



GAHC010287332023

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THE GAUHATI HIGH COURT

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

WRIT PETITION (C) NO. 7378/2023

M/s Brahmaputra Television Network,
A proprietorship firm having its registered
office at Bora Bhawan, T.R. Phookan Road,
Bharalamukh, Guwahati, Kamrup [M], Assam
– 781009 represented by its sole proprietor
Ms. Anjana Bora.

.....Petitioner

-VERSUS-

1. The Union of India, Represented by the Secretary to the Government of India, Ministry of Finance, Department of Revenue, North Block, New Delhi - 110001.
2. The Commissioner [Appeals] CGST, Central Excise and Customs, GST Bhawan, Kedar Road, Machkowa, Guwahati - 781001.
3. The Additional Commissioner, GST & Central Excise Commissionerate, GST Bhawan, Kedar Road, Machkowa, Guwahati - 781001.



4. The State of Assam, Represented by the Principal Secretary to the Government of Assam, Information and Public Relations Department, Janata Bhawan, Dispur – 781006, Assam.
5. The Director, Directorate of Information and Public Relations, Dispute, Guwahati – 781006, Assam.

.....Respondents

Advocates :

Petitioner	: Mr. D. Das, Senior Advocate : Ms. S. Sarma, Advocate
Respondent no. 1	: Ms. K. Phukan, Central Government Counsel
Respondent nos. 2 & 3	: Mr. S.C. Keyal, Standing Counsel, GST
Respondent nos. 4 & 5	: —
Date of Hearing	: 19.04.2024 & 23.04.2024
Date of Judgment & Order	: 21.06.2024

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

The petitioner has instituted the instant writ petition under Article 226 of the Constitution of India to assail the original proceedings which was initiated by a Demand-cum-Show Cause Notice bearing no. C.No. V[15]75/ADJ/CGST-HQRS/GHY/ST/2021/1421 dated 26.04.2021 resulting into an Order-in-Original no. 61/Addl. Commr./ST/GHY/2021-22 dated 01.03.2022 passed by the Additional Commissioner, O/o the Principal Commissioner, GST & Central Excise Commissionerate, Guwahati [the respondent no. 3] and the appeal proceedings which emanated from the appeal preferred by the petitioner as appellant



against the Order-in-Original dated 01.03.2022 culminating in an Order-in-Appeal bearing no. 528/GHY[A]/COM/ST/GHY/ 2023 dated 21.09.2023 of the Commissioner [Appeals], CGST, Central Excise & Customs, Guwahati [the respondent no. 2].

- 1.1. The Order-in-Original no. 61/Addl. Commr./ST/GHY/2021-22 [‘the Order-in-Original’, for short] dated 01.03.2022 passed by the respondent no. 3 [hereinafter referred to as ‘the Adjudicating Authority’, for easy reference] was against the interests of the petitioner. By the Order-in-Appeal bearing no. 528/GHY[A]/COM/ST/GHY/2023 [‘the Order-in-Appeal’, for short] dated 21.09.2023 of the respondent no. 2 [hereinafter referred to as ‘the Appellate Authority’, for easy reference], the appeal preferred by the petitioner as the appellant under Section 85 of the Finance Act, 1994 against the Order-in-Original was dismissed, thereby, upholding the Order-in-Original passed by the Adjudicating Authority.
2. It has been stated that the petitioner, M/s Brahmaputra Television Networks is a proprietorship firm having its registered office at Guwahati. It is mentioned that the petitioner is engaged in providing taxable service in the nature of ‘advertising agency services’ since the year 2000 and as part of its business, it provides advertising services to the State Government agencies and private parties. For the purpose of Service Tax, the petitioner had got itself registered with Service Tax Code [STC] Registration no. ATTPS7285FST001 with VAT Registration Certificate no. GRN18530220383. Subsequently, after coming into effect of the Goods and Services Tax [GST] Act, 2017 on and from 01.07.2017, the Service Tax registration and the VAT registration of the petitioner have been migrated to the GST regime with GST Registration no. 18ATTPS7285F1ZR.
3. The events which have led the petitioner to institute the present writ petition can be narrated, briefly, as follows :-
 - 3.1. The petitioner was served with the Demand-cum-Show Cause Notice bearing no. C.No. V[15]75/ADJ/CGST-HQRS/GHY/ST/2021/1421 dated 26.04.2021 [‘the Demand-cum-Show Cause Notice’, for short] whereby the petitioner was called upon to show cause within thirty days from the receipt of the Demand-cum-Show Cause Notice as to why :-



- [i] Service Tax amounting to Rs. 1,34,54,383/- [Rupees one crore thirty four lakhs fifty four thousand three hundred eighty three] only for the period 2015-2016 should not be demanded and recovered from the petitioner under the proviso to Section 73[1] of the Finance Act, 1994 read with Section 174[2] of the CGST Act, 2017;
- [ii] Applicable interest on the amount of unpaid Service Tax should not be demanded and recovered from the petitioner under Section 75 of the Finance Act, 1994.
- [iii] Penalty should not be imposed under Section 77 of the Finance Act, 1994 for failure to furnish information and produce documents requisitioned by the department; and
- [iv] Penalty should not be imposed upon the petitioner under Section 78 of the Finance Act, 1994 for failure to pay the Service Tax by the due dates and for suppression of vital facts from the department with intent for evade payment of Service Tax by various acts of omission and commission as explained therein.

3.2. In the Demand-cum-Show Cause Notice, it was mentioned that it appeared to the authorities that the noticee-assessee [the petitioner] had provided taxable services other than those specified in the Negative List of services under Section 66D of the Finance Act, 1994 during the Financial Year : 2015-2016. It was alleged that the noticee-assessee had suppressed the actual value of services provided during the said Financial Year : 2015 – 2016; did not fully disclose its liability in ST-3 returns for the said year; and had consequently short-paid Service Tax dues to the tune of Rs. 1,34,54,383/- in violation of the provisions contained in Section 66B, Section 67, Section 68 and Section 70 of the Finance Act, 1994 r/w Rule 6 of the Service Tax Rules, 1994. It was further mentioned that from the data shared by the Central Board of Direct Taxes [CBDT], it was apparent that the noticee-assessee received monetary considerations and made required declarations under various sections of the Income Tax Act, 1961 relating to provision of services and TDS deductions. Those were found reflected in the Income Tax Returns of the noticee-assessee but the noticee-assessee did not declare those receipts against provision of services in the periodic ST-3 returns for the Financial Year : 2015-2016. It was mentioned that the same had resulted into non-payment/short-payment of Service Tax.

3.3. As per the contents of the Demand-cum-Show Cause Notice, it appeared to the Adjudicating Authority that the noticee-assessee had rendered taxable services under



Section 65B of the Finance Act, 1994 and it had mis-declared the actual value of services provided and corresponding Service Tax liability in its periodic ST-3 returns. Post introduction of Negative List regime in the Service Tax, which became effective from 01.07.2012, the services provided by the noticee-assessee fell under the definition of 'Service', defined under Section 65B[44] of the Finance Act, 1994, as any activity carried out by a person for consideration and included declared service. Mention was also made to the effect that as per Clause [51] of Section 65B of the Finance Act, 1994, 'Taxable Service' was any service on which Service Tax was leviable under Section 66B of the Finance Act, 1994. A tax @ 14% [effective rate 14.5% including cess] was leviable on the value of all services, other than those services specified in the Negative List, as per Section 66B of the Finance Act, 1994 and it appeared to the Adjudicating Authority that the noticee-assessee was providing services which were taxable in terms of Section 66B of the Finance Act, 1994 on the value determinable in terms of Section 67 thereof. The noticee-assessee was under obligation to self-assess the tax due on the services provided by it and to furnish correct returns in terms of Section 70 of the Finance Act, 1994.

