IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No. 21073 of 2021

M/s. Nagen Caterer, Santa Sahi, BuxiBuzar, Cuttack	...	***Petitioner***

Mr. Tushar Kanti Satapathy,
Advocate

-versus-

Central Board of Indirect Taxes & Customs and others	...	***Opposite Parties***

Mr. Choudhury Satyajit Mishra,
Senior Standing Counsel

CORAM:
JUSTICE JASWANT SINGH
JUSTICE M.S. RAMAN

ORDER

Order No. **15.03.2022**

1. *1.* This matter is taken up by virtual/physical mode.

2. Beseeching to issue writ of *certiorari* invoking Article 226 of the Constitution of India, the Petitioner has prayed to quash the Demand-*cum*-Show Cause Notice bearing No. C. No. IV(04)48/ S.Tax-Adjn/BBSR/2021/7207A, dated 22.04.2021 issued by the Additional Commissioner GST & Central Excise, Bhubaneswar Commissionerate (hereinafter be referred to as "Adjudicating Authority") under Sections 73, 75, 76 and 78 of the Finance Act, 1994 pertaining to the periods 2015-16 and 2016-17 by asserting that the same is barred by limitation.

3. The Petitioner, M/s. Nagen Caterer, claiming it to be a partnership firm, provides outdoor catering services and got registered under the Finance Act, 1994. It is alleged by the opposite party-Adjudicating Authority that from the data obtained from the Income Tax Department it is revealed that the Petitioner having received considerable amount from different service recipients has made neither full disclosure of the amount in the returns in Form ST-3 nor has it filed the returns in Form ST-3 for certain period; thereby, it has evaded payment of service tax. The Adjudicating Authority proposed to proceed with determination of tax, interest and penalty for the periods 2015-16 and 2016-17 and therefore, he issued Demand-*cum*-Show Cause Notice dated 22.04.2021 calling upon the Petitioner to produce evidence to rebut the following:-

> *"*** *** *** *** ****
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> *6.0 Now, therefore the noticee, i.e. M/s. Nagen Caterer, at Samanta Sahi, P.O.: Buxibazar, Cuttack-753001, bearing Service Tax Registration No. AAAAN1310KSD002 is called upon to Show Cause to the Additional Commissioner, CGST & CX, Bhubaneswar Commissionerate, C.R. Buildings, Rajaswa Vihar, Bhubaneswar – 751 007 within 30 (thirty days) of receipt of this notice as to why—*
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> *i) Service Tax including S.B. Cess & K.K. Cess amounting to Rs.1,72,28,439/- (Rupees One crore Seventy-two lakh Twenty-eight thousand Four hundred and Thirty-nine) only should not be recovered from them under Section 73(1) of the Finance Act, 1994.*
>
> *ii) Interest as applicable should not be recovered from them under Section 75 of the Act on the above demanded amount.*
>
> *iii) Penalty should not be imposed on them under Section 76 of the Act for non-payment of Service Tax in*

contravention of Section 68(1) of the Act read with Rule 6 of the Rules with intent to evade payment of Service Tax.

iv) Penalty should not be imposed upon them under Section 78 of the Act for deliberate suppression of taxable value with intent to evade payment of Service Tax.

7.0 M/s. Nagen Caterer, at Samanta Sahi P.O. Buxibazar, Cuttack-753001 while showing cause should produce all the evidences upon which they intend to rely in support of their defense. They should also indicate in their written explanation as to whether they wish to be heard in person before the adjudicating authority when the case will be posted for hearing.

8.0 If no cause is shown against the action proposed to be taken within the above stipulated time and/or they fail to appear before the Adjudicating Authority when the case is posted for hearing, the case will be decided ex parte on the basis of the evidences available on records without any further reference to them.

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4. Referring to *Calcutta Discount Co. Ltd. Vrs. Income Tax Officer, AIR 1961 SC 372; East India Commercial Co. Ltd. Vrs. Collector of Customs, AIR 1962 SC 1893,* the counsel for the Petitioner submitted that the Adjudicating Authority had no jurisdiction to issue the Demand-*cum*-Show Cause Notice *vide* Annexure-1 inasmuch as Section 73(1) of the Finance Act, 1994 envisages action for non-payment of service tax or short payment of service tax by the authorities within eighteen months from the relevant date, and since the case does not fall within the ingredients mentioned under proviso thereto, the extended period of limitation does not get attracted in the present context.

5. It is the further case of the Petitioner that there is illegality in issuance of Demand-*cum*-Show Cause Notice dated 22.04.2021 as the authority concerned has not considered the effect of *Order dated 06.04.2021* of this Court in the case of the Petitioner's own case being *Nagen Caterer Vrs. Central Board of Indirect Taxes & Customs & others, W.P.(C) No.24377 of 2020.* Mr.Tushar Kanti Satapathy, counsel for the Petitioner placing reliance on the following paragraphs of the said order submitted that the assessing authority is precluded from raising demand which stood concluded by virtue of direction to issue SVLDRS-4 under Sabka Viswas Legacy Dispute Resolution Scheme, 2019 (SVLDRS):-

"17. As far as the second writ petition filed by NC is concerned, in the counter affidavit again there is no explanation why the Designated Committee issued SVLDRS-2 and SVLDRS-2A without issuing SVLDRS-3. It is also not in dispute that the pre-deposit amount indicated therein is Rs.33,86,126/- whereas it should be Rs.39,41,880/- as indicated by NC in SVLDRS-1. The only defence put forth is that this was accepted by NC. This is incorrect since NC did write to the authorities on 29th June 2020 which fact is not disputed by the Opposite Parties in the counter affidavit.

