GAHC010190142022

IN THE GAUHATI HIGH COURT

(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

PRINCIPAL SEAT

W.P(C) No. 6166/2022

M/S Technocom

(Formerly Proprietorship concern)

A Partnership firm having its Kamrup Chamber Road, Fancy Bazar, Guwahati. In the present proceedings, the petitioner is represented by its one of the Partner Shri Dwarka Prasad Didwania, Aged about 65 years resident of Kamrup Chamber, Road, Fancy Bazar, Guwahati-781001, Assam

.....Petitioner

-***Versus***-

1. **Union of India**
   Represented by Secretary Ministry of Finance, Department of Revenue, North Block, Central Secretariat, New Delhi-110 001
2. **The Principal Commissioner,** GST & Central Excise Commissionerate, having his office at GST Bhawan, Kedar Road, Guwahati-781 001

*.....**Respondents***

– B E F O R E –

HON'BLE MR. JUSTICE SOUMITRA SAIKIA

Advocate for the petitioner :Dr.Ashok Saraf, Sr. Advocate
Assisted by Mr. A Goyal, Advocate

Advocate for the respondents :Mr.S.C Keyal, Standing Counsel, GST

Dates of hearing :**10.12.2024; 12.12.2024; 19.03.2025; 24.04.2025; 27.05.2025; 06.08.2025; 16.09.2025; 28.10.2025**

Date of Judgment & Order: : **09.01.2026**

JUDGMENT AND ORDER

This writ petition is filed by the petitioner who is the partnership firms namely, M/S Technocom having its office situated at Kamrup Chamber Road, Fancy Bazar, Guwahati. The petitioner was registered under the VAT Act, 2003 and under the relevant provisions of the Finance Act, 1994 and discharged his taxable liabilities under the respective Act. The petitioner is engaged in the business of execution of contract with Railways as Contractor. For the Financial Year 2016-17, a show cause notice dated 22.10.2022 was issued by the Principal Commissioner, GST & Central Excise Commissionerate alleging inter-alia that the petitioner had suppressed the actual value of services provided during the financial year 2015-16 and did not fully disclose its liability in its ST-3 returns for the Financial Year 2016-17 and had consequently short paid its service tax dues to the tune of Rs. 9,37,91,059/- in violation of Sections 66B, 67, 68 and 70 of the Finance Act, 1994 read with Rule 6 & 7 of the Service Tax Rules, 1994.

2. It is also alleged that from the third party data provided by the Income Tax Department, the petitioner had declared Rs.

63,62,45,475/- as sale of services in Income Tax Return but the petitioner had declared the gross value of services in ST-3 returns as Rs. 1,09,71,749/- only. The Principal Commissioner, GST & Central Excise Commisionerate alleged in the show cause notice that from the information received from the Income Tax Department that the during the Financial year 2016-17, the Petitioner suppressed taxable value amounting to Rs. 62,52,73,726/- and on such value of services, the Service Tax amounting to Rs. 9,37,91,059/- was required to be paid by the Petitioner to the Government exchequer which the Petitioner did not pay and the same was required to be recovered under proviso to Section 73(1) of the Finance Act,1994 by invoking extended period of limitation along with interest at appropriate rate under Section 75 of the Finance Act 1994.

3. The Petitioner submitted its reply on 26.10.2021 to the show cause notice dated 22.10.2021. In the said reply, the Petitioner submitted that the Petitioner received work orders in the nature of works contracts for execution of construction, erection, commissioning or installation of original works pertaining to Railways and AMC services. The Petitioner also enclosed few work orders along with reply for the purpose of showing the nature of work. It is submitted that the Petitioner as a main contractors for the work awarded by the Railways also engaged sub-contractor for full or

partial execution of the contracts pertaining to Railways. In the said reply, the Petitioner also informed that the contracts undertaken by the Petitioner were pertaining to Railways and the same was exempted from payment of service tax under Entry No. 14 (a) of the Mega Exemption Notification No. 25/2012 S.T. dated 20.06.2012 w.e.f. 01.07.2012 as amended. The Petitioner also submitted in its reply that for the contract related to AMC services, the Petitioner has paid Service Tax and had also filed its return. In the said reply the Petitioner also enclosed Audited Balance sheet, Contract A/c and Profit & Loss with Schedules for the Financial Year 2016-17. The Petitioner in its reply also enclosed, audited financial statements prepared on mercantile basis and the Significant Accounting Policies. It is submitted by the Petitioner in its reply that deduction of TDS is on payment basis with or without accrual as and when payments arise in terms of the contracts.

4. It is submitted by the learned Senior counsel for the petitioner that the case was fixed for hearing on 31.05.2022 through video conferencing, the authorized representative of the Petitioner appeared before the Authority and argued the case and the matter was adjourned for further hearing. On 31.05.2022, it was informed that the date of next hearing shall be communicated to the Petitioner later. But to the utter shock and surprise to the Petitioner, the

petitioner received the impugned Order-in-Original dated 28.06.2022 without considering and appreciating the reply submitted by the Petitioner and without affording opportunity of being heard as the matter was supposed to be taken up for further hearing and an amount of Rs. 9,37,91,059/- was levied as service tax payable by the Petitioner. The said Order-in-Original, the Principal Commissioner of GST & Central Excise Commissionerate confirmed the demand of service tax of the said amount of Rs.9,37,91,059/- for the Financial Year 2016-17 in terms of Section 73(2) of the Finance Act,1994 and also imposed interest under section 75 of the Act with an equal amount of penalty of Rs. 9,37,91,059/- under section 78 of the Act. In the said order, it was observed that on scrutiny of the information received for the Financial year 2016-17, it was found that the Petitioner was engaged in providing taxable services and the services provided by the Petitioner neither fall under Negative List nor covered under the Mega Exemption Notification No. 25/2012-ST dated 20.06.2012. The Principal Commissioner of GST & Central Excise Commissionerate further observed that as per the third party data received from the Directorate General of Systems, New Delhi, it appeared that in the financial year 2016-17, the Petitioner rendered taxable services for a consideration of Rs. 63,62,45,475/-. However, in the ST-3 returns filed by the Petitioner for the said year, the

Petitioner declared only Rs.1,09,71,749/- as the gross value of services and thus the Petitioner suppressed the actual value of taxable services provided during the said period and consequently evaded payment of Service Tax including cesses to tune of Rs. 9,37,91,059/- in violation of Section 66B, 67 and 70 of the Finance Act,1994 read with Rules 6 and 7 of the Service Tax Rules,1994. The Petitioner respectfully submits that the only reason in the Order-in-Original dated 28.06.2022 in levying service tax was that on scrutiny of the third party data i.e. Form 26AS, the Petitioner rendered taxable services. It is relevant to mention herein that the Form 26AS is the Certificate of Tax Deduction at Source issued by the Income Tax Department showing the total amount of tax deducted at source under the Income Tax Act,1961 against the total receipts during the relevant assessment year. The relevant "Form 26 AS" issued by the Income Tax Department clearly shows the details of Agencies which made payments to the Petitioner with the amount of tax deducted at source. The work executed for the Railways is exempted under the Mega Notification No. 25/2012(Service Tax) dated 20.06.2012. In support of the said claim of exemption, the Petitioner submitted various contract agreements executed with Railways before the Principal Commissioner, GST & Central Excise Commissionerate. However, without considering such Clear evidence of exemption from

payment of service tax, the Respondent No. 2 proceeded erroneously and levied service tax on entire receipt including the exempted and non-taxable transaction under the said Notification No. 25/2012(Service Tax) dated 20.06.2012 issued by the CBIC. Being aggrieved, the present writ petition has been filed putting a challenge to impugned order-in-original No. 27/Pr. Commr./ST/GHY/2022-23 dated 28.06.2022 passed by the respondent No. 2.

