

IN THE HIGH COURT OF KARNATAKA DHARWAD BENCH

DATED THIS THE 27TH DAY OF MARCH, 2026

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPRASANNA

WRIT PETITION No.100372 OF 2024 (T-RES)

BETWEEN:

SRI GOURIBIDANUR VENKATAKRISHNA KUMAR
AGED ABOUT 54 YEARS
S/O G.V.VENKATAKRISHNA
RESIDING AT NO.101
SIDDHIVINAYAKA APARTMENT
ADHAYAPAK NAGAR, HUBLI – 580 032.

... PETITIONER

(BY SRI D.R.RAVISHANKAR, SENIOR ADVOCATE A/W.
SRI NAVEEN G. S., ADVOCATE)

AND:

THE ASST. COMMISSIONER
CGST-CENTRAL EXCISE
OFFICE AT:
OFFICE OF THE ASST. COMMISSIONER
HUBLI DIVISION, I FLOOR
C.R.BUILDING, NAVANAGAR
HUBLI – 580 025.

... RESPONDENT

(BY SRI SHIVRAJ S.BALLOLI, ADVOCATE)

THIS WRIT PETITION IS FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA PRAYING TO ISSUE AN WRIT OR SUCH OTHER ORDER IN THE NATURE OF CERTIORARI TO QUASH OR SET ASIDE THE ORDER PASSED BY THE RESPONDENT ON 31.08.2023 AND ISSUED ON 25.09.2023 BEARING NO. BEL-EXCUS-000-HBL-AC-MR-24-2023-24-ST AND PRODUCE AT ANNEXURE-E.

THIS WRIT PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

CORAM: **THE HON'BLE MR JUSTICE M.NAGAPRASANNA**

CAV ORDER

The petitioner/assessee is before the Court calling in question the order dated 31-08-2023 passed by the respondent and issued on 25-09-2023 determining service tax liability, penalty and late fee against the petitioner, combining three different assessment years.

2. Heard Sri D.R. Ravishankar, learned senior counsel appearing for the petitioner and Sri Shivaraj S.Balloli, learned appearing for the respondent.

3. Facts, in brief, germane are as follows: -

3.1. The petitioner/assessee is the proprietor of M/s Advaita Consultancy Services engaged in the business of sale of computers, printers and computer related accessories to various Government undertakings. The petitioner was assessed to value added tax (for short, 'VAT') up to the date on which it subsisted i.e., up to 30-06-2017 and is said to have been paying GST from its onset on 01-07-2017. The assessee was earlier in the business of maintenance and repairs of computers and had obtained a service tax registration for the said business of maintenance and repair of computers and copying machines. From the financial year 2013-14, the assessee surrendered his service tax registration for the business of maintenance and repairs and switched over to the business of sale and marketing of computers and copying machines. These are the averments in the petition.

3.2. After about 5 years, between the dates 23-10-2019 and 14-10-2020, several communications are issued by the Superintendent of Central Tax seeking various documents and

details pertaining to Form ST-3 returns, P & L Account and Balance Sheet and Form 26AS for the assessment year 2015-16. The petitioner is said to have complied with those directions. Notwithstanding the same, on 18-12-2020 the respondent issues a show cause notice calling upon the petitioner/assessee to show cause as to why service tax should not be determined against him along with penalty for short payment of service tax. The respondent issues a notice for personal hearing to the petitioner. The petitioner attends personal hearing and submits his reply. After about 2 years, again another personal hearing notice is issued to the petitioner and later an order in original is passed determining service tax liability and late fee to the tune of ₹8,73,031/-. It is this order in original that is challenged in the subject petition.