18. Consequently, both the writ petitions are disposed of by issuing the following directions:

(i) *** *** *** ***

(ii) As far as W.P.(C) No.24377 of 2020 is concerned, the Designated Committee (Opposite Party No.2) will issue to NC by 3rd May 2021 the corrected SVLDRS-3 showing the corrected pre-deposit figure as Rs.39,41,880/-. Since NC has already paid the admitted tax liability as indicated therein, the Opposite Parties will also issue in favour of NC

> *by the same date the SVLDRS-4. The SVLDRS-2 and SVLDRS-2A already issued stands quashed. It will be open to NC to seek disposal of the pending appeal thereafter in accordance with law."*

6. Sri Choudhury Satyajit Mishra, Senior Standing Counsel for the Revenue pointed out that the Demand-*cum*-Show Cause Notice relates to the periods 2015-16 and 2016-17 whereas the SVLDRS, 2019 related to the years 2011-12 to 2015-16. Furthermore, the Adjudicating Authority has issued said impugned notice invoking proviso to sub-section (1) of Section 73 of the Finance Act, 1994. Whereas by virtue of amendment *vide* Finance Act, 2012 (Act 28 of 2016), the normal period of "eighteen months" has been substituted by "thirty months". Said amendment would also cover the periods 2015-16 and 2016-17. Be that be, since the Adjudicating Authority has called upon the Petitioner to furnish evidence(s) to justify its claim *vis-à-vis* non-disclosure of complete particulars in the returns as also non-filing of the returns during the periods 2015-17 (two years), it is open for the Petitioner to avail the opportunity and he is at liberty to explain with objection and reconcile. It is with vehemence the learned Senior Standing Counsel submitted that the extended period of limitation of "five years" is attracted per proviso to sub-section (1) of Section 73 of the Finance Act, 1994. At the stage of Show Cause Notice this Court need not exercise extraordinary jurisdiction under Article 226 of the Constitution of India. It is stated that inasmuch as the decisions cited and relied upon by the counsel for the Petitioner are in the connection with different setting of language in the statute compared to the Finance

Act, 1994, they have no material bearing on the present facts and circumstances of the matter.

7. Heard Sri Tushar Kanti Satapathy, learned Advocate for the Petitioner and Sri. Choudhury Satyajit Mishra, Senior Standing Counsel.

8. Provisions for levy and imposition of service tax were introduced *vide* Chapter V in the Finance Act, 1994 and have been amended from time to time. Service tax does not have a separate enactment like the Central Excise Act, 1944, the Customs Act, 1962 or the Income Tax Act 1961. Section 65B of the Finance Act which deals with interpretation *vide* clause (55) states as follows:

> *"(55)words and expressions used but not defined in this Chapter and defined in the Central Excise Act, 1944 (Act 1 of 1944) or the rules made thereunder, shall apply, so far as may be, in relation of service tax as they apply in relation to a duty of excise."*

Explanation clarifies for removal of doubts that provisions of Section 66 of Chapter V of the Finance Act for the purpose of levy and collection of service tax and shall be construed as references to the provisions of Section 66B of the Finance Act. Section 66B creates a charge of service tax on or after the Finance Act, 2012.

9. Section 73 of the Finance Act as amended with effect from 14th May, 2016 reads as under:

> *"73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded.—*

(1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, Central Excise Officer may, within thirty months from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of—

(a) fraud; or

(b) collusion; or

(c) wilful mis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax;

by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "thirty months", the words "five years" had been substituted.

Explanation.—

Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of thirty months or five years, as the case may be.

(1A) Notwithstanding anything contained in sub-section (1) except the period of thirty months of serving the notice for recovery of service tax), the Central Excise Officer

may serve, subsequent to any notice or notices served under that sub-section, a statement, containing the details of service tax not levied or paid or short levied or short paid or erroneously refunded for the subsequent period, on the person chargeable to service tax, then, service of such statement shall be deemed to be service of notice on such person, subject to the condition that the grounds relied upon for the subsequent period are same as are mentioned in the earlier notices.

(1B) Notwithstanding anything contained in sub-section (1), in a case where the amount of service tax payable has been self-assessed in the return furnished under sub-section (1) of section 70, but not paid either in full or in part, the same shall be recovered along with interest thereon in any of the modes specified in section 87, without service of notice under sub-section (1).

(2) The Central Excise Officer shall, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), determine the amount of service tax due from, or erroneously refunded to, such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined :

(2A) Where any appellate authority or tribunal or court concludes that the notice issued under the proviso to sub-section (1) is not sustainable for the reason that the charge of,—

(a) fraud; or

(b) collusion; or

(c) wilful misstatement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or the rules made thereunder with intent to evade payment of service tax;

has not been established against the person chargeable with the service tax, to whom the notice was issued, the Central Excise Officer shall determine the service tax payable by such person for the period of thirty months, as if the notice was issued for the offences for which limitation of thirty months applies under sub-section (1).

(3) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer before service of notice on him under sub-section (1) in respect of such service tax, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the amount so paid :

Provided that the Central Excise Officer may determine the amount of short-payment of service tax or erroneously refunded service tax, if any, which in his opinion has not been paid by such person and, then, the Central Excise Officer shall proceed to recover such amount in the manner specified in this section, and the period of "thirty months" referred to in sub- section (1) shall be counted from the date of receipt of such information of payment.