5. The learned Senior counsel for the petitioner strenuously submits that the very basis of issuance of the demand cum show cause notice was on a mistaken belief of the department that any service tax is due from the writ petitioner whereas the contracts undertaken by the Petitioner were pertaining to Railways and the same was exempted from payment of service tax under Entry No. 14 (a) of the Mega Exemption Notification No. 25/2012 S.T. dated 20.06.2012 w.e.f. 01.07.2012 as amended.

6. It is strenuously urged by the learned senior counsel that there was absolutely no application of mind by the respondent authorities nor did they consider the materials which were placed before the authorities concerned before passing the impugned order in original imposing the demand of service tax and penalty. It is submitted that

these information being placed before the authorities concerned pursuant to the summons issued itself, there was no case for suppression made out against the petitioner as sought to be alleged against the petitioner and thereby issuing the demand cum show cause notice by extending the prescribed period of time under Section 73 of the CGST Act.

7. The learned Senior counsel for the petitioner submits that for imposition of tax, there must be a declaration of liability under the statute and which the assessee is required to comply with. It is submitted that tax cannot be imposed on an analogy and inferences based on Form 26AS statement received from the Income Tax Department. In support of his contention, the learned Senior Counsel has pressed into service Judgment of the Apex Court rendered in *Chatturam Horilram Ltd. Vs. Commissioner of Income Tax,* reported in *1955 (2) SCR 290*. It is submitted that in the said Judgment, the Apex Court by referring to a Judgment of the Federal Court held that there are three stages of imposition of taxes. There must be a declaration of liability which is the part of the statute which determines the liability in respect of the assessee, next there must be an assessment. The liability does not depend on the assessment it is already fixed under the statute but the assessment particularizes the exact sum which a person liable is required to pay and lastly there

must be modes of recovery of tax, in the event the assessee who is taxed does not pay voluntarily.

8. The learned Senior counsel for the petitioner also presses into service the Judgment of the Apex Court rendered in *A.V Fernandez Vs. State of Kerala,* reported in *(1957) 8 STC 561.* It is submitted that before any assessment is made levying any tax there must be a liability to tax. If there is no liability to tax the question of making an assessment in respect of the same does not arise. In the present case, there was no liability to pay the taxes inasmuch as either the services liability to pay tax was on the recipient of the services on reverse charge basis and whichever tax was payable.

9. The learned Senior counsel submits that the Judgments of the Apex Court cited are subsequently followed in *Commissioner of Income Tax Vs. Provident Investment Company Ltd.* reported in *(1957) 32 ITR 190.* The learned Senior counsel also presses into service Judgments in support of his contention by referring to *Venkateswara Stainless Steel and Wire Industries Vs. Union of India*, reported in *(1987) 27 ELT 648* and *M/S N.E Logistics & Anr. Vs. Union of India & 2 Ors. [W.P(C) No. 1870/2020].* It is submitted that in *N.E Logistics (Supra)* , similar show cause notice was issued based on information collected from the Income Tax Department through

Form 26AS. It is submitted that the High Court remanded the matter back to the authorities on the ground that the department had proceeded on a presumption that the assessee therein was liable to pay tax. It was held that the liability to pay tax of a service tax is not based on presumption nor can it be based upon the State of indeterminateness on the part of the authorities. Liability to pay the tax has to be conclusively determined for a given transaction for which the tax is imposed and for which the noticee has been held to be liable to pay tax as the same determination has not been made, the matter was remanded back to the Principal Commissioner, CGST for fresh determination and the assesses therein were given a opportunity to produce any relevant materials to show cause that the contract works for the service tax has been imposed for which the noticee is not liable to pay for such transaction.

10. It is submitted on behalf of the petitioner that by the said Judgment directed that after arriving at a conclusive determination reasoned order or a further demand notice as the case may be issued by the authorities. However, if on the other hand in the conclusion arrived at that the petitioner is not liable to pay service tax appropriate reason order is to be passed. It is submitted that the order has attained finality as no appeal has been preferred against the said Judgment.

11. The learned Senior Counsel for the petitioner also pressed into service Judgment rendered in *Luit Developers Private Limited Vs. Commissioner of CGST & Central Excise, Dibrugarh (Service Tax Appeal No. 75792 of 2021*) by the Customs, Excise & Service Tax Appellate Tribunal, Kolkata. While dealing with the imposition of service tax levied on the basis of entries in Form 26AS of the Income Tax Act. The Tribunal held that Form 26AS cannot be used to determine service tax liability unless there is any evidence shown that it was due to a taxable service. The Tribunal also came to the conclusion that there was no mala fide intention and therefore extended period of limitation cannot be invoked on the ground and service tax, interest and penalty was not sustainable and the same was accordingly set aside.

12. The learned Senior counsel for the petitioner submits that in the present case the Service Tax has been levied on the basis of the information reflected in the 26AS statement of the Income Tax. The 26AS statement only reflects the Income Tax deducted at source and the amount from which the said tax has been deducted. The said 26AS statement cannot determine the liability of the Service Tax of the petitioner inasmuch as only because Income Tax was deducted at source from certain receipts in respect of the various services rendered, it cannot be said that the said services were taxable under

the Finance Act of 1994. A particular receipt on account of services rendered though may be liable to Income Tax under the Income Tax Act, 1961, the same may not be liable for payment of service tax because of the exemptions granted under the Finance Act of 1994, or because the liability for payment of service tax may have been fastened on the service recipient on reverse charge basis. As such the information contained in the 26AS statement cannot by any stretch of imagination be said to be indicative of the fact that the services in respect of which the amount was received and the income tax was deducted at source on the said receipt were also taxable under the Finance Act of 1994 and liable to Service Tax. The Adjudicating Authority simply on the basis of inferences and analogy levied Service Tax on the entire receipts as reflected in the 26AS statement without examining the fact as to whether those Services were liable to Service Tax under the Finance Act of 1994. Without undertaking such an exercise and examination, the Adjudicating Authority cannot levy the Service Tax on the said receipts as has been held by the Apex Court that Tax cannot be imposed on the basis of Inferences and analogy. Since in the present case the entire Service Tax liability has been imposed any on inferences and analogy without coming to a finding that the said services were liable to Service Tax under the Finance Act of 1994 the impugned

Adjudication Order is absolutely illegal, without jurisdiction, and the same is liable to be set aside and quashed.

13. It is further submitted by Dr. Saraf, learned Senior Counsel that in the present case the adjudicating authority has levied service tax without examining the facts and without coming to a finding that the said services were taxable and simply on the basis of the information available in Form 26AS statement of the Income Tax, has levied the service tax on the entire amount received, on pure inferences and analogy which is not permissible in law, and thereby the said order passed by the adjudicating authority is absolutely illegal, without jurisdiction and the same is liable to be set aside and quashed.