- 3.4. On receipt of the Demand-cum-Show Cause Notice, the petitioner submitted a Reply to the Demand-cum-Show Cause Notice on 17.02.2022. The petitioner had claimed that in the said Reply, it had provided explanations along with facts and figures by stating inter alia that during the Financial Year : 2015-2016, its gross sales/turnover was Rs. 40,38,06,352/-. It was stated that out of Rs. 40,38,06,352/-, the gross value of services was Rs. 31,18,68,087/- on which Service Tax was payable and the gross value was Rs. 9,19,38,265/- on which VAT was payable. The remaining sum, Rs. 1,165/- was bank interest. It was contended in the Reply that as the petitioner had already paid VAT in respect of Rs. 9,19,38,265/- there was no question of paying Service Tax against the same amount as it would result in double taxation. It was further mentioned that when the petitioner noticed a difference of Rs. 8,50,586/- in the value of services as per the Income Tax Return and the ST-3 returns, it deposited the said amount on 26.07.2016.
- 3.5. In the proceedings before the Adjudicating Authority, initiated with the Demand-cum-Show Cause Notice dated 26.04.2021, the petitioner was represented by its Tax Consultant and Authorized Representative. The petitioner has stated that in the course of personal



hearing, held on 17.02.2022, it was contended that the liability on Service Tax had been discharged on the actual value of services amounting to Rs. 31,18,68,087/- by presenting a break-up and by placing the supporting documents.

- 3.6. The Adjudicating Authority had passed the Order-in-Original confirming the demand of Service Tax including cess amounting to Rs. 1,34,54,383/- under Section 73[2] of the Finance Act, 1994, by rejecting the grounds urged on behalf of the petitioner. The Adjudicating Authority had ordered payment of interest on the afore-mentioned confirmed amount at the rates applicable in terms of Section 75 of the Finance Act, 1994. In addition, the Adjudicating Authority had also imposed a penalty of Rs. 1,34,54,383/- in terms of Section 78 of the Finance Act, 1994. The Adjudicating Authority had further imposed a penalty of Rs. 10,000/- in terms of the provisions contained in Section 77 of the Finance Act, 1994 for alleged failure on the part of the petitioner to furnish information and produce documents requisitioned by the departmental authorities. The Adjudicating Authority while confirming as above, had given an option to the noticee-assessee, that is, the petitioner to pay reduced penalty equivalent to 25% of the amount of the penalty imposed under Section 78 of the Finance Act, 1994, subject to the condition that the noticee-assessee would have to deposit the amount of Service Tax and cess confirmed under Section 73 along with interest in terms of Section 75 and penalty under Section 77 of the Finance Act, 1994 as well as reduced penalty under the proviso to Section 78 within 30 [thirty] days of the date of receipt of the Order-in-Original.
- 3.7. Aggrieved by the passing of the Order-in-Original dated 01.03.2022 against it, the petitioner preferred an appeal before the Appellate Authority, that is, the Commissioner of Central Excise [Appeals] under Section 85 of the Finance Act, 1994 on 06.05.2022 by depositing an amount of Rs. 10,09,079/- as pre-deposit. Before the Appellate Authority, the dates of personal hearing were on 25.05.2023, 10.07.2023 and finally, on 13.09.2023. The Appellate Authority had passed the Order-in-Appeal on 21.09.2023. In the Order-in-Appeal, the Appellate Authority had observed that the appellant-petitioner had failed to substantiate its claim. The Appellate Authority in the Order-in-Appeal by holding that the demand of Service Tax including cesses had been rightly confirmed by the Adjudicating



Authority in the Order-in-Original, has dismissed the appeal preferred by the petitioner finding no merits therein.

4. Aggrieved by and dissatisfied with the Order-in-Appeal dated 21.09.2023 whereby the Order-in-Original dated 01.03.2022 has been upheld and the appeal preferred by the petitioner has been dismissed, the petitioner has instituted the instant writ petition by seeking to invoke the extra-ordinary and discretionary jurisdiction under Article 226 of the Constitution of India to assail both the Order-in-Original and the Order-in-Appeal.
5. I have heard Mr. D. Das, learned Senior counsel assisted by Ms. S. Sarma, learned counsel for the petitioner; Ms. K. Phukan, learned Central Government Counsel [CGC] for the respondent no. 1; and Mr. S.C. Keyal, learned Standing Counsel, CGST for the respondent nos. 2 & 3. None has appeared for the respondent nos. 4 & 5.
6. Mr. Das, learned Senior Counsel appearing for the petitioner has contended that the principles of natural justice have been violated by both the Adjudicating Authority and the Appellate Authority during the course of the proceedings leading to the passing of the Order-in-Original and the Order-in-Appeal respectively.
 - 6.1. In elaboration, reference has been to the Demand-cum-Show Cause Notice wherein the Adjudicating Authority had mentioned that the noticee-assessee [the petitioner] was asked to submit certain documents vide a Letter bearing no. C.No.IV[18]01/ST/3rd party/IID/20 dated 04.09.2020 for ascertaining the petitioner's actual Service Tax liability during the Financial Year : 2015-2016. In that connection, the Adjudicating Authority had also recorded that the petitioner had failed to submit the documents till the date of issuance of the Demand-cum-Show Cause Notice. It has been contended that no such Letter dated 04.09.2020 was ever served on the noticee-assessee [the petitioner]. It has, thus, been urged that had such Letter been received by the petitioner, the petitioner could have responded to such a Letter appropriately and no occasion for issuance of the Demand-cum-Show Cause Notice would have arisen.



