

GAHC010088102024



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WRIT PETITION [C] NO. 2364/2024

Ashika Business Private Limited having registered officer at Trinity, 226/1, A.J.C. Bose Road, 7th Floor, Kolkata, West Bengal : 700020 and principal place of business in Assam at O.N.G.C. Road, Village – Mundamala, P.O. & P.S. – Patherkandi, District – Karimganj, Assam, Pin – 788724.

.....Petitioner

-VERSUS-

1. Union of India, Represented by the Secretary, Ministry of Finance, Department of Revenue, having its office North Block, New Delhi, PIN – 110001;
2. The Principal Commissioner, Central GST & Central Excise Commissionerate, GST Bhawan, Kedar Road, Machkowa, Guwahati, Assam – 781001;
3. The Assistant Commissioner of Central GST & Central Excise, Silchar Audit Circle, [Shillong Audit Commissionerate], having office at 1st Floor, Surendra Bhawan, Chowringhee, Ambicapatty, Silchar, Assam – 78804;
4. The Assistant Commissioner of Central GST & Central Excise, Silchar Audit Circle, [under Shillong Audit

Commissionerate], Revenue Building, Circuit House Road,
Silchar, District – Cachar, Assam, Pin - 788001.

.....Respondents

Advocates :

Petitioner : Ms. S. Mukherjee, Advocate
: Mr. S.S. Barooah, Advocate.

Respondent nos. 2, 3 & 4 : Mr. S.C. Keyal, Standing Counsel, CGST
Date of Hearing, Judgment & Order : 09.05.2024

BEFORE
HON'BLE MR. JUSTICE MANISH CHOUDHURY
JUDGMENT & ORDER

The instant writ petition seeking to invoke the extra-ordinary and discretionary jurisdiction of this Court under Article 226 of the Constitution of India is preferred to assail a Demand-cum-Show Cause Notice bearing no. GADT/CnG/ADT/GST/6758/2021-Gr-22-CGST-SLCR ADT CIR-ADT SHILLONG/308 [‘Demand-cum-Show Cause Notice’, for short] dated 22.09.2023 issued under sub-section [1] of Section 73 of the Central Goods and Services Tax Act, 2017 [hereinafter referred to as ‘the CGST Act, 2017’, for short] and an Order-in-Original bearing no. 15/GST/AC/SIL/2023-24 [‘Order-in-Original’, for short] dated 14.12.2023 passed under sub-section [9] of Section 73 of the CGST Act, 2017 by the Assistant Commissioner, Central [Goods and Service Tax] & Central Excise Division, Silchar as the Adjudicating Authority.

2. The writ petitioner herein is a private limited company incorporated under the Companies Act, 1956 and it carries on the business *inter alia* of service provider. It has its registered office at Kolkata, West Bengal. With the enactments of the CGST Act, 2017 and the Assam Goods and Services Act, 2017 [‘the AGST Act, 2017’] and their coming into effect w.e.f. 01.07.2017, the petitioner company applied for registration under the said Acts and has been granted registration vide GSTIN 18AAECA7729F1ZL on 01.08.2017. The petitioner company is assessed under the office of the respondent no. 2, that is, the Principal Commissioner, Central GST & Central Excise Commissioner, GST Bhawan, Kedar Road, Machkowa, Guwahati, Pin - 781001, Assam. The petitioner company has asserted that it has been duly complying with all statutory requirements under the CGST Act, 2017/AGST Act, 2017 by way of filing its Statements of Outward Supply in GSTR – 1 and Monthly Returns in GSTR-3B till this date.

3. Section 65 of Chapter XIII of the CGST Act, 2017 has a provision for Audit by the tax authorities. As per sub-section [1] of Section 65 of the CGST Act, 2017, the Commissioner or any officer authorised by him, by way of a general or a specific order, may undertake audit of any registered person for such period, at such frequency and in such manner as may be prescribed. Sub-rule [2] of Rule 101 of the Central Goods and Services Tax Rules, 2017 [hereinafter referred to as ‘the CGST Rules, 2017’, for short] has provided that where it is decided to undertake audit of a registered person in accordance with the provisions of Section 65, the proper officer shall issue a notice in FORM GST ADT-01 in accordance with the provisions of sub-section [3] of Section 65. The proper officer, as per sub-rule [4] of Rule 101, is to inform the registered person

of the discrepancies noticed, if any, as observed in the audit and the said person may file his reply and the proper officer shall finalise the findings of the audit after due consideration of the reply furnished.

4. After conducting an audit of the books of accounts and records of the petitioner company for the period from July, 2017 to March, 2019 to the extent available, the discrepancies observed in the course of audit was informed to the petitioner company vide its Letter on the subject – 'Audit Observations', dated 30.11.2021. After issuance of the Letter dated 30.11.2021, the respondent no. 3 issued a Corrigendum to 'the Audit Observations' on 16.12.2021. In response to 'the Audit Observations' made by the respondent no. 3, the petitioner company submitted its Reply on 30.12.2021 wherein the petitioner accepted some of the liabilities as noted in 'the Audit Observations' and duly discharged the said liabilities voluntarily in Form GST DRC-03.

