HIGH COURT OF ORISSA : CUTTACK.

W.P.(C) No. 20996 of 2022

(In the matter of an application under
Articles 226 and 227 of the Constitution of India, 1950)

***

SRI MUNA PANI
SON OF
LATE PRANABANDHU PANI
P.O.: GURUJANG
P.S.: TALCHER
DISTRICT: ANGUL
ODISHA – 759 100 ...

Petitioner

Mr. Siddhartha Sinha, proxy counsel for Mr. Anirudh Sanganeria, Advocate for the petitioner

VERSUS

STATE OF ODISHA
REPRESENTED THROUGH
ENGINEER-IN-CHIEF
WATER RESOURCES
DEPARTMENT
STATE SECRETARIAT
BHUBANESWAR
ODISHA – 751 001
& OTHERS ...

Opposite parties

Mr. Lalatendu Samantaray, Additional Government Advocate for opposite party Nos.1 to 3

Mr. Sunil Mishra, Additional Standing Counsel (Commercial Tax & Goods and Service Tax) for opposite party Nos.4 and 5

Date of Judgment: 18.11.2022

P.T.O.

CORAM:

MR. JUSTICE JASWANT SINGH

AND

MR. JUSTICE MURAHARI SRI RAMAN

JUDGMENT

Murahari Sri Raman, J.—

1. The petitioner, indulged in execution of works contract, beseeches following relief(s) against the Notices dated 06.08.2022 issued by CT&GST Officer, Angul Circle, Angul (hereinafter be referred to as "proper officer"), for initiation of proceeding under Section 73 of the Central Goods and Services Tax Act, 2017 and the Odisha Goods and Services Tax Act, 2017 (collectively be read as, "GST Act") pertaining to the periods 2017-18 and 2018-19 *vide* Annexures-9 and 10:

"It is, therefore, most respectfully prayed that this Hon'ble Court may graciously be pleased to admit this writ petition and issue rule nisi, calling upon the respondents to show cause as to why this writ petition shall not be allowed.

If the opposite parties fail to show cause or show insufficient cause, the said rule may be made absolute and upon hearing the parties this Hon'ble Court may further be pleased to:

a. To declare the Demand-cum-Show Cause Notices as ultra vires, illegal, unconstitutional and violative of the Fundamental Rights of the petitioner and thereby quash the Show Cause Notices with Reference Nos. ZD2108220041633 and ZD210822004217Y for the tax periods July, 2017 - March, 2018 and April, 2018 – May, 2018; and

b. Pass any other order(s) and direction(s) as would be deemed just and proper by this Hon'ble Court;

c. And for this act of kindness, the petitioner shall as in duty bound ever pray."

2. Fact leading the petitioner to approach this Court to beseech invocation of extraordinary jurisdiction under the provisions of Article 226/227 of the Constitution of India, 1950, is that the proper officer has issued Show Cause Notices (for short, "SCN") on 06.08.2022 for determination of tax liability pertaining to the periods 2017-18 [July, 2017 to March, 2018] and 2018-19 [April, 2018 to May, 2018] under Section 73 of the GST Act on the basis of discrepancy observed between the figures furnished by the petitioner-taxpayer in the returns furnished in Form GSTR-3B under Rule 61 of the GST Rules and the data made available in the web portal-WORKS AND ACCOUNTS MANAGEMENT INFORMATION SYSTEM (WAMIS)[1].

2.1. It is contended by counsel for the petitioner that the petitioner seeking quashment of Circular *vide* Memo No. 36116—FIN-CT1-TAX-0045-2017/F., dated 07.12.2017 issued by the Finance Department which provided for modality to ascertain tax effect for reimbursement *qua* works executed after 01.07.2017, *i.e.*, introduction of the GST Act, in connection with contract awarded prior to 01.07.2017, *i.e.*, during the VAT (value added tax) regime, approached this Court in *W.P.(C) No.3452 of 2021* which

[1] *This System covers the entire life cycle of typical construction project work right from its inspection to its final completion. WAMIS has been developed with the view that all financial transactions pertainingto the State/Central Plan Schemes/Projects are accessed by the Executive, Legislature, Internal Audit, External audit and the citizen at large and the same be assessed against the physical progress and the desired outcome. The System is work flow enabled and comprises of various building blocks in the formof module.*

came to be disposed of on 01.02.2021 with the following observation:

"5. By way of this writ petition, Petitioner has challenged the action of the Opposite Parties in not reimbursing the differential tax amount arising out of change in tax regime from Value Added Tax (VAT) to Goods and Service Tax (GST) with effect from 01.07.2017.

6. Batch of writ petitions are being filed on this issue. The main issue involved in such matters is that the difficulty faced by the contractors due to change in the regime regarding works contract under GST. The grievance of the Petitioner is that in view of the introduction of the GST, Petitioner is required to pay tax which was not envisaged while entering into the agreement.

7. In that view of the matter, Petitioner shall make a comprehensive representation before the appropriate authority within two weeks from today ventilating the grievance. If such a representation is filed, the authority will consider and dispose of the same, in the light of the aforesaid revised guidelines dated 10.12.2018 issued by the Finance Department, Government of Odisha, as expeditiously as possible, preferably by 15.03.2021.

8. If the Petitioner(s) will be aggrieved by the decision of the authority, it will be open for the Petitioner(s) to challenge the same.

9. No coercive action shall be taken against the Petitioner till 15.03.2021.

10. The writ petition is disposed of accordingly."

2.2. Said order has further been modified with the following order dated 12.11.2021 in consideration of I.A. No.4735 of 2021 filed in the disposed of W.P.(C) No.3452 of 2021:

"1. Last opportunity is granted to the Applicant (Petitioner) to file a representation to the Executive Engineer, Manjore Irrigation Division, Athamallik (Opposite Party No.3) and not to the tax authority. It is made clear that if such representation is not made on or before 1st December, 2021 the interim protection granted by this Court by the order dated 1st February, 2021 will stand vacated.