- 6.2. As regards the obligation on the part of the Adjudicating Authority to issue such a Letter dated 04.09.2020 prior to issuance of any Demand-cum-Show Cause Notice under Section 73[1], Mr. Das has referred to Section 83 of the Finance Act, 1994 whereby certain provisions of the Central Excise Act, 1944 including Section 14 thereof, have been made applicable in relation to Service Tax. By referring to the provisions of Section 14 of the Central Excise Act, 1944, he has submitted that the officer empowered to issue the Demand-cum-Show Cause Notice under sub-section [1] of Section 73 of the Finance Act, 1994 is not only obligated to issue such a letter like the Letter dated 04.09.2020 but is also obligated to serve the same duly upon the noticee-assessee to afford the noticee-assessee due opportunity to produce the specified documents. It has been submitted that such obligation is cast due to the provisions of Section 77[c] of the Finance Act, 1994. It has been contended that when the matter of non-service of the Letter dated 04.09.2020 was raised in the appeal by the petitioner, the Appellate Authority in his Order-in-Appeal did not even deal with the issue. It has, thus, been contended that the principles of natural justice have clearly been violated both by the Adjudicating Authority and the Appellate Authority.
- 6.3. He has further contended that the Demand-cum-Show Cause Notice was without jurisdiction in that the Adjudicating Authority had illegally invoked the jurisdiction under the proviso to sub-section [1] of Section 73 of the Finance Act, 1994 to extend the period of issuing the Demand-cum-Show Cause Notice from thirty months to five years.
- 6.4. Learned Senior Counsel has further submitted that as per sub-section [1] of Section 73 of the Finance Act, 1994, it is ordinarily within a period of thirty months from the relevant date a Demand-cum-Show Cause Notice like the one involved here can be issued. To invoke the extended period of five years under the proviso to sub-section [1] of Section 73 of the Finance Act, 1994, proper reason is to be recorded on the basis of actual materials on record and such reason must have to be relatable to any of the five grounds, mentioned therein. The wilful mis-statement and/or suppression of facts, allegedly attributed to the petitioner, were relatable to the Financial Year : 2015-2016. By the time the Demand-cum-Show Cause Notice stood issued on 26.04.2021, a period of thirty months had already elapsed subsequent to the Financial Year : 2015-2016 and the



Adjudicating Authority in order to obviate the bar of thirty months, had illegally resorted to the proviso to sub-section [1] of Section 73 of the Finance Act, 1994 and as such, the proceedings initiated by the respondent authorities are clearly without jurisdiction.

- 6.5. Detail information about the total Income Tax including Form 26AS, filed by the petitioner way back in the Year : 2015-2016, and the periodical ST-3 returns filed in the Year : 2015-2016 were very much within the knowledge of the respondent authorities. Therefore, the allegation of suppression of facts brought by the respondent authorities against the petitioner is wholly misconceived, without any basis and without any jurisdiction. It has been submitted that the allegation of differential taxable amount, Rs. 9,27,88,851/-, brought in by the respondent authorities against the petitioner, is baseless and erroneous as the petitioner had already paid the VAT against the said amount of Rs. 9,27,88,851/-. If the petitioner is penalized despite paying the VAT, it would amount to double taxation which, in turn, would cause serious prejudice.
- 6.6. It has been further contended that when during the course of the proceedings before the Appellate Authority the petitioner as the appellant submitted an application on 15.09.2023 seeking time to produce a vital document in support of the case of the petitioner-appellant, the Appellate Authority without considering the said application, had proceeded to pass the Order-in-Appeal on 21.09.2023. Not granting time to the petitioner-appellant to produce a document having a vital bearing by the Appellate Authority is a clear case of not affording proper opportunity and such action in haste is an action in violation of the principles of natural justice.
- 6.7. It has been contended in view of the grounds urged, that is, violation of the principles of natural justice and lack of jurisdiction to initiate the proceedings by the Demand-cum-Show Cause Notice, a writ petition is maintainable, despite availability of statutory remedy in the form of an appeal. Lastly, it has been submitted that present writ petition has been filed within the period a statutory appeal is required to be filed.
7. Mr. Keyal, learned Standing Counsel, CGST has submitted that the question here, in essence, is about maintainability and entertainability of a writ petition against the Order-in-



Original and the Order-in-Appeal. As the two orders are self-sufficient, there is no necessity to file any response. He has contended that against the Order-in-Original, the petitioner as the noticee-assessee had already availed the remedy of appeal under Section 85[1] of the Finance Act, 1994. The Appellate Authority by the Order-in-Appeal has upheld the Order-in-Original and against the Order-in-Appeal, an appeal lies under Section 86 of the Finance Act, 1994 to the Customs, Excise and Service Tax Appellate Tribunal [CESTAT]. The petitioner herein instead of preferring such a statutory appeal, has preferred the present writ petition seeking to invoke the extra-ordinary and discretionary writ jurisdiction under Article 226 of the Constitution of India. As such, the writ petition is not maintainable and the petitioner should be relegated to prefer the statutory remedy of appeal.

- 7.1. As regards the Letter dated 04.09.2020, he has contended that a reference of the said Letter was made in the Demand-cum-Show Cause Notice dated 26.04.2021. The noticee-assessee had submitted a Reply to the Demand-cum-Show Cause Notice on 17.02.2022. In the said Reply, the noticee-assessee did not make any whisper as regards non-receipt of the Letter dated 04.09.2020. After passing of the Order-in-Original, the petitioner preferred an appeal before the Appellate Authority and it was only in its Memorandum of Appeal, the petitioner had taken any plea as regards non-receipt of the Letter dated 04.09.2020. Thus, at the stage of preferring a second appeal which the petitioner has sought to avert by filing this writ petition, it is not open for the petitioner to raise any further plea as regards non-receipt of the Letter dated 04.09.2020. For not raising any objection as regards non-receipt of the Letter dated 04.09.2020 at the time of submitting its Reply on 17.02.2022 during the original proceedings the petitioner is precluded from raising it again by the doctrine of waiver and acquiescence.
- 7.2. It is further contended that reference to the provisions of Section 14 of the Central Excise Act, 1944 and Section 83 of the Finance Act, 1994 is misconceived and untenable as the said provision has not cast any obligation on the Adjudicating Authority to issue any kind of notice prior to issuance of any Demand-cum-Show Cause Notice under Section 73 [1] or under the proviso to sub-section [1] of Section 73 of the Finance Act, 1994.



- 7.3. On the issue of requirement to serve a notice/summon of the nature contemplated in Section 14 of the Central Excise Act, 1944 as a precursor to the Demand-cum-Show Cause Notice under Section 73[1] of the Finance Act, 1994, Mr. Keyal has contended that such a requirement is not mandatory in view of the clarificatory instruction contained in Circular No. 1079/03/2021-CX dated 11.11.2021 of the Central Board of Indirect Taxes and Customs, Department of Revenue, Ministry of Finance, Government of India. By referring to the Circular [supra], he has submitted that a pre-show cause notice consultation is not mandatory in respect of those cases under Section 73[1] of the Finance Act, 1994 where the proviso to sub-section [1] has been invoked for extending the period.
- 7.4. Refuting the contention advanced on behalf of the petitioner with regard to the application, stated to have been filed by the petitioner on 15.09.2023 before the Appellate Authority, such a plea of granting time to produce a document cannot be considered to be in violation of the principles of natural justice. The materials on record have clearly indicated that by that time, the petitioner was provided with sufficient opportunities of hearing. The document sought to be produced by the application dated 15.09.2023, was not produced during the course of entire original proceedings which was initiated on 26.04.2021 with the issuance of the Demand-cum-Show Cause Notice. It is further contended by him that if the document for which the application dated 15.09.2023 was filed, is of vital bearing the same can be produced before the CESTAT and such a plea is not available to the petitioner to be taken in the present writ petition.
8. Ms. Phukan, learned Central Government Counsel [CGC] representing the respondent no. 1 has submitted that she would adopt the submissions made by the learned Standing Counsel, GST.
9. During the course of hearing, the learned counsel for the parties have referred to a number of authorities in support of their submissions.
- 9.1. Learned Senior Counsel for the petitioner in support of his submissions, has referred to the following decisions :-



- [i] *Maharashtra Chess Association vs. Union of India*, reported in [2020] 13 SCC 285;
- [ii] *Godrej Sara Lee Ltd. vs. Excise and Taxation Officer-cum-Assessing Authority and others*, reported in [2023] 3 SCR 871;
- [iii] *Magadh Sugar and Energy Ltd. vs. the State of Bihar and others*, reported in [2021] 9 SCR 284.
- [iv] *Simplex Infrastructure Ltd. vs. Commissioner of Service Tax, Kolkata*, reported in 2016 SCC OnLine Cal 571; and
- [v] *Kellogg India Pvt. Ltd. vs. Union of India*, reported in 2005 SCC OnLine Bom 1692.