5. Sub-section [6] of Section 65 requires that on conclusion of audit, the proper officer shall, within the stipulated period, inform the registered person, whose records are audited, about the findings, his rights and obligations and the reasons for such findings. As per sub-rule [5] of Rule 101 of the CGST Rules, 2017, on conclusion of the audit, the proper officer shall inform the findings of audit to the registered person in accordance with the provisions of sub-section [6] of Section 65 in FORM GST ADT-02. In the case in hand, the findings of the Audit in FORM GST ADT-02 was served upon the petitioner company on 01.09.2022.

6. As per sub-Section [7] of Section 65 of the CGST Act, 2017, where the

Audit conducted under sub-section [1] of Section 65 results in detection of tax not paid or short paid or erroneously refunded, or input tax credit wrongly availed or utilised, the proper officer may initiate action under Section 73 or Section 74 of the CGST Act, 2017.

7. After issuance of the FORM GST ADT-02 on 01.09.2022, the Demand-cum-Show Cause Notice under sub-Section [1] of Section 73 of the CGST Act, 2017 stood issued to the petitioner company to show cause within 30 [thirty] days as to why :-

[i] GST amounting to Rs.24,00,059/- [Rupees twenty four Lakh and fifty nine only] [IGST: Rs. 19,11,519/- + CGST: Rs. 2,44,270/- + AGST: Rs. 2,44,270/-] in respect of Audit Para-3 should not be demanded and recovered from them as provided under Section 73 [1] of the Central Goods and Services Tax Act, 2017 / Assam Goods and Services Tax Act, 2017 read with Section 20 of the Integrated Goods and Services Tax Act, 2017 for contravention of Sections 16 and 155 of the Central Goods and Services Tax Act, 2017 / Assam Goods and Services Tax Act, 2017 as made applicable to Integrated Goods and Services Tax Act, 2017 vide Section 20 of the Act ibid.

[ii] Interest on the said recoverable amount as at [i] above should not be demanded and recovered from them under Section 50 of the Central Goods and Services Tax Act, 2017 / Assam GST Act, 2017 read with the provisions of Section 20 of the Integrated Goods and Services Tax Act, 2017 and as provided under Section 73 of the Acts ibid;

[iii] Penalty on the said recoverable amount as at [i] above should not be imposed on them as provided under Section 73 of the Central Goods and Services Tax Act, 2017 / Assam GST Act, 2017, as made applicable to Integrated Goods and Services Tax Act, 2017 vide Section 20 of the Act ibid.

[iv] Penalty of Rs. 50,000/-[Rupees fifty thousand only] [CGST+AGST] under

Section 125 of the Central GST Act, 2017 / Assam GST Act, 2017 read with CBIC Circular No. 76/50/2018-GST dated 31.12.2018 should not be demanded and recovered from them for contravention of Section 39 [7] of the Central GST Act, 2017 / Assam GST Act, 2017 in respect of Audit Para-1.

[v] Penalty amounting to Rs. 10,000/- [CGST] should not be imposed on them in terms of Section 122[1][xvi] of the Central GST Act, 2017 in respect of Audit Para-5.

[vi] The penalty amounting to Rs.10,000/- [AGST] already paid by the Noticee, in this regard should not be confirmed and appropriated in terms of Section 122[1][xvi] of the Assam GST Act, 2017, in respect of Audit Para-5.

[vii] Penalty amounting to Rs. 10,000/- [CGST] should not be imposed on them in terms of Section 122[1][xvii] of the Central GST Act, 2017 in respect of Audit Para-6.

[viii]The penalty amounting to Rs.10,000/- [AGST] already paid by the Noticee, in this regard should not be confirmed and appropriated in terms of Section 122[1][xvii] of the Assam GST Act, 2017, in respect of Audit Para-6.

8. On receipt of the Demand-cum-Show Cause Notice, the petitioner company submitted its Reply to the Show Cause Notice on 04.12.2023. It was thereafter, the Order-in-Original came to be passed by the Adjudicating Authority on 14.12.2023. The Adjudicating Authority after discussion and recording its findings, had proceeded to pass the following order :-

[1] I confirm the demand of GST amounting to Rs. 24,00,059/- [Rupees Twenty four lakh and fifty nine only] [IGST: Rs. 19,11,519/- + CGST: Rs. 2,44,270/- + AGST: Rs. 2,44,270/-] in respect of Audit Para-3 under Section 73 [1] of the Central Goods and Services Tax Act, 2017 / Assam Goods and Services Tax Act, 2017 read with Section 20 of the Integrated Goods and Services Tax Act,

2017.

[2] I order that the said assessee should pay the due Interest on the said amount of Rs. 24,00,059/- [Rupees Twenty four Lakh and fifty nine only] under Section 50 of the Central Goods and Services Tax Act, 2017 / Assam GST Act, 2017 read with the provisions of Section 20 of the Integrated Goods and Services Tax Act, 2017 and as provided under Section 73 of the Acts *ibid*;

[3] I also impose a penalty of Rs. 2,40,006.00 [i.e. 10% of Rs. 24,00,059.00] as provided under Section 73 of the Central Goods and Services Tax Act, 2017 / Assam GST Act, 2017, as made applicable to Integrated Goods and Services Tax Act, 2017 *vide* Section 20 of the Act *ibid*.

