IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.10644 of 2024

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Ramnath Prasad, Son of Basudeo Prasad, Resident of Ward No.11, Machhargawa, Nautan Dube, Distt. West Champaran, Bihar - 845438.

... ... Petitioner

Versus

1. Principal Commissioner of CGST and Central Excise having its Office at Central Revenue Building, (Annexe), Bir Chand Patel Path, Patna 800001.

2. Additional Commissioner, CGST and CX, Patna-II having its Office at CTTC Building Sanchar Pariusar Budh Marg, Patna-800001.

... ... Respondents

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Acts/Sections/Rules:

- *Sections 65, 73 of the Finance Act, 1994*

Cases referred:

- *Rochem Separation Systems (India) Pvt. Ltd. vs. the Union of India & Ors. (Writ Petition No. 822 of 2021 and analogus cases dated 30.01.2023)*
- *Amadeus India Pvt. Ltd. vs. Principal Commissioner, Central Excise, Service Tax and Central Tax Commissionerate reported in 2019 SCC OnLine Del 8437*
- *Principal Commissioner, Central Excise, Service Tax and Central Tax Commissionerate vs. Amadeus India Private Limited (Special Leave Petition (Civil) Diary No(s). 35886/2019)*
- *M/s Kanak Automobiles Private Limited vs. the Union of India and Others (Patna High Court CWJC No. 18398 of 2023)*

Writ petition - *filed to quash the order issued by the Central Board of Excise and Customs proposing and levying of Service Tax, interest and penalty without a pre-show cause consultation.*

Held - *Even before issuance of demand-cum-show cause notice, the petitioner had an opportunity to submit his response together with all documents and information in his support but he did not avail that opportunity. (Para 25)*

Petitioner was given sufficient opportunity even in course of adjudication proceeding but he did not avail the opportunity. In such circumstance, the impugned order would not require any interference on the ground of violation of the principle of Natural justice. - Pre-show cause notice consultation would be mandatory in certain circumstances but a bare reading of the Circular referred to would show that the pre- consultation notice is not mandatory for the cases booked under fraud, collusion, wilful mis-statement, suppression of facts, evasion of tax etc. (Para 26)

Court sitting under Article 226 of the Constitution of India would refrain itself as a matter of self-restraint in conducting an enquiry as to whether it is a case of fraud or not. It is left open to be considered by Appellate Authority. (Para 28)

Where the petitioner himself was not cooperating and was not responding to the notice issued by the Department, it would not have been possible for the Department to determine the amount of service tax within the period of limitation prescribed under clause (b) of sub-section (4B) of Section 73 of the Act of 1994. (Para 30)

Competent authority has been found the information from the Income Tax Department and the materials proceeded to verify those materials but in course of the said verification, if the petitioner was not cooperating and participating and the materials indicated that it is a case of evasion of tax, the Authority would not be wrong in having a reasonable belief that the assessee is not cooperating and providing information in response to the notice with sole intention to evade the tax. (Para 34)

If the petitioner files a duly constituted appeal within a period of eight weeks from today, the Appellate Authority i.e. Commissioner (Appeal), CGST and CX shall consider the issue of limitation (Para 40)

Writ application is disposed of. (Para 42)

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Appearance :

For the Petitioner	:	Mr. D.V.Pathy, Sr. Advocate Mr. Sadashiv Tiwari, Advocate Ms. Prachi Pallavi, Advocate Mr. Hiresh Karan, Advocate Mr. Shivani Dewalla, Advocate
For the Respondents	:	Mr. Dr. Krishna Nandan Singh, Sr. Adv. (ASG) Mr. Anshuman Singh, Sr. SC, CGST & CX Mr. Shivaditya Dhari Sinha, Advocate Mr. Amarjeet, Advocate

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
and
HONOURABLE MR. JUSTICE RAMESH CHAND MALVIYA

ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date : 28-01-2025

Heard Mr. D.V. Pathy, learned Senior Counsel assisted by Mr. Sadashiv Tiwari, learned counsel for the petitioner and Dr. K.N. Singh, learned Additional Solicitor General assisted by Mr. Anshuman Singh, learned Senior Standing Counsel, CGST & CX for the respondents.