9.2. The learned Standing Counsel, CGST has referred to the following decisions of the Hon'ble Supreme Court of India to buttress his contentions :-

- [i] *Thansing Nathmal vs. the Superintendent of Taxes, Dhubri and others*, reported in AIR 1964 SC 1419.
- [ii] *The Commissioner of Income Tax and others vs. Chhabil Dass Agarwal*, reported in [2014] 1 SCC 603;
- [iii] *M/s South Indian Bank Ltd. and others vs. Naveen Mathew Philip and another*, reported in [2023] 4 SCR 18;
- [iv] *PHR Invent Educational Society vs. UCO Bank and others*, reported in [2024] 4 SCR 541;
- [v] *Writ Appeal no. 188/2022 [M/s Sailaja Commercial Construction Private Ltd. vs. the Union of India and others]*, decided on 20.02.2023, by a Division Bench of this Court; and
- [vi] *W.P.[C] no. 6942/2023 [Smti. Ajitha Krishnan vs. Union of India and others]*, decided on 04.12.2023, by a Single Bench of this Court.

10. I have given due consideration to the submissions made by the learned counsel for the parties. I have also gone through the materials available on record; the written synopses submitted by the learned counsel for the parties; and the decisions cited at the Bar by the learned counsel for the parties in support of their contentions.



11. The Order-in-Original was passed by the Adjudicating Authority in exercise of powers conferred under Section 73[2] of the Finance Act, 1994 whereas the Order-in-Appeal has been passed by the Appellate Authority in exercise of powers conferred on it under Section 85 of the Finance Act, 1994. The learned counsel for the parties are not in disagreement on the fact that against the Order-in-Appeal, an appeal lies under Section 86 of the Finance Act, 1994. As per sub-section [1] of Section 86 of the Finance Act, 1994, save as otherwise provided therein, an assessee aggrieved by an Order passed by a Commissioner [Appeals] under Section 85[4] of the Finance Act, 1994, may appeal to the Appellate Tribunal against such Order within three months from the date of receipt of the Order. The Order-in-Appeal has also mentioned that an appeal against the Order-in-Appeal would lie under Section 86 of the Finance Act, 1994 to the Customs, Excise and Service Tax Appellate Tribunal [CESTAT] within three months from the date on which the Order sought to be appealed against is communicated. It is in such backdrop, the rival contentions made by the parties are to be considered in the present writ petition.
12. Before making any deliberation on the merits of the respective contentions of the parties, it is appropriate to refer to the propositions laid down and observations made in some of the forenamed judgments, referred to by the parties.
13. The decision in *Godrej Sara Lee Ltd.* [supra] has lucidly explained the distinct concepts of 'maintainability' of a writ petition and 'entertainability' of a writ petition on the premise of availability of alternative remedy provided by the relevant statutes. It has been observed that Article 226 of the Constitution of India does not, in terms, impose any limitation or restraint on the exercise of power to issue writs. Exercise of writ powers despite availability of a remedy under the very statute which has been invoked and has given rise to the action impugned in the writ petition ought not to be made in a routine manner, yet, the mere fact that the petitioner before the High Court, in a given case, has not pursued the alternative remedy available to him/it cannot be construed as a ground for its dismissal. It has been observed that the High Courts, bearing in mind the facts of each particular case, have a discretion whether to entertain a writ petition or not. One of the self-imposed restrictions on the exercise of power under Article 226 that has evolved through judicial



precedents is that the High Courts should normally not entertain a writ petition, where an effective and efficacious alternative remedy is available. At the same time, it is required to be remembered that mere availability of an alternative remedy of appeal or revision, which the party invoking the jurisdiction of the High Court under Article 226 has not been pursued, would not oust the jurisdiction of the High Court and render a writ petition 'not maintainable'. Availability of an alternative remedy does not operate as an absolute bar to the 'maintainability' of a writ petition. It has, thus, been observed that 'entertainability' and 'maintainability' of a writ petition are distinct concepts. While an objection to the 'maintainability' goes to the root of the matter, the question of 'entertainability' is entirely within the realm of discretion of the High Courts. Being otherwise maintainable, it has been enunciated, dismissal of a writ petition by a High Court on the ground that the petitioner has not availed the alternative remedy, without examining the aspect whether an exceptional case has been made out for such entertainment, would not be proper.

14. The issue involved in *Maharashtra Chess Association* [supra] was whether a private agreement entered into between the appellant and the second respondent in the form of the constitution and bye-laws of the later could, by conferring exclusive jurisdiction on the courts of a particular place, oust the writ jurisdiction of a High Court which does not have territorial jurisdiction over the courts of that particular place, under Article 226 of the Constitution of India. It has been observed that the existence of an alternative remedy, whether adequate or not, does not alter the fundamentally discretionary nature of the High Court's writ jurisdiction and therefore, does not create an absolute legal bar on the exercise of the writ jurisdiction by a High Court. The decision whether or not to entertain an action under its writ jurisdiction remains a decision to be taken by the High Court on an examination of the facts and circumstances of a particular case. The mere existence of an alternate forum where the aggrieved party may secure relief does not create a legal bar on a High Court to exercise its writ jurisdiction. Existence of alternative forum is a factor to be taken into consideration by the High Court amongst several factors. The High Court has to take a holistic view of the facts as submitted in the writ petition and make a determination on the facts and circumstances of each particular case. It has been held that the scrutiny to be applied to every writ petition under Article 226 by the High Court is a crucial safeguard of the rule of law under the Constitution. The Courts have themselves imposed



certain restrictions on the exercise of their writ jurisdiction to ensure that the jurisdiction does not become an appellate mechanism for all disputes within a High Court's territorial jurisdiction. The intention behind the self-imposed rule is if the High Courts are to exercise their writ jurisdiction widely so as to regularly override appellate procedures, they would themselves become inundated with a vast number of cases to the detriment of the litigants in those cases. The same would defeat the legislature's intention in enacting statutory appeal mechanisms to ensure the speedy disposal of cases.

15. The statute involved in *Thansingh Nathmal vs. The Superintendent of Taxes, Dhubri and others*, AIR 1964 SC 1419, was the Assam Sales Tax Act, 1947, which had provided a hierarchy of taxing tribunals competent to decide question as to the liability of the taxpayer under the said Act, with a right to have questions of law arising out of the order decided by the jurisdictional High Court. It is in the above fact situation, the Constitution Bench in *Thansingh Nathmal* [supra] has observed as under :-

7.*The jurisdiction of the High Court under Article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the Articles. But the exercise of the jurisdiction is discretionary: it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort to that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Article 226, where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy. Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by*



assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution, the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up.