4. The learned senior counsel appearing for the petitioner would contend that the impugned order is without jurisdiction. Section 73(1) of the Finance Act, 1994 (for short, 'the Act') provides that where service tax has been short paid, notice had to be served on the person chargeable to service tax within thirty months from the relevant date. The proviso to Section 73(1)

stipulates that where short payment is due to fraud, collusion, willful misstatement and suppression of facts, the time limit period of thirty months would be required to be read as five years. Since the show cause notice is issued beyond thirty months from the relevant date, it is without jurisdiction. The second limb of submission is that a single show cause notice is issued for financial years 2015-16 to 2017-18 which is again contrary to law. Clubbing of financial years and issuing a solitary show cause notice is held to be illegal by coordinate Benches of this Court. Demanding service tax on the income received by the assessee would amount to double taxation, as VAT has already been paid by him. The petitioner did produce all the VAT returns before the concerned Authority for the relevant years. Notwithstanding the same, the liability comes about.

5. The learned counsel appearing for the respondent would refute the submissions to contend that the order in original is appealable under Section 85 of the Act. The assessee ought to have approached the Commissioner of Central Excise in appeal and a writ petition is not entertainable in the teeth of availability of alternative

remedy. Without prejudice to the aforesaid submission, the learned counsel would submit that the assessee contends that there is no suppression of facts or willful misstatement. But, the assessee has suppressed an amount of ₹58,76,004/- towards taxable value as it was not projected. Service tax is levied on the basis of self-assessment system. It is the responsibility of the assessee to bring about all the facts. The revenue becomes aware only at a later point in time and issues show cause notice. Since suppression is the ground on which proceedings have sprung, the limitation is not thirty months, but it is five years. The demand is well within five years. He would seek dismissal of the petition.

6. I have given my anxious consideration to the submissions made by the respective learned counsel and have perused the material on record.

7. The afore-narrated facts are not in dispute. The petitioner initially was engaged in the business of maintenance and repairs of computers. He was assessed to VAT on the sale of goods up to 30-06-2017 and later subjected to tax under the GST regime. It is

not the case of the revenue that VAT has been short paid by the petitioner. It is the case of the revenue that service tax has been short paid. Therefore, it is necessary to notice the genesis of the proceedings when the revenue issued a show cause-cum-demand notice which triggered the entire issue in the case at hand. An electronic mail is said to have been communicated to the petitioner seeking to explain as to why, turn over for the financial year 2015-16 had not been declared in maintenance or repair service by holder of service tax registration – the assessee. The show cause notice reads as follows:

"SHOW CAUSE CUM DEMAND NOTICE

Shri Gauribidanur Kumar, No 102, Plot No. 39, Siddhivinayak Apartment, Adhyapaknagar, Hubballi- 580032, is engaged in providing the taxable services of "MAINTENANCE OR REPAIR SERVICE" and holder of Service Tax Registration No. AFOPK5065JST001 (hereinafter also referred to as 'the assessee').

02. Whereas, as per the information available with the Department it is noticed that the assessee has not filed Form ST-3 for the period 2015-16 and onwards.

03. Whereas, the Superintendent of Central Tax having jurisdiction over the said assessee (hereinafter referred to as 'the Superintendent') received data of CBDT along with Data of Form ST-3 data for the financial year 2015-16 from the Director General of Systems and Data Management, New Delhi, through the Chief Commissioner of Central Excise, Customs & Service Tax, Mysore Zone, as shown below with a direction to carry out the

verification of mismatch between the ITR / TDS data and data of Service Tax return. Whereas, as per the data, there is a difference in value of services as per ITR and Gross Value in as per Form ST-3; difference is Rs. 16,73,969/-.

04. Accordingly, the Superintendent of Central Tax, Hubballi-B Range, the jurisdictional Range officer, vide letter dated 23/10/2019 by email, asked the assessee to explain the difference of Rs. 1673969/- for the year 2015-16 in the turnover declared in Income-tax Return filed/Value of Services Credited in TDS and Value of Service provided as per STRs.

05. The assessee failed to explain for the difference in the turnover declared in the Income Tax return and STR value with documentary evidences like Bills/ Invoices, Agreements. Hence, they were extended some more opportunities to explain for the difference, vide letters 11/10/2020, 14/10/2020, 20/11/2020 and 20/11/2020, 27/11/2020. Again.