2. This writ application has been preferred seeking the following reliefs:-

> i) the order dated 02.01.2024 (as contained in Annexure – P2) passed by the respondent no. 2 for the Period

2015 – 2016 and 2016 – 17 proposing levy of Service Tax, interest and penalty without a pre-show cause consultation as per Master Circular No. 1053/02/2017 – CX dated 10.03.2017 issued by the Central Board of Excise and Customs and subsequently clarified by Circular dated 19.11.2020 be set aside quashed.

ii) the order dated 02.01.2024 (as contained in Annexure – P 2) passed by the respondent no. 1 for the Period 2015 – 2016 and 2016 – 17 imposing Service Tax, interest and penalty without consideration of the exemption Notification No. 25/2012 – Service Tax dated 20.06.2012 issued by the Central Government beyond the period of limitation being wholly without jurisdiction be set aside and quashed.

iii) for granting any other relief (s) to which the petitioner is otherwise found entitled to."

Brief Facts of the Case

3. The petitioner is engaged in the business of transportation of goods who entered into an agreement on 05.02.2014 with the Bihar State Food and Civil Supplies Corporation Limited (hereinafter called 'Corporation') for transportation of foodgrains and other essential commodities within a district or to other district and from outside the State including handling and temporary storage etc. A show cause notice has been issued to the petitioner by the respondent no. 1 stating that he is providing taxable service and has suppressed the taxable turnover for the Financial Year 2015 – 16 and 2016 – 17. However, the petitioner denies about receiving such notice and stated that he has

received reminder only to the show cause notice. The said show cause notice has not been complied with. The respondent no. 1 passed an ex parte order holding therein inter alia that the petitioner is engaged in providing taxable services under Section 65 of the Finance Act, 1994 (hereinafter referred to as 'the Act of 1994') with the subsequent amendments and does not fall under any of the entries of the Mega Exemption Notification No. 25/2012-Service Tax dated 20.06.2012 as amended. The respondent no. 1 held vide order dated 02.01.2024 as contained in Annexure 'P2' (hereinafter referred to as the 'impugned order') that the petitioner has suppressed taxable turnover in contravention of the provisions of the Act of 1994 and imposed service tax of Rs.1,26,03,035/- and an equivalent penalty among other penalty and interest.

Submissions on behalf of the Petitioner

4. Learned Senior Counsel for the petitioner has assailed the impugned order on various grounds. Referring to the impugned order, learned Senior Counsel submits that a perusal of the same would show that the proceeding in the instant case was initiated by issuance of a demand-cum-show cause notice dated 28.04.2021 to this petitioner. It is his submission that the Assessing Authority has passed the impugned order (Annexure 'P2') with respect to

financial years 2015 – 16 and 2016 – 17. Every assessment year is a self-contained assessment year and separate returns are filed, therefore, it was incumbent upon the Assessing Authority to issue separate show cause notices.

5. Learned senior counsel submits that the show cause notice issued on 28.04.2021 would be between the period of limitation as prescribed under Sub-Section (1) of Section 73 of the Act of 1994. During the relevant period, the period of limitation prescribed for notice was 18 months only but in this case, the notice was issued after five years and four years respectively from the relevant date. It is, thus, submitted that the very issuance of the show cause notice would be hit by Sub-Section (1) of Section 73 of the Act of 1994.

6. One of his contentions is that prior to issuance of the show cause notice, the Assessing Authority had a duty cast upon him to issue a pre-consultation notice. In this regard, learned Senior Counsel submits that it is a mandatory provision which has been brought into existence by virtue of the statutory powers conferred upon the competent authority and the instructions in this regard have been held to be mandatory in nature. Learned Senior Counsel has taken this Court through paragraph ‘5.0’ of the Circular No. 1053/02/2017 – CX dated 10th March, 2017 with

which is annexed the Master Circular. According to paragraph '5.0' of the Master Circular, the Board has made a provision for pre-show cause notice consultation by the Principal Commissioner/Commissioner prior to issue of show cause notice in cases involving demands of duty above Rs.50 lakhs (except for preventive/ offence related SCN's) mandatory vide instruction issued from F No. 1080/09/DLA/MISC/15 dated 21st December, 2015. It is stated therein that such consultation shall be done by the Adjudicating Authority with the assessee concerned. To strengthen his submissions, learned Senior Counsel has relied upon the judgments of Hon'ble Bombay High Court, Hon'ble Delhi High Court and Hon'ble Supreme Court in the case of **Rochem Separation Systems (India) Pvt. Ltd. vs. the Union of India & Ors.** (Writ Petition No. 822 of 2021 and analogus cases dated 30.01.2023)**; Amadeus India Pvt. Ltd. vs. Principal Commissioner, Central Excise, Service Tax and Central Tax Commissionerate reported in 2019 SCC OnLine Del 8437 and Principal Commissioner, Central Excise, Service Tax and Central Tax Commissionerate vs. Amadeus India Private Limited** (Special Leave Petition (Civil) Diary No(s). 35886/2019 dated 04.11.2019) (Annexures 'P5', 'P6' and 'P8' respectively). This Court has been informed by showing Annexure 'P/8' that the

judgment of the Hon'ble Delhi High is pending consideration before the Hon'ble Supreme Court.