16. The decision in *Commissioner of Income Tax and others vs. Chhabil Dass Agarwal*, reported in [2014] 1 SCC 603, arose out of an order of assessment passed by the Assessing Authority under Section 146 of the Income Tax Act, 1961. The Hon'ble Supreme Court of India made a survey of a number of decisions available on the point of entertainability of writ petition by the High Court, despite availability of an efficacious and alternative remedy. The observations are made in the following manner :-

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



[2003] 2 SCC 107; and *State of H.P. vs. Gujarat Ambuja Cement Ltd.*, [2005] 6 SCC 499].

12. *The Constitution Benches of this Court in K.S. Rashid and Sons vs. Income Tax Investigation Commission*, AIR 1954 SC 207; *Sangram Singh vs. Election Tribunal, Kotah*, AIR 1955 SC 425; *Union of India vs. T.R. Varma*, AIR 1957 SC 882; *State of U.P. vs. Mohd. Nooh*, AIR 1958 SC 86; and *K.S. Venkataraman and Co. [P] Ltd. vs. State of Madras*, AIR 1966 SC 1089, have held that though Article 226 confers a very wide powers in the matter of issuing writs on the High Court, the remedy of writ is absolutely discretionary in character. If the High Court is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere, it can refuse to exercise its jurisdiction. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of the principles of natural justice or the procedure required for decision has not been adopted [See : *N.T. Veluswami Thevar vs. G. Raja Nainar*, AIR 1959 SC 422; *Municipal Council, Khurai vs. Kamal Kumar*, [1965] 2 SCR 653; *Siliguri Municipality vs. Amalendu Das*, [1984] 2 SCC 436; *S.T. Muthusami vs. K. Natarajan*, [1988] 1 SCC 572; *Rajasthan SRTC vs. Krishna Kant*, [1995] 5 SCC 75; *Kerala SEB vs. Kurien E. Kalathil*, [2000] 6 SCC 293; *A. Venkatasubbiah Naidu vs. S. Chellappan*, [2000] 7 SCC 695; *L.L. Sudhakar Reddy vs. State of A.P.*, [2001] 6 SCC 634; *Shri Sant Sadguru Janardan Swami [Moingiri Maharaj] Sahakari Dugdha Utpadak Sanstha vs. State of Maharashtra*, [2001] 8 SCC 509; *Pratap Singh vs. State of Haryana*, [2002] 7 SCC 484; and *GKN Driveshafts [India] Ltd. vs. ITO*, [2003] 1 SCC 72].
13. In *Nivedita Sharma vs. Cellular Operators Assn. of India*, [2011] 14 SCC 337, this Court has held that where hierarchy of appeals is provided by the statute, the party must exhaust the statutory remedies before resorting to writ jurisdiction for relief :



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

11. *It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of.*

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

77. *So far as the jurisdiction of the High Court under Article 226—or for that matter, the jurisdiction of this Court under Article 32—is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment [See : G. Veerappa Pillai vs. Raman & Raman Ltd., AIR 1952 SC 192; CCE vs. Dunlop India Ltd., [1985] 1 SCC 260; Ramendra Kishore Biswas vs. State of Tripura, [1999] 1 SCC 472; Shivgonda Anna Patil vs. State of Maharashtra, [1999] 3 SCC 5; C.A. Abraham vs. ITO, [1961] 2 SCR 765; Titaghur Paper Mills Co. Ltd. vs. State of Orissa, [1983] 2 SCC 433; Excise and Taxation Officer-cum-Assessing Authority vs. Gopi Nath and Sons, 1992 Supp [2] SCC 312 ; Whirlpool Corpn. vs. Registrar of Trade Marks, [1998] 8 SCC 1; Tin Plate Co. of India Ltd. vs. State of Bihar, [1998] 8 SCC 272; Sheela Devi*



vs. Jaspal Singh, [1999] 1 SCC 209; and Punjab National Bank vs. O.C. Krishnan, [2001] 6 SCC 569].

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

8. *Before we discuss the correctness of the impugned order, we intend to remind ourselves the observations made by this Court in Munshi Ram vs. Municipal Committee, Chheharta, [1979] 3 SCC 83. In the said decision, this Court was pleased to observe that : [SCC p. 88, para 23].*

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

17. In the 3-Judge Bench decision in *M/s Magadh Sugar & Energy Ltd. vs. the State of Bihar & Others*, reported in [2021] 9 S.C.R. 284, the observations are made in the following manner :-

19. *While a High Court would normally not exercise its writ jurisdiction under Article 226 of the Constitution if an effective and efficacious alternate remedy is available, the existence of an alternate remedy does not by itself bar the High Court from exercising its jurisdiction in certain contingencies. This principle has been crystallized by this Court in Whirpool Corporation vs. Registrar of Trademarks, Mumbai, [1998] 8 SCC 1; and Harbanslal Sahni vs. Indian Oil Corporation Ltd, [2003] 2 SCC 107. Recently, in Radha Krishan Industries vs. State of Himachal Pradesh & Ors, reported in 2021 SCC OnLine SC 334, a*



two judge Bench of this Court of which one of us was a part of [Justice DY Chandrachud] has summarized the principles governing the exercise of writ jurisdiction by the High Court in the presence of an alternate remedy. This Court has observed :

28. The principles of law which emerge are that :

- [i] The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well;*
- [ii] The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person;*
- [iii] Exceptions to the rule of alternate remedy arise where [a] the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; [b] there has been a violation of the principles of natural justice; [c] the order or proceedings are wholly without jurisdiction; or [d] the vires of a legislation is challenged;*
- [iv] An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law;*
- [v] When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion; and*
- [vi] In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the*



view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with.

The principle of alternate remedies and its exceptions was also reiterated recently in the decision in Assistant Commissioner of State Tax vs. M/s Commercial Steel Limited [Civil Appeal No. 5121 of 2021].

In State of HP vs. Gujarat Ambuja Cement Ltd, reported in [2005] 6 SCC 49, this Court has held that a writ petition is maintainable before the High Court if the taxing authorities have acted beyond the scope of their jurisdiction. This Court observed :

23. Where under a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess can be the grounds on which the writ petitions can be entertained. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute. It was noted by this Court in L. Hriday Narain vs. ITO [(1970) 2 SCC 355] that if the High Court had entertained a petition despite availability of alternative remedy and heard the parties on merits it would be ordinarily unjustifiable for the High Court to dismiss the same on the ground of non-exhaustion of statutory remedies; unless the High Court finds that factual disputes are involved and it would not be desirable to deal with them in a writ petition.



18. *M/s South Indian Bank Ltd. and others vs. Naveen Mathew Philip and another*, reported in [2023] 4 SCR 18, has observed as under :-

14. A writ of certiorari is to be issued over a decision when the Court finds that the process does not conform to the law or statute. In other words, courts are not expected to substitute themselves with the decision-making authority while finding fault with the process along with the reasons assigned. Such a writ is not expected to be issued to remedy all violations. When a Tribunal is constituted, it is expected to go into the issues of fact and law, including a statutory violation. A question as to whether such a violation would be over a mandatory prescription as against a discretionary one is primarily within the domain of the Tribunal. So also, the issue governing waiver, acquiescence, and estoppel.