2. The time for disposal of such representation stands correspondingly be extended up to 1st March, 2022.

3. The application is disposed of."

2.3. It is submitted that the petitioner, in respect of other works executed, also filed writ petitions being W.P.(C) Nos.3456 of 2021, 3457 of 2021, 3458 of 2021, 3460 of 2021, 3461 of 2021, 3464 of 2021 and 3465 of 2021 on identical grounds as that were urged in W.P.(C) No.3452 of 2021. Said writ petitions also suffered similar orders of this Court on the very same date as is passed in W.P.(C) No.3452 of 2021.

2.4. It is alleged that while the representation dated 24.11.2021 (Annexure-7 series) filed before the Executive Engineer, Manjore Irrigation Division, Athamallik; Executive Engineer, Rural Works Division, Angul; and Executive Engineer, Angul Irrigation Division, Angul; in the district of Angul is still pending consideration, the CT & GST Officer of Angul Circle-opposite party No.5 has taken steps for recovery of tax with interest and penalty pertaining to July, 2017-May, 2018 by issue of SCNs dated 06.08.2022 bearing Reference Nos. ZD2108220041633 and ZD210822004217Y in exercise of power conferred under Section 73 of the GST Act.

2.5. The counsel for the petitioner would submit that in view of Clause 30 of the Agreement executed prior to introduction of the GST Act with effect from 01.07.2017 between the petitioner-contractor and the Executive Engineer-contractee stipulated that *"the contractor shall bear all taxes, including sales tax, income tax, royalty, fair-weather charges and tollage where necessary"* and therefore, the change of law enhancing the rate of tax during subsistence of agreement would entail reimbursement of differential tax by the contractee. It is amplified by submitting that at the time of participating in the bid in response to the notice inviting tender of the Executive Engineer the estimated cost quoted was inclusive of value added tax as was levied under erstwhile VAT regime and therefore, it is pleaded at paragraph 5 of the writ petition as follows:

> *"*** The Odisha Value Added Tax (VAT) has been included in the estimated value of the present works contract and formed a part of the Bid Price as well as the Contract Price. Accordingly, the Tax Deducted at Source from gross amount of each running bill of the petitioner/contractor shall be made as per the then prevailing statutory provisions of law at the time of floating of tender/ submission of the tender for the contract work. The Value Added Tax is applicable to the instant contract work as the Value Added Tax Act was prevailing at the time of floating/submission of tender for the respective contract work. ***"*

2.6. The petitioner by referring to the following text from Guidelines issued by the Government of Odisha in Finance Department *vide* Memo No. 36116—FIN-CT1-TAX-0045-2017/F., dated 07.12.2017 urged that the authority ought not to have insisted on submission of bills for the work already executed showing goods and service tax element as inclusive of the contract price:

"Works Contracts executed before 01.07.2017 and payments made in pre-GST and GST period.—

(i) In the pre-GST regime, taxes like Central excise Duty, Entry Tax, OVAT and Service Tax have been included in the estimated value of the Works Contract and form a part of the bid price as well as of the contract price. Accordingly, value of the contract was inclusive of all taxes.

(ii) In case of Running bills submitted before 1st July, 2017 for the works executed in the GST regime, the tax invoice is to be issued by the contractor showing CGST and SGST as applicable separately within the contract value of the works.

(iii) In case, TDS has been deducted before 01.07.2017, but not yet deposited in the State Government exchequer under the Head of Account— 0040 through challan, the same may be deposited immediately."

3. *Per contra,* Mr. Sunil Mishra, Additional Standing Counsel (CT & GST Organisation) would urge that the prayer to declare Demand-*cum*-Show Cause Notices [Reference Nos. ZD2108220041633 and ZD210822004217Y], dated 06.08.2022 *ultra vires*, unconstitutional and violative of fundamental rights does not warrant consideration inasmuch as there being no prejudice caused to the petitioner in getting his liability determined by competent authority vested with power under the provisions of the GST Act. The machinery provisions contained in Section 73 for adjudication of correct liability *qua* petitioner-registered supplier of service by executing works contact in terms of Schedule II appended to the GST Act pursuant to provisions envisaged in Section 7 cannot in any manner be held to be either unconstitutional or *ultra vires* or impinges any of the fundamental

rights enshrined under the Constitution of India much less Article 19(1)(g).

3.1. Vehemently arguing that the SCNs issued by the opposite party No.5 is unambiguous, Mr. Sunil Mishra submitted that since the opposite party No.5-CT&GST Officer of Angul Circle, assigned with power to function as "proper officer" in exercise of powers under Section 5(1) read with Section 2(91), is competent to initiate proceeding under Section 73 on the basis of "tax liability disclosed in GSTR-3B is less than liability as per WAMIS data", which is clearly enumerated under the heading "SUMMARY OF SHOW CAUSE NOTICE" in Form GST DRC-01 prescribed under Rule 142(1)(a) issued on 06.08.2022.

4. This Court, while examining the issue whether the petitioner, works contractor, is eligible to get reimbursement of tax effect on introduction of the GST Act with effect from 01.07.2017 from the Executive Engineers has disposed of W.P.(C) No.3452 of 2021 and other cases filed by the petitioner *vide* order dated 01.02.2021 read with modified order dated 12.11.2021.

4.1. Consequent upon such disposal, though the petitioner claims to have made comprehensive representations *vide* Annexure-7 series and affirms the same to be pending before the Executive Engineers of Manjore Irrigation Division, Athamallik; Rural Works Division, Angul; and Angul Irrigation Division, Angul; in the district of Angul, nothing is stated in the instant writ petition as to why the petitioner has arrayed Executive Engineer of Rengali Right Canal Division No.II, Dhenkanal against whom possibly no relief could have been asserted. Therefore, this Court

does not find any merit in the contention of the petitioner that the Executive Engineer having not yet considered such representations, the CT&GST Officer of Angul Circle has no competence to initiate action under Section 73 of the GST Act for the purpose of determining tax liability in respect of amounts received on execution of works. It is, therefore, held that the writ petition is incompetent for non-joinder and mis-joinder of proper and necessary party and pendency of representation, if any, before such authority who is not impleaded as party in the writ petition does not deserve consideration for the purpose of adjudication as to whether the CT&GST Organisation is justified in initiating action for determination of tax liability under the GST Act.

