the threshold by the interim protection granted.”

15. In another case, ***Union of India v. Kunisetty Satyanarayana***,

(2006) 12 SCC 28, the Supreme court has held:

“13. It is well settled by a series of decisions of this Court that ordinarily no writ lies against a charge-sheet or show-cause notice vide *Executive Engineer, Bihar State Housing Board v. Ramesh Kumar Singh*, *Special Director v. Mohd. Ghulam Ghouse*, *Ulagappa v. Divisional Commr., Mysore, State of U.P. v. Brahm Datt Sharma*, etc.

**14.** The reason why ordinarily a writ petition should not be entertained against a mere show-cause notice or charge-sheet is that at that stage the writ petition may be held to be premature. A mere charge-sheet or show-cause notice does not give rise to any cause of action, because it does not amount to an adverse order which affects the rights of any party unless the same has been issued by a person having no jurisdiction to do so. It is quite possible that after considering the reply to the show-cause notice or after holding an enquiry the authority concerned may drop the proceedings and/or hold that the charges are not established. It is well settled that a writ petition lies when some right of any party is infringed. A mere show-cause notice or charge-sheet does not infringe the right of anyone. It is only when a final order imposing some punishment or otherwise adversely affecting a party is passed, that the said party can be said to have any grievance.

**15.** Writ jurisdiction is discretionary jurisdiction and hence such discretion under Article 226 should not ordinarily be exercised by quashing a show-cause notice or charge-sheet.

**16.** No doubt, in some very rare and exceptional cases the High Court can quash a charge-sheet or show-cause notice if it is found to be wholly without jurisdiction or for some other reason if it is wholly illegal. However, ordinarily the High Court should not interfere in such a matter.”

16. In the present cases, as noticed above, there are factual disputes which have to be thrashed out in addition to interpretation of provisions. We do not see any reason why we should entertain Writ Petition (C) Nos. 7773/2010 & 7774/2010 against show cause notice. It may be noted that in these two writ petitions no circular or letter issued by the Ministry of Finance, Department of Revenue, has been challenged or questioned. For the sake of convenience, the prayer clause in Writ Petition (Civil) No. 7773/2010 is reproduced :-

“A) issue a Writ of certiorari/mandamus or any other appropriate Writ/order/direction by quashing the

impugned show cause notice dated 11.10.2010 issued by the Respondent No. 3 (**Annexure P-1**);

B) tagged the present petition with the earlier Writ Petition (C) No. 9394/2009 filed by the present Petitioner, to consider the prayer made therein to declare that the ship broking activity of the Petitioner is not liable to tax under Chapter V of Finance Act, 1994;

C) issue such other writ/order/direction and further orders as the Hon'ble Court may deem just and proper in the facts and circumstances of the case."

17. As noticed above, while issuing notice in the Writ Petition (Civil) No. 9394/2009, it was directed that the assessment order will not be given effect to without leave of the court. Similar interim order has been passed in the Writ Petition (Civil) No. 12228/2009 and the Writ Petition (Civil) Nos. 7773/2010 and 7774/2010.

18. Petitioners in Writ Petition (Civil) Nos. 9394/2009 and 12228/2009 are required to file an appeal before the Appellate Tribunal. The appellants are given liberty to file appeal within a period of 30 days of receipt of copy of this order. In case the appeal is filed within the said period, the same will not be dismissed/rejected on the ground that they have been filed beyond the period of limitation. The Tribunal will expeditiously hear the appeals and preferably decide the issues involved within a period of six months from the date of filing of the appeals. The interim order passed by this Court will continue till the

appeals filed by the petitioners are decided by the Tribunal. In case the petitioners delay the proceedings or ask for adjournments, learned Tribunal will be entitled to modify or even vacate the stay order.

19. In W.P.(C) No. 7773/2010 and 7774/2010, the interim order is modified to the extent that the assessment order, if passed, will not be given effect to for a period of one month from the date it is communicated to the petitioners to enable them to approach the Tribunal. It will be thereafter open to the Tribunal to decide the application for stay. At that stage, the Tribunal will take into account decision, if any, in the case of Interocean Shipping (I) Pvt. Ltd. and Interocean shipping Company and in case the appeals filed by them have not been decided, the application for stay will be decided keeping in mind the stay granted in the connected matters.

20. We have continued with the interim orders as WP(C) Nos. 9394/2009 and 12228/2009 have remained pending in this court for more than 18 months and we do accept and recognize that the questions raised require consideration and examination. Service tax has been recently imposed and in the present cases, there is a dispute about the interpretation of provisions relating to 'business auxiliary services' as well as the factual matrix. Though letter dated 19<sup>th</sup> December, 2008 was written by the Ministry of Finance, Department of

Revenue, after the petitioners had asked for their intervention, it is the case of the petitioners that the opinion expressed in the letter foreclosed their defence and has prevented independent and fair application of mind by the adjudicating authority. The question with regard to interpretation of Export of Service Rules, 2005 is also involved.

21. The writ petitions are accordingly disposed of. There will be no orders as to costs. It is clarified that this court has not expressed any opinion on merits of the case of either side. Any observation on merits made above will not be binding on the Tribunal.

**(SANJIV KHANNA)**  
**JUDGE**

**(DIPAK MISRA)**  
**CHIEF JUSTICE**

**MARCH 3, 2011**  
**KKB**