14. The impugned order in original is further assailed on the ground that the extended period of limitation is illegal as there was no suppression, fraud, collusion or willful misstatement or suppression of facts or contravention of any of the provisions of the Act. Dr. Saraf, learned Senior counsel submits that Section 73 specifies recovery of service tax not levied or paid or short-levied or short paid or erroneously refunded and in such an event, the extended period of five (5) years is applicable. It is submitted that a section itself prescribes that the provisions of the section would be

applicable for recovery of Service Tax not levied or paid or short levied or short paid or erroneously refunded by reasons of –

(a) Fraud; or

(b) Collusion; or

(c) Willful misstatement; or

(d) Suppression of facts; or

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

15. It is submitted that for initiating any proceeding under Section 73 of the Act, there must be tax levied or paid or short-levied or short paid or erroneously refunded. Further the Notice has to be issued within a period of eighteen (18) months from the relevant date on the person chargeable with the service tax which has not been levied or paid or erroneously refunded. The Proviso to the said sub-section (1) also specifies that such notice can be issued within such extended period of five years only if such short-levy or short-payment or erroneous refunds were by reasons of fraud, collusion, willful misstatement, suppression of facts or contravention of any of the provisions of the Act or the Rules made thereunder with the interest to evade payment of tax.

16. It is submitted by the learned Senior counsel that assuming though not admitting that there was a failure to furnish correct information, however, the same does not constitute suppression unless the failure/omission to furnish information or failure to pay taxes are made willfully in order to evade payment of tax. In support of his contentions, the learned Senior counsel has referred to the Judgment of the Apex Court rendered in *Continental Foundation Joint Venture Holding Vs. CCE,* reported in *(2007) 10 SCC 334*. It is submitted that the Apex Court in the said Judgment held that mere omission to give correct information did not constitute suppression unless that omission was made willfully in order to evade duty. Suppression would mean failure to disclose full and true information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party would not constitute suppression. An incorrect statement cannot be equated with a willful mis-statement. The latter implies making of an incorrect statement with the knowledge that the statement made was not correct. It was further held therein that a mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment duty in order to evade duty.

17. Referring to the Judgment of Apex Court rendered in *CCE Vs. Chemphar Drugs & Liniments,* reported in *(1989) 2 SCC 127* , the

learned Senior Counsel, Dr Saraf, submits that the Apex Court while interpreting the provisions of Section 11A of the Central Sales Tax Act, 1944 held that something positive other than mere inaction or failure on the part of the manufacture or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability of invoking the extended period of limitation.

18. Reliance is also placed upon the Judgment of the Apex Court rendered in *Cosmic Dye Chemical Vs. CCE.,* reported in *(1995) 6 SCC 117,* it is submitted that the Apex Court therein held that the words "contravention of an of the provisions of the Act or Rules" are qualified by the immediately following words "with intent to evade payment of duty", and therefore it was not correct to say that there can be a suppression or misstatement of fact, which was not willful and yet constitutes a permissible ground for the purpose of the proviso to Section 11A. It is submitted that the law laid down by the Apex Court in this Judgment are squarely applicable in the present case inasmuch as there is no such finding the adjudicating authority while invoking the powers under Section 73 by invoking the extended period of limitation. It is submitted that the intent to evade payment of tax cannot be established by peering into the minds of the tax

payer but has to be established through evaluation of the tax behavior.

19. Referring to the Judgments pressed into service in support of his contention, Dr. Saraf urges that from the law laid down by the Apex Court and referred to by him, it is clear that without examining the fact as to whether there was any suppression, mis-statement, fraud, collusion, or contravention of any of the provisions if the Act and the rules with the intent to evade payment of any tax, the Adjudicating Authority simply on the basis of the tax behavior has invoked the extended period of limitation without fulfilling the preconditions laid down in proviso to Section 73(1) of the Act and thereby the impugned show cause notice is clearly barred by limitation and consequently the impugned order in original as well as the show cause notice are liable to be set aside and quashed.

The learned Senior counsel therefore submits that the order-in-original has been passed by invoking extended period of limitation of five (5) years without providing any tangible evidence to show that any material fact or information was willfully suppressed from the Revenue with the intent to evade payment of any tax and thereby the issuance of the show cause notice itself is barred by the

limitation and consequently the impugned show cause as well the order in original are liable to be set aside and/or quashed.

20. It is further submitted by the learned Senior counsel that if an authority while acting within its jurisdiction makes an error of law which is revealed on the face of its recorded determination, then the Court, in the exercise of its supervisory function, may correct the error unless there is some provision preventing a review by a Court of law. In support of his contentions, the learned Senior counsel refers to the Judgment rendered in *Anisminic Ltd. Vs. Foreign Compensation Commission and another,* reported in *(1969) 2 WLR 163.*Referring to the said Judgment, it is submitted that lack of jurisdiction may also arise if the authority in the intervening stage, while engaged on a proper enquiry, departs from the roots of natural Justice, or ask itself a wrong questions or takes into accounts matters which it was not directed to take into account. In such a situation it would amounts to a steps outside it jurisdiction.

21. The further limb of argument of the learned Senior Counsel for the petitioner is that the levy of interest in the instant case is absolutely illegal and without jurisdiction inasmuch as where service tax itself is not payable by the petitioner as the Petitioner also informed that the contracts undertaken by the Petitioner was

exempted from payment of service tax under Entry No. 14 (a) of the Mega Exemption Notification No. 25/2012 S.T. dated 20.06.2012 w.e.f. 01.07.2012 as amended. It is submitted that in so far as the levy of the penalty is concerned, it is a settled law that in order to justify imposition of penalty the authority concerned must find out not only that there has been a default but should also consider the question whether there were good and sufficient reasons for the default and only when such grounds are available the authorities can proceed to impose penalty. Referring to the finding of the Adjudicating authority, it is submitted that it clear that the adjudicating authority has imposed penalty most mechanically without considering as to whether the assessee had acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation. In support of his contention, the learned Senior counsel refers to the Judgments rendered in *Hindustan Steel Ltd. Vs State of Orissa,* reported in *(1972) 83 ITR 26; B.D Khaitan Vs. Income Tax Officer,* reported in *(1978) 113 ITR 556 (Cal)* and *Brajalal Banik Vs. State of Tripura and Ors,* reported in *(1989) 2 GLR 220.* Referring to the Judgments, the learned Senior Counsel submits that the adjudicating authority has not applied its mind to the facts and circumstances of the case but has acted mechanically while imposing penalty and the

order does not contain any reason legally sustainable whatsoever as to why the officer concerned had decided to levy penalty and also why he has levied the maximum amount of penalty. It is submitted that the maximum amount of penalty cannot be imposed in all the cases inasmuch as the authority has to decide the relevant factors such as the period of delay conduct of dealer and such other considerations and the levy of maximum penalty without stating any reasons may not be sustainable. It is therefore submitted that the imposition of interest and penalty in the instant case is absolutely illegal without jurisdiction and thereby the same is liable to be set aside and quashed. Such a non-speaking order is not maintainable in law and same is liable to be set aside and quashed.