4.2. This apart, it may also be pertinent for the authority concerned to determine as to whether the claim of the petitioner is within the period of limitation with reference to particular terms of contract specifying commencement and completion of execution of work. This Court in the case of *Chandra Sekhar Jena Vrs. State of Odisha and Others, W.P.(C) No.23703 of 2021 vide* Order dated 30.10.2021 held as follows:

> *"1. Although learned counsel for the Petitioner seeks to have the order similar to the one passed by this Court on 13th January, 2021 in W.P.(C) No.23906 of 2020, it is seen that the agreement in question is dated 26th April, 2016 with the time for completion being 11 months. Clearly, therefore, any claim now raised arising from the said contract would be time barred. It is, therefore, not possible to accede to the prayer of the Petitioner.*
>
> *2. The writ petition is dismissed."*

4.3. Another pertinent fact which is required to be addressed to is factual dispute with regard to claim for reimbursement of differential tax in view of variation of rate of tax prior to or during the GST regime with reference to Section 64A of the Sale of Goods Act, 1930 cannot be adjudicated upon in exercise of writ jurisdiction under Article 226/227 of the Constitution of India in absence of objection as to lack jurisdiction of the CT&GST Officer to initiate action under Section 73 of the GST Act. The question whether, in fact, any amount is owed to the petitioner by opposite parties on account of GST deducted from its bills or *vice versa*, has become a highly disputed question of fact. The claim of the Petitioner ultimately, in simple terms, is one for money which it seeks as reimbursement from the opposite parties. It is not possible for this Court in its writ jurisdiction under Article 226 of the Constitution to calculate on a case to case basis which part of the work executed by the petitioner for reimbursement on account of introduction of GST Act and which is not. This being a disputed question of fact, the Court declines to undertake this exercise in the writ jurisdiction and leaves it to the petitioner to seek other appropriate remedies available to him in accordance with law. This is what has been precisely laid down by this Court in the case of *M/s. Maa Vaishno Devi Construction Vrs. The Executive Engineer, Bhubaneswar R&B Division-IV, Bhubaneswar, W.P.(C) No.7956 of 2019 vide Order dated 22.02.2021*.

4.4. It is also noteworthy here that very many works contractors laid challenge to the Guidelines issued by the Government of Odisha in Finance Department *vide* Memo No. 36116—FIN-CT1-TAX-

0045-2017/F., dated 07.12.2017 on the advent of the GST statute with effect from 01.07.2017. During the pendency of the writ petitions, being *W.P.(C) No. 6178 of 2018 : All Orissa Contractors Association Vrs. State of Odisha,* and other cases, the Government of Odisha in Finance Department brought out Revised Guidelines for works contract *vide* Office Memorandum bearing No.38535-FIN-CT1-TAX-0045-2017/F., dated 10.12.2018. This Court *vide* Order dated 12.12.2018 disposed of said writ petition(s) by extracting the Revised Guidelines *in extenso* and held as follows:

*"*** In that view of the matter, the Petitioner shall make a comprehensive representation before the appropriate authority within four weeks from today ventilating the grievance. If such a representation is filed, the authority will consider and dispose of the same, in the light of the aforesaid revised guidelines dated 10th December, 2018 issued by the Finance Department, Government of Odisha, as expeditiously as possible, preferably by 31.03.2019.*

If the petitioner(s) will be aggrieved by the decision of the authority, it will be open for the petitioner(s) to challenge the same.

No coercive action shall be taken against the petitioner(s) till 31.03.2019.

The writ petition is disposed of accordingly."

4.5. Subsequently aforesaid direction of this Court being carried out by the authority concerned, amongst many, one of such works contractors *viz. Harish Chandra Majhi, by way of petition being W.P.(C) No.14924 of 2020,* challenged the Revised Guidelines *vide* Office Memorandum No.38535-FIN-CT1-TAX-0045-2017/F., dated 10.12.2018. This Court disposed of said case *vide*

Judgment dated 07.06.2021 [reported as *Harish Chandra Majhi Vrs. State of Odisha and others, 2021 SCC OnLine Ori 643 = (2021) 51 GSTL 113 = (2021) 93 GSTR 354 (Ori)*] wherein the following has been observed:

"1. The Office Memorandum dated 10 December, 2018 of the Finance Department under Annexure-3 prescribing guidelines for the implementation of GST (Goods and Services Tax) in works contract in post-GST regime with effect from 1 July, 2017, the Revised Schedule of Rates-2014 (Revised SoR-2014) under Annexure-8 and the demand notice issued under Section 61 of the Odisha Goods and Services Act (OGST Act) has been questioned in the present writ petition and connected batch of cases. The prayers in the present petition read as under:

'i. why the action and decision of the Opp. Parties shall not be declared illegal, unconstitutional and violative of legal right of the Petitioner on account of the Taxes being shared and borne by the Petitioner on post enactment Goods and Services Tax Act, 2017?

ii. the Opp. Parties shall not be directed to restitute the benefit of GST to the Petitioner along with interest within a stipulated period in respect of work in which the estimated was prepared under VAT law.

iii. the Office Memorandum dated 10.12.2018 issued by the Opp. Party No. 4 under Annexure-3 shall not be declared illegal, arbitrary, unreasonable and same shall not be quashed.

iv. further the process adopted by the Opp. Parties in preparation of revised SoR dated 15.09.2017 under Annexure-8 shall not be declared illegal, arbitrary and same shall not be quashed.

v. why the notice issued by the Opp. Party No. 9 under Annexure-9 shall not be declared illegal, arbitrary and same shall not be quashed?

vi. *why the Opp. Party shall not be directed to prepare a fresh schedule of rates considering rapidly change of rate and price and calculate the differential amount of GST on the contract in which estimate was prepared under VAT?'*

***

11. *The basic price of materials as per SoR-2014 was inclusive of VAT, entry tax and other tax components. Since 1 July 2017 GST is payable on the value of the contract, the value of tax components in the price of the materials in SoR-2014 was revised and reduced by excluding such tax components prevalent during pre-GST period. As such, the revised SoR-2014 was issued on 16 September, 2017.*

12. *The Petitioner complains that the procedure adopted in the preparation of the revised SoR-2014 dated 16 September, 2017 (Annexure-8) is illegal, arbitrary and contrary to the provisions of Odisha Public Works Department Code (OPWD Code) and that the rates have not been determined on the basis of actual rates prevailing in different areas of the State.*