7. Learned Senior Counsel has further taken this Court through sub-Section (4B) of Section 73 of the Act of 1994 to submit that this provision makes it mandatory for the Central Excise Officer to determine the amount of tax due under Sub-Section (2) within one year from the date of notice in respect of cases falling under the proviso to Sub-Section (1). Learned Senior Counsel has given much emphasis on his submissions that the case of this petitioner would not be falling under proviso to Sub-Section (1) of Section 73 or under Sub-Section (4) of Section 73 as this cannot be categorised in a case falling under either of the reasons from (a) to (e). According to him, in this case, there is no material on record which may satisfy this Court that it would be a case of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of Chapter V or of Rules made thereunder with intent to evade payment of service tax.

8. It is his submission that it is only in the cases which would be falling under any of the categories provided under the proviso to Sub-Section (1) of Section 73, the provision of Sub-Section (1) which lays down a limitation of 18 months shall be

read as if in place of 18 months the period of limitation would be five years.

9. It is submitted that the respondents cannot apply the limitation of five years in the present case. The only document on which the respondents has relied upon to put this case in the category of evasion of tax is the information available in the proceeding of the income tax, form 26AS which contains the description of the taxes deducted at source shows the total amount of tax deducted at source against the PAN of this petitioner. In any case, this cannot be said to be a case of fraud or mis-statement or evasion of tax. Learned Senior Counsel has relied upon the Circular Instruction No. 05/2023-GST (paragraph '3.3') to strengthen his submissions.

10. Learned Senior Counsel further submits that no doubt sub-Section (4B) may be read as if it is not absolute but the cluster of words "where it is possible to do so" occurring under clauses (a) and (b) under Sub-Section (4B) would cast a duty upon the Assessing Authority to satisfy this Court that they were at work but despite their all efforts the proceeding could not be possibly concluded within the given period of limitation.

11. Learned senior counsel for the petitioner has placed before this Court a copy of the order of the judgment passed by a

learned Co-ordinate Bench of this Court on 04.04.2024 in CWJC No. 18398 of 2023 (**M/s Kanak Automobiles Private Limited vs. the Union of India and Others**) to submit that in the said case, the Hon'ble Division Bench has been pleased to take a view that the statutory provision would require the authorities to take all possible steps so to do and conclude the proceeding within a year. In the said case, since the Court was satisfied that no step was taken in the entire one year period, the delay would result in frustration of the goal of expediency as required statutorily, hence, the Court did not permit to continue with the proceeding.

12. Learned counsel has further relied upon a judgment of the Hon'ble Supreme Court in the case of **C.C., C.E. and S.T. Bangalore (Adjudication) and Others vs. Northern Operating Systems Private Limited** reported in **(2022) 17 SCC 90** to submit that while dealing with the principles of invocation of the extended period of limitation, the Hon'ble Supreme Court quoted the rules expressed earlier by the Apex Court in the case of **Cosmic Dye Chemical vs. CCE** reported in **(1995) 6 SCC 117** in the context of Section 11-A of the Central Excise Act, 1944 which is in identical terms with Section 73 of the Act of 1994. The judgment clearly stipulates that so far as fraud and collusion are concerned, the requisite ingredient would be the intent to evade duty and this

ingredient is in-built into these very words. Paragraph '6' of the judgment in the case of **Cosmic Dye Chemical** (supra) has been quoted with approval by the Hon'ble Supreme Court. This Court would reproduce the same hereinafter at appropriate stage.

13. Learned Senior Counsel has taken this Court through the agreement (Annexure 'P1'). It is submitted that on perusal of the agreement entered into between the Corporation and this petitioner, it would appear that the Corporation was in need to organise transportation of foodgrains and other essential commodities including sugar, edible oil, cloth etc. by road within a district from or to other district and from outside district which also involved handling and/or temporary storage thereof in godowns owned or hired in whole or part. It is for this purpose, the services of the petitioner was taken and an agreement was entered into.