22. In so far as the question of maintainability of the writ petition is concerned in view of the statutory remedy of appeal being provided under the Act, the learned Senior counsel submits that the existence of other adequate legal remedy will not per se act a bar for issuance of a writ of certiorari and in an appropriate case it may issue prerogative writs. The duty of the superior Court to issue a writ of certiorari to correct the errors of an inferior court or tribunal called upon to exercise judicial or quasi-judicial functions and not to relegate the petitioner to other legal remedies available to him and a Superior Court in a proper case exercise its jurisdiction in favour of a

petitioner who has allowed the time to appeal to expire or has not preferred his appeal. It cannot then be laid down as an inflexible rule that the superior Court must deny the writ when an inferior Court or tribunal by discarding the principles of natural justice and all accepted principle of procedure arrive at a conclusion which shocks the sense of justice and fair play.

23. Referring to the Judgment of this Court rendered in *Hardeodas Jagannath Vs. Income Tax Officer,* reported in *(1961) 47 ITR 56,* it is submitted that there is no inflexible rule that the existence of an alternative remedy is a bar to the issue of a writ of certiorari. The issue of various writs or directions is in the discretion of the Court and the Court while exercising its jurisdiction may take into consideration the existence of an alternative remedy as a mater of policy, but the existence of an alternative remedy and it is not per so as bar to the issue of a writ of certiorari. It is submitted by the learned Senior counsel that this position laid down by the Assam High Court has also summarised by the Apex Court in the case of *Hari Vishnu Kamath Vs. Ahmed Ishaque,* reported in *AIR 1955 SC 233.*

24. Similar views have been laid down by the Apex Court in *TELCO Vs Assistant Commissioner,* reported in *AIR 1967 SC 1401*; *State of*

U.P. Vs. Mohd. Nooh, reported in *1958 SCR 595*; *Bhopal Sugar Industries Vs. D.P. Dubey*, reported in *AIR 1967 SC 549 and Altafur Rahman Vs. Union of India*, reported in *(1986) 1 GLR 14.*

25. The learned Senior Counsel submits that a very recent decision of the Apex Court consistently has held that exhaustion of alternative remedy is not an inflexible rule. Where the Court finds that there has been violation of natural justice or the invocation of the jurisdiction itself is contrary to the provision of law, a writ Court is not denuded of it's powers to invoke the prerogative writs notwithstanding the availability of statutory alternative remedy.

26. The learned Senior counsel for the petitioner further fortifies his submissions by referring to the Judgments of the Apex Court rendered in *Whirlpool Corporation Vs. Registration of Trade Mark,* reported in *(1998) 8 SCC 1*; *Union of India Vs. Parashotam Dass,* reported in *2023 SCCOnline SC 314; State of Tripura Vs. Monoranjan Chakraborty,* reported in *(2001) 10 SCC 740; Assistant Commissioner of State Taxes Vs. Commercial Steel Co. Ltd.,* reported in 2021 SCCOnline SC 884 and *Godrej Sara Lee Ltd. Vs. Com. Assessing Officer,* reported in *2023 SCCOnline SC 9695.*

27. The learned Senior counsel therefore submits that the writ petition be allowed. The impugned order-in-original be interfered

with and set aside interfering with the demand of service tax as well as the imposition of penalty imposed on the writ petitioner.

28. Mr. S.C Keyal, learned counsel appearing for the Respondents has strongly disputed the contentions made on behalf of the writ petitioner. On the question of maintainability of the writ petition, it is submitted that where there is elaborately prescribed statutory provisions providing for alternative remedy, the petitioner assessee should not be permitted to invoke the writ jurisdiction without first availing of the statutory prescribed remedies. The GST is a complete code in itself and elaborate provisions are prescribed for ventilating grievances of the assesses who are aggrieved by any orders passed by the GST authorities. Therefore the writ petition should be dismissed and the petitioner should be relegated to avail of the statutory alternative remedies prescribed. Unless the petitioner had availed of these remedies, there is no scope for entertaining the instant writ petition. Therefore, since the petitioners did not avail statutory remedy, the petition should be dismissed on this limited ground and the parties be relegated to the avail of the statutory remedy prescribed. In support of his contentions, the learned counsel for the respondent relies upon the following Judgments:

1. GNRC Limited Vs. Union of India, reported in *2024 0 Supreme (Gau) 973;*

2. PHR Invent Educational Society Vs. UCO Bank and Ors, reported in *2024 0 Supreme SC 333;*

3. Brahmaputra Television Network Vs. Union of India, reported in *2024 0 Supreme (Gau) 855*

4. M/S Sailaja Commercial Construction Pvt. Ltd. Vs Union of India & Ors, (W.A. No. 188/2022)

5.Bekem Infra Projects Ltd Vs. Deputy Commissioner of State Tax, [SLP(C) No. 27712/2024];

6. Sanjib Das Vs. Union of India, reported in 2022 0 Supreme (Gau) 284;

7. Sunil Gulati Vs. Additional Commissioner, CGST, Delhi South Commissioner & Anr. [W.P(C) No. 4383/2025];

8. M/S Vishwanath Traders Vs. Union of India and Ors [SLP(C) No. 15594/2023];

9. Union of India and Ors. Vs. Coastal Container Transpiration Association and ors, reported in 2019 0 Supreme (SC) 215.

29. The respondents refers to the judgment of rendered in GNRC Limited vs Union of India reported in (2024) 0 Supreme (Gau) 973. The learned counsel for the respondents also pressed into service the judgment rendered in PHR Invent Educational Society Vs. UCO Bank and Ors, reported in 2024 0 Supreme SC 333. Pressing these judgments into service, the learned counsel for the respondents submit that in the face of well anointed procedures prescribed under the GST providing for appeals, the petitioner should be relegated for filing appeal before the appropriate authority.

30. Heard learned counsel for the parties. Pleadings available on records have been carefully perused as also the demand made by the show cause notice which ultimately came to be confirmed by the

impugned order in original which is the issue in the present proceedings has been assailed primarily on two grounds.

31. The first ground urged before this Court by the writ petitioner assessee is that there were no dues of service tax payable by the petitioner in respect of the services rendered.

32. Upon a perusal of the pleadings available before the Court, it is seen that the service tax liability of services by the petitioner was stated that the contracts undertaken by the Petitioner were pertaining to Railways and the same was exempted from payment of service tax under Entry No. 14 (a) of the Mega Exemption Notification No. 25/2012 S.T. dated 20.06.2012 w.e.f. 01.07.2012 as amended.

33. In this context a reference to the Notification No. 25/2012-Service Tax dated 20.06.2012 as amended, in exercise of powers conferred on it by Sub-section (1) of Section 93 of the Finance Act, 1994 notified certain exemptions of the taxable services from the whole of the service tax leviable thereon under Section 66B of the said Act.