05.1 In response to this office letter dated 27/11/2020 the assessee submitted his reply through mail. In this reply he stated that - there was an error in the ITR filing for the year 2015-16. Their consultant has filed the ITR returns wrongly instead filing the tax Returns as Income from Sales he has filed a Income from Service. In the reply he further stated that - in the middle of the year of 2013-14 they have closed the Service Tax registration and don't have the copy of it.

05.2 Whereas from the P&L Account for the period 2015-16, it is observed that he has received an amount of Rs. 16,73,969/- as Contract receipts. Hence, not satisfied with the compliance submitted by the assessee, the Superintendent called for further details viz. P&L etc. for the period 2016-17 and 2017-18 vide mail dated 27/11/2020.

05.3 In response assessee submitted the P&L account for further period from 2016-17 and 2017-18 through mail.

05.4 It is observed from P&L account for the period 2016-17, it is observed that he has received an amount of Rs.38,22,524/- as Contract receipts, and for the period 2017-18 he has received an amount of Rs. 3,79,511/- as Contract receipts. Since the Assessee did not submit the contract receipts month-wise for the period 2017-18 contract receipts for whole year is taken into account.

05.5 Hence, from the above this, it appears that the assessee has deliberately suppressed a part of the taxable value for the financial year 2015-16 with intent to evade payment of service tax. It appears that the assessee has suppressed an amount of Rs. 16,73,969/- for the year 2015-16, Rs. 38,22,524/- for the year 2016-17 and Rs.3,79,511/-for the year 2017-18, totalling to Rs. 58,76,004/- towards taxable value and failed to discharge applicable Service Tax thereon. The Service Tax liability on the said taxable value works out to Rs.8,73,031/- (Service Tax of Rs.8,22,641/-, Swatch Bharat Cess of Rs.29,380/- and Krishi Kalyana Cess of Rs.21,010/-) as detailed in the Annexure to this Show Cause Notice, and same appears liable to be recovered from him under the provisions of the Finance Act, 1994.

Invocation of extended period:

06. From the discussions in above paras, it appears that the assessee have got himself registered with the department voluntarily with the Registration No. AFOPK5065JST001, for providing taxable service of "MAINTENANCE OR REPAIR SERVICE". The assessee is aware of the provisions of Service Tax in as much as they already hold Service Tax Registration and have been paying Service Tax on the taxable services provided by him. It appears that the assessee for the Financial Year 2015-16, 2016-17 and 2017-18 has suppressed an amount of Rs.58,76,004/-towards taxable value and failed to discharge applicable Service Tax thereon.

07. However it is noticed that the assessee appears to have wilfully not filed the ST-3 Return the above said period. The said wilful mis-statement appears to have

been done by the assessee with an intention to evade payment of Service Tax by not declaring taxable value. Hence, the Service Tax not paid by them appears to be recoverable from them, under the provisions of clause (c) of proviso to Section 73(1) of the Act for the extended period of five years.

07.1 Service Tax is levied as per the provisions of the Finance Act, 1994 and the Rules made there under wherein a system of self-assessment and self-disclosure, through periodical returns is prescribed. In other words, it is the legal responsibility of the assessee to assess and discharge the tax liability as per the provisions of the said Act, and also to declare the same through the prescribed periodical returns. In self-assessment system, the department comes to know about the service provided and payment of Service Tax only during the scrutiny of the statutory returns filed by the service providers as per Rule 7 of the Service Tax Rules, 1994 read with Section 70 of the Finance Act, 1994. The Service Provider is required to correctly assess their Service Tax liability and discharge it within the prescribed dates. It places greater onus on the service provider in this trust based regime to conform to the highest standards of integrity in disclosure of information in the statutory returns. Thus the entire responsibility of making disclosure of rendering a service voluntarily is on the service provider under the system of self-assessment. The said evasion of Service Tax would not have come to light but for the investigations conducted by the Department.

07.2 Therefore, in view of the above, it appears that Service Tax of Rs. 8,73,031/-(inclusive of all Cesses) for the period from 01.04.2015 to 31.03.2018, is liable to be recoverable from the assessee by invocation of extended period under proviso to Section 73(1) of the Finance Act, 1994.