Explanation.1—

For the removal of doubts, it is hereby declared that the interest under section 75 shall be payable on the amount paid by the person under this sub-section and *also on the amount of short payment of service tax or erroneously refunded service tax, if any, as may be determined by the Central Excise Officer, but for this sub-section.*

Explanation 2.—

For the removal of doubts, it is hereby declared that no penalty under any of the provisions of this Act or the rules made thereunder shall be imposed in respect of payment of service tax under this sub-section and interest thereon.

(4) Nothing contained in sub-section (3) shall apply to a case where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of —

(a) fraud; or

(b) collusion; or

(c) wilfulmis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax.

(4A) * * * *** *** ***

(4B) The Central Excise Officer shall determine the amount of service tax due under sub-section (2)—

(a) within six months from the date of notice where it is possible to do so, in respect of cases falling under sub-section (1);

(b) within one year from the date of notice, where it is possible to do so, in respect of cases falling under the proviso to sub-section (1) or the proviso to sub-section (4A).

(5) The provisions of sub-section (3) shall not apply to any case where the service tax had become payable or ought to have been paid before the 14th day of May, 2003.

(6) For the purposes of this section, "relevant date" means,—

(i) in the case of taxable service in respect of which service tax has not been levied or paid or has been short-levied or short-paid —

(a) where under the rules made under this Chapter, a periodical return, showing particulars of service tax paid during the period to which the said return relates, is to be filed by an assessee, the date on which such return is so filed;

(b) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules;

(c) in any other case, the date on which the service tax is to be paid under this Chapter or the rules made thereunder;

(ii) in a case where the service tax is provisionally assessed under this Chapter or the rules made thereunder, the date of adjustment of the service tax after the final assessment thereof;

(iii) *in a case where any sum, relating to service tax, has erroneously been refunded, the date of such refund*."

It is apparent from the bare reading of aforesaid provisions contained in Section 73 (1) that the competent authority may within thirty months from the relevant date serve a notice on the assessee where service tax has not been levied or paid or short levied or short paid or is erroneously refunded. The expression "relevant date" has been defined in sub-section (6) of Section 73.

By virtue of sub-section (3), the assessee is given scope to voluntarily disclose on its own assessment or on the basis of ascertainment of tax by the Officer before issue of show cause notice under sub-section (1) of section 73 of the Finance Act. If such payment is made, notice under Sub-Section (1) is not warranted in respect of the amount paid. This payment is required to be made voluntarily. Nonetheless, if the Officer is of the view that the amount is not paid, he is empowered to proceed to recover the short payment in the manner provided in sub-section (1) to Section 73. Explanation 2 declares that where the assessee makes payment in terms of sub-section (3) of Section73, no penalty under the provisions of the Fin Act or the Rules shall be imposed. However, interest as stipulated has to be paid. As per Section 73(4) nothing in sub-section (3) shall apply to cases of fraud, collusion, wilful misstatement, suppression of facts or contravention of any of the provisions of Chapter V of the Finance Act or Rules framed thereunder with the intent to evade payment of tax.

Thus, as per Section 73, unless payment is made in terms of sub-sections (3) and (4) thereof, the proceedings for assessment would commence by issue of the show cause notice under sub-section (1) of Section 73 of the Finance Act. This is the procedure prescribed by the statute for recovery of service tax in cases of non-levy, non-payment, short levy, short payment and erroneous refund.

Section 83 Chapter V of the Finance Act, 1994 empowers the Authority to invoke Section 14 of the Central Excise Act, 1944 which empowers the Officer to issue summons to any person to give evidence and produce documents. The summons can be issued to any person whose attendance the officer considers necessary. The power can be exercised to collect evidence or a document or any other thing in any inquiry which the officer is making for any purposes under the Act.

Perusal of the impugned notice *vide* Annexure-1 to the writ petition shows that it contains reasons for issue of notice and it specifies the amount for which recovery proceedings have been initiated. The Show Cause Notice contains particulars with factual and legal assertions why recovery of the amount quantified should not be made on account of short levy, short payment or erroneous refund. These details and particulars are ascertained and found mentioned in the Show Cause Notice itself, as they would constitute the basis and foundation of the notice under Section 73(1) of the Finance Act. Proviso to sub-section (1) of Section 73 extends recovery for a period up to five years in cases of fraud, collusion, wilful misstatement, suppression of facts or contravention of the provisions of the Finance Act or the Rules with an intent to evade payment of service tax.

10. The statutory scheme requires issue of show cause notice by the Adjudicating Authority, response by the person served with the show cause notice and final determination by the order in original. Issue of show cause notice is a condition precedent to raising an enforceable demand. Reference may be had to *Commissioner of Central Excise, Vishakhapatnam Vrs. Mehta & Co., (2011) 4 SCC 435; Union of India Vrs. Madhumilan Syntex Pvt. Ltd., (1988) 3 SCC 348; Golak Patel Volkart Limited Vrs. Collector of Central Excise, Belgaum (1987) 2 SCC 93.*

11. In the present writ petition, the Petitioner has challenged Demand-*cum*-Show Cause Notice whereby the Adjudicating Authority has asked the assessee to produce evidence which may be relevant to rely in support of its defense. The said Authority also in order to afford opportunity called for explanation/objection and has disclosed proposed actions by specifying components of tax, interest and penalty. Such a Show Cause Notice having clearly spelt out reasons, no prejudice possibly be caused to the Petitioner in the event it is relegated to avail such opportunity by placing relevant material fact including its stance of limitation and the period and transactions covered under the SVLDRS, 2019. This Court, therefore, wishes to leave it to the Adjudicating Authority to proceed and decide. While deciding, the Authority would be obligated to take into consideration any representation or submission made by the Petitioner-assessee.