13. *The said submission of the Petitioner is not found acceptable because the rates of materials are to be maintained uniformly all over the State. Further, if there is any difference in the actual rate and scheduled rate in any particular area, the Petitioner could submit the same to the employer and this has nothing to do with the GST.*

14. *A further ground urged on behalf of the Petitioner is that the tender was floated prior to 1 July, 2017. The price quoted for the items and labour was as per the then prevailing market rate. Therefore, the revised SoR-2014 brought into force on 1 July, 2017 at a reduced rate is illegal and discriminatory.*

15. *This contention of the Petitioner is not found convincing for the reason that, first, nothing has been brought on record to show any comparison of market rate in 2014 when SoR-2014 was issued and the market rate in 2017 when revised SoR was issued. Secondly, no dispute has been raised*

against the rates mentioned in pre-revised SoR-2014. The price difference in the revised SoR-2014 is to the extent of the changed tax amount only. Undoubtedly, the rates in revised SoR-2014 are applicable for the works all over the State.

16. Works contract is a composite supply of services and is taxable under the GST. The earlier SoR-2014 issued on 10 November, 2014 was inclusive of taxes like Central Excise Duty, Service Tax, VAT, Entry Tax etc. After the GST regime only some of the tax components needed to be included. This necessitated a revision of SoR-2014 to arrive at the GST exclusive work value. The GST component is to be added to the work value. As the revised SoR is exclusive of the tax components, the estimated value of the work gets reduced to that extent. This was prepared under the recommendation of a Code Revision Committee and after verification of tax rate in the pre-GST period of each of the items including the hire charges of machineries.

*****

29. In the instant case, three components of the tax, i.e., subject of tax, person liable to pay the tax and rate of tax has been clearly defined in the statute. The OM dated 10th December, 2018 only prescribes the manner/procedure of calculation to determine the amount of tax in a particular eventuality in the transitional period of migration to GST Act with effect from 1st July, 2017. Consequently, the Court finds no merit in the Petitioner's challenge to the said OM in law."

4.6. This Court on 01.02.2021 while disposing of W.P.(C) No.3452 of 2021 and other cases filed by the petitioner has taken into consideration Revised Guidelines *vide* Office Memorandum No.38535-FIN-CT1-TAX-0045-2017/F., dated 10.12.2018 and directed as follows:

*"*** In that view of the matter, Petitioner shall make a comprehensive representation before the appropriate authority within two weeks from today ventilating the grievance. If such a*

*representation is filed, the authority will consider and dispose of the same, in the light of the aforesaid revised guidelines dated 10.12.2018 issued by the Finance Department, Government of Odisha, as expeditiously as possible, preferably by 15.03.2021. ***"*

Hence, the petitioner again in the present writ petition, which is filed on 17.08.2022, without referring to Revised Guidelines dated 10.12.2018, has sought to rely on erstwhile Guidelines dated 07.12.2017 (Annexure-2, Paragraph 4 of the writ petition) which appears to be an attempt to misguide the Court.

4.7. This Court having threadbare compared the clauses contained in File No. NRRDA-GO21(17)/32017-FA, dated 06.06.2018 [Office Memorandum NRRDA-GO21(17)/32017-FA, dated 06.06.2018] issued by the National Rural Infrastructure Development Agency, Ministry of Rural Development, Government of India *vis-à-vis* Revised Guidelines contained in Office Memorandum No.38535-FIN-CT1-TAX-0045-2017/F., dated 10.12.2018 issued by the Government of Odisha in Finance Department in the matters of *Harish Chandra Majhi Vrs. State of Odisha and others, 2021 SCC OnLine Ori 643 = (2021) 51 GSTL 113 = (2021) 93 GSTR 354 (Ori),* upheld the impugned Revised Guidelines *vide* Office Memorandum bearing No.38535-FIN-CT1-TAX-0045-2017/F., dated 10.12.2018.

4.8. In the said Revised Guidelines *vide* Office Memorandum dated 10.12.2018 the grievance of the petitioner is addressed to in the following manner:

*"*** On careful consideration of the representation of the contractors visa-vis existing guidelines issued in the matter,*

Government have been pleased to issue following revised guidelines in supersession of the guidelines issued vide Finance Department letter dated 07.12.2017:

1. *The Goods and Services Tax (GST) has come into force w.e.f. 1st July, 2017 by subsuming various indirect taxes such as Excise Duty, VAT, CST, Entry Tax, Service Tax etc. Works contract is treated as composite supply of service under GST and are taxable @ 18%, 12% or 5% depending on the nature of works contract. In order to comply the provisions of GST relating to works contract the State Government have revised the Schedule of Rates 2014 (SoR-2014) vide Works Department OM No.13827/WD dated 16.09.2017 w.e.f. 01.07.2017. While the item rates in the SoR-2014 were inclusive of all taxes i.e. Excise Duty, VAT, Entry Tax, Service Tax etc., the same has been excluded in the Revised SoR-2014. Therefore, while preparing estimates for a work after 01.07.2017, the GST exclusive work value is to be arrived at as per the revised SoR-2014 and then GST will be added at the appropriate rate.*

2. *In GST regime, the works contractor is required to raise Tax Invoice clearly showing the taxable work value and GST (CGST + SGST) separately.*

3. *In case of work, where the tender was invited before 01.07.2017 on the basis of SoR-2014, but payments made for balance work or full work after implementation of GST, the following procedure shall be followed to determine the amount payable to the works contractor;*

    (i) *Item-wise quantity of work done after 30.06.2017 (i.e. the Balance Work) and its work value as per the original agreement basing on the pre-revised SoR-2014 is to be ascertained first.*

    (ii) *The revised estimated work value for the Balance Work is to be determined as per the Revised SoR-2014.* ***(In case of rates of any goods or service used in execution of the Balance Work not covered in the Revised SoR-2014, the tax exclusive basic value of that goods or service shall be determined by removing the embedded tax incidences of VAT,***

Entry Tax, Excise Duty, Service Tax, etc. from the estimated Price/Quoted Price.)

(iii) The revised estimated work value for the Balance Work shall then be enhanced or reduced in the same proportion as that of the tender premium/discount.