08. Other Contraventions:

Whereas, the assessee, in view of the above omissions and commissions, has also appears to have contravened the following provisions of the Finance Act, 1994 and Service Tax Rules, 1994:

08.1 The assessee has failed to deposit the Service Tax amounting to Rs. 8,73,031/-(inclusive of all Cesses) pertaining to the period 01.04.2015 to 30.06.2017 within the period prescribed to the Government exchequer as per the provisions of Section 68 of the Act read with Rule 6 of the Service Tax Rules, 1994. Hence, it appears that the assessee is required to pay interest for the non payment of the above amount of Service Tax in terms of Section 75 of the Finance Act, 1994.

08.2 Whereas, the assessee for the Financial Year 2015-16, 2016-17 and 2017-18 (April-June, 2017) has failed to file Form ST-3 Returns on ACES application. The provisions of the Finance Act, 1994 and Service Tax rules relating to furnishing of periodical returns are as under:

08.2.1 As per Section 70 of the of the Finance Act, 1994 -

(1) Every person liable to pay the service tax shall himself assess the tax due on the services provided by him and shall furnish to the Superintendent of Central Excise, a return in such form and in such manner and at such frequency and with such late fee **not exceeding twenty thousand rupees**, for delayed furnishing of return, as may be prescribed.

08.2.2 As per Rule 7C of the Service Tax Rules, 1994 -

(1) Where the return prescribed under rule 7 is furnished after the date prescribed for submission of such return, the person liable to furnish the said return shall pay to the credit of the Central Government, for the period of delay of-

(i) fifteen days from the date prescribed for submission of such return, an amount of five hundred rupees;

(ii) beyond fifteen days but not later than thirty days from the date prescribed for submission of such return, an amount of one thousand rupees; and

(iii) beyond thirty days from the date prescribed for submission of such return an amount of one thousand

rupees plus one hundred rupees for every day from the thirty first day till the date of furnishing the said return:

(2) [XXXX]

Provided that the total amount payable in terms of this rule, for delayed submission of return, shall not exceed the amount specified in section 70 of the Act

08.2.3 Whereas due dates for filing of Form ST-3 for the period 2015-16 and 2016-17 is as mentioned in Table below.

Period	Return Period	Due Date for filing ST-3	-ST-3Filed on
2015-16	April-September-2015	25/10/2015	Not filed
	October-March-2016	25/04/2016	Not filed
2016-17	April-September-2016	25/10/2016	Not filed
	October-March-2017	25/04/2017	Not filed
2017-18	April-June-2017	15-08-2017	Not filed

Whereas, since the assessee failed to file any Form ST-3 Return for the said period it appears that in terms of Section 70 of the Finance Act, 1994 read with Rule 7C of the Service Tax Rules, 1994 the assessee is liable for maximum late fee of Rs. 20,000/- for each for such returns, totalling to Rs.1,00,000/- (Rs. 20,000 X 5).

08.3 Whereas, it appears that the assessee, have violated the provisions of Section 88 of the Act read with Rule 6 of the Service Tax Rules, 1994, in as much as they have suppressed the fact of rendering of taxable services valued at Rs. 58,76,004/- during the period April, 2015 to March, 2018, hence have wilfully mis-stated the taxable value to that extent in the Form ST-3 returns filed for the said period with an intention to evade payment of Service Tax on it amounting to Rs. 8,73,031/- (inclusive of all Cesses). Hence, it appears that they have rendered themselves liable to penalty which shall be equal to hundred per cent. of the amount of such service tax in terms of Section 78(1) of the Finance Act, 1994.

8.3.1 However, as per proviso to Section 78(1) *ibid* - where service tax and interest is paid within a period of thirty days of the date of service of notice under the proviso to (i) sub-section (1) of section 73, the penalty payable shall be fifteen per cent. of such service tax and proceedings in respect of such service tax, interest and penalty shall be deemed to be concluded.