12. If the Demand-*cum*-Show Cause Notice (Annexure-1) is read in its entirety it is *ex-facie* clear that facts are required to be reconciled, settled and adjudicated by the Adjudicating Authority. There seems to be disputed questions of fact *inter alia* as to:

i. Whether the transactions under impugned Show Cause Notice were disclosed in the returns with complete material particulars and/or transactions remained undisclosed as returns being not filed?

ii. Whether total period of 2015-16 and 2016-17 would fall within the scope of normal period of limitation under Section 73(1) or would be embraced within the fold of proviso thereto?

iii. Whether the amounts received and shown in the income-tax returns do relate to service tax *vis-à-vis* records that would be produced and/or evidence adduced by the Petitioner?

iv. Whether the transactions (partly or wholly) which were considered under the SVLDRS, 2019 as reflected in the Order dated 06.04.2021 of this Court in the case of present Petitioner in W.P.(C) No.24377 of 2020 are covered in the subject-matter of impugned Show Cause Notice relating to 2015-17 (two financial years)?

These are illustrations of questions of fact which may crop up along with any other factual aspects during the process of adjudication under Section 73 of the Finance Act. Furthermore, it has been held in *Ramesh B Desai Vrs. Bipin Vadilal Mehta, (2006) 5 SCC 638* that a plea of limitation is a mixed question of law and fact. In the instant case the Adjudicating Authority is competent to decide whether service tax proposed to be levied for the periods 2015-16 and 2016-17 would be comprehended within the ingredients specified under proviso to sub-section (1) of Section 73 of the Finance Act. Conclusion is required to be arrived at by the

Adjudicating Authority including the Appellate Fora provided under the statute that on the facts and materials available on the records the initiation of the proceeding is time-barred. Such a finding is yet to be rendered by the Authority who issued the show cause notice for proceeding under Section 73. Needless to state that factual disputes need not be adjudicated in writ jurisdiction.

13. Self-imposed restriction for entertainment of writ jurisdiction has been succinctly enunciated by the Hon'ble Supreme Court in *Star Paper Mills Ltd. Vrs. State of U.P., (2006) 10 SCC 201 : 2006 SCC OnLine SC 979* which is to the following effect:

> *"4. In response, learned counsel for the respondents submitted that on factual adjudication it was to be established by the appellant that its case is covered by the ratio of this Court's decision in Krishi Utpadan Mandi Samiti case [1995 Supp (3) SCC 433].*
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> *"10. The issues relating to entertaining writ petitions when alternative remedy is available, were examined by this Court in several cases and recently in State of H.P. v. Gujarat Ambuja Cement Ltd. [(2005) 6 SCC 499].*
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> *11. Except for a period when Article 226 was amended by the Constitution (Forty-second Amendment) Act, 1976, the power relating to alternative remedy has been considered to be a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite the existence of an alternative remedy it is within the jurisdiction or discretion of the High Court to grant relief under Article 226 of the Constitution. At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to*

do with the jurisdiction of the case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy. If somebody approaches the High Court without availing the alternative remedy provided, the High Court should ensure that he has made out a strong case or that there exist good grounds to invoke the extraordinary jurisdiction.

12. Constitution Benches of this Court in K.S. Rashid and Son v. Income Tax Investigation Commission [1954 SCR 738 : AIR 1954 SC 207] , Sangram Singh v. Election Tribunal, Kotah [(1955) 2 SCR 1 : AIR 1955 SC 425], Union of India v. T.R. Varma [1958 SCR 499 : AIR 1957 SC 882] , State of U.P. v. Mohd. Nooh [1958 SCR 595 : AIR 1958 SC 86] and Venkataraman and Co. v. State of Madras [(1966) 2 SCR 229 : AIR 1966 SC 1089] held that Article 226 of the Constitution confers on all the High Courts a very wide power in the matter of issuing writs. However, the remedy of writ is an absolutely discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of principles of natural justice or procedure required for decision has not been adopted.

13. Another Constitution Bench of this Court in State of M.P. v. Bhailal Bhai [(1964) 6 SCR 261 : AIR 1964 SC 1006] held that the remedy provided in a writ jurisdiction is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny defence legitimately open in such actions. The power to give relief under Article 226 of the Constitution is a discretionary power. Similar view has been reiterated in N.T. Veluswami Thevar v. G. Raja

Nainar [1959 Supp (1) SCR 623 : AIR 1959 SC 422] , Municipal Council, Khurai v. Kamal Kumar [(1965) 2 SCR 653 : AIR 1965 SC 1321] , Siliguri Municipality v. Amalendu Das [(1984) 2 SCC 436 : 1984 SCC (Tax) 133 : AIR 1984 SC 653] , S.T. Muthusami v. K. Natarajan [(1988) 1 SCC 572 : AIR 1998 SC 616] , Rajasthan SRTC v. Krishna Kant [(1995) 5 SCC 75 : 1995 SCC (L&S) 1207 : (1995) 31 ATC 110 : AIR 1995 SC 1715] , Kerala SEB v. Kurien E. Kalathil [(2000) 6 SCC 293 : AIR 2000 SC 2573] , A. Venkatasubbiah Naidu v. S. Chellappan [(2000) 7 SCC 695] , L.L. Sudhakar Reddy v. State of A.P. [(2001) 6 SCC 634] , Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha v. State of Maharashtra [(2001) 8 SCC 509] , Pratap Singh v. State of Haryana [(2002) 7 SCC 484 : 2002 SCC (L&S) 1075] and GKN Driveshafts (India) Ltd. v. ITO [(2003) 1 SCC 72] .