* * * * *

16. Approaching the High Court for the consideration of an offer by the borrower is also frowned upon by this Court. A writ of mandamus is a prerogative writ. In the absence of any legal right, the Court cannot exercise the said power. More circumspection is required in a financial transaction, particularly when one of the parties would not come within the purview of Article 12 of the Constitution of India. When a statute prescribes a particular mode, an attempt to circumvent shall not be encouraged by a writ court. A litigant cannot avoid the non-compliance of approaching the Tribunal which requires the prescription of fees and use the constitutional remedy as an alternative.

* * * * *

19. In the recent three-Judge decision in *PHR Invent Educational Society* [supra], decided on 10.04.2024, the Hon'ble Supreme Court has held as follows :-



15. *It could thus be seen that, this Court has clearly held that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person. It has been held that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. The Court clearly observed that, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the Legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. It has been held that, though the powers of the High Court under Article 226 of the Constitution are of widest amplitude, still the Courts cannot be oblivious of the rules of self-imposed restraint evolved by this Court. The Court further held that though the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, still it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution.*

19.1. After discussing the decisions in *Thansing Nathmal* [supra]; *Titaghur Paper Mills* [supra]; *Chhabil Dass Agarwal* [supra]; and many other decisions, the Court has further observed as under :-

29. *It could thus clearly be seen that the Court has carved out certain exceptions when a petition under Article 226 of the Constitution could be entertained in spite of availability of an alternative remedy. Some of them are thus : [i] where the statutory authority has not acted in accordance with the provisions of the enactment in question; [ii] it has acted in*



defiance of the fundamental principles of judicial procedure; [iii] it has resorted to invoke the provisions which are repealed; and [iv] when an order has been passed in total violation of the principles of natural justice.

30. It has however been clarified that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance.

20. The maintainability of the present writ petition is not in doubt. The question which requires consideration is whether in the fact situation obtaining in the present case and on the basis of the contentions advanced by the parties, an exceptional case has been made out for entertaining the writ petition. A deliberation on the contentions advanced is, therefore, necessary.
21. Section 73 of the Finance Act, 1994 contains the provision for recovery of Service Tax not levied or paid or short-levied or short-paid or erroneously refunded. As per sub-section [1] Section 73, where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, an Adjudicating Authority 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. The proviso to sub-section [1] of Section 73 has prescribed 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 Chapter V of the Finance Act, 1994 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 the sub-section shall have effect, as if, for the words 'thirty months', the words 'five years' have been substituted.



22. Reference has been made from the end of the petitioner to the provisions contained in Section 83 of the Finance Act, 1994. By Section 83 of the Finance Act, 1994, a number of Sections of the Central Excise Act, 1944, as in force from time to time, are made applicable, so far as may be, in relation to Service Tax as they apply in relation to a duty of excise. Section 14 of the Central Excise Act, 1944 is one of the Sections made applicable to the Finance Act, 1994.
- 22.1. Section 14 of the Central Excise Act, 1944 has provided for a power to summon persons to give evidence and produce documents in inquiries under the Central Excise Act, 1944. As per sub-section [1] of Section 14, any Central Excise Officer duly empowered by the Central Government in that behalf shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making for any of the purposes of the Act. A summon to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned. As per sub-section [2] thereof, all persons so summoned shall be bound to attend, either in person or by any authorized agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and to produce such documents and other things as may be required. The afore-mentioned provision is required to be read accordingly in the Finance Act, 1994 in view of Section 83 therein.
- 22.2. From the provisions of Section 14 of the Central Excise Act, 1944, it is noticeable that by Section 14, power has been vested on a duly empowered officer to summon any person whose attendance before him is found necessary either to give evidence or to produce a document or any other thing in any inquiry which the Central Excise Officer is making for any of the purposes of the Central Excise Act, 1944 or the Finance Act, 1994, as the case may be. Only because a power is vested on an empowered officer to summon persons to give evidence and to produce documents in inquiries undertaken under the Finance Act, 1994 it does not flow, as a corollary, automatically out of it that in all cases where a



Demand-cum-Show Cause Notice under sub-section [1] or under the proviso to sub-section [1] of Section 73 of the Finance Act is to be issued such Demand-cum-Show Cause notice is to be preceded by a notice/summon in terms of Section 14 of the Central Excise Act, 1944, made applicable by virtue of Section 83 of the Finance Act, 1994, as a precursor. It can, however, be accepted that in the event a notice/summon of the nature contemplated in Section 14 is issued by the empowered officer under the above provisions of the Finance Act, 1994, it is also necessary to ensure service of such notice/summon on the noticee.

- 22.3. Moreover, by the Circular dated 11.11.2021, it has been clarified that a pre-show cause notice consultation shall not be mandatory for those cases booked under Chapter V of the Finance Act, 1994 for recovery of duties or taxes not levied or paid 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 provision of Chapter V of the Finance Act, 1994 or the rules made thereunder with the intent to evade payment of duties or taxes.
23. Reverting back to the facts of the case in hand, it is noticed that the Adjudicating Authority in the Demand-cum-Show Cause Notice had recorded that the noticee was asked to submit certain documents vide Letter no. C.No.IV[18]01/ST/3rd party/IID/20 dated 04.09.2020 for ascertaining the noticee's actual Service Tax liability during the Financial Year : 2015-2016. It was further recorded that the noticee failed to submit those documents till the date of issuance of the Demand-cum-Show Cause Notice. It has been argued that no such Letter dated 04.09.2020 prior to the Demand-cum-Show Cause Notice was ever received by the petitioner. It has, thus, been contended that recording of the fact of failure to respond to such Letter dated 04.09.2020 by the Adjudicating Authority in the Demand-cum-Show Cause Notice was incorrect. With such projection, it has been contended that the same has made out a case of violation of the principles of natural justice.
- 23.1. On receipt of the Demand-cum-Show Cause Notice dated 26.04.2021, the petitioner had submitted a Reply on 17.02.2022 responding to the allegations made in the Demand-cum-Show Cause Notice. Noticeably, the petitioner in the said Reply was totally silent in respect of the Letter dated 04.09.2020. The petitioner did not raise any contention in the said



Reply that the Letter dated 04.09.2020 was never received. As the assertion made on behalf of the Adjudicating Authority about issuance and service of the Letter dated 04.09.2020 was not traversed and controverted by the petitioner in the Reply dated 17.02.2022, the Adjudicating Authority in the Order-in-Original seemed to have not dealt with the said aspect. It was only in the appeal preferred by the petitioner, the petitioner had again raised the issue that it did not receive the Letter dated 04.09.2020.