09. Now, therefore, the assessee, **Shri Gauribidanur Kumar, No 102, Plot No. 39, Siddhivinayak Apartment, Adhyapaknagar, Hubballi- 580032**, is hereby called upon to show cause to the **Assistant Commissioner of Central Tax, Hubli Division, 1st Floor, C R Building, Navanagar, Hubli- 580025**, as to why-

- (i) the amount of Service Tax short paid of **Rs.8,73,031/-** (rupees eight lakh seventy three thousand and thirty one only) (Service Tax of Rs.8,22,641/-, Swatch Bharat Cess of Rs.29,380/- and Krishi Kalyana Cess of Rs.21,010/-) should not be demanded and recovered from them, under proviso to Section 73(1) of the Finance Act, 1994, as amended;
- (ii) applicable interest on the Service Tax amount demanded at Sl. No.(i) above should not be demanded and recovered from them under Section 75 of the Finance Act, 1994;
- (iii) Late fee of Rs. 100,000/- for not filing of Form ST-3 for the period 2015-16, 2016-17 and 2017-18 should not be recovered from them under Section 70 of the Finance Act, 1994.
- (iv) Penalty equal to amount demanded at Sl.No.(i) above should not be imposed on them, under section 78 of Finance Act, 1994.

The Penalty, however, will be reduced to 15% of amount demanded at Sl.No.(i) above, in terms of the proviso to Section 78(1) of Service Tax Act, 1994 (Section 114 of Finance Act, 2015) provided the whole of such service tax amount demanded, interest leviable

thereon, along with reduced penalty is paid **within 30 days of the date of service of this notice.**

10. The provisions/rules are invoked of the relevant period when the contraventions occurred and the Show Cause Notice is issued as read with the provisions of Section 173 & 174 of the CGST Act, 2017.

11. In terms of Section 142(8) (a) of CGST Act 2017, where in pursuance of an assessment or adjudication proceedings instituted, whether before, on or after the appointed day, under the existing law, any amount of tax, interest, fine or penalty becomes recoverable from the person, the same shall, unless recovered under the existing law, be recovered as an arrear of tax under CGST Act, 2017 and the amount so recovered shall not be admissible as input tax credit under CGST Act 2017.

12. The assessee may also like to opt for settlement of case in terms of provisions contained under Chapter V of the Central Excised Act, 1944, which, is made applicable to the Service Tax matters by Section 83 of the Finance Act, 1994, subject to fulfilment of conditions contained in the respective Act.

13. The assessee, are further required to produce at the time of showing cause all the evidence upon which they intend to rely in support of their defence. The assessee should indicate in their written reply as to whether they desire to be heard in person before the case is adjudicated. If no mention is made in their written reply to the Show Cause Notice, it would be presumed that they do not desire to be heard in person.

13. If no cause is shown against the action proposed to be taken within 30 days of receipt of this notice or if they do not appear before the adjudicating authority when the case is posted for hearing, the case will be decided ex-parte.

14. Reliance is placed on the following documents for issue of this notice.

Sl. No.	Relied Upon Documents
1.	Letters dtd 10.9.2020, 24.9.2020 and 26.11.2020, issued to assessee by the Superintendent of Central Tax, Hubballi-B Range"

This is replied to by the petitioner on appearing before the Authority for personal hearing. Two detailed replies are rendered in justification of the same. It becomes apposite to notice one such reply dated 28-08-2023, which reads as follows:

"28-08-2023

From
Gauribidanur Venkatakrisna Kumar
101, Siddhi Vinayak Apartment, Adhyapak Nagar,
Hubli, Karnataka, 580032

ST No: AFOPK5065JST001

To,
Assistant Commissioner
Hubballi Division
Navanagar

Respected Sir,

Subject: Response to Personal Hearing Notice
Ref: SCN No 89/2020-21/664/23 ST Dated 27-06-2023

I am writing to you today in response to the personal hearing notice that I received from your office on 27-06-2023.