14. *In Harbanslal Sahnia v. Indian Oil Corpn. Ltd. [(2003) 2 SCC 107] this Court held that the rule of exclusion of writ jurisdiction by availability of alternative remedy is a rule of discretion and not one of compulsion and the court must consider the pros and cons of the case and then may interfere if it comes to the conclusion that the Petitioner seeks enforcement of any of the fundamental rights; where there is failure of principles of natural justice or where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged.*

15. *In Veerappa Pillai v. Raman & Raman Ltd. [1952 SCR 583 : AIR 1952 SC 192] , CCE v. Dunlop India Ltd. [(1985) 1 SCC 260 : 1985 SCC (Tax) 75 : AIR 1985 SC 330] , Ramendra Kishore Biswas v. State of Tripura [(1999) 1 SCC 472 : 1999 SCC (L&S) 295 : AIR 1999 SC 294] , Shivgonda Anna Patil v. State of Maharashtra*

[(1999) 3 SCC 5 : AIR 1999 SC 2281] , C.A. Abraham v. ITO [(1961) 2 SCR 765 : AIR 1961 SC 609] , Titaghur Paper Mills Co. Ltd. v. State of Orissa [(1983) 2 SCC 433 : 1983 SCC (Tax) 131 : AIR 1983 SC 603] , H.B. Gandhi v. Gopi Nath & Sons [1992 Supp (2) SCC 312] , Whirlpool Corpn. v. Registrar of Trade Marks [(1998) 8 SCC 1 : AIR 1999 SC 22] , Tin Plate Co. of India Ltd. v. State of Bihar [(1998) 8 SCC 272 : AIR 1999 SC 74] , Sheela Devi v. Jaspal Singh [(1999) 1 SCC 209] and Punjab National Bank v. O.C. Krishnan [(2001) 6 SCC 569] this Court held that where hierarchy of appeals is provided by the statute, the party must exhaust the statutory remedies before resorting to writ jurisdiction.

16. *If, as was noted in Ram and Shyam Co. v. State of Haryana [(1985) 3 SCC 267 : AIR 1985 SC 1147] the appeal is from 'Caesar to Caesar's wife' the existence of alternative remedy would be a mirage and an exercise in futility. ... There are two well-recognized exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the principles of natural justice. We may add that where the proceedings themselves are an abuse of process of law the High Court in an appropriate case can entertain a writ petition."*

The above position was recently highlighted in U.P. State Spg. Co. Ltd. v. R.S. Pandey [(2005) 8 SCC 264 : 2005 SCC (L&S) 78] , SCC pp. 270-72, paras 10-16."

14. It may be worthwhile to state that writ petition is not entertainable against the Show Cause Notice in view of parameters laid down in *Union of India Vrs. Coastal Container Transporters Association, (2019) 20 SCC 446; South India Tanners & Dealers Association Vrs. Deputy Commissioner of Commercial Taxes, (2008) 23 VST 8 (SC); Supreme Paper Mills Limited Vrs. Assistant Commissioner of Commercial Taxes, (2010) 11 SCC 593; Bhubaneswar Development Authority Vrs. Commissioner of Central Excise, 2015 SCC OnLine Ori 53; National Aluminium Company Ltd. Vrs. Employees State Insurance Corporation, 2012 SCC OnLine Ori 90.*

15. In a case where assessment order was challenged before the High Court and the High Court quashed the same invoking writ jurisdiction, the Hon'ble Supreme Court in the matter of *CIT Vrs. Chhabil Dass Agarwal, (2014) 1 SCC 603 : 2013 SCC OnLine SC 717* reiterated the scope and purport of exercise of power under Article 226 of the Constitution of India and re-stated the self-imposed restrictions *qua* entertainment of writ petition:

> *"12. The Constitution Benches of this Court in K.S. Rashid and Son v. Income Tax Investigation Commission [AIR 1954 SC 207] , Sangram Singh v. Election Tribunal [AIR 1955 SC 425] , Union of India v. T.R. Varma [AIR 1957 SC 882] , State of U.P. v. Mohd. Nooh [AIR 1958 SC 86] and K.S. Venkataraman and Co. (P) Ltd. v. State of Madras [AIR 1966 SC 1089] have held that though Article 226 confers very wide powers in the matter of issuing writs on the High Court, the remedy of writ is 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 v. G. Raja Nainar [AIR 1959 SC 422] , MunicipalCouncil, Khurai v. Kamal Kumar [AIR 1965 SC 1321 : (1965) 2 SCR 653] , Siliguri Municipality v. Amalendu Das [(1984) 2 SCC 436 : 1984 SCC (Tax) 133] , S.T. Muthusami v. K. Natarajan [(1988) 1 SCC 572] , Rajasthan SRTC v. Krishna Kant [(1995) 5 SCC 75 : 1995 SCC (L&S) 1207 : (1995) 31 ATC 110] , Kerala SEB v. Kurien E. Kalathil [(2000) 6 SCC 293] , A. Venkatasubbiah Naidu v. S. Chellappan [(2000) 7 SCC 695] , L.L. Sudhakar Reddy v. State of A.P. [(2001) 6 SCC 634] , Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha v. State of Maharashtra [(2001) 8 SCC 509] , Pratap Singh v. State of Haryana [(2002) 7 SCC 484 : 2002 SCC (L&S) 1075] and GKN Driveshafts (India) Ltd. v. ITO [(2003) 1 SCC 72] .]