[4] I also impose a penalty of Rs. 50,000/- [Rupees Fifty thousand only] [CGST+AGST] under Section 125 of the Central GST Act, 2017 / Assam GST Act, 2017 read with CBIC Circular No. 76/50/2018-GST dated 31.12.2018 in respect of Audit Para-1.

[5] I also impose a Penalty amounting to Rs. 10,000/- [CGST] in terms of Section 122[1][xvi] of the CGST Act, 2017 in respect of Audit Para-5.

[6] I also impose a Penalty amounting to Rs.10,000/- [AGST] in terms of Section 122[1][xvi] of the CGST Act, 2017 in respect of Audit Para-5. Since, the said assessee has already paid the amount, I order for appropriation of the said amount in terms of Section 122[1][xvi] of the Assam GST Act, 2017, in respect of Audit Para-5.

[7] I also impose a Penalty amounting to Rs. 10,000/- [CGST] in terms of Section 122[1] [xvii] of the CGST Act, 2017 in respect of Audit Para-6.

[8] I also impose a Penalty amounting to Rs.10,000/- [AGST] in terms of Section 122[1] [xvii] of the Assam GST Act, 2017, in respect of Audit Para-6. Since, the said assessee has already paid the amount, I order for appropriation of the said amount in terms of Section 122[1][xvii] of the

Assam GST Act, 2017, in respect of Audit Para-6.

9. The afore-mentioned Demand-cum-Show Cause Notice dated 22.09.2023 and Order-in-Original dated 14.12.2023 have been assailed in the instant writ petition.

10. I have heard Ms. S. Mukherjee, learned counsel through virtual mode, assisted by Mr. S.S. Barooah, learned counsel for the petitioner; and Mr. S.C. Keyal, learned Standing Counsel, CGST for the respondent nos. 2, 3 & 4.

11. Ms. Mukherjee, learned counsel for the petitioner has submitted that the entire proceedings right from the stage of issuance of the Demand-cum-Show Cause Notice till passing of the Order-in-Original on 14.12.2023 are vitiated in view of non-compliance of the statutory prescriptions contained in the CGST Act, 2017 and the CGST Rules, 2017. Specifically pointing out, Ms. Mukherjee has contended that the proceedings are in violation of the provisions contained in Rule 142 of the CGST Rules, 2017. Ms. Mukherjee has further drawn attention to Instruction no. 04/2023-GST dated 23.11.2023 to submit that neither the summary of the Demand-cum-Show Cause Notice issued under Section 73[1] nor the summary of the Order-in-Original issued under Section 73[9] of the CGST Act, 2017 had been uploaded on the portal in FORM GST DRC-01 and FORM GST DRC-07 respectively. In view of such violation of the statutory prescriptions, which are required to be scrupulously followed by the respondent authorities, neither the Demand-cum-Show Cause Notice dated 22.09.2023 nor the Order-in-Original dated 14.12.2023 is sustainable in law. The next limb of submission of Ms. Mukherjee is to the effect that the Demand-cum-Show Cause Notice was issued by one authority but the Order-in-Original has been passed

by another authority. Such procedure adopted by the respondent authorities are in clear violation of the principles of natural justice and as such, both the Demand-cum-Show Cause Notice dated 22.09.2023 and the Order-in-Original dated 14.12.2023 are not sustainable in law and the same are liable to be set aside and quashed. Ms. Mukherjee has further submitted that no personal hearing was afforded to the petitioner by the respondent authorities before passing the impugned Order-in-Original.

12. *Au contraire*, Mr. Keyal, learned Standing Counsel, CGST has submitted that the instant writ petition under Article 226 of the Constitution of India is neither maintainable nor entertainable, as there is a statutory remedy of appeal available to the petitioner under Section 107 of the CGST Act, 2017. All the grounds which are raised by the petitioner in the writ petition can be raised in a statutory appeal and as such, the instant writ petition is liable to be dismissed at the threshold. He has submitted that it has been held by a long line of decisions, aptly surveyed in *Commissioner of Income Tax and others vs. Chhabil Das Agarwal*, [2014] 1 SCC 603, that when an efficacious and alternative statutory remedy is available, a writ petition can be preferred only in exceptional situations. As regards the first limb of submission advanced on behalf of the petitioner, it is submitted by Mr. Keyal that the petitioner in its Reply to the Demand-cum-Show Cause Notice did not raise any point regarding non-uploading of the summary of the Demand-cum-Show Cause Notice on the portal. Admittedly, a physical copy of the Demand-cum-Show Cause Notice was duly served upon the petitioner-assessee. Thus, it is not open for the petitioner-assessee to raise such a ground in a writ petition. It is further submitted by him that even it is assumed that the summary of the Order-in-Original issued under

Section 73[9] was not uploaded electronically in the portal in FORM GST DRC-07, the same cannot be a ground to entertain the instant writ petition since the petitioner has not denied about receipt of the Order-in-Original dated 14.12.2023,. It is further submitted by him that a number of dates were fixed for personal hearing but the petitioner company failed to attend on the scheduled dates for personal hearing on four occasions. Since the petitioner company had chosen not to appear for personal hearing on those four dates, it is not open for the petitioner now to contend that the Demand-cum-Show Cause Notice was issued by one authority and the Order-in-Original has been passed by another authority.

