HC-KAR

NC: 2025:KHC:35242
WP No. 7635 of 2024

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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 16TH DAY OF JULY, 2025

BEFORE

THE HON'BLE MR. JUSTICE S.R.KRISHNA KUMAR

WRIT PETITION NO. 7635 OF 2024 (T-RES)

BETWEEN:

M/S NCS PEARSON INC.
MINNESOTA BASED CORPORATION,. USA
REPRESENTED BY ITS AUTHORIZED REPRESENTATIVE
MR SAURABH KANSAL
AGED ABOUT 39 YEARS
R/A 312, VIJAYA BUILDING,
BARAKHAMBA ROAD,
NEW DELHI 110 001.

…PETITIONER

(BY SRI. SUJITH GHOSH, SENIOR ADVOCATE FOR SRI.ASHRAY BEHURA MANNATH AND SRI.MOHAN MAIYA G L.,ADVOCATES)

AND:

1. UNION OF INDIA
THROUGH ITS SECRETARY
MINISTRY OF FINANCE,
NORTH BLOCK,
NEW DELHI - 110 001.

2. JOINT DIRECTOR
DIRECTORATE GENERAL OF
GST INTELLIGENCE CHENNAI ZONAL UNIT,
5TH AND 6TH FLOOR,
BSNL BUILDING TOWER-II
NO 16, GREAMS ROAD
CHENNAI 600 006.

3. ADDITIONAL COMMISSIONER/JOINT COMMISSIONER
CENTRAL TAX AND CENTRAL EXCISE,
'WEST OIDAR SERVICES' DIVISION,
BENGALURU WEST COMMISSIONERATE,
TTMC, BMTC BUILDING,

1ST FLOOR, KANAKPURA ROAD,
BENGALURU (BANGALORE) URBAN - 560 070.

4. CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS
MINISTRY OF FINANCE,
DEPARTMENT OF REVENUE,
NORTH BLOCK, NEW DELHI – 110 001.

5. THE GST COUNCIL
THROUGH ITS CHAIRPERSON,
5TH FLOOR, TOWER-II
JEEVAN BHARTI BUILDING,
JANPATH ROAD, CONNAUGHT PLACE,
NEW DELHI - 110 001.

6. GOVERNMENT OF KARNATAKA
DEPARTMENT OF FINANCE
THROUGH COMMISSIONER OF
COMMERCIAL TAXES DEPARTMENT,
VANIJYA THERIGE KARYALAYA-1,
1ST FLOOR, GANDHINAGAR,
BENGALURU – 560 009.

…RESPONDENTS

(BY SRI. TIMMANNA BHAT, CGC FOR R1,
SRI.JEEVAN J.NEERALGI, ADV. FOR R2 TO R5,
SRI.K.HEMAKUMAR, AGA FOR R6)

THIS W.P IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH THE SHOW-CAUSE NOTICE DATED 12/02/2024 BEARING NO. 007/2024 (F. NO. DGGI/INTL/347/2020-GR T)VIDE ANNEXURE-A ISSUED BY R2 UNDER SECTION 74 OF THE CENTRAL GOODS AND SERVICES TAX ACT, 2017 AS BEING ISSUED ILLEGALLY AND WITHOUT JURISDICTION AND ETC. ,

THIS PETITION IS BEING HEARD AND RESERVED ON 25.04.2025, COMING ON FOR PRONOUNCEMENT OF ORDERS THIS DAY, THE COURT MADE THE FOLLOWING:-

CORAM: HON'BLE MR. JUSTICE S.R.KRISHNA KUMAR

ORAL ORDER

In this petition, petitioner seeks for the following reliefs:-

"a) Issue a writ of certiorari or writ in the nature of certiorari or any other appropriate writ, direction or order quashing the Show-cause Notice dated 12.02.2024 bearing No. 007/2024(F. No. DGGI/INT/INTL/347/2020-Gr T)Vide Annexure-A issued by Respondent No. 2 under Section 74 of the Central Goods and Services Tax Act, 2017 as being issued Illegally and without jurisdiction;

b) Issue a writ of declaration or any other writ, order or direction quashing Notification No. 2/2017 Central Tax dated 19.06.2017 read with Corrigendum dated 29.07.2019 vide Annexure-B being issued without jurisdiction by the Respondent No. 1 and for being ultra-vires sections 2(91), 3 and 5 of the CGST Act:

c) Issue a writ of declaration or any other writ, order or direction quashing Notification No. 14/2017 Central Tax dated 01.07.2017 read with Corrigendum dated 29.07.2019 for being issued without jurisdiction by Respondent No. 1 (vide Annexure-C) and for being ultra-vires section 2(91) read with 3 and 5 of the CGST Act:

d) Issue a writ of declaration or any other writ, order or direction quashing Notification No. 2/2022 Central Tax dated 11.03.2022 as being ultra vires section 2(91) read

with 3 and 5 of the CGST Act issued by the Respondent No. 1 vide Annexure-B:

e) Issue a writ of declaration or any other writ, order or direction quashing Circular No. 3/3/2017-GST dated 05.07.2017 (Vide Annexure-D) issued by the Respondent No. 4 for being issued without the authority of law for being ultra-vires Section 2(91) of the CGST Act;

f) In the alternative, if Impugned Show-cause Notice dated 12.02.2024 (vide Annexure - A) is treated to be issued under Section 73 of the CGST Act, issue a writ