(iv) Finally, the applicable GST rate (5%, 12% or 18% as the case may be) is to be added on the revised estimated work value for the Balance Work to arrive at the GST-inclusive work value for the Balance Work.

(v) A model format for calculation of the GST-inclusive work value for the Balance Work is attached as Annexure. The competent authority responsible for making payment to the works contractor will determine GST inclusive work value for the Balance Work for which agreement executed on the basis of SoR-2014.

(vi) A supplementary agreement shall be signed with the works contractor for the revised GST-inclusive work value for the Balance Work as determined above.

(vii) In case the revised GST-inclusive work value for the Balance Work is more than the original agreement work value for the Balance Work, the works contractor is to be reimbursed for the excess amount.

(viii) In case the revised GST-inclusive work value for the Balance Work is less than the original agreement work value for the Balance Work, the payment to the works contractor is to be reduced accordingly. In case excess payment has already been made to the works contractor in pursuance of the original agreement, the excess amount paid must be recovered from the works contractor.

(ix) These procedures shall be applicable to all works contract including those executed in EPC/Turn-key/Lumpsum mode.

4. In case of F2 contracts, the taxable value under GST for each item of the balance work is to be determined by the competent authority applying the premium/discount offered by the works contractor on respective item.

****"*

[Emphasis supplied]

4.9. As is admitted and conceded by the counsel for the parties that in terms of Clause 30 of the Agreement executed prior to introduction of the GST Act with effect from 01.07.2017 it is the contractor-petitioner who is required to bear all taxes, including sales tax, income tax, royalty, fair-weather charges and tollage where necessary. Therefore, the modality under the Revised Guidelines *vide* Office Memorandum dated 10.12.2018 in unequivocal terms specified bifurcation of work done prior and post 01.07.2017 so as to ascertain the item-wise quantity of work done after 30.06.2017 (*i.e.* the balance work) and its work value as per the original agreement. In other words, this will facilitate determination of tax exclusive basic value of that goods or service by removing the embedded tax incidences of VAT, Entry Tax, Excise Duty, Service Tax, *etc*. from the estimated Price/Quoted Price. The applicable GST rate (5%, 12% or 18%, as the case may be) is to be added on the revised estimated work value to arrive at the GST-inclusive work value for the balance work. The Revised Guidelines dated 10.12.2018 has rationality in application of rate of tax under the GST Act on the balance work.

4.10. At this juncture the following provisions of the GST Act are relevant to be taken note of.

Section 2(119):

" 'works contract' means a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning of any immovable property wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract;

Section 7(1A):

"Where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II."

Schedule II:

"Activities or transactions to be treated as supply of goods or supply of services—

***

5. Supply of services

The following shall be treated as supply of service, namely:—

(a) renting of immovable property;

(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.

Explanation.—

For the purposes of this clause—

(1) the expression "competent authority" means the Government or any authority authorised to issue completion certificate under any law for the time being in force and in case of non-

requirement of such certificate from such authority, from any of the following, namely:—

(i) an architect registered with the Council of Architecture constituted under the Architects Act, 1972 [20 of 1972]; or

(ii) a chartered engineer registered with the Institution of Engineers (India); or

(iii) a licensed surveyor of the respective local body of the city or town or village or development or planning authority;

(2) the expression "construction" includes additions, alterations, replacements or remodelling of any existing civil structure;

(c) temporary transfer or permitting the use or enjoyment of any intellectual property right;

(d) development, design, programming, customisation, adaptation, upgradation, enhancement, implementation of information technology software;

(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; and

(f) transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration.

6. Composite supply

The following composite supplies shall be treated as a supply of services, namely:—

(a) works contract as defined in clause (119) of Section 2; and

(b) supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (other than alcoholic liquor for human consumption), where such supply or service is for

cash, deferred payment or other valuable consideration."

4.11. The statutory provision and the legal position as set forth by this Court lead to show that the petitioner-contractor is supplier of service which is subject to levy of GST and for that matter ascertainment of liability and correct quantification of tax liability is subject-matter of adjudication by the authorities bestowed with power under the provisions of the GST Act.

4.12. The legal position has been succinctly laid down by different Courts. Suffice it to refer to the case of *Jindal Poly Films Ltd. Vrs. State of Maharashtra, (2013) 63 VST 67 (Bom)* wherein *Hira Lal Rattan Lal Vrs. Sales Tax Officer, (1973) 31 STC 178 (SC) = (1973) 1 SCC 216* has been taken note of to say that the fact that the dealer upon whom the tax is imposed, is not in a position to pass on the tax on his consumers has no relevance to the competence of the Legislature. An amendment is permissible even when the principal Act fails to bring out clearly the intention of the Legislature. In *M.A. Rahman Vrs. State of Andhra Pradesh, (1961) 12 STC 392 (SC)* wherein it has been stated that though there is no provision in the Act or the Rules specifically authorising the seller to pass on the tax to the consumer, what actually happens is that the seller includes the tax in the price and thus passes it on to the consumer. Then in his turn the seller pays the tax to the State. In effect by thus passing on the tax to the consumer through the price, the dealer has already collected the tax. The fault for failure to pay the tax or fraudulent evasion in payment thereof lies in the circumstances entirely on the dealer.

4.13. Conspectus of *George Oaks Pvt. Ltd. Vrs. State of Madras, (1961) 12 STC 476 (SC); Tata Iron & Steel Co. Ltd. Vrs. State of Bihar, AIR 1958 SC 452; Delhi Cloth & General Mills Co. Ltd. Vrs. CST, (1971) 28 STC 331 (SC)* leads to understand that even if statute permits the seller who is a registered dealer to collect the sales tax as a tax from the purchaser does not do away with the primary liability of the seller to pay the sales tax. The registered dealer need not, if he so pleases or chooses, collect the tax from the purchaser and sometimes by reason of competition with other registered dealers he may find it profitable to sell his goods and to retain his old customers even at the sacrifice of the sales tax. The sales tax need not be passed on to the purchasers and this fact does not alter the real nature of the tax, which by the express provisions of the law, is under no liability to pay sales tax in addition to the agreed sale price unless the contract specifically provides otherwise. When the seller passes on his tax liability to the buyer, the amount recovered by the dealer is really part of the entire consideration paid by the buyer and the distinction between the two amounts,— tax and price— loses all significance.