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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 [AIR 1964 SC 1419] , Titaghur Paper Mills case [Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433 : 1983 SCC (Tax) 131] 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.*"

16. As a prelude this Court may hasten to quote from *Deepak Agro Foods v. State of Rajasthan, (2008) 7 SCC 748 : 2008 SCC OnLine SC 1047* with regard to illegal *vis-à-vis* irregular jurisdiction:

> *"18. Proceedings for assessment under a fiscal statute are not in the nature of judicial proceedings, like proceedings in a suit inasmuch as the assessing officer does not adjudicate on a lis between an assessee and the State and, therefore, the law on the issue laid down under the civil law may not stricto sensu apply to assessment proceedings. Nevertheless, in order to appreciate the distinction between a null and void order and an illegal or irregular order, it would be profitable to notice a few decisions of this Court on the point.*
>
> *19. In Rafique Bibi v. Sayed Waliuddin [(2004) 1 SCC 287] explaining the distinction between null and void decree and illegal decree, this Court has said that a decree can be said to be without jurisdiction, and hence a nullity, if the court passing the decree has usurped a jurisdiction which it did not have; a mere wrong exercise of jurisdiction does not result in a nullity. The lack of jurisdiction in the court passing the decree must be patent on its face in order to enable the executing court to take cognizance of such a nullity based on want of jurisdiction. The Court further held that a distinction exists between a decree passed by a court having no jurisdiction and consequently being a nullity and not executable and a decree of the court which is merely illegal or not passed in accordance*

> *with the procedure laid down by law. A decree suffering from illegality or irregularity of procedure, cannot be termed inexecutable."*

17. The Constitution Bench of the Hon'ble Supreme Court of India in the case of *Central Potteries Ltd. v. State of Maharashtra, (1963) 1 SCR 166 : AIR 1966 SC 932 : (1962) 13 STC 472* held as follows:

> *"7. In this connection it should be remembered that there is a fundamental distinction between want of jurisdiction and irregular assumption of jurisdiction, and that whereas an order passed by an authority with respect to a matter over which it has no jurisdiction is a nullity and is open to collateral attack, an order passed by an authority which has jurisdiction over the matter, but has assumed it otherwise than in the mode prescribed by law, is not a nullity. It may be liable to be questioned in those very proceedings, but subject to that it is good, and not open to collateral attack. Therefore even if the proceedings for assessment were taken against a non-registered dealer without the issue of a notice under Section 10(1) that would be a mere irregularity in the assumption of jurisdiction and the orders of assessment passed in those proceedings cannot be held to be without jurisdiction and no suit will lie for impeaching them on the ground that Section 10(1) had not been followed. This must a fortiori be so when the appellant has itself submitted to jurisdiction and made a return. We accordingly agree with the learned Judges that even if the registration of the appellant as a dealer under Section 8 is bad that has no effect on the validity of the proceedings taken against it under the Act and the assessment of tax made thereunder."*

18. This Court in the case of *National Aluminium Company Ltd. Vrs. Employees State Insurance Corporation, 2012 SCC OnLine Ori 90* has observed as follows:

> "24. This Court in the case of Rohit Kumar Behera vs. State of Orissa, 2012 (II) ILR-CUT-395, held as under:
>
> > '21. Law is well settled that unless it is shown that the notice to show cause has been issued palpably without any authority of law, the show cause notice cannot be quashed in exercise of writ jurisdiction under Articles 226 and 227 of the Constitution.' "

19. Bearing in mind the above, we may venture to examine the scope of alternative remedy *vis-à-vis* entertainment of writ petition by exercising extraordinary jurisdiction under Article 226 of the Constitution of India *qua* the Show Cause Notice (Annexure-1) issued by the Additional Commissioner, GST & Central Excise, Bhubaneswar Commissionerate.

20. In *Union of India Vrs. Coastal Container Transporters Association, (2019) 20 SCC 446* the Hon'ble Supreme Court has laid down as follows:

> *"30. On the other hand, we find force in the contention of the learned senior counsel, Sri Radhakrishnan, appearing for the appellants that the High Court has committed error in entertaining the writ petition under Article 226 of Constitution of India at the stage of show cause notices. Though there is no bar as such for entertaining the writ petitions at the stage of show cause notice, but it is settled by number of decisions of this Court, where writ petitions can be entertained at the show cause notice stage. Neither it is a case of lack*

> *of jurisdiction nor any violation of principles of natural justice is alleged so as to entertain the writ petition at the stage of notice. High Court ought not to have entertained the writ petition, more so, when against the final orders appeal lies to this Court. The judgment of this Court in the case of Union of India v. Guwahati Carbon Ltd., (2012) 11 SCC 651 : 2012 SCC OnLine SC 210 relied on by the learned senior counsel for the appellants also supports their case. In the aforesaid judgment, arising out of Central Excise Act, 1944, this Court has held that excise law is a complete code in order to seek redress in excise matters and held that entertaining writ petition is not proper where alternative remedy under statute is available. When there is a serious dispute with regard to classification of service, the respondents ought to have responded to the show cause notices by placing material in support of their stand but at the same time, there is no reason to approach the High Court questioning the very show cause notices. Further, as held by the High Court, it cannot be said that even from the contents of show cause notices there are no factual disputes. Further, the judgment of this Court in the case of Malladi Drugs & Pharma Ltd. v. Union of India, (2020) 12 SCC 808 : 2004 SCC OnLine SC 358, relied on by the learned senior counsel for the appellants also supports their case where this Court has upheld the judgment of the High Court which refused to interfere at show cause notice stage."*

21. The Supreme Court of India in *South India Tanners & Dealers Association Vrs. Deputy Commissioner of Commercial Taxes, (2008) 23 VST 8 (SC)* expressed displeasure in entertainment of writ petition against the Show Cause Notice. The Hon'ble Supreme Court in the said case laid down the modality for the Authority in the following terms:

"2. We have repeatedly stated that as far as possible the High Courts should not interfere in matters at show cause notice stage.