34. The first limb of argument by the learned Senior counsel for the petitioner before this Court is imposition of tax on solely on the basis of data available in Form 26AS which is obtained from the

Income Tax Department. In *Chatturam Holiram Ltd (Supra)* , the Apex Court held that there are three stages in the imposition of tax. There has to be a declaration of liability, which is the part of the statute which determines what persons in respect of what property are liable to pay the tax. Then there has to the assessment. The liability to pay taxes does not depend on the assessment which has already been fixed by the statute. But the assessment specifies the exact sum which a person is found to be liable to pay and finally the modes of recovery of taxes which are assessed in the event the assessee refuses to pay voluntarily. The relevant paragraphs of this Judgments are extracted below:

> *"As has been pointed out by the Federal Court in Chatturam Vs. Commissioner of Income-tax, Bihar [(1947) F.C.R. 116 at 126; 15 ITR 302, at 302] (quoting from the judgment of Lord Dunedin in Whitney Vs. Commissioners of Inland Revenue [(1926) A.C. 37] 'there are three stages in the imposition of a tax. There is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, ex-hypothesi, has already been fixed. But assessment particularses the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay"*

35. Again in A.V Fernandez Vs. State of Kerala, reported in (1957) 8 STC 561, the Apex Court held that the three stages in the imposition of tax which are laid down predicate, in the first instance, a declaration of liability as the starting point. If there is a liability to pay tax which is imposed in terms of the taxing statute, then the

provisions with regard to the assessment of such liability is to be followed. If there is no liability to tax there cannot be any assessment either. Sales or purchases in respect of which there is no liability to tax imposed by the statute cannot at all be included in the calculation of turnover for the purpose of assessment and the exact sum which the dealer is liable to pay must be ascertained without any reference whatever to the same.

It was further held that if under the statute, it is found that the assessee is not liable to tax, no tax can be levied or imposed on them and they do not come under the purview of such a statute. The Apex Court went on to hold that no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter. It was held that regard must be had to the actual provision of the Act and the Rules made thereunder before any conclusion can be arrived at that the assessee is liable to assessment as contended by the revenue authorities. The relevant provisions this Act are extracted below:

> *"The three stages in the imposition of a tax which are laid down here predicate, in the first instance, a declaration of liability as the starting point. If there is a liability to tax, imposed under the terms of the taxing statute, then follow the provisions in regard to the assessment of such liability. If there is no liability to tax there cannot be any assessment either. Sales or purchases in respect of which there is no liability to tax imposed by the statute cannot at all be included in the*

calculation of turnover for the purpose of assessment and the exact sum which the dealer is liable to pay must be ascertained without any reference whatever to the same.

The legislature cannot enact a law imposing or authorizing the imposition of a tax thereupon and they are not liable to any such imposition of tax. If they are thus not liable to tax, no tax can be levied or imposed on them and they do not come within the purview of the Act at all. The very fact of their non-liability to tax is sufficient to exclude them from the calculation of the gross turnover as well as the net turnover on which sales tax can be levied or imposed.

It is no doubt true that in construing fiscal statutes and in determining the liability of a subject to tax one must have regard to the strict letter of the law and not merely to the spirit of the statute or the substance of the law. If the Revenue satisfies the Court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter. We must of necessity, therefore, have regard to the actual provisions of the Act and the rules made thereunder before we can come to the conclusion that the appellant was liable to assessment as contended by the Sales Tax Authorities."

36. Coming to the facts of the present case, in the absence of any specific averments made before this Court, it is seen that in the impugned order-in-original, the respondent authorities had held that the assessee had failed to the reply to the show cause notice within the stipulated period but subsequent paragraphs reveals that the appellant did reply and submit all the relevant documents.

37. From the recital of the impugned Order-in-original, it is seen that the respondent No. 2 does not dispute that the gross receipts as reflected in the Form 26AS obtained from the Income Tax Department.

38. Therefore, under such circumstances, this Court is of the considered view that the determination made by the respondent authorities by issuing the demand cum show cause notice and the confirmation in the impugned order-in-original is contrary to the provisions of the Act and the law declared by the Apex Court as well as by the High Court. The impugned order-in-original is therefore is bad and the same is liable to set aside.

39. Coming to the question of the invocation of the extended period of limitation, it is necessary to refer to the provisions of Section 73 of the Finance Act, the same is extracted below:

> ***Section 73: - Recovery of Service tax not levied or paid or short-levied or short-paid or erroneously refunded.-***
>
> *73 (1) where any service tax has not been levied or paid or short -levied or short-paid or erroneously refunded, the Central Excise Officer may, within eighteen 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 persons 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) willful misstatement ;or*
>
> *(d) suppression of facts; or*
>
> *(e) contravention of any of the provisions of this chapter or of the rules made there under 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 eighteen 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 eighteen months or five years as the case may be.

(1A) Notwithstanding anything contained in sub-section (1), 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

(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.

(3) .....

40. A perusal of the Section 73 of the Finance Act reveals that the extended period in respect of recovery of service tax not levied or paid or short levied or short paid or erroneously refunded can be invoked only when any or more of the conditions prescribed under the proviso to the said section is present. Under the proviso to the said section, there are five situations when the extended period of limitation can be invoked. These are:

(a) Fraud; or

(b) Collusion; or

(c) Willful misstatement; or

(d) Suppression of facts; or

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

41. It is only in the event that any or more of these conditions are found to be applicable in the facts and circumstances of the case that the provisions for extension of limitation under Section 73 can be invoked. In the event, it is invoked a notice has to be issued within a period of 18 months from the relevant date on the person chargeable with service tax.

42. In this context, it is necessary to refer to the case laws cited before this Court. In Continental Foundation Joint Venture Holding (Supra), the extended period of limitation under Section 11A of the Central Excise and Salt Act, 1944 was under consideration. The Apex Court held that mere omission to give correct information did not constitute suppression unless that omission was made willfully in order to evade duty. The Apex Court held that suppression would mean failure to disclose full and true information with the intent to evade payment of duty. When the facts are known to both the parties, omissions by one party would not constitute suppression. It was held that an incorrect statement cannot be equated with a willful

mis-statement. The latter implies making of an incorrect statement with the knowledge that the statement made was not correct. The relevant paragraphs of the Judgment are extracted below:

> ***12.*** *The expression "suppression" has been used in the proviso to Section 11-A of the Act accompanied by very strong words as "fraud" or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop (sic evade) the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under Section 11-A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a wilful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct.*

43. In CEE Vs Chemphar Drugs & Liniments (Supra), while interpreting provisions of Section 11A of the Act of 1944, the Apex Court held 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 (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.

44. In Cosmic Dye Chemical (Supra), the Apex Court again while examining Section 11 A of the Act of 1944 held that the emphasis is on the requisite intent i.e the intent to evade payment of duty which is built into the very works of section. The Apex Court held that even misstatement or suppression of fact are clearly qualified by the words "willful" preceeding the words "misstatement or suppression of facts" which means with intent to evade duty. The Apex Court therefore held that it will not be correct to say that there can be a suppression or misstatement of fact, which is not willful and yet constitutes a permissible ground for the purpose of the provisio to Section 11-A. Misstatement or suppression of fact must be willful. The relevant paragraph is extracted below:

> ***"6.*** *Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word 'wilful' preceding the words "misstatement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or rules" are again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or misstatement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11-A. Misstatement or suppression of fact must be wilful.*

45. Coming to the fact and the present proceedings from the recital of the impugned order-in-original, it is seen that the ST-3 returns filed for the period mentioned, the petitioner declared only

Rs. 1,09,71,749/- as the gross value of services and thus suppressed the actual value of taxable services provided during the said period and consequently evaded payment of service tax to the tune of Rs. 9,37,91,059/- including Krishi Kalyan Cess and Swachh Bharat Cess on the differential taxable value of Rs. 62,52,73,726/-. Therefore, assessing authority found that the petitioner did not declare the correct value of taxable service in the ST-3 returns as per their book of accounts.