4.14. Going through the impugned notices dated 06.08.2022 *ex facie* indicates that the proper officer initiated action under Section 73 of the GST Act for adjudication of appropriate fact and determination of correct figure as there is anomaly in the data available on the WAMIS and the figures disclosed in the return furnished to the CT&GST Organisation in Form GSTR-3B. This has nothing to do with disposal of representation(s) at Annexure-7

series stated to be pending before the Executive Engineer(s) which has separate cause of action, if any, inasmuch as the Executive Engineer is not the competent authority vested with power for adjudication of tax liability under the GST Act.

4.15. Under the above premises, there is little scope to show indulgence in the present matter as the petitioner is required to justify his claim made in the returns in Form GSTR-3B prescribed under Rule 61(5) of the GST Rules read with Section 39 of the GST Act *vis-à-vis* data disclosed in WAMIS.

5. The petitioner in the writ petition has made a prayer to issue writ of *certiorari* by quashing Show Cause Notices dated 06.08.2022 issued by CT&GST Officer, Angul Circle, Angul under Section 73 of the GST Act pertaining to the periods from 01.07.2017 to March, 2018 and 01.04.2018 to 31.05.2018 on the plea that the representation(s) filed before the Executive Engineer (Annexure-7 series) has not been considered in terms of Revised Guidelines dated 10.12.2018.

5.1. It may be pertinent to quote relevant portion of the representation(s) addressed to the Executive Engineer(s):

> *"That it is humbly submitted here that payments are received by me are arising out of the above contract executed prior to the commencement of the GST Act, i.e. w.e.f. 01.07.2017 wherein the Tender Notices were published prior to the commencement of the GST Act with the estimate prepared completely prior to the commencement of GST Act. Therefore, taking into consideration the works contractor required to pay the GST which was not envisaged while entering into the contract, the Finance Department vide Office Memorandum No. FIN-CT1-TAX-0045-2017/38535/F., dated 10.12.2018 has introduced a revised*

guidelines envisaging the circumstances where the tender was invited before 01.07.2017 but payments made for the work after implementation of GST, for which I am not liable to pay the GST amount because my work executed prior to GST came into force.

*I, therefore, pray your good office kindly consider my representation not to demand GST and reimburse the same ***."*

5.2. It is to be noted that determination of tax liability is the domain of "proper officer" defined under Section 2(91) by exercising powers conferred in Chapter XV of the GST Act. Section 73 in said Chapter deals with "determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized for any reason other than fraud or any wilful misstatement or suppression of facts". In the instant case the proper officer has invoked provisions of Section 73 for determination of tax liability of the petitioner and issued the subject Show Cause Notices. Therefore, it cannot be said that such notices are invalid or vague.

5.3. Time and again this Court is called upon to exercise power under Article 226 of the Constitution of India to interfere with the matter at the stage of Show Cause Notice. This Court on more often than not has been declining to invoke extraordinary jurisdiction showing indulgence at the stage of notice.

5.4. Therefore, meddling at this stage by this Court would be premature and entertainment of writ petition by exercise of power under Article 226 of the Constitution of India would run contrary to the settled principles.

5.5. 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].

'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. Vrs. Gujarat Ambuja Cement Ltd. [(2005) 6 SCC 499].

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 Vrs. Income Tax Investigation Commission [1954 SCR 738 = AIR 1954 SC 207], Sangram Singh Vrs. Election Tribunal, Kotah [(1955) 2 SCR 1 = AIR 1955 SC 425], Union of India Vrs. T.R. Varma [1958 SCR 499 = AIR 1957 SC 882], State of U.P. Vrs. Mohd. Nooh [1958 SCR 595 = AIR 1958 SC 86] and

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

GKN Driveshafts (India) Ltd. Vrs. ITO [(2003) 1 SCC 72].

14. *In Harbanslal Sahnia Vrs. Indian Oil Corporation 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 Vrs. Raman & Raman Ltd. [1952 SCR 583 = AIR 1952 SC 192], CCE Vrs. Dunlop India Ltd. [(1985) 1 SCC 260 = 1985 SCC (Tax) 75 = AIR 1985 SC 330], Ramendra Kishore Biswas Vrs. State of Tripura [(1999) 1 SCC 472 = 1999 SCC (L&S) 295 = AIR 1999 SC 294], Shivgonda Anna Patil Vrs. State of Maharashtra [(1999) 3 SCC 5 = AIR 1999 SC 2281], C.A. Abraham Vrs. ITO [(1961) 2 SCR 765 = AIR 1961 SC 609], Titaghur Paper Mills Co. Ltd. Vrs. State of Orissa [(1983) 2 SCC 433 = 1983 SCC (Tax) 131 = AIR 1983 SC 603], H.B. Gandhi Vrs. Gopi Nath & Sons [1992 Supp (2) SCC 312], Whirlpool Corporation Vrs. Registrar of Trade Marks [(1998) 8 SCC 1 = AIR 1999 SC 22], Tin Plate Co. of India Ltd. Vrs. State of Bihar [(1998) 8 SCC 272 = AIR 1999 SC 74], Sheela Devi Vrs. Jaspal Singh [(1999) 1 SCC 209] and Punjab National Bank Vrs. 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. Vrs. 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 Spinning Co. Ltd. Vrs. R.S. Pandey [(2005) 8 SCC 264 = 2005 SCC (L&S) 78], SCC pp. 270-72, paras 10-16."