3. Without reply to the show cause notice the appellants herein preferred Original Petitions before the Tamil Nadu Taxation Special Tribunal which decided the matters against the assessees. The assessees filed writ petitions against the order passed by the Special Tribunal in the High Court of Madras in which impugned judgments have been delivered, against which these Civil Appeals have been filed. We find that the assessees have never replied to the show cause notices till date.

4. We are of the view that in such circumstances the Special Tribunal/High Court ought not to have interfered and they ought to have directed the assessee to reply to the show cause notice and exhaust the statutory remedy under the Act, which they have not done till date.

5. In the circumstances, to put an end to this controversy we, first of all, grant liberty to the Department to amend the show cause notices and take up additional grounds, if so advised, within a period of eight weeks from today. They will accordingly give an opportunity to the assessees to reply to the amended show cause notice as well as the original show cause notice within a period of six weeks from the date of the assessees receiving the amended show cause notice.

6. On receiving replies from the assessees the Assessing Authority shall hear and dispose of the matters as expeditiously as possible in accordance with law and in accordance with the directions given hereinabove.

7. We make it clear that the Assessing Authority will decide the matters uninfluenced by any observations

> *made by the High Court/Tribunal in the earlier round of litigation.*
>
> *8. All contentions on both sides are expressly kept open. At this stage we do not wish to express any opinion on the merits of the case."*

22. In an identical case relating to writ petition questioning the show cause notice relating to service tax under the Finance Act, 1994, *viz. Bhubaneswar Development Authority Vrs. Commissioner of Central Excise, 2015 SCC OnLine Ori 53* this Court observed as follows:

> *"5. After hearing the learned counsel for the respective parties, it would be relevant herein to take note that the judgment of the Hon'ble Supreme Court in the case of Collector of Central Excise, Hyderabad v. M/s. Chemphar Drugs and Liniments, Hyderabad, (1989) 2 SCC 127 and in particular, Para-9 thereof is quoted as hereunder:*
>
> > *"9. *** In order to make the demand for duty sustainable beyond a period of six months and up to a period of 5 years in view of the proviso to sub-section (1) of Section 11-A of the Act, it has to be established that the duty of excise has not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or willful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, before (sic beyond) the period of six*

months. Whether in a particular set of facts and circumstances there was any fraud or collusion or willful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case."

6. *Hon'ble Single Judge of Calcutta High Court in the case of Infinity Infotech Parks Ltd., (2015) 85 VST 465 (Cal) appears to have placed reliance on the judgment of Hon'ble Supreme Court as noted hereinabove in Para-66 which admittedly, is a leading judgment on the issue raised in the present case. In the said case, the Hon'ble Supreme Court came to conclude that something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, before the period of six months. But most importantly, the Hon'ble Supreme Court has noted thereafter that 'Whether in a particular set of facts and circumstances there was any fraud or collusion or willful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case.*

7. *On perusal of the aforesaid judgment of the Hon'ble Supreme Court, it is clear therefrom that Hon'ble Supreme Court in the said case was dealing with an appeal filed by the Collector of Central Excise, Hyderabad against an order passed by the Tribunal. In the facts and circumstances of the said case, Hon'ble Supreme Court came to hold that this finding of fact having been ultimately held against the revenue by the Tribunal which is the final fact forum and dismissed the appeal filed by the revenue on the basis that it did*

not want to interfere the facts determined by the Tribunal in the said case.

8. *In the present set of circumstances of the case, any finding by the Court at this stage is likely to be prejudicial, either the Petitioner-BDA or the Service Tax Authority. ***"*

23. In *Supreme Paper Mills Limited Vrs. Assistant Commissioner of Commercial Taxes, (2010) 11 SCC 593,* the Hon'ble Supreme Court after taking note of earlier case being *Sales Tax Officer, Ganjam Vrs. Uttareswari Rice Mills, (1973) 3 SCC 171 : 1973 SCC (Tax) 123,* wherein challenge was made to Show Cause Notice, has been pleased to make the following observation:

"14. In our considered opinion, the ratio of the aforesaid decision in Uttareswari Rice Mills case [(1973) 3 SCC 171 : 1973 SCC (Tax) 123] of this Court is squarely applicable to the facts of the present case. The expression used in Section 11-E of the Act is that the Commissioner must be satisfied on information or otherwise that the registered dealer has furnished incorrect statement of his turnover or furnished incorrect particulars of his sale in the return. A show-cause notice is issued to the dealer with the purpose of informing him that the Department proposes to reopen the assessment because the Commissioner himself is satisfied that the dealer has furnished incorrect statement of his turnover or incorrect particulars of his sales in the return submitted, so as to enable the dealer to reply to the show-cause notice as to why the said power vested in the Commissioner should not be exercised.