13. I have duly considered the submissions of the learned counsel for the parties and have perused the materials available on record.

14. The events leading to the issuance of and the reasons behind issuance of the impugned Demand-cum-Show Cause Notice under sub-section [1] of Section 73 of the CGST Act, 2017 have already been outlined above. As per sub-Section [1] of Section 73 of the CGST Act, 2017, where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised for any reason, other than the reason of fraud or any wilful-misstatement or suppression of facts to evade tax, he shall serve a notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under Section 50 and a penalty

leviable under the provisions of the Act or the rules made thereunder.

15. In the case in hand, the Demand-cum-Show Cause Notice was issued on 22.09.2023 by one Subhra Mukherjee, Assistant Commissioner, Central Goods and Services Tax, Silchar Audit Circle, Shillong Audit Commissionerate. It is not the case of the petitioner that a copy of the Demand-cum-Show Cause Notice dated 22.09.2023 was not served upon the petitioner. On receipt of a copy of the Demand-cum-Show Cause Notice dated 22.09.2023, the petitioner company submitted its Reply to the Demand-cum-Show Cause Notice after a period of more than two months on 04.12.2023. Thereafter, the Order-in-Original was passed on 14.12.2023.

16. As the first ground of challenge of the petitioner is based on sub-rule [1] of Rule 142 of the CGST Rules, 2017, it is apposite to refer to sub-rule [1] and sub-rule [5] of Rule 142 of the CGST Rules, 2017. The same are referred herein below for ready reference :-

[1] The proper officer shall serve, along with the

[a] notice issued under Section 52 or Section 73 or Section 74 or Section 76 or Section 122 or Section 123 or Section 124 or Section 125 or Section 127 or Section 129 or Section 130, a summary thereof electronically in FORM GST DRC-01,

[b] statement under sub-Section [3] of Section 73 or sub-Section [3] of Section 74, a summary thereof electronically in FORM GST DRC-02, specifying therein the details of the amount payable.

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[5] A summary of the order issued under Section 52 or Section 62 or Section 63 or Section 64 or Section 73 or Section 74 or Section 75 or Section 76 or

Section 122 or Section 123 or Section 124 or Section 125 or Section 127 or Section 129 or Section 130 shall be uploaded electronically in FORM GST DRC-07, specifying therein the amount of tax, interest and penalty payable by the person chargeable with tax.

17. Instruction no. 04/2023-GST has been issued by the Central Board of Indirect Taxes and Customs [CBIC], Ministry of Finance, Government of India on the subject – ‘*Serving of the summary of notice in FORM GST DRC-01 and uploading of summary of order in FORM GST DRC-07 electronically on the portal by the proper officer - regarding*’. The said Instruction has *inter alia* been issued by the CBIC taking note of the provisions contained in Section 73 of the CGST Act, 2017 and the CBIC is of the view that non-issuance of the summary of notices / orders electronically on the portal could be in clear violation of the explicit provisions of the CGST Rules. The proper officers have been accordingly directed to ensure that summary of the notices and the summary of the orders issued under Section 73 of the CGST Act are uploaded electronically on the portal in FORM GST DRC-01 and FORM GST DRC-07 respectively. The relevant excerpts of Instruction no. 04/2023-GST are quoted herein below :-

4. *It is highlighted that non-issuance of the summary of such notices / orders electronically on the portal is in clear violation of the explicit provisions of CGST Rules. Besides, serving / uploading the summary of notices / orders electronically on the portal not only makes the said notices / orders available electronically to the taxpayers on the portal, but also helps in keeping a track of such proceedings and consequential action in respect of recovery, appeal etc, subsequent to issuance of such notices / orders. Accordingly, any deviation from this requirement under CGST Rules may adversely impact record keeping under GST. Further, such an action may also impact further proceedings of appeal and / or recovery*

to be done seamlessly on the portal.

5. *The proper officers are accordingly directed to ensure that summary of the notices issued under Section 52 or Section 73 or Section 74 or Section 122 or Section 123 or Section 124 or Section 125 or Section 127 or Section 129 or Section 130 of CGST Act are served, electronically on the portal in FORM GST DRC-01. Also, they should ensure that summary of the order issued under Section 52 or Section 62 or Section 63 or Section 64 or Section 73 or Section 74 or Section 75 or Section 76 or Section 122 or Section 123 or Section 124 or Section 125 or Section 127 or Section 129 or Section 130 of CGST Act is uploaded electronically on the portal in FORM GST DRC-07.*

18. Before dilating on the above ground urged by the writ petitioner, it is appropriate to deal on the issue about the situations when despite availability of an alternative and efficacious statutory remedy, a writ petition under Article 226 can be entertained. Chapter XVIII of the CGST Act, 2017 contains the provisions for appeal and revision. As per sub-section [1] of Section 107, any person aggrieved by any decision or order passed under the CGST Act, 2017 or the SGST Act, 2017 by an Adjudicating Authority may appeal to such Appellate Authority as may be prescribed within three months from the date on which the said decision or order is communicated to such person. The Order-in-Original in the present case has been issued on 14.12.2023 and indisputably it is an appealable order under sub-section [1] of Section 107 of the CGST Act, 2017. The petitioner company instead of preferring such an appeal has preferred the instant writ petition.