5.6. In the context where assessment order being challenged, the High Court quashed the same invoking writ jurisdiction, the Hon'ble Supreme Court in the matter of *Commissioner of Income Tax Vrs. Chhabil Dass Agarwal, (2014) 1 SCC 603 = 2013 SCC OnLine SC 717 = (2013) 357 ITR 357 (SC)* 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 as follows:

"12. The Constitution Benches of this Court in K.S. Rashid and Son Vrs. Income Tax Investigation Commission [AIR 1954 SC 207], Sangram Singh Vrs. Election Tribunal [AIR 1955 SC 425], Union of India Vrs. T.R. Varma [AIR 1957 SC 882], State of U.P. Vrs. Mohd. Nooh [AIR 1958 SC 86] and K.S. Venkataraman and Co. (P) Ltd. Vrs. 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 Vrs. G. Raja Nainar [AIR 1959 SC 422], Municipal Council, Khurai Vrs. Kamal Kumar [AIR 1965 SC 1321 = (1965) 2 SCR 653], Siliguri Municipality Vrs. Amalendu Das [(1984) 2 SCC 436 = 1984 SCC (Tax) 133], S.T. Muthusami Vrs. K. Natarajan [(1988) 1 SCC 572], Rajasthan SRTC Vrs. Krishna Kant [(1995) 5 SCC 75 = 1995 SCC (L&S) 1207 = (1995) 31 ATC 110], Kerala SEB Vrs. Kurien E. Kalathil [(2000) 6 SCC 293], A. Venkatasubbiah Naidu Vrs. S. Chellappan [(2000) 7 SCC 695], L.L. Sudhakar Reddy Vrs. State of A.P. [(2001) 6 SCC 634], Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha Vrs. State of Maharashtra [(2001) 8 SCC 509], Pratap Singh Vrs. State of Haryana [(2002) 7 SCC 484 = 2002 SCC (L&S) 1075] and GKN Driveshafts (India) Ltd. Vrs. ITO [(2003) 1 SCC72] .]

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15. *Thus, while it can be said that this Court has recognized 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. Vrs. 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."

5.7. 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 Vrs. 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.' "*

5.8. Bearing in mind the above principles, the scope of alternative remedy *vis-à-vis* entertainment of writ petition for exercising extraordinary jurisdiction under Article 226 of the Constitution of India *qua* the impugned Notice(s) *vide* Annexures-9 and 10 issued by the CT&GST Officer, it may be apt to refer to *Union of India Vrs. Coastal Container Transporters Association, (2019) 20 SCC 446* wherein it has been laid down by the Hon'ble Supreme Court 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 Vrs. 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. Vrs. 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."

5.9. 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. Said Hon'ble 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 assesse 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 assesses 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."*

5.10. In an identical case *viz. Bhubaneswar Development Authority Vrs. Commissioner of Central Excise, 2015 SCC OnLine Ori 53,* where the Show Cause Notice relating to service tax under Chapter-V of the Finance Act, 1994 was under challenge, 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 Vrs. 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. ***"*

5.11. In *Supreme Paper Mills Limited Vrs. Assistant Commissioner of Commercial Taxes, (2010) 11 SCC 593 = (2010) 31 VST 1 (SC),* 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 = AIR 1972 SC 2617 = (1972) 30 STC 567 (SC) = (1973) 89 ITR 6 (SC),* 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."

5.12. Challenge being made to the Show Cause Notice, the Hon'ble Supreme Court in the case of *CCE Vrs. Krishna Wax (P) Ltd., (2020) 12 SCC 572 = 2019 SCC OnLine SC 1470* at Paragraphs 7, 10 and 13 discussed 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 11A, 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.*

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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."*

5.13. In *Union of India Vrs. Bajaj Tempo Ltd., (1998) 9 SCC 281 = 1997 (94) ELT 285 SC = JT 1998 (9) SC 138* it is advised that the appropriate course for the assessee was to reply to the show cause notice enabling the authorities to record their findings of fact in each case and then, if necessary, the matter could be proceeded to the Tribunal and thereafter to the High Court.

5.14. The Hon'ble Supreme Court in *Union of India Vrs. Guwahati Carbon Ltd., (2012) 11 SCC 651* has held as under:

> *"8. Before we discuss the correctness of the impugned order, we intend to remind ourselves the observations made by this Court in Munshi Ram vs. Municipal Committee, Chheharta, (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."*

5.15. The petitioner, in the instant case, has the fullest opportunity to refute allegations, if any, and rebut adverse finding/observations involved in the matter, as discussed above. The petitioner may also raise legal issues as well as factual disputes before the Assessing Officer during the course of proceeding. It is possible for the petitioner to seek 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 it to collect further material. It cannot, therefore, be said that the notices dated 06.08.2022 under Section 73 are vulnerable. Reference can be made to *GKN Driveshafts (India) Ltd. Vrs. 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 above said five assessment years."*

5.16. The Hon'ble Supreme Court in the case of *State of Maharashtra and Others Vrs. Greatship (India) Limited, 2022 SCC OnLine SC 1262* reiterated the scope of interference where there is existence of statutory remedy in exercise of power under Article 226/227 of the Constitution of India. The following are the observations:

> *"14. At the outset, it is required to be noted that against the assessment order passed by the Assessing Officer under the provisions of the MVAT Act and CST Act, the assesse straightway preferred writ petition under Article 226 of the Constitution of India. It is not in dispute that the statutes provide for the right of appeal against the assessment order passed by the Assessing Officer and against the order passed by the first appellate authority, an appeal/revision before the Tribunal. In that view of the matter, the High Court ought not to have entertained the writ petition under Article 226 of the Constitution of India challenging the assessment order in view of the availability of statutory remedy under the Act. At this stage, the decision of this Court in the case of United Bank of India Vrs. Satyawati*

Tondon, (2010) 8 SCC 110 in which this Court had an occasion to consider the entertainability of a writ petition under Article 226 of the Constitution of India by by-passing the statutory remedies, is required to be referred to. After considering the earlier decisions of this Court, in paragraphs 49 to 52, it was observed and held as under:

"49. The views expressed in Titaghur Paper Mills Co. Ltd. Vrs. State of Orissa, (1983) 2 SCC 433 were echoed in CCE Vrs. Dunlop India Ltd., (1985) 1 SCC 260 in the following words : (SCC p. 264, para 3)

> *"3. ... Article 226 is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the Court must have good and sufficient reason to bypass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters. We can also take judicial notice of the fact that the vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged."*

50. In Punjab National Bank Vrs. O.C. Krishnan, (2001) 6 SCC 569 this Court considered the question whether a petition under Article 227 of the Constitution was maintainable against an order passed by the Tribunal under Section 19 of the DRT Act and observed : (SCC p. 570, paras 5-6)

> *"5. In our opinion, the order which was passed by the Tribunal directing sale of mortgaged property was appealable under Section 20 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short 'the Act'). The High Court ought not to have exercised its jurisdiction under Article 227 in view of the provision for alternative remedy contained in the Act. We do not propose to go into the correctness of the decision of the High Court and whether the order passed by the Tribunal was correct or not has to be decided before an appropriate forum.*
>
> *6. The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is a hierarchy of appeal provided in the Act, namely, filing of an appeal under Section 20 and this fast-track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the Court under Articles 226 and 227 of the Constitution, nevertheless, when there is an alternative remedy available, judicial prudence demands that the Court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act."*

51. In CCT Vrs. Indian Explosives Ltd. [(2008) 3 SCC 688] the Court reversed an order passed by the Division Bench of the Orissa High Court quashing the show cause notice issued to the respondent under

the Orissa Sales Tax Act by observing that the High Court had completely ignored the parameters laid down by this Court in a large number of cases relating to exhaustion of alternative remedy.