14. Learned Senior Counsel submits that at this stage, this Court may take note of the Mega Exemption Notification No. 25/2012 as contained in Annexure 'P4' of the writ application. Attention of this Court has been drawn towards item no. 21(a) to demonstrate that the services provided by a goods transport agency by way of transportation of fruits, vegetables, eggs, milk, foodgrains or pulses in a goods carriage would not be subjected to

service tax. It has been exempted from the list of taxable service. It is submitted that if the serviced rendered by the petitioner was not taxable by virtue of Mega Exemption Notification (Annexure 'P4'), the petitioner had no liability to file return showing the receipts from such receipts under the said agreement as income received on account of a service chargeable to service tax. It is submitted that in such circumstance, the Assessing Authority has erred in passing the impugned order whereby and whereunder a service tax amounting to Rs.1,26,03,035/- has been confirmed and the petitioner has been held liable to pay the said amount with interest and penalty.

15. Learned Senior Counsel submits that in fact from perusal of the impugned order (Annexure 'P2'), it would be evident that the assessment as well as penalty proceeding have been taken up simultaneously and by the one and same or the Assessing Authority has confirmed the service tax as well as the penalty which would not be appropriate and is liable to be held bad in law.

Submissions on behalf of Respondent

16. On the other hand, Mr. Dr. K.N. Singh, learned ASG has contested the writ application. It is submitted that the very foundation of this case is the information contained in the income

tax return showing that tax has been deducted at source in this case under Section 194 (c) from the petitioner who was working under a contract and had received huge amount from the Corporation on account of the said contract work. Learned Senior Counsel submits that the law does not prohibit the respondents from taking into account third party information, therefore, no illegality may be found in the fact that the instant proceeding has been initiated on the basis of the information available in the income tax proceeding, particularly, in form 26AS.

17. Learned Senior Counsel has taken this Court through paragraph '10' of the counter affidavit. It is submitted that the noticee had been given ample opportunity to submit his response but despite knowledge of the show cause notice issued on 28.04.2021, the noticee did not submit any reply. It is pointed out that the Adjudicating Authority fixed several dates giving opportunity of personal hearing to the petitioner. Four times the noticee was given opportunity to appear for personal hearing. The noticee appeared on 30.10.2023 and submitted a letter requesting for four weeks' time. The Adjudicating Authority considered the request and waited for the defence submission but the petitioner failed to submit his response. Ultimately, the order in original

which is impugned in the present writ application was issued on 02.01.2024.

18. Learned Senior Counsel further submits that if the noticee has any grievance with the said order in original, they have a remedy by way of an appeal before the Commissioner (Appeal) CGST & CX, Patna within a period of 60 days from the date of receipt of the order but in this case, the petitioner instead of invoking his right to appeal, has chosen to approach this Court under Article 226 of the Constitution of India. The submission is that where there is an equally efficacious remedy available to the petitioner, a Writ Court may exercise self-restraint and not entertain a writ application.

19. Learned Senior Counsel submits that the issue of limitation as pleaded on behalf of the petitioner would not be available to the petitioner on the face of the provisions contained under Section 73 of the Act of 1994. Learned Senior Counsel submits that in the present case, the proceeding was initiated by putting this case in the category of evasion of tax. Attention of this Court has been drawn towards the brief facts of the case mentioned in the impugned order. It is submitted that the Assessing Authority has taken up this case for one of the reasons stated under (a) to (e) vide proviso to sub-Section (1) of Section

73. Thus, it is submitted that the case would fall under the extended period of five years limitation.

20. Learned Senior Counsel submits that the Sub-Section (4B) of Section 73 of the Act of 1994 provides two clauses and under both the clauses the period of limitation has, though been fixed but a bare reading of those provisions would show that they are not mandatory in nature. It is submitted that in case of **M/s Kanak Automobiles Private Limited** (supra), learned Co-ordinate Bench of this Court, though exercised its discretion under Article 226 of the Constitution of India and did not permit proceeding to continue but at the same time, in paragraph '10' of its judgment, the Hon'ble Division Bench expressed its agreement with the submission that it is not an absolute mandate that the proceeding should be completed within one year from the notice. It is submitted that there is nothing on the record to show that during this period of one year, no action was taken at the end of the Assessing Authority and it was possible to conclude the proceeding within the period of limitation. It is pointed out that the show cause notice was issued during the Covid-19 period and the benefit of the Covid-19 period in terms of the judgment of this Court in the case of **Suo Moto Writ Petition (Civil) No. 03 of 2020,** would be equally available to the Department. Post Covid