19. It is settled that availability of an alternative remedy does not always operate as a bar to the maintainability of a writ petition under Article 226 of the Constitution of India. Even if a writ petition is maintainable, the High Court in its

extra-ordinary and discretionary jurisdiction may not entertain a writ petition. The distinct concepts of 'maintainability' and 'entertainability' have been succinctly explained by the Hon'ble Supreme Court of India in *M/s Godrej Sara Lee Ltd. vs. The Excise and Taxation Officer-cum-Assessing Authority and others*, reported in [2023] 3 SCR 871. It has been observed that Article 226 of the Constitution of India does not, in terms, impose any limitation or restraint on the exercise of power to issue writs. Exercise of writ powers despite availability of a remedy under the very statute which has been invoked and has given rise to the action impugned in the writ petition ought not to be made in a routine manner, yet, the mere fact that the petitioner before the High Court, in a given case, has not pursued the alternative remedy available to him / it cannot be construed as a ground for its dismissal. It has been observed that the High Courts, bearing in mind the facts of each particular case, have a discretion whether to entertain a writ petition or not. One of the self-imposed restrictions on the exercise of power under Article 226 that has evolved through judicial precedents is that the High Courts should normally not entertain a writ petition, where an effective and efficacious alternative remedy is available. At the same time, it is required to be remembered that mere availability of an alternative remedy of appeal or revision, which the party invoking the jurisdiction of the High Court under Article 226 has not pursued, would not oust the jurisdiction of the High Court and render a writ petition 'not maintainable'. Availability of an alternative remedy does not operate as an absolute bar to the 'maintainability' of a writ petition. It has, thus, been observed that 'entertainability' and 'maintainability' of a writ petition are distinct concepts. While an objection to the 'maintainability' goes to the root of the matter, the question of 'entertainability' is entirely within the realm of discretion of the High Courts. Being otherwise

maintainable, it has been enunciated that dismissal of a writ petition by a High Court on the ground that the petitioner has not availed the alternative remedy, without examining the aspect whether an exceptional case has been made out for such entertainment, would not be proper.

20. Having regard to the distinct concepts of maintainability and entertainability, there is no doubt that the instant writ petition is maintainable under Article 226 of the Constitution of India. The issue herein is, thus, whether this writ petition should be entertained or not in the backdrop of the obtaining fact situation. After making a survey of a large number of precedents especially in revenue / tax matters, the Hon'ble Supreme Court of India in the case titled ***Commissioner of Income Tax and others vs. Chhabil Dass Agarwal***, reported in [2014] 1 SCC 603, has observed as under :-

11. *Before discussing the fact proposition, we would notice the principle of law as laid down by this Court. It is settled law that non-entertainment of petitions under writ jurisdiction by the High Court when an efficacious alternative remedy is available is a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion rather than a rule of law. Undoubtedly, it is within the discretion of the High Court to grant relief under Article 226 despite the existence of an alternative remedy. However, the High Court must not interfere if there is an adequate efficacious alternative remedy available to the petitioner and he has approached the High Court without availing the same unless he has made out an exceptional case warranting such interference or there exist sufficient grounds to invoke the extraordinary jurisdiction under Article 226 [See : State of U.P. vs. Mohammad Nooh, AIR 1958 SC 86; Titaghur Paper Mills Co. Ltd. vs. State of Orissa, [1983] 2 SCC 433; Harbanslal Sahnia vs. Indian Oil Corpn. Ltd., [2003] 2 SCC 107; State of H.P. vs. Gujarat Ambuja Cement Ltd., [2005] 6 SCC 499].*

12. *The Constitution Benches of this Court in K.S. Rashid and Sons vs. Income Tax Investigation Commission, AIR 1954 SC 207; Sangram Singh vs. Election Tribunal, Kotah, AIR 1955 SC 425; Union of India vs. T.R. Varma, AIR 1957 SC 882; State of U.P. vs. Mohd. Nooh, AIR 1958 SC 86; and K.S. Venkataraman and Co. [P] Ltd. vs. State of Madras, AIR 1966 SC 1089, have held that though Article 226 confers a very wide powers in the matter of issuing writs on the High Court, the remedy of writ absolutely discretionary in character. If the High Court is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere, it can refuse to exercise its jurisdiction. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of the principles of natural justice or the procedure required for decision has not been adopted. [See N.T. Veluswami Thevar vs. G. Raja Nainar, AIR 1959 SC 422; Municipal Council, Khurai vs. Kamal Kumar, [1965] 2 SCR 653; Siliguri Municipality vs. Amalendu Das, [1984] 2 SCC 436; S.T. Muthusami vs. K. Natarajan, [1988] 1 SCC 572; Rajasthan SRTC vs. Krishna Kant, [1995] 5 SCC 75; Kerala SEB vs. Kurien E. Kalathil, [2000] 6 SCC 293; A. Venkatasubbiah Naidu vs. S. Chellappan, [2000] 7 SCC 695; L.L. Sudhakar Reddy vs. State of A.P., [2001] 6 SCC 634; Shri Sant Sadguru Janardan Swami [Moingiri Maharaj] Sahakari Dugdha Utpadak Sanstha vs. State of Maharashtra, [2001] 8 SCC 509; Pratap Singh vs. State of Haryana, [2002] 7 SCC 484; and GKN Driveshafts [India] Ltd. vs. ITO, [2003] 1 SCC 72].*

13. *In Nivedita Sharma vs. Cellular Operators Assn. of India, reported in [2011] 14 SCC 337, this Court has held that where hierarchy of appeals is provided by the statute, the party must exhaust the statutory remedies before resorting to writ jurisdiction for relief :*

13. *In Titaghur Paper Mills Co. Ltd. v. State of Orissa, reported in [1983] 2 SCC 433 this Court observed : [SCC pp. 440-41, para 11]*

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.