I would like to bring your kind notice that my business primarily involves the supply of goods manufactured by renowned companies such as HP, Toshiba, Canon Xerox etc. The goods supply are intended for government organisations, and any related services such as

installation, manufacturing and technical support are explicitly managed by the respective manufacturing companies. I do not provide these services directly; they are bundled with the products and handled by the manufacturers.

To substantiate my claims, I have attached copies of purchase orders from various government organisations that clearly indicate the nature of the transactions.

Additionally, I would like to address the matter of the service tax liability mentioned in the show cause notice. I kindly request to reconsider this liability, as the nature of my business is aligned with the supply of goods only. The services, as stated earlier, are directly managed and performed by the respective manufacturing companies.

Furthermore, it has come to my attention that certain government customers have been deducting TDS under section 194C, treating my supply of goods as a contract service. I would like to clarify that despite their categorization, my transactions are strictly related to the supply of goods and not the provision of services. I am in communication with these customers to rectify this misclassification and ensure accurate reporting in the future.

I kindly request a fair consideration of my case based on the evidence provided and humbly request you to drop the further proceedings.

Thanking you

Yours faith fully

Gauribidanur Venkatakrishna Kumar
(Proprietor)
Date: 28-08-2023
Place: Hubballi."

(Emphasis added at each instance)

8. A perusal at the show cause notice or the demand notice would indicate that for the first time the jurisdictional Range Officer had communicated in electronic mail asking the assessee to explain the difference of ₹16,73,969/- for the year 2015-16. The mail was on 23-10-2019 and the show cause notice is on 18-12-2020. Therefore, the notice admittedly is issued after thirty months. It, therefore, becomes necessary to notice the bar in the jurisdiction as obtaining under Section 73(1) of the Act. Section 73(1) reads as follows:

“73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded. —

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

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

- (a) fraud; or**
- (b) collusion; or**
- (c) wilful mis-statement; or**

- (d) suppression of facts; or**
- (e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax,**

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

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

Section 73(1) mandates demand of service tax from an assessee within an outer limit of thirty months from the relevant date. In cases of suppression or willful misstatement or fraud, it is five years in terms of the proviso. The financial year for the tax that is demanded in the case at hand is admittedly 2015-16 and the notice is issued on 18-12-2020. Therefore, it is admittedly beyond thirty months. The canopy under which the revenue takes shelter is suppression, by combining three years of assessment into a single show cause notice, to cover up the issue of limitation. The suppression that is projected is also untenable for the reason that when the assessee had already paid VAT on sale of goods regularly, the question of paying service tax would not arise in the light of the

judgment of the Apex Court in **COMMISSIONER OF SERVICE TAX-V, MUMBAI v. UFO MOVIEZ INDIA LIMITED**¹, wherein it is held as follows:

“....

2. In the facts of the present case as it is not disputed that the respondent had regularly paid amount towards value added tax liability in respect of the subject goods during the relevant period, the question of claiming service tax thereon does not arise.

3. Accordingly, in the facts of the present case, the civil appeal is dismissed.”

9. The further case of the revenue is that when possession of goods is transferred with effective control on the said goods, there is deemed sale. The revenue seeks to contend that the transfer of maintenance and services to another establishment would indicate that it is deemed sale and service tax would become applicable. The Madras High Court considers an identical circumstance and holds that what would be chargeable to VAT would be under the Sales Tax law and not service tax as demanded. The Madras High Court in

¹ 2022 SCC OnLine SC 959

ANANDCINE SERVICE (P) LTD. v. COMMISSIONER OF SERVICE TAX-II, CHENNAI², holds as follows:

"

19. The clauses in the agreement, reproduced above, make it clear that the possession and effective control has been transferred. If it is not so, why will the owner reserve a right to inspect the equipments as and when required. If the possession and effective control is still with the owner, he would not need the hirers' permission to inspect. If effective possession and control has not been transferred, why the hirer has to make it known to the owner regarding loss or destruction or damage, after such loss or damage occurs. If possession and effective control has not been transferred and it is still with the owner, why will the hirer give an undertaking not to part with possession or undertake not to sell, hypothecate or pledge the equipments and have the equipments insured at its full value at his own cost. If possession and effective control is still with the owner or has not been transferred to the hirer, why would the hirer make a statement that he has taken inspection of the goods and he is satisfied with the condition thereof and the owner shall not be liable for any defects.