period, the petitioner was given several opportunities to participate in the adjudication proceeding. There is no denial of the fact that several adjournments were granted to the petitioner, he, in fact, appeared and sought adjournment but thereafter abandoned the proceeding. In such circumstance, where the Department has waited for his response after acceding to his request for adjournment, it would not lie in the mouth of the petitioner to say that the order in original (Annexure 'P2') would be hit by law of limitation.

21. It is submitted that so far as the chargeability of service tax to the services rendered by the petitioner under the agreement (Annexure 'P1') is concerned, it will be a pure question of fact which would be required to be looked into by the Appellate Authority and as the Appeal would be a continuation of the original proceeding, it would always be appropriate to relegate the petitioner to the remedy of appeal. Sub-Section (2A) of Section 73 has been referred to. Learned Senior Counsel has placed before this Court a copy of the judgment of another learned Co-ordinate Bench of this Court in CWJC No. 4541 of 2024 (**M/S Mangal Murti Constructions vs. The Union of India and Others**) to submit that the learned Co-ordinate Bench having noticed an identical submission in the said case was of the view that whether

the petitioner would be entitled to exemption from service tax under the relevant provision or not would be required to be examined with reference to the requisite documents and material information. The Learned Co-ordinate Bench, therefore, by relying upon the judgment of the Hon'ble Supreme Court in the case of **Godrej Sara Lee Ltd. vs. Excise and Taxation Officer-cum-Assessing Authority and Others** reported in **2023 SCC OnLine SC 95 (para '4')** and **Shalini Shyam Shetty and another Versus Rajendra Shankar Patil** reported in **(2010) 8 SCC 329** took a view that this Court cannot adjudicate the issue involved in the writ application in exercise of its power under Article 226 of the Constitution of India. The petitioner in the said case was relegated to the Appellate Tribunal to seek his remedy in appeal. It is his submission that similar view be taken in the present appeal.

22. Learned Senior Counsel has further submitted that since this case has been put in the category of evasion of tax by the petitioner, it would be incumbent upon the petitioner to satisfy the Appellate Authority by producing cogent materials and on the strength of judicial pronouncements to demonstrate that it would not fall in the category of evasion of tax. The intent of the petitioner would be required to be judged by the Appellate Authority, therefore, this Court may not record its own views on

this aspect of the matter as it is well settled that the issue of fraud would necessarily involve a question of fact.

23. It is further pointed out that so far as the judgment in the case of **M/S Kanak Automobiles Private Limited** (supra) is concerned, the Hon'ble Supreme Court has though dismissed the Special Leave Petition but at the same time, clarified that the impugned judgment does not lay down any principle of law. It is, thus, submitted that the petitioner has not made out a case for exercise of discretionary and plenary power of this Court under Article 226 of the Constitution of India.

Consideration

24. We have heard learned Senior Counsel for both the sides at length and perused the materials available on the record. At first instance, we take note of the fact that even though a copy of the counter affidavit was served upon learned counsel for the petitioner as back as on 21.08.2024, the petitioner has not controverted the statement of facts in the counter affidavit. In paragraph '10 of the counter affidavit, the respondents have given the details of the opportunities given to the petitioner to respond to the show cause notice dated 28.04.2021. It is stated that before issuance of demand-cum-show cause notice dated 28.04.2021, three opportunities were given to the noticee vide letter dated

13.04.2021, email dated 14.04.2021 and reminder dated 20.04.2021 by the Department to submit documents/information for verification/reconciliation of the date provided by the Income Tax Department but the noticee did not respond. It is further stated that despite giving ample opportunity before issuance of demand-cum-show cause notice, when the noticee did not respond then the demand-cum-show cause notice was issued on 28.04.2021 wherein 30 days' time were given to the noticee to submit his defence reply. The noticee did not submit any defence reply against the demand-cum-show cause notice nor he turned up on any of the dates fixed for personal hearing before the Adjudicating Authority. Four times the noticee was given opportunity to appear before the Adjudicating Authority for personal hearing but he did not appear. Thereafter, the noticee vide his letter dated 30.10.2023 made a request to the Adjudicating Authority for granting four weeks' time. The Adjudicating Authority considered this request and waited for the defence submission but the petitioner failed to file its defence.