46. Such conclusions as have been discussed above are contrary to the facts which are evident from the pleadings. In any view of the matter for invocation of the provisions of Section 73 for extension of the period of limitation, it must necessarily be a case which falls under any or all the conditions specified under the proviso to Section 73(1) of the CGST Act. From a plain reading of the impugned Order-in-Original and the relevant portions of which have been extracted above, it is evident that there is no finding by the Adjudicating Authority that the case of the petitioner can be considered to be a case which falls under the conditions specified in proviso to Section 73(1). Under such circumstances, the impugned Order-in-Original appears to the Court to have been assumption of jurisdiction by the revenue authorities which was not otherwise vested on the said authority. For the revenue authorities to invoke powers under Section

73(1), there must be a finding and a conclusion arrived at based on the facts of the case that the petitioner assessee had willfully and deliberately resorted to fraud, collusion, willful misstatement, suppression of facts of contravention of any of the provision thereunder with the intent to evade payment of service tax. Therefore, for invocation of the powers proviso to Section 73(1), there must be a conclusive finding arrived at by the Revenue authorities that the petitioner assessee had resorted to any or all for these acts or omissions with the sole intention to evade payment of service tax. Such finding is not discernable from the impugned Order-in-Original passed by the Revenue Authorities. Therefore, the assumption of jurisdiction of the Revenue under the proviso to Section 73(1) has to be concluded to be a jurisdiction assumed by the Revenue authorities not vested on it by the statute. Such assumption of jurisdiction therefore, being contrary to the provisions of the statute itself, the same is colourable and therefore it is held to be unauthorized.

47. Where a subordinate Tribunal and an authority is found to have assumed jurisdiction not vested on it a superior Court may invoke its extraordinary jurisdiction to correct such errors which were exercises by the authorities. The powers of a superior Court to examine the authority assumed by a Tribunal was the issue in *Anisminic Ltd*

(Supra). It was held therein that the jurisdiction of the superior Court is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would itself, in turn, transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualification and conditions of its exercise; the other is the observance of the law in the course of its exercise. If, therefore, a tribunal while within the area of its jurisdiction committed some error of law and if such error was made apparent in the determination itself (or, as it is often expressed, on the face of the record) then the superior court would certainly be competent correct that error unless it was otherwise forbidden to do so under the statute. It would be so forbidden if the determination was "not to be called in question in any court of law". If so forbidden it could not then even hear argument which suggested that error of law had been made. It could, however, still consider whether the determination was within "the area of the inferior jurisdiction.

By referring to Reg. Vs. Cotham, reported in (1898) 1 Q.B. 802, 808, it was noted that the distinction between, on the one hand, disregarding the provisions of a statute and considering matters

which ought not to be considered and, on the other hand, what is called "a mere misconstruction of an Act of Parliament". This perhaps illustrates the clear distinction which exists between an error when in the exercise of jurisdiction and an error in deciding whether jurisdiction can be assumed: in the latter case an error may have the consequence that jurisdiction was lacking and was wrongly assumed and the result would be that any purported decision would have no validity.

The Court held that lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper inquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity.

48. Again in *Bunbury Vs. Fuller,* reported in *(1853) 9 Exch 111, 140* on the question of excessive jurisdiction of a Court of limited jurisdiction, it was held that no court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars, making up together the subject matter which, if true, Is within its jurisdiction, and however necessary in many cases it may be for it to make a preliminary inquiry, whether some collateral matter be or be not within the limits, yet upon this preliminary question, its decision must always be open to inquiry in the superior court.

49. Again in *Rex Vs. Shoreditch Assessment Committee, Ex parte Morgan,* reported in *(1910) 2 K.B. 859,* it was held that no tribunal of inferior jurisdiction can by its own decision finally decide on the question of the existence or extent of such Jurisdiction: such question is always subject to review by the High Court, which does not permit the inferior tribunal either to usurp a jurisdiction which it does not possess, whether at all or to the extent claimed, or to refuse to exercise a jurisdiction which it has and ought to exercise. Subjection in this respect to the High Court is a necessary and inseparable incident to all tribunals of limited jurisdiction; for the existence of the limit necessitates an authority to determine and

enforce it: it is a contradiction in terms to create a tribunal with limited Jurisdiction and unlimited power to determine such limit at its own will and pleasure — such a tribunal would be autocratic,not limited — and it is immaterial whether the decision of the inferior tribunal on the question of the existence or nonexistence of its own jurisdiction is founded on law or fact.

50. In Pilling Vs. Abergele Urban District Council, reported in (1950) 1KB 636, it was held that where a duty to determine a question is conferred on a authority which state their reason for the decision and the reasons which they state show that they have taken into account matters which they ought not to have taken into account or that they have failed to take matters into account which they ought to have taken into account, the court to which an appeal lies can and ought to adjudicate on the matter.

51. Similar views have been expressed by Courts in India and followed in several cases in the context of examination of jurisdiction vested on Tribunals and Court of limited jurisdiction. In Dhirajlal Girdharilal Vs. CIT, Bombay, reported in AIR 1955 SC 271, the Apex Court held that when a Court of fact acts on materials partly relevant and partly irrelevant, it is impossible to say to what extent the mind of the Court was affected by the irrelevant materials used by it in

arriving at its finding and such a finding is vitiated because of use of inadmissible material and thereby a question of law arises.

52. In Ram Avtar Sharma Vs. State of Haryana, reported in AIR 1985 SC 915, the Apex Court held that discretionary power must be exercised on relevant and not on irrelevant or extraneous considerations. It means that power must be exercised taking into account the considerations mentioned in the statute. If the statute mentions no such considerations, then the power is to be exercised on considerations relevant to the purpose of which it is conferred. On the other hand, if the authority concerned pays attention to, or takes into account, wholly irrelevant or extraneous circumstances, events or matters or considerations then the action taken by it is invalid and will be quashed.

53. In Jt. Reg., Co-operative Societies Vs. Rajagopal, reported in AIR 1970 SC 992, the Apex Court held that even though an authority may act in its subjective satisfaction, there must be cogent materials on which the authority has to form its opinion.

54. In Indian Railway Construction Co. Ltd. Vs. Ajay Kumar, reported in AIR 2003 SC 1843, the Apex Court held that in the purported exercise of its discretion, the authority conferred with discretion must not do what it has been forbidden to do, nor must it

do what it has not been authorized to do. It must act in good faith, must have regard to all relevant considerations, must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the letter and to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously.

55. Again in Shalini Soni Vs. Union of India, reported in (1980) 4 SCC 544, it was held by the Apex Court that it is an unwritten rule of law, constitutional and administrative, that whenever a decision-making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote. Applying this principle in CIT Vs Mahindra & Mahindra, reported in (1983) 4 SCC 392, the Supreme Court quashed a decision under Section 72-A of the Income Tax Act, as the government was "clearly influenced by irrelevant and extraneous materials vitiating the impugned conclusion.