20. The attributes outlined by the apex court in *Bharat Sanchar Nigam Ltd. v. Union of India* [(2006) 3 VST 95 (SC); (2006) 282 ITR 273 (SC); (2006) 145 STC 91 (SC); (2006) 6 RC 276; (2006) 3 SCC 1; 2006 SCC OnLine SC 258; (2006) 2 STR 161 (SC).] at paragraph 97 thereof are available in the transaction undertaken by the appellant with the hirer, Chennai Cinema Private Limited, as evidenced by the clauses quoted above.

21. In fact, the adjudicating authority has in its findings accepted the legal position that for levy of VAT

² 2025 SCC OnLine Mad 2282

under sales tax law, it is not necessary that the possession of goods must be transferred and that if the person has been provided with effective control of the goods, it would tantamount to transfer of right to use the goods and service tax is not chargeable. Since in the case at hand possession and effective control of the goods has been transferred to the hirer, it will amount to transfer of right to use goods and service tax is not chargeable.

22. To reiterate, there shall be a deemed sale where there is 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. From the documents and particularly from the clauses reproduced above, it is quite clear that there has been a transfer of the right to use equipments for valuable consideration. Even in clause (29A) of article 366 of the Constitution of India, the only requirement is there should be transfer of the rights to use the goods for valuable consideration. Factually, there has been."

10. The Apex Court, long before the onset of GST regime had considered the interplay between service tax and value added tax in **IMAGIC CREATIVE (P) LTD. v. COMMISSIONER OF COMMERCIAL TAXES**³ and the observations of the Apex Court was that Service Tax and VAT are mutually exclusive. Therefore, they should be held to be applicable having regard to the parameters of Service Tax and the Sales Tax. The Apex Court has held as follows:

"....

³ (2008) 2 SCC 614

32. Payments of service tax as also VAT are mutually exclusive. Therefore, they should be held to be applicable having regard to the respective parameters of service tax and the sales tax as envisaged in a composite contract as contradistinguished from an indivisible contract. It may consist of different elements providing for attracting different nature of levy. It is, therefore, difficult to hold that in a case of this nature, sales tax would be payable on the value of the entire contract, irrespective of the element of service provided. The approach of the assessing authority, to us, thus, appears to be correct."

For all the facts being thus, (i) the show cause notice itself is issued beyond limitation, (ii) the petitioner paying value added tax cannot be charged with service tax for the same period and for the same purpose and the observation of the Apex Court that they are mutually exclusive, the show cause notice itself becomes without jurisdiction. If the show cause notice is without jurisdiction and all further proceedings that are taken thereto would also become without jurisdiction. If they are in their entirety without jurisdiction, writ petition would be entertainable and this Court would not direct the petitioner to follow the statutory remedy of filing an appeal and then approach this Court. The issue stands answered by the judgment of the Apex Court in **WHIRLPOOL CORPORATION v.**

REGISTRAR OF TRADE MARKS, MUMBAI⁴ wherein it is held as follows:

"....

14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field."

⁴ (1998) 8 SCC 1

This judgment is later followed in **GODREJ SARA LEE LIMITED v. EXCISE AND TAXATION OFFICER-CUM-ASSESSING AUTHORITY**⁵ wherein the Apex Court has held as follows:

"....