14. *In Mafatlal Industries Ltd. v. Union of India*, reported in [1997] 5 SCC 536, B.P. Jeevan Reddy, J. [speaking for the majority of the larger Bench] observed: [SCC p. 607, para 77]

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. [See : *G. Veerappa Pillai vs. Raman & Raman Ltd.*, AIR 1952 SC 192; *CCE vs. Dunlop India Ltd.*, [1985] 1 SCC 260; *Ramendra Kishore Biswas vs. State of Tripura*, [1999] 1 SCC 472; *Shivgonda Anna Patil vs. State of Maharashtra*, [1999] 3 SCC 5; *C.A. Abraham vs. ITO*, [1961] 2 SCR 765; *Titaghur Paper Mills Co. Ltd. vs. State of Orissa*, [1983] 2 SCC 433; *Excise and Taxation Officer-cum-Assessing Authority vs. Gopi Nath and Sons*, 1992 Supp [2] SCC 312 ; *Whirlpool Corpn. vs. Registrar of Trade Marks*, [1998] 8 SCC 1; *Tin Plate Co. of India Ltd. vs. State of Bihar*, [1998] 8 SCC 272; *Sheela Devi vs. Jaspal Singh*, [1999] 1 SCC 209; and *Punjab National Bank vs. O.C. Krishnan*, [2001] 6 SCC 569].

14. *In Union of India vs. Guwahati Carbon Ltd.*, reported in [2012] 11 SCC 651, this Court has reiterated the aforesaid principle and observed: [SCC p. 653, para 8]

8. Before we discuss the correctness of the impugned order, we intend to remind ourselves the observations made by this Court in *Munshi Ram v. Municipal Committee, Chheharta*, reported in [1979] 3 SCC 83. In

the said decision, this Court was pleased to observe that: [SCC p. 88, para 23].

23. ..[when] a revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner, and all the other forums and modes of seeking [remedy] are excluded.

*15. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in **Thansingh Nathmal** case, **Titaghur Paper Mills** case and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.*

21. The factual scenario which has emerged from the contentions of the learned counsel for the parties are that the petitioner had duly received a copy of the Demand-cum-Show Cause Notice dated 22.09.2023 but the summary of the said Demand-cum-Show Cause Notice was not uploaded electronically on the portal in terms of the provisions contained in Rule 142[1][a] of the CGST Rules, 2017 in FORM GST DRC-01. Similarly, the petitioner company has received the copy of the Order-in-Original dated 14.12.2023 but the summary of

the Order-in-Original passed under Section 73[9] has not been uploaded on the portal in FORM GST DRC-07. The issue is whether such non-uploading of the forms, that is, FORM GST DRC-01 and FORM GST DRC-07 is sufficient enough to entertain the writ petition despite availability of the statutory remedy of appeal. It is pertinent to note that after receipt of the Demand-cum-Show Cause Notice dated 22.09.2023, the petitioner company took ample time of more than two months to submit its Reply to the Demand-cum-Show Cause Notice and it submitted such Reply finally on 04.12.2023. The petitioner company in its Reply did not make any whisper as regards non-compliance of the provisions of Rule 142[1][a] of the CGST Rules, 2017. In plain language, summary means a brief and clear statement mentioning the most important facts about something. A summary of the notice required to be uploaded electronically in FORM GST DRC-01 is nothing but a summary of the contents of the Demand-cum-Show Cause Notice issued under sub-section [1] of Section 73 of the CGST Act, 2017, meaning thereby, a summary of the Demand-cum-Show Cause Notice would not contain anything more than what are found mentioned in the Demand-cum-Show Cause Notice issued under Section 73[1] of the CGST Act, 2017.

22. On perusal of Instruction no. 40/2023-GST dated 23.11.2023, it is noticed that the same has been issued after it came to the notice of the CBIC that some of the field formations are serving the Show Cause Notices and the Orders passed *inter-alia* under Section 73, CGST Act, 2017 manually only and are not serving the summary of the notices and the summary of the Orders passed *inter-alia* under Section 73, CGST Act, 2017 electronically on the portal. In the considered view of this Court, by not whispering anything in its Reply to the Show Cause Notice, submitted on 04.12.2023, by the petitioner company, it

had, by implication, waived the requirement of uploading of the notice electronically on the portal. It is well settled in law that ordinarily, a mandatory provision of law requires strict compliance but there are situations / exceptions where even if a provision is mandatory, non-compliance would not result in nullification of the act. For example, if a certain requirement or condition is provided in a statute for the benefit or interest of a particular person, the same can be waived by him if no public interest is involved. The ultimate result would be valid even if the requirement or condition is not performed.