56. In S.R Venkataraman Vs. Union of India, reported in AIR 1979 SC 49, the Apex Court held that an administrative order which is based on reasons of facts which do not exist is infested with an abuse of power. There will be an error of fact when a public body is

promoted by a mistaken belief in the existence of a non-existing fact or circumstance.

57. From a careful analysis of the judicial pronouncements as discussed above, it is clear that if an authority while making the inquiry rejects a consideration which is relevant and/or takes into consideration materials and other information which are not relevant, the said decision can be said to be a decision in excess or without jurisdiction. In the present case the adjudicating authority took into consideration the information available in form 26AS of the Income Tax Act, the sole basis for the purpose of levy of service tax. The authority did not consider the services rendered by the petitioner were exempted from levy of service tax or the liability to pay the service tax on the said services was on the recipient on the services. Since the adjudicating authority did not take into consideration those relevant materials which it was bound to take into consideration and on the other hand it had taken into consideration factors and materials, which if not irrelevant and not germane for deciding the liability of the service tax, cannot establish the liability of the assessee, then the said actions of the adjudicating authority is certainly without jurisdiction and/or is in excess of jurisdiction and thereby the impugned actions, orders and notices issued by the adjudicating authority are liable to interfered with by this Court in

exercise of its extra ordinary jurisdiction under Article 226 of the Constitution of India.

58. Coming to the question of maintainability of the writ petition in view of the availability of statutory alternative remedy, the respondents have raised objections that whatever issues have been urged by the petitioner before this Court can very well be looked into by the appellate authority prescribed under the statute. Therefore, the question of exercise of prerogative writs by this court is not called for and the writ petition should be dismissed and the petitioners should be relegated to avail the statutory remedy. That

59. While the respondents are within their rights to raise their objections, time and again the question of issuance of prerogative writs even where statutory alternative remedies are available and/or are not availed of by the assessee, has come up before this Court as well as the Apex Court in a Catena judgments. The Assam High Court in *Hardeodas Jagannath Vs. Income Tax Officer*, reported in (1961) 47 ITR 56 had clearly held that there is no inflexible rule that the existence of an alternative remedy is a bar to the issue of writ of certiorari. The issuance of prerogative writs or directions is always to the discretion of the Court and the Court while exercising its discretion may take into consideration the existence of an alternative

remedy as a matter of policy, but the existence of an alternative remedy is not per se a bar to the issue of writ of certiorari.

The High Court at Paragraph 42 held as under:

> *"42 No Tribunal and no Officer can confer jurisdiction or authority or competence upon itself or himself by misconstruing a section. An authority cannot claim to exercise jurisdiction by construing a section erroneously and thereby contending that the section so wrongly construed gives him the necessary power. In such a case, if the section has been wrongly construed, it would be a clear case of absence of jurisdiction apparent on the face of the record because the Court has got to look at the section and to decide whether the officer construing the section was in the right or in the wrong."*

60. The Apex Court in *TELCO Vs. Assistant Commissioner,* reported in *AIR 1967 SC 1 401* held that though ordinarily High Court leaves an aggrieved party to take recourse to the remedies available under the ordinary law, if they are equally efficacious, yet there are certain exceptions and one of such exceptions pointed out is where action is being taken arbitrarily and without the sanction of law.

61. In *State of U.P Vs. Mohd. Nooh*, reported in *1958 SCR 595*, the Apex Court held that the rule requiring the exhaustion of statutory remedies before the writ is granted is a rule of policy, convenience and discretion rather than rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies.

62. In *Bhopal Sugar Industries Vs. D.P Dubey*, reported in *AIR 1967 SC 549*, the Apex Court held that the High Court has undoubted jurisdiction to decide the writ application whether the taxing authority has arrogated to itself, powers which it does not posses or has committed serious errors of procedure which has affected the validity of the decision or where the taxing authority threatens to recover tax on an interpretation of the statute which is erroneous.

63. In *Altafur Rahman Vs. Union of India,* reported in *(1986) 1 GLR 14,* this Court held that when the challenges of the petitioner go to the root of the jurisdiction of the Controller and therefore the writ petition cannot be dismissed without disposing the contentions of the petitioner on merits.

64. In *Whirlpool Corporation Vs. Registration of Trade Mark,* reported in *(1998) 8 SCC 1*, the Apex Court on the question of alternative remedy held that exception on the existence whereof a Writ Court would be justified in entertaining a writ petition despite the party approaching it not having availed the alternative remedy provided by the statute were laid document was the exceptional land document by the Apex Court were as under :

(i) where the writ petition seeks enforcement of any of the fundamental rights.

(ii) where there is violation of principles of natural justice;

(iii) Where the order or the proceedings are wholly without jurisdiction; or

(iv) Where the vires of an Act is challenged

65. In Godrej Sara Lee Ltd (Supra), the Apex Court held that mere availability of an alternative remedy of appeal or revision, which the party invoking the jurisdiction of the High Court under Article 226 has not pursued, would not oust the jurisdiction of the High Court and render a writ petition "not maintainable". The Court made it clear that availability of an alternative remedy does not operate as an absolute bar to the "maintainability" of a writ petition and that the rule, which requires a party to pursue the alternative remedy provided by a statute, is a rule of policy, convenience and discretion rather than a rule of law. The Apex Court in further held that dismissal of a writ petition by a high court on the ground that the petitioner has not availed the alternative remedy without, however, examining whether an exceptional case has been made out for such entertainment would not be proper. The Apex Court further held that where the controversy is a purely legal one and it does not involve disputed questions of fact but only questions of law, then it should be decided by the high court instead of dismissing the writ petition

on the ground of an alternative remedy being available. The relevant paragraph is extracted below:

> *"9. Now, reverting to the facts of this appeal, we find that the appellant had claimed before the High Court that the suo motu revisional power could not have been exercised by the Revisional Authority in view of the existing facts and circumstances leading to the only conclusion that the assessment orders were legally correct and that the final orders impugned in the writ petition were passed upon assuming a jurisdiction which the Revisional Authority did not possess. In fine, the orders impugned were passed wholly without jurisdiction. Since a jurisdictional issue was raised by the appellant in the writ petition questioning the very competence of the Revisional Authority to exercise suo motu power, being a pure question of law, we are of the considered view that the plea raised in the writ petition did deserve a consideration on merits and the appellants writ petiton ought not to have been thrown out at the threshold."*

66. Again in Union of India Vs. Parashtom Dass, reported in 2023 SCCOnline SC 314, the Apex Court held that the provision of Article 226 of the Constitution forming part of the basic structure of the Constitution and that the self-restraint of the High Court under Article 226 of the Constitution is distinct from putting an embargo on the High Court in exercising this jurisdiction under Article 226 of the Constitution while judicially reviewing a decision arising from an order of the Tribunal. The relevant Paragraphs are extracted below:

> *"A High Court Judge has immense experience. In any exercise of jurisdiction under Article 226, the High Courts are quite conscious of the scope and nature of jurisdiction, which in turn would depend on the nature of the matter.*
>
> *We believe that there is no necessity to carve out certain case from the scope of judicial review under Article 226 of the Constitution, as was suggested by the learned Additional Solicitor General. It was enunciated in*

the Constitution Bench Judgment in S.N. Mukherjee case that even in respect of courts-martial, the High Court could grant appropriate relief in a certain scenario as envisaged therein, i.e., "if the said proceedings have resulted in denial of the fundamental rights guaranteed under Part III of the Constitution or if the said proceedings suffer from a jurisdictional error or any error of law apparent on the face of the record."