15. *A notice was issued in order to provide an opportunity of natural justice to the dealer. There is nothing in the language of the aforesaid provision which either*

expressly or impliedly mandates the recording of any reasons. The provision of the Act nowhere postulates that the reasons which led to the issue of the said notice should be incorporated in the notice itself, and that in case of failure to do so, the same would invalidate the notice.

16. The aforesaid provision is clear and explicit and there is no ambiguity in it. If the legislature had intended to give any other meaning as suggested by the counsel appearing for the appellant it would have made specific provision laying down such conditions explicitly and in clear words. It is a well-settled principle in law that the court cannot add anything into a statutory provision, which is plain and unambiguous. Language employed in a statute itself determines and indicates the legislative intent. If the language is clear and unambiguous it would not be proper for the court to add any words thereto and evolve some legislative intent not found in the statute."

24. It may be apt to refer to yet another Judgment rendered by the Hon'ble Supreme Court in the context of challenge as to Show Cause Notice in the case of *CCE Vrs. Krishna Wax (P) Ltd., (2020) 12 SCC 572 : 2019 SCC OnLine SC 1470*. Paragraphs 7 and 10 of said Judgment reads thus:

"7. Section 11-A thus deals with various facets including non-levy and non-payment of excise duty and contemplates issuance of a show-cause notice by the Central Excise Officer requiring the "person chargeable with duty" to show cause why "he should not pay the amount specified in the notice". In terms of sub-section (10) of said Section 11-A, the person concerned has to be afforded opportunity of being heard and after considering his representation, if any, the amount of duty of excise due from such person has to be determined by the Central Excise Officer.

Without going into other details regarding the period of limitations and the circumstances under which show-cause notice can be issued, the crux of the matter is that such determination is after the issuance of show-cause notice followed by affording of opportunity and consideration of representation, if any, made by the person concerned.

***

10. The issuance of show-cause notice under Section 11-A also has some significance in the eye of the law. The day the show-cause notice is issued, becomes the reckoning date for various issues including the issue of limitation. If we accept the submission of the respondent that a prima facie view entertained by the department whether the matter requires to be proceeded with or not is to be taken as a decision or determination, it will create an imbalance in the working of various provisions of Section 11-A of the Act including periods of limitation. It will be difficult to reckon as to from which date the limitation has to be counted."

25. In aforesaid Judgment being *CCE Vrs. Krishna Wax (P) Ltd., (2020) 12 SCC 572 : 2019 SCC OnLine SC 1470* the Hon'ble Supreme Court in clear voice assigned reason as follows:

"13. It must be noted that while issuing a show-cause notice under Section 11-A of the Act, what is entertained by the Department is only a prima facie view, on the basis of which the show-cause notice is issued. The determination comes only after a response or representation is preferred by the person to whom the show-cause notice is addressed. As a part of his response, the person concerned may present his view point on all possible issues and only thereafter the determination or decision is arrived at. In the present case even before the response could be made by the

respondent and the determination could be arrived at, the matter was carried in appeal against the said internal order. The appellant was therefore, justified in submitting that the appeal itself was premature."

26. At this stage where Demand-*cum*-show cause notice has been issued to the Petitioner-Nagen Caterer, various aspects are found mentioned in the impugned Show Cause Notice as to why the Adjudicating Authority has sought to invoke the extended period of limitation in terms of proviso to sub-section (1) of Section 73 of the Finance Act which essentially relates to the facts and circumstances of the case. Of course, the Petitioner has the fullest opportunity to counter the same during the course of proceeding. It is possible for the Petitioner to seek for further time, if according to him the time given by the authority for filing the reply was required to be extended in order to enable him to collect some record. It cannot therefore be said that if detailed reasons for issuance of notice being absent in the Show Cause Notice, the same would be rendered invalid.

27. We may fruitfully refer to *GKN Driveshafts (India) Ltd. v. ITO, (2003) 1 SCC 72 : 2002 SCC OnLine SC 1116* as the guiding rule for the Adjudicating Authorities as enunciated by the Hon'ble Apex Court. Paragraph 5 of said Judgment speaks as follows:

5. We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under Section 148 of the Income Tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The assessing officer is bound to furnish reasons within a reasonable time. On receipt of

> *reasons, the noticee is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the assessing officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the abovesaid five assessment years."*

28. The present case seems neither to be a case of lack of jurisdiction nor is there any allegation of violation of principles of natural justice. Even though point of limitation is raised as a matter of jurisdictional fact, the same being mixed question of fact and law, the Petitioner has ample opportunity to agitate such an issue before the Adjudicating Authority. Therefore, this Court feels entertainment of the writ petition at the stage of notice would be premature. Doing so would frustrate the tax administration and adjudication process. This Court is live to the fact that the statute under consideration, *viz.*, Chapter-V of the Finance Act, 1994 and rules framed thereunder has provided sufficient safeguard for the assessee-Petitioner, more so, when against the final orders, appeal lay.

29. In fine, without expressing any opinion on the issues raised in the writ petition, we dismiss the writ petition, but allow the Petitioner a further period of four weeks from availability of the instant order to file reply/objection to the Show Cause Notice dated 22.04.2021 and also to participate in the proceeding. The Petitioner is at liberty to raise all such contentions and the Adjudicating Authority shall deal with the matter strictly in accordance with law without in any manner being influenced by any observation made hereinabove and reach in an independent conclusion both on fact and legal issues raised.

(Jaswant Singh)
Judge

(M.S. Raman)
Judge

Laxmikant *March 15, 2022*
Cuttack