25. Since these statements contained in paragraph '10' of the counter affidavit remained uncontroverted, we have no difficulty in taking a view that even before issuance of demand-cum-show cause notice, the petitioner had an opportunity to

submit his response together with all documents and information in his support but he did not avail that opportunity.

26. He was given sufficient opportunity even in course of adjudication proceeding but he did not avail the opportunity. In such circumstance, the impugned order would not require any interference on the ground of violation of the principle of *audi alterm partem.* So far as the submission of learned Senior Counsel that a pre-show cause notice consultation is concerned, there is no difficulty in accepting the submission that a pre-show cause notice consultation would be mandatory in certain circumstances but a bare reading of the Circular referred to would show that the pre-consultation notice is not mandatory for the cases booked under fraud, collusion, wilful mis-statement, suppression of facts, evasion of tax etc.

27. The contention of learned Senior Counsel for the petitioner that 'fraud or collusion' is to be established with reference to the intent of the petitioner is based on judicial pronouncement and in this regard, the judgment of the Hon'ble Supreme Court in the case of **Northern Operating System Private Limited** (supra) would govern the field. What have been observed in paragraph '69' of the judgment in the case of

Northern Operating System Private Limited (supra) are being quoted hereunder for a ready reference:-

> **69.** The Revenue's argument that the assessee had indulged in wilful suppression, in this Court's considered view, is insubstantial. The view of a previous three-Judge ruling, in *Cosmic Dye Chemical* v. *CCE*[42] — in the context of Section 11-A of the Central Excise Act, 1944, which is in identical terms with Section 73 of the Finance Act, 1994 was that : (SCC p. 119, para 6)
>
> > "*6*. Now so far as fraud and collusion are concerned, it is evident that the requisite intent i.e. intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word "wilful" preceding the words "misstatement or suppression of facts" which means with intent to evade duty. The next set of words 'contravention of any of the provisions of this Act or rules' are again qualified by the immediately following words 'with intent to evade payment of duty'. It is, therefore, not correct to say that there can be a suppression or misstatement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11-A. Misstatement or suppression of fact must be wilful."

42. (1995) 6 SCC 117

28. On a bare reading of the judgment of the Hon'ble Supreme Court in the aforementioned case, it appears that what is the requirement to prove 'fraud' and 'collusion' is the intent to evade duty. How to gather this intention or judge it would remain a question of fact and this issue as to whether it is a case of fraud, or wilful mis-statement, collusion or is falling under any of the clauses (a) to (b) of the proviso to sub-Section (1) of Section 73 may be properly adjudicated by either the Adjudicating authority or the Appellate Authority with reference to the materials on the record. This Court would not usurp the powers of the Appellate Authority. In our considered opinion, this Court sitting under Article 226 of the Constitution of India would refrain itself as a matter of self-restraint in conducting an enquiry as to whether it is a case of fraud or not. It is left open to be considered by Appellate Authority.

29. The issue of limitations which have been raised before this Court may be simply answered after taking note of the relevant provision. We reproduce Section 73(1) and (2) and sub-Section (2A) and (4B) of Section 73 of the Act of 1994 which are the two relevant provisions placed before this Court for consideration, hereunder for a ready reference:-

> "**SECTION 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 [1][[2][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 [1][[2][thirty months]], the words "five years" had been substituted.

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

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

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1. Substituted for "one year" by Finance Act, 2012 (23 of 2012), dt.28-5-2012.
2. Substituted for "eighteen months" by Finance Act, 2016 (28 of 2016), dt.14-5-2016.

2. Substituted for "Assistant Commissioner of Central Excise or, as the case may be, the Deputy Commissioner of Central Excise" by Finance Act, 2005 (18 of 2005), dt. 13-5-2005.