52. *In City and Industrial Development Corpn. Vrs. Dosu Aardeshir Bhiwandiwala [(2009) 1 SCC 168] the Court highlighted the parameters which are required to be kept in view by the High Court while exercising jurisdiction under Article 226 of the Constitution. Paras 29 and 30 of that judgment which contain the views of this Court read as under : (SCC pp. 175-76)*

> *"29. In our opinion, the High Court while exercising its extraordinary jurisdiction under Article 226 of the Constitution is duty-bound to take all the relevant facts and circumstances into consideration and decide for itself even in the absence of proper affidavits from the State and its instrumentalities as to whether any case at all is made out requiring its interference on the basis of the material made available on record. There is nothing like issuing an ex parte writ of mandamus, order or direction in a public law remedy. Further, while considering the validity of impugned action or inaction the Court will not consider itself restricted to the pleadings of the State but would be free to satisfy itself whether any case as such is made out by a person invoking its extraordinary jurisdiction under Article 226 of the Constitution.*
>
> *30. The Court while exercising its jurisdiction under Article 226 is duty-bound to consider whether:*
>
> *(a) adjudication of writ petition involves any complex and disputed questions of facts and whether they can be satisfactorily resolved;*
>
> *(b) the petition reveals all material facts;*

(c) *the petitioner has any alternative or effective remedy for the resolution of the dispute;*

(d) *person invoking the jurisdiction is guilty of unexplained delay and laches;*

(e) *ex facie barred by any laws of limitation;*

(f) *grant of relief is against public policy or barred by any valid law; and host of other factors.*

The Court in appropriate cases in its discretion may direct the State or its instrumentalities as the case may be to file proper affidavits placing all the relevant facts truly and accurately for the consideration of the Court and particularly in cases where public revenue and public interest are involved. Such directions are always required to be complied with by the State. No relief could be granted in a public law remedy as a matter of course only on the ground that the State did not file its counter-affidavit opposing the writ petition. Further, empty and self-defeating affidavits or statements of Government spokesmen by themselves do not form basis to grant any relief to a person in a public law remedy to which he is not otherwise entitled to in law."

53. *In Raj Kumar Shivhare Vrs. Directorate of Enforcement [(2010) 4 SCC 772] the Court was dealing with the issue whether the alternative statutory remedy available under the Foreign Exchange Management Act, 1999 can be bypassed and jurisdiction under Article 226 of the Constitution could be invoked. After examining the scheme of the Act, the Court observed : (SCC p. 781, paras 31-32)*

"31. When a statutory forum is created by law for redressal of grievance and that too in a fiscal

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

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

15. Applying the law laid down by this Court in the aforesaid decision, the High Court has seriously erred in entertaining the writ petition under Article 226 of the Constitution of India against the assessment order, bypassing the statutory remedies."

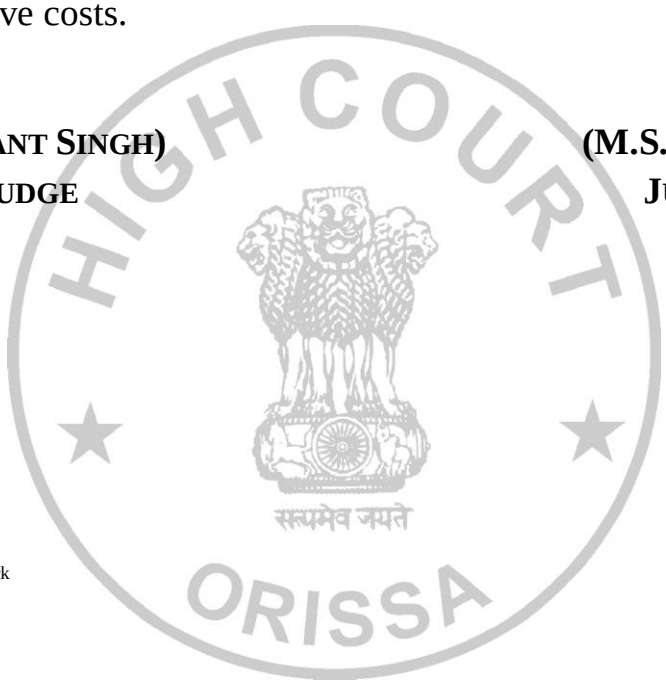
5.17. Considering the fact that the petitioner has ample opportunity to agitate issues before the Assessing Officer, this Court holds that entertainment of the writ petition at the stage of notice would be premature. Doing so would frustrate the tax administration and interdict adjudication process. This Court is alive to the fact that the statute under consideration, *viz.*, the GST Act and rules framed thereunder, provides sufficient safeguard for the assessee-petitioner, more so, when against the final orders of adjudication, appeal lies.

5.18. Thus, the proper officer concerned is at liberty to verify the veracity of the claim(s) made in the returns furnished by the petitioner and take appropriate steps in accordance with law after affording reasonable opportunity of hearing to the petitioner.

6. For the aforesaid reasons, this Court does not warrant it necessary to invoke extraordinary jurisdiction in exercise of power under Article 226 of the Constitution at the stage of Show Cause Notice. The writ petition is, therefore, dismissed. Parties are to bear their respective costs.

(JASWANT SINGH)
JUDGE

(M.S. RAMAN)
JUDGE



Aks/
Laxmikant

High Court of Orissa, Cuttack
November 18, 2022