4. Before answering the questions, we feel the urge to say a few words on the exercise of writ powers conferred by article 226 of the Constitution having come across certain orders passed by the High Courts holding writ petitions as "not maintainable" merely because the alternative remedy provided by the relevant statutes has not been pursued by the parties desirous of invocation of the writ jurisdiction. The power to issue prerogative writs under article 226 is plenary in nature. Any limitation on the exercise of such power must be traceable in the Constitution itself. Profitable reference in this regard may be made to article 329 and ordainments of other similarly worded articles in the Constitution. **Article 226 does not, in terms, impose any limitation or restraint on the exercise of power to issue writs. While it is true that exercise of writ powers despite availability of a remedy under the very statute which has been invoked and has given rise to the action impugned in the writ petition ought not to be made in a routine manner, yet, the mere fact that the petitioner before the High Court, in a given case, has not pursued the alternative remedy available to him/it cannot mechanically be construed as a ground for its dismissal. It is axiomatic that the High Courts (bearing in mind the facts of each particular case) have a discretion whether to entertain a writ petition or not. One of the self-imposed restrictions on the exercise of power under article 226 that has evolved through judicial precedents is that the High Courts should normally not entertain a writ petition, where an effective and efficacious alternative remedy is available. At the same time, it must be remembered that mere availability of an alternative remedy of appeal or revision, which the party invoking the jurisdiction of the**

⁵ 2023 SCC OnLine SC 95

High Court under article 226 has not pursued, would not oust the jurisdiction of the High Court and render a writ petition "not maintainable". In a long line of decisions, this court has 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. Though elementary, it needs to be restated that "entertainability" and "maintainability" of a writ petition are distinct concepts. The fine but real distinction between the two ought not to be lost sight of. The objection as to "maintainability" goes to the root of the matter and if such objection were found to be of substance, the courts would be rendered incapable of even receiving the lis for adjudication. On the other hand, the question of "entertainability" is entirely within the realm of discretion of the High Courts, writ remedy being discretionary. A writ petition despite being maintainable may not be entertained by a High Court for very many reasons or relief could even be refused to the petitioner, despite setting up a sound legal point, if grant of the claimed relief would not further public interest. Hence, 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.

5. A little after the dawn of the Constitution, a Constitution Bench of this Court in its decision reported in [1958] SCR 595 (State of Uttar Pradesh v. Mohammad Nooh) had the occasion to observe as follows :

"10. In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute, (Halsbury's Laws of England, 3rd Edn., Vol. 11, p. 130 and the cases cited there). The fact that the

aggrieved party has another and adequate remedy may be taken into consideration by the superior court in arriving at a conclusion as to whether it should, in exercise of its

discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a 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.. . ."

6. At the end of the last century, this court in paragraph 15 of its decision reported in (1998) 8 SCC 1 (Whirlpool Corporation v. Registrar of Trade Marks, Mumbai) carved out the exceptions 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. The same read 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.**

7. Not too long ago, this court in its decision reported in [2021] SCC Online SC 884 (Assistant Commissioner of State Tax v. Commercial Steel Limited)* has reiterated the same principles in paragraph 11.

8. That apart, we may also usefully refer to the decisions of this Court reported in (1977) 2 SCC 724 (State of U. P. v. Indian Hume Pipe Co. Ltd.): and (2000) 10 SCC 482 (Union of India v. State of Haryana).**

What appears on a plain reading of the former decision is that whether a certain item falls within an entry in a sales tax statute, raises a pure question of law and if investigation into facts is unnecessary, the High Court could entertain a writ petition in its discretion even though the alternative remedy was not availed of ; and, unless exercise of discretion is shown to be unreasonable or perverse, this Court would not interfere. In the latter decision, this court found the issue raised by the appellant to be pristinely legal requiring determination by the High Court without putting the appellant through the mill of statutory appeals in the hierarchy. **What follows from the said decisions is that where the controversy is a purely legal one and it does not**

*** (2021) 93 GSTR 1 (SC).**

**** (1977) 39 STC 355 (SC).**

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."

(Emphasis supplied at each instance)

In the light of the aforesaid reasons, the petition deserves to be entertained.

11. For the aforesaid reasons, the following:

ORDER

- (i) Writ Petition is **allowed**.
- (ii) Order dated 31-08-2023 passed by the respondent and issued on 25-09-2023 stand quashed.

- (iii) The petitioner becomes entitled to all consequential benefits that would flow from quashing of the impugned order.

Sd/-
(M.NAGAPRASANNA)
JUDGE

bkp
CT:SS