23. In this connection, it is also pertinent to refer to the provision contained in Section 169, CGST 2017, which have provided for service of notices or orders. Section 169, CST Act, 2017 reads as under :-

Section 169. Service of notice in certain circumstances.—

[1] Any decision, order, summons, notice or other communication under this Act or the rules made thereunder shall be served by any one of the following methods, namely:—

[a] by giving or tendering it directly or by a messenger including a courier to the addressee or the taxable person or to his manager or authorised representative or an advocate or a tax practitioner holding authority to appear in the proceedings on behalf of the taxable person or to a person regularly employed by him in connection with the business, or to any adult member of family residing with the taxable person; or

[b] by registered post or speed post or courier with acknowledgement due, to the person for whom it is intended or his authorised representative, if any, at his last known place of business or residence; or

[c] by sending a communication to his e-mail address provided at the time of registration or as amended from time to time; or

[d] by making it available on the common portal; or

[e] by publication in a newspaper circulating in the locality in which the taxable person or the person to whom it is issued is last known to have resided, carried on business or personally worked for gain; or

[f] if none of the modes aforesaid is practicable, by affixing it in some conspicuous place at his last known place of business or residence and if such mode is not practicable for any reason, then by affixing a copy thereof on the notice board of the office of the concerned officer or authority who or which passed such decision or order or issued such summons or notice.

24. The statutory prescriptions contained in the Statute, that is, the CGST Act, 2017 makes it evident that the notices or order passed under the provisions of Section 73, CGST Act, 2017 can be served upon the noticee/assessee under any of the modes prescribed therein and such notice or order shall be deemed to have been served on the date on which it is tendered or published. Service of the notice or the order, as the case may be, under Section 73, CGST Act, 2017, by giving or tendering it directly or by a messenger to the taxable person or the addressee, etc. in the manner, is a statutorily permissible mode of service. By making the notice or the order available on the common portal is another statutorily permissible mode of service.

25. In *Commissioner of Customs, Mumbai vs. Virgo Steels, Bombay and another*, reported in *[2002] 4 SCC 316*, a point was raised to the effect that the notice required to be issued under Section 28 [as it then stood] of the

Customs Act, 1962 was not issued to the respondent. It was contended that a notice under Section 28 of the Customs Act, 1962 was a condition precedent to invoke the jurisdiction of the officer concerned and in the absence of such notice proceedings initiated for the recovery of duty would be void. It was contended that the principle of waiver did not apply to a mandatory requirement of law. On the other hand, it was contended by the Department that the respondent company having expressly waived its right to receive the show cause notice as also personal hearing, could not be permitted to turn around and say that non-issuance of notice under Section 28 of the Customs Act, 1962 was fatal to the revenue. The three-Judge Bench in its Judgment has held that while non-issuance of notice under Section 28 of the Customs Act, 1962 may invalidate the procedure adopted by the proper officer under the Act, it would not take away the jurisdiction of the officer to initiate action for the purpose of recovery of the duty escaped. It has been held that Section 28 has only provided for the procedural aspect for recovery of duty. Hence, any irregularity committed by a proper officer in following the procedure laid down in Section 28 would not denude that officer of his jurisdiction to initiate action for recovery of escaped duty as the jurisdiction to initiate proceedings for recovery of escaped duty is traceable to statutory provision, other than Section 28. The question considered was can a mandatory requirement of a statute be waived by the party concerned. It has been held that even though a provision of law is mandatory in its operation if such provision is one which deals with the individual rights of the person concerned and is for his benefit, the said person can always waive such a right. It has been held that the mandatory requirement of issuance of notice under Section 28 of the Customs Act, 1962 is provided solely for the benefit of the individual concerned. Therefore, he can waive that

right. The duty is cast on the proper officer to issue notice to the person concerned of the proposed action to be taken. The notice is not in the nature of a public notice nor any person other than the person against whom the proceedings are initiated has any right for such a notice. Thus, this right of notice being personal to the person concerned, the same can be waived by that person.

26. The position of law, thus, is that a mandatory provision of law requires strict compliance. However, there are situations where non-compliance of a mandatory provision would not affect the final decision or would not affect the proceedings. The Demand-cum-Show Cause Notice and the Order-in-Original do not have public character as the Demand-cum-Show Cause Notice was meant solely for the petitioner-assessee to apprise him about the action proposed to be taken and the Order-in-Original is to make the petitioner-assessee aware about the decision arrived at the conclusion of the proceedings drawn up against him. Neither the Demand-cum-Show Cause Notice nor the Order-in-Original had/has any public character as it dealt/deals with the individual rights of the petitioner-assessee only. By not raising anything about non-uploading of the summary of the Demand-cum-Show Cause Notice on the common portal in its Reply to the Demand-cum-Show Cause Notice, the petitioner had clearly waived the right to urge about non-compliance as regards uploading on the common portal. The petitioner-assessee has not raised any ground on prejudice qua non-uploading of the summary of the Order-in-Original. The petitioner-assessee has already received the copy of the Order-in-Original. The power to frame rules is conferred by the Act. In the present case, the power to frame the CGST Rules, 2017 is conferred by the CGST Act, 2017. If a provision in the rules is