There appears to be a misconception that the High Court would re-appreciate the evidence, thereby making it into a second appeal, etc. WE believe that the High Courts are quite conscious of the parameters within which the jurisdiction is to be exercised, and those principles, in turn, are also already enunciated by this Court."

67. From a careful analysis of the judgments discussed above, it is clear that the writ Court can interfere any arbitrary action notwithstanding the availability of alternative remedy when the authorities acts within jurisdiction or in exercise of jurisdiction or there is a procedural irregularity or were the order is high handed and is palpably illegal order in as much the same would amount to violation of Article 14 of the Constitution of India.

68. Although ordinarily it is the law enunciated by this court as well as by the Apex Court that an aggrieved assessee ought to avail of statutory remedies ascribed or prescribed under the statute, there is no quarrel on this principle of law. The GST is a complete code in itself providing for filing of returns, assessments, recovery as well as for appeals before the appropriate appellate authority. The facts involved in the present proceedings are however peculiar in essence that this show cause notice and the consequential confirmation of

demand by the impugned order in original was a proceeding initiated by the respondent authority after invoking the extended period of limitation under Section 73(1). Therefore, in an ordinary course of proceedings seeking recovery of tax demanded, the normal course would be to avail of the statutory remedies. However, before the authorities invoke their jurisdiction under section 73(1), it is the mandate of the statute that the authorities must come to a specific conclusion that the jurisdiction conferred on the revenue authorities under Section 73 (1) can be invoked in the facts and circumstances of the present case. As have been elaborately discussed in the preceeding paragraphs that for invocation of jurisdiction under section 73(1), the respondent authorities must come to a conclusion that the invocation of the powers under section 73 (1) is necessary as the petitioner's case falls under any of the conditions mentioned in the proviso to section 73(1) of the CGST Act. However, from the recital of the order impugned, it is seen that the primary reason for invoking the jurisdiction under section 73(1) is non furnishing of the required documents by the petitioner assessee to be full satisfaction of the respondent authorities. This mere non furnishing of documents or information in itself cannot be construed to have given rise to a situation under any or all of these five conditions under proviso to section 73(1) in order to levy service tax by extending

limitation by the revenue authorities who have invoked this powers under section 73(1). Under such circumstances, ordinarily the revenue authorities could not have issued the impugned notice in demand followed by the order in original as it would have been hit by limitation. It is only by invocation of Section 73(1) under the GST Act that the revenue authorities have assumed powers for issuance of the show cause and the consequential confirmation by the impugned order in original by extension of the limitation. Therefore, the parameters prescribed under the proviso to section 73 (1) are to be scrupulously and diligently followed by the revenue authorities. It does not depend on the *ipse dixit* of the revenue authorities. They must certainly arrive at a specific conclusion that the non-furnishing of documents leading to non-payment of GST is a deliberate and willful attempt by the petitioner assessee to evade from payment of the taxes due. The revenue authorities were within their rights to issue appropriate notices and carry out proceedings within the ordinary period of limitation prescribed, if it was their conclusion on due examination of the materials before them that there was any shortfall in the payment of GST and the same was required to be recovered. However, this process for demand and recovery was not initiated within the period of limitation ordinarily prescribed under the provisions of the Act. Therefore, the revenue authorities invoked the

provisions under Section 73(1) to issue the demand cum show cause notice and the consequential impugned order in original confirming the demand and imposition of penalty and interest. It is the view of this Court that while demand and recovery of taxes as ordinarily prescribed under the provisions of the Act requires careful consideration of the facts and circumstances and satisfaction of all the parameters prescribed upon, the demand and recovery under the extended period of limitation under section 73(1) being an exception to the General Rule, requires a higher degree of responsibility and diligence on the part of the revenue authorities before they can proceed to invoke the powers conferred under section 73(1).

69. It is a trite law that greater the power prescribed under the statute greater will be the responsibility on the authorities on whom it has been bestowed to ensure that no infraction of the provisions of the Act and the Rules are made and no injustice is caused to the assessee during the process of demand and recovery. This Court while examining the facts and circumstances in minute detail and the exposition of the law laid down by various Courts including this Court as well as the Apex court of the country has held that for the Revenue authorities to invoke the powers under section 73(1), there must be a conclusive finding by the Revenue authorities that the petitioner assessee under the facts and circumstances, had wilfully

and deliberately evaded or neglected to pay the GST. This conclusion by the Revenue authorities is not apparent and discernible from a plain reading of the impugned order in original. It is not a case that the petitioner assessee never responded to the notices. It is not a case that the documents which were called for required to be submitted were not furnished. The ST-3 Returns filed by the petitioner assessee were available in the records of the revenue authorities and which would have given a complete picture of the services rendered by petitioner assessee and/or whether such services come within the ambit of service taxes or are excluded by any circular or notification issue. However, there is no finding by the revenue authorities as to why this aspect was not examined. There is no conclusion of the revenue authorities in this aspect of the matter as is evident from the impugned order in original.

70. Therefore, under such circumstances the invocation of extended period of limitation under section 73(1) has been held by this Court to be invalid and contrary to the prescriptions mandated by law. This being a position, it is a clear case of assumption of jurisdiction by the Revenue authorities where the statutes did not confer them such jurisdiction by default. A Writ Court while exercising its powers under Article 226 can certainly examine whether the Tribunal or the quasi-judicial authority by exercising its

jurisdiction mandated under the statute has fulfilled the necessary pre-conditions prescribed by the statute itself.

71. In the facts and circumstances of the case, it is the conclusion arrived at by this Court that such preconditions mandated by law under section 73(1) having not been fulfilled by the Revenue authorities, their assumption of jurisdiction under section 73(1) of the GST Act was completely unwarranted and revenue authorities could not have assumed the jurisdiction under section 73(1) unless these pre-conditions mandated and a conclusion thereto has been arrived at by the Revenue authorities before assumption of such jurisdiction. It is under these circumstances that notwithstanding the availability of statutory alternative remedy, this Court considers it an appropriate case to invoke its jurisdiction under Article 226 to interfere with the impugned order in original and to set aside and quash the order-in-original. Under these circumstances, the case laws referred to by the respondents will have no bearing in the facts and circumstances of the present proceedings. There is also no quarrel with the general proposition of law that in the face of statutory alternative remedy being available, a Writ Court would ordinarily not invoke its power of issuance of prerogative Writs. Since this Court has held that the levy of service tax on the petitioner by extending the limitation is contrary to the provisions of law, the

natural corollary that would follow is that the levy of all penalty, surcharge and interest are also not leviable on the petitioner, this Court therefore issues a writ of certiorari setting aside the impugned order in original and it is ordered accordingly.

72. Therefore the writ petition stands accordingly allowed. However no order as to cost. Pending I.A.s are also dismissed and the interim order if any stands merged.

JUDGE

Comparing Assistant