(a) fraud; or
(b) collusion; or
(c) wilful misstatement; or
(d) suppression of facts; or
(e) contravention of any of the provisions of this Chapter or therules made thereunder with intent to evade payment of service tax, has not been established against the person chargeable with the service tax, to whom the notice was issued, the Central Excise Officer shall determine the service tax payable by such person for the period of thirty months, as if the notice was issued for the offences for which limitation of thirty months applies under sub-section (1).
[1][(4B) The Central Excise Officer shall determine the amount of service tax due under sub-section (2)—
(a) within six months from the date of notice where it is possible to do so, in respect of cases [2][falling under] sub-section (1); (b) within one year from the date of notice, where it is possible to do so, in respect of cases falling under the proviso to sub-section (1) or the proviso to sub-section (4A);]"

30. We find on a bare reading of sub-Section (1) of Section 73 that the period of limitation for serving a notice under this provision was 18 months at the relevant time but the proviso to sub-Section (1) carves out an exception and it clearly provides that in the cases falling under any one of the reasons stated under clauses (a) to (e) of the proviso, the provisions of the sub-Section shall have effect, as if for the words "18 months", the words "five years" have been substituted. Since the initiation of proceeding itself has been done taking this case as one of evasion of tax, the respondents have rightly argued that the period of limitation in this

1. Inserted by Finance (No. 2) Act, 2014 (25 of 2014), dt. 6-8-2014, dt. 6-8-2014.
2. Substituted for "whose limitation is specified as eighteen months in" by Finance Act, 2016 (28 of 2016), dt. 14-5-2016.

case would be five years. We, would, however, hasten to add that we are not recording any finding that it is a case of evasion of payment of service tax as any such opinion of this Court would be an encroachment upon the jurisdiction of the Adjudicating Authority or Appellate Authority, as the case may be, in reaching to a just and proper conclusion after giving appropriate opportunity of hearing to the petitioner. The fact remains that the proceeding was initiated taking this case as one under evasion of tax, therefore, the period of limitation would be five years. At the same time, we, having gone through sub-Section (4B) of Section 73 of the Act of 1994, are of the opinion that this sub-Section cannot be taken as providing an absolute period of limitation. No doubt the legislative intent is that the Central Excise Commissioner shall determine the amount of service tax due under sub-Section (2) – (a) within six months from the date of issue of notice where it is possible to do so, in respect of cases falling under Sub-Section (1); (b) within one year from the date of notice where it is possible to do so in respect of cases falling under the proviso to sub-Section (1), the cluster of words “where it is possible to do so” clearly indicates that the legislatures were never of the view that a proceeding which would not be concluded within the period of limitation for whatever reasons would be

closed by virtue of the expiry of the period of limitation alone. To us, it appears that the opinion of the court as to whether it was possible to do so with the period fixed would differ from case to case. In this case, in our opinion, the respondents have satisfied this Court by placing on record that the proceeding was adjourned on several occasions in order to provide ample opportunity to the petitioner to participate and even before issuance of the demand-cum-show cause notice, the petitioner was given opportunity at least on three occasions. The statements of the respondents having remained uncontroverted, we are of the view that where the petitioner himself was not cooperating and was not responding to the notice issued by the Department, it would not have been possible for the Department to determine the amount of service tax within the period of limitation prescribed under clause (b) of sub-Section (4B) of Section 73 of the Act of 1994.

31. This would bring us to the last submission of learned Senior Counsel for the petitioner wherein he has argued that by virtue of the nature of service being rendered under the agreement (Annexure ‘P1’), the service so rendered by the petitioner would not be amenable to the service tax. For this purpose, he has relied upon the Mega Exemption Notification (Annexure ‘P4’). Paragraph ‘3.3’ of the Instruction No. 05/2023-GST dated

13.12.2023 has been placed before this Court to submit that after the judgment of the Hon'ble Supreme Court in the case of **Commissioner of Central Excise, Mumbai vs. M/s Fiat India (P) Ltd. in Civil Appeal No. 1648-49 of 2004,** the Department of Revenue, Ministry of Finance, Government of India has come with this Instruction. We have been requested by learned Senior Counsel for the petitioner to take into consideration this instruction contained in paragraph '3.1' to '3.3'. We would reproduce these paragraphs hereunder for a ready reference:-

> "3.1 It has also been represented by the industry that in many cases involving secondment, the field formations are mechanically invoking extended period of limitation under section 74(1) of the CGST Act.
>
> 3.2 In this regard, section 74(1) of CGST Act reads as follows:
>
> > *"(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilized* ***by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax."***
>
> 3.3 From the perusal of wording of section 74(1) of CGST Act, it is evident that section 74(1) can be invoked only in cases where there is a fraud or wilful mis-statement or suppression of facts to evade tax on the part of the said taxpayer. Section 74(1) cannot be invoked merely on account of non-payment of GST, without specific element of fraud or wilful mis-statement or suppression of facts to evade tax. Therefore, only in the cases where the investigation indicates that there is material evidence of fraud or wilful mis-statement or suppression of fact to evade tax on the part of the

> taxpayer, provisions of section 74(1) of CGST Act may be invoked for issuance of show cause notice, and such evidence should also be made a part of the show cause notice."