- 23.2. The petitioner has, in the present writ petition, raised a ground that despite raising the issue of non-receipt of the Letter dated 04.09.2020 in the appeal, the Appellate Authority in the Order-in-Appeal did not give any consideration on it. It is trite to observe that this Court in writ proceedings does not determine any question of fact. Whether the Letter dated 04.09.2020 was issued or not and if issued, whether it was served upon or received by the petitioner or not; etc. are questions of fact and in the fact situation obtaining in this case due to claim and contrary claim, these are disputed questions of facts. It is settled that all questions of facts are to be decided by the Adjudicating Authority or the appellate authorities in the hierarchy, constituted by the statute, as such authorities are competent to deal with and decide on disputed questions of facts. The determination of such disputed questions of facts and to correct errors of fact fall within the province of the appellate authorities. As the said aspect is a disputed question of fact, this Court in writ jurisdiction is not required to embark on a fact finding exercise on the said aspect. Therefore, it is accordingly observed. As an appeal is considered to be in continuation of the original proceedings and a writ proceeding is not considered so, the issue as to whether a fact which was not controverted or traversed in any manner initially, can be raised in appeal subsequently or not, or the petitioner is precluded to raise such issue by operation of the doctrine of waiver and acquiescence, can very well be gone into by the appellate forum as it can go into issues of law also. The recourse is very well available for the petitioner to approach under Section 86 of the Finance Act, 1994 in the case in hand.
24. Ordinarily, a Demand-cum-Show Cause Notice under sub-section [1] of Section 73 for recovery of Service Tax not levied or paid or has been short-levied or short-paid or erroneously refunded is to be issued within a period of thirty months from the relevant date. By the proviso to sub-section [1], the Adjudicating Authority has been empowered to



issue a Demand-cum-Show Cause Notice within a period of five years from the relevant date, if any of the grounds mentioned therein is found to exist. Sub-section [6] of Section 73 has provided the meaning of 'relevant date' for the purpose of Section 73. As per Section 73[6][i][a], 'relevant date' means, in the case of taxable service in respect of which Service Tax has not been levied or paid or has been short-levied or short-paid, whereunder the rules made under Chapter V of the Finance Act, 1994, a periodical return, showing particulars of Service Tax paid during the period to which the said return relates, is to be filed by an assessee, the date on which such return is so filed. Under Rule 7 of the Service Tax Rules, 1994 framed under the Finance Act, 1994, it has inter alia been provided that an assessee shall submit a half-yearly return in Form ST-3.

25. In the case in hand, the concerned Financial Year was 2015-2016 in respect of which the allegations regarding suppression of actual value of services provided and short-payment of Service Tax dues are made. The Demand-cum-Show Cause Notice dated 26.04.2021 was issued invoking the power under the proviso to sub-section [1] of Section 73 of the Finance Act, 1994. According to the petitioner, it had duly filed its returns in Form ST-3 for the Financial Year : 2015-2016.

26. It is a settled proposition that the extra-ordinary and discretionary jurisdiction to issue a writ in the nature of certiorari under Article 226 of the Constitution of India is different from appellate jurisdiction. The writ jurisdiction extends only to cases where the orders are passed by tribunals or authorities without jurisdiction or by assuming jurisdiction where their exists none or in excess of their jurisdiction by crossing the limits of jurisdiction or by refusing to exercise jurisdiction vested in them or acting illegally or improperly in exercise of their jurisdiction causing grave miscarriage. It is also no longer rest integra that in regard to a finding of fact recorded by a tribunal or authority, a writ of certiorari can be issued only if in recording such a finding, the tribunal or the authority has acted on evidence which is legally inadmissible or has refused to admit an admissible evidence or if the finding is not supported by any evidence at all, because in such cases the error amounts to an error of law. It is also settled that a pure error of fact, however, grave, cannot be corrected by a writ. It is not the case of the petitioner that the Demand-cum-Show Cause Notice was issued beyond the period of five years from the relevant date,



thereby, making it a case as one without jurisdiction. Rather, it is the case of the petitioner that the Adjudicating Authority had issued the Demand-cum-Show Cause Notice by illegally extending the period of thirty months to five years.

27. Having regard to the provision contained in sub-section [1] and in the proviso to sub-section [1] of Section 73 of the Finance Act 1994, it cannot be said that the Adjudicating Authority does not have the jurisdiction to issue a Demand-cum-Show Cause Notice within a period of five year from the relevant date if he has reasons to believe that any of the grounds mentioned therein exists and as a result, any Service Tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded. In the present case, while invoking the power to extend the period to five years from the relevant date, the Adjudicating Authority had recorded in the Demand-cum-Show Cause Notice dated 26.04.2021 the reasons as to why the case, according to it, is a case of wilful suppression of facts and short-payment of Service Tax to invoke the power under the proviso. The Adjudicating Authority had specifically referred to information/data collected from the Income Tax Department pertaining to considerations received from the customers/changed to customers under Section 194C/194H/194I/194J etc. of the Income Tax Act, 1961 for the Financial Year : 2015-2016 and mentioned that on the basis of those information/data collected he had reasons to believe that the petitioner-assessee had failed to pay Service Tax to the tune of Rs. 1,34,54,383/- on the differential and undeclared value of services.
28. The question about the adequacy of reasons or its sufficiency can be raised in a tribunal of facts and law and the issue can also be considered by an appellate tribunal which is empowered to consider issues of both facts and law. From sub-section [2A] of Section 73 of the Finance Act, 1994, it is clearly discernible that an appellate authority can go into the issue as to whether the power under the proviso to sub-section [1] of Section 73 for extending the period to five years by the Adjudicating Authority has been properly exercised or not. The appellate tribunal can very well come to a conclusion that the notice issued under the proviso to sub-section [1] of Section 73 is not sustainable for the reason that the charge 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 Chapter V of the Finance Act, 1994 or of the rules made thereunder with intent to evade payment of service



tax; has not been established against the person chargeable with the Service Tax, to whom the notice was issued. Thus, the appellate tribunal can go into the question as to whether the power under the proviso to sub-section [1] of Section 73 to extend the period to five years was properly exercised or not by the Adjudicating Authority. This Court is also the considered view that since the case of the petitioner is not one that the Adjudicating Authority has exercised the jurisdiction under the proviso to sub-section [1] of Section 73 without jurisdiction or in excess of jurisdiction or by assumption of jurisdiction where there is no such jurisdiction, such issue should be decided by the appellate tribunal first.

29. In *Simplex Infrastructure Limited* [supra], a demand was raised by a demand-cum-show cause notice invoking the extended period of limitation under the proviso to Section 73 of the Finance Act, 1994 on the ground of alleged suppression. Having considered the contents of the demand-cum-show cause notice, the learned Single Bench has held the view that a mere mechanical reproduction of the language of the proviso to Section 73[1] of the Finance Act, 1994 does not per se justify invocation of the extended period of limitation. The notice must contain particulars of facts and circumstance in support of such allegation. The Court has found that the Department initiated an enquiry and issued letters to the petitioner from time to time and the petitioner was found diligent in responding to all the letters issued by the Department. It was in such backdrop, the learned Single Bench has reached the view that there appears to be no basis in the Department's contention that the petitioner suppressed material facts with an intent to evade payment of Service Tax. On perusal, the fact situation obtaining in *Simplex Infrastructure Limited* [supra], with respect, is not found similar to the fact situation obtaining in the case in hand.
30. As discussed above, the matter of issuance and service of the Letter dated 04.09.2020 is a disputed one. In view of the contention raised, a reference to the relevant parts of Section 73 of the Finance Act, 1994 appears necessary. Sub-clause [c] of sub-section [1] of Section 77 has inter alia prescribed that any person who fails to furnish information called by an officer in accordance with the provisions of Chapter V or rules made thereunder; or produce documents called for by the Adjudicating Authority in accordance with the provisions of Chapter V or rules made thereunder; shall be liable to a penalty



which may extend to ten thousand rupees or two hundred rupees for every day during which such failure continues, whichever is higher, starting with the first day after the due date, till the date of actual compliance. The petitioner has raised a question of illegal imposition of penalty amounting to Rs. 10,000/- by the Adjudicating Authority in the Order-in-Original and affirmed by the first Appellate Authority in the Order-in-Appeal. As this issue is dependent on the outcome of the determination of the question regarding matter of issuance and service of the Letter dated 04.09.2020, this issue is not required to be decided in the present writ petition.

31. From the Order-in-Original, it is noticed that in the proceedings before the Adjudicating Authority, the petitioner was afforded opportunity of personal hearing on 17.02.2022. On 17.02.2022, the petitioner was found to be represented by its Tax Consultant and Authorized Representative. During the appellate proceedings, dates for personal hearing were fixed on 25.05.2023, 10.07.2023 and 13.09.2023 respectively and the Appellate Authority had passed the Order-in-Appeal on 21.09.2023. *Prima facie*, the case is not one which falls in the category of 'no notice', 'no opportunity' and 'no hearing'. There is a distinction between a case where there is violation of the rule of *audi alteram partem* with 'no notice', 'no opportunity' or 'no hearing' and a case where there is violation of a facet of the rule of *audi alteram partem* where the plea is 'no adequate notice', or 'no adequate opportunity' or 'no fair hearing'. In the first category of cases, the order passed could be termed as invalid on the ground of total violation of the principles of natural justice. But it cannot be readily held so in the later category of cases as the effect of violation of a facet of the rule of *audi alteram partem* would require examination from the standpoint of prejudice. Having regard to the fact situation obtaining in the case in hand, the Appellate Tribunal can very well examine whether the petitioner was given adequate notice or was afforded adequate opportunity or a fair hearing in the proceedings before the Adjudicating Authority and/or before the first Appellate Authority. The contention of the petitioner as regards non-consideration of its Letter dated 15.09.2023 is also to be considered from the above perspective. Since this Court is of the considered view that neither the Order-in-Original nor the Order-in-Appeal has been passed in total violation of the principles of natural justice, the petitioner has not been able to make out an exceptional case on this point for entertaining the present writ petition.



32. In *Kellogg India Private Limited* [supra], a show cause notice was issued to the writ petitioner calling upon them to show cause as to why their product 'Chocos' should not be classified under Chapter sub-heading no. 1084.00 of the Tariff Act and the classification declaration filed under Rule 173B of the Central Rules, 1944. After submission of a reply by the petitioner, the Adjudicating Authority passed an Order-in-Original. The petitioner unsuccessfully carried an appeal before the Commissioner [Appeals]. After rejection of the appeal by the first appellate authority, the petitioner carried the matter further by preferring an appeal before the Customs, Excise and Gold [Control] Appellate Tribunal [the Tribunal', for short]. The Tribunal allowed the appeal and remanded the matter to the Adjudicating Authority for consideration afresh as directed in the remand order. The petitioner had inter alia sought for the copies of the test reports, methodology followed for determination of cocoa content, and an opportunity to cross-examine the authority who carried out the tests. When such prayer of the petitioner was rejected, the concerned writ petition under Article 226 of the Constitution of India was filed. On consideration of the background facts and circumstances of the case, the Hon'ble Court has held that the failure on the part of the respondents to supply copies of the test reports which has denied the petitioner of the opportunity to have the contents of the test reports relied upon by the respondents before the Adjudicating Authority was an act clearly in breach of the principles of natural justice and hence, the bar of alternate remedy does not stand in the way of the petitioner. Without expressing any opinion on its merits, the matter was remitted back to the Adjudicating Authority. The decision in *Kellogg India Private Limited* [supra] is not found to be of any assistance to the cause of the petitioner for the reasons mentioned in paragraph 31 hereinabove.
33. In *M/s Sailaja Commercial Construction Private Limited* [supra], an intra-court appeal was preferred against a Judgment dated 18.04.2022 of a learned Single Bench passed in a writ petition, W.P.[C] no. 153/2022. The writ petition was preferred by the writ petitioner/writ appellant against an Order-in-Original dated 09.09.2021 passed by the Principal Commissioner of Central Goods and Services Tax and Central Excise, Guwahati whereby a demand for an amount towards Service Tax along with equivalent amount of penalty in terms of Section 78 of the Finance Act, 1994 and penalty in terms of Section 77



of the Finance Act, 1994 were imposed upon the writ petition/writ appellant. The learned Single Bench had held that the statutory remedy of filing an appeal was available to the writ petitioner/writ appellant and therefore, the writ petition was not fit to be entertained. The Division Bench has affirmed the said expression of opinion of the learned Single Bench. A contention was advanced on behalf of the writ petitioner/writ appellant that a statutory pre-deposit was required to be made for filing an appeal and thus, the remedy was not efficacious. Such contention has been held by the Hon'ble Division Bench to be unworthy of credence because mere requirement of furnishing or making the pre-deposit with the appeal under the Goods and Services Act would not make the remedy inefficacious. It has been held that the remedy of appeal is an efficacious statutory remedy and ordinarily, the writ jurisdiction should not be invoked to examine the validity of a demand notice, if none of the exceptions carved out by the Hon'ble Supreme Court in its decision is made out.

34. It is noticed that against an order like the Order-in-Appeal no. 528/GHY[A]/COM/ST/GHY/2023 dated 21.09.2023, an appeal lies under Section 86 of the Finance Act, 1994 to the Customs, Excise and Central Tax Appellate Tribunal and such appeal is required to be filed within three months from the date on which the order sought to be appealed against has been communicated. Sub-section [5] of Section 86 has provided that the Appellate Tribunal may admit an appeal after the expiry of such period of limitation if it is satisfied that there was sufficient cause for not presenting it within that period.

35. In view of the fact that a statutory, adequate and efficacious remedy of appeal has already been provided for to assail an order like the Order-in-Appeal no. 528/GHY[A]/COM/ST/GHY/2023 dated 21.09.2023 before the Appellate Tribunal having the power to condone any delay, this Court is of the considered view, as also observed in *Smti. Ajitha Krishnan* [supra], that the writ petition preferred under Article 226 of the Constitution of India is not to be entertained at this stage, reserving the liberty to the petitioner to avail the statutory remedy of appeal provided under Section 86 of the Finance Act, 1994. It is accordingly observed. Consequently, the interim order passed earlier stands recalled.



36. It is pertinent to mention that the present writ petition against the Order-in-Appeal no. 528/GHY[A]/COM/ST/GHY/2023 dated 21.09.2023 was filed on 16.12.2023, that is, within the statutory period of limitation of three months provided under Section 86 of the Finance Act, 1994. As the period of three months since the Order-in-Appeal has expired in the meantime, the petitioner is also at liberty to prefer an application before the Appellate Tribunal showing cause as to why the appeal could not be presented within the statutory period of limitation. It is observed that in the event such an application for condoning the delay and an appeal are preferred by the petitioner, the Appellate Tribunal shall consider the same in accordance with law and on its own merits.

JUDGE

Comparing Assistant