inconsistent with a provision of the parent statute, then such provision in the rules ordinarily, has to be read with the provision of the parent statute for the purpose of reconciling them, if there appears to be some kind of conflict. In case of any inconsistency, the rules must give way to the parent statute. In essence, it is not a case of no service of either of the Demand-cum-Show Cause Notice or of the Order-in-Original. It is also not a case of no service of either the Demand-cum-Show Cause Notice or of the Order-in-Original in terms of Section 169 of the CGST Act, 2017. It is only a case of non-uploading on the common portal in terms of Rule 142 of the CGST Rules, 2017. With no prejudice alleged/pleaded qua non-uploading of the summary of the Order-in-Original on the common portal and with compliance of the provision contained in Section 169 of the CGST Act, 2017 as regards service of the Order-in-Original upon the petitioner-assessee the ground urged regarding non-uploading of the summary of the Order-in-Original on the common portal, in the considered view of this Court, is not an exceptional situation to entertain the writ petition.

27. The next contention advanced on behalf of the petitioner is that the Demand-cum-Show Cause Notice dated 22.09.2023 was issued by one authority, that is, Subhra Mukherjee, Assistant Commissioner, Central Goods and Services Tax, Silchar Audit Circle, Shillong Audit Commissionerate and the Order-in-Original dated 14.12.2023 was passed by another authority, Alok Kumar Biswas, Assistant Commissioner, Central [Goods and Services Tax] & Central Excise, Silchar Division. On perusal of the Demand-cum-Show Cause Notice, it is found that the petitioner noticee was called upon to show cause specifically before the Assistant Commissioner, Central Goods and Services Tax, Silchar Division, Silchar within thirty days of the receipt of the notice. It is recorded in

the Order-in-Original that personal hearing in the case was fixed on 23.11.2023 and 28.11.2023 respectively. It is further recorded that the petitioner-assessee failed to attend on those scheduled dates for personal hearing. Another date for personal hearing was fixed on 04.12.2023 but it is recorded that on that date also, the petitioner-assessee did not attend personal hearing. Subsequently, a fresh date for personal hearing was given on 08.12.2023. The Adjudicating Authority in the Order-in-Original further recorded that the petitioner-assessee again abstained from attending the personal hearing on 08.12.2023 and had sent an e-mail letter dated 04.12.2023 on 07.12.2023, which in fact is the Reply to the Show Cause Notice.

28. The learned counsel for the petitioner has further contended that no such notice fixing dates of personal hearing was served upon the petitioner-assessee and the said fact has been vehemently disputed by the learned Standing Counsel, CGST. Conspicuously, it is not a pleaded case in the writ petition that the petitioner-assessee did not have any knowledge or notice about the dates of personal hearing. It is also not a pleaded case of the petitioner in this writ petition that the petitioner-assessee had asked for affording an opportunity of personal hearing after receipt of the Demand-cum-Show Cause Notice dated 22.09.2023. A ground not taken and pleaded in the writ petition is not to be raised in argument. Such claim and counter claim at best, gives rise to a dispute on the factual aspects which are not required to be decided in a writ proceeding, if its determination requires leading of and appreciation of evidence. As a statutory appeal is considered to be continuation of the original proceedings, determination of disputed questions of fact would fall within the province of the appellate authority, as the appellate authority has the

jurisdiction to decide both on the facts as well as in law.

29. In the absence of any such materials, the only conclusion which can be drawn is that the petitioner-assessee had failed to avail itself the opportunity of personal hearing and left the case to be decided by the Adjudicating Authority on the basis of the written Reply to the Show Cause Notice dated 04.12.2023. Thus, it is not a case which can be said to have fallen within the principle of law, '*one who hears must decide the case*'. Moreover, the Demand-cum-Show Cause Notice had specifically indicated to the petitioner-assessee before whom it was called upon to show cause. When in such situation, an Adjudicating Authority was required to adjudicate on the basis of the grounds mentioned in the Demand-cum-Show Cause Notice and the grounds urged in the written Reply to the Demand-cum-Show Cause Notice, the contention raised that one authority had issued the Demand-cum-Show Cause Notice and another authority had passed the Order-in-Original is not to be accepted, more so, when the Order-in-Original has addressed on the grounds raised in the Demand-cum-Show Cause Notice.

30. In view of the discussion made above and for the reasons assigned therein, this Court is of the unhesitant view that the petitioner has not been able to make out any exceptional case to interfere with the Demand-cum-Show Cause Notice dated 22.09.2023 and the Order-in-Original dated 14.12.2023 in the extra-ordinary and discretionary jurisdiction under Article 226 of the Constitution of India. In such view of the matter, this Court has found that the instant writ petition is not to be entertained. It is accordingly held.

31. It is, however, made clear that the observations made hereinabove are only for the purpose of examining whether the writ petition on the basis of the grounds urged/pleaded, is to be entertained or not. It is clarified that non-entertainment of the writ petition shall not preclude the writ petitioner to raise all contentions on facts and law before the statutory appellate authority and none of the observations made herein shall be construed to be observations on merits of the claims of the petitioner. If the petitioner prefers a statutory appeal under Section 107 of the CGST Act, 2017, the appellate authority shall take into consideration the factum of preferring the instant writ petition and the time period spent, while considering the issue of limitation.

JUDGE

Comparing Assistant