32. On going through the instructions, we find that all that has been stated in paragraph '3.3' is that Section 74(1) of CGST Act cannot be invoked merely on account of non-payment of GST, without specific element of fraud or wilful mis-statement or suppression of facts to evade tax. It further provides that only in the cases where the investigation indicates that there is material evidence of fraud or wilful mis-statement or suppression of fact to evade tax on the part of the taxpayer, provisions of Section 74(1) of the CGST Act may be invoked for issuance of show cause notice and such evidence should also be made a part of the show cause notice.

33. So far as the facts of the present case are concerned, we find on reading of the impugned order (Annexure 'P2') that the Assessing Officer has recorded in paragraph '2' that from the data shared by the Income Tax Department showing that the noticee is a service provider and has received Rs.8,57,65,000/- only during the period 2015 – 16 and 2016 – 17. In order to verify data received from the Income Tax Department with regard to service tax liabilities and proper discharge of the same, under a reasonable belief that the noticee was evading service tax, letters were sent to the noticee vide C.No. IV(II)-Third Party/BTH/2020/27 dated

13.04.2021 and email dated 14.04.2021 followed by a reminder email dated 20.04.2021 by the Superintendent, CGST and CEX Range, Bettiah to furnish certain documents/records and information for verification/reconciliation of the date provided by the Income Tax Department. The impugned order also takes note of the fact that no information/response from the noticee and because of this, the competent authority has formed an opinion that the noticee has done it with sole intention to evade payment of due service tax, hence, the Department was compelled to consider it reasonable to accept the documents submitted by the Income Tax Department being valid and proceeded for calculation of service tax and cess.

34. In our considered opinion, clause '3.3' of the Instruction must be read keeping in view the facts of the case. The facts of this case would reveal that the competent authority has been found the information from the Income Tax Department and the materials proceeded to verify those materials but in course of the said verification, if the petitioner was not cooperating and participating and the materials indicated that it is a case of evasion of tax, the Authority would not be wrong in having a reasonable belief that the assessee is not cooperating and providing information in response to the notice with sole intention to evade the tax.

35. In our opinion, no fault may be found on the part of the competent authority in forming of a reasonable belief in absence of a response by the petitioner.

36. The upshot of the aforesaid discussions would lead this Court to conclude that it is not a fit case to interfere with the impugned order in original (Annexure 'P2') in exercise of the writ jurisdiction of this Court.

37. In a recent judgment in the case of **M/s Mangal Murti Constructions** (supra), the learned coordinate Bench has recently passed an order on 18.01.2025 in similar circumstance relegating the petitioner to the alternative remedy of appeal and a request has been made to the Appellate Tribunal to condone the delay.

38. The petitioner may, if so advised, avail the statutory remedy of appeal before the Commissioner, (Appeal), CGST and CX.

39. Mr. D.V. Pathy, learned senior counsel submits that the impugned order in original (Annexure 'P2') is dated 02.01.2024, therefore, the period of limitation for filing the appeal has expired. At this stage, learned ASG submits that even as the period of limitation has expired, but in reference to the judgment and order of this Court passed from time to time in several cases, the Appellate Authorities are, in order to do substantial justice, entertaining the

appeal considering the pendency of the writ application in the High Court.

40. Having regard to the aforementioned facts and circumstances and the materials placed before us, we are of the view that if the petitioner files a duly constituted appeal within a period of eight weeks from today, the Appellate Authority i.e. Commissioner (Appeal), CGST and CX shall consider the issue of limitation keeping in view the fact that the petitioner was legally advised to approach this Court and the writ application was pending consideration in this Court with an interim order of stay of the impugned judgment.

41. It is expected that the Appellate Authority shall consider the plea of limitation, if raised, keeping in view that substantial justice is always better.

42. This writ application stands disposed of accordingly.

(Rajeev Ranjan Prasad, J)

(Ramesh Chand Malviya, J)

SUSHMA2/-

AFR/NAFR	AFR
CAV DATE	
Uploading Date	31.01.2025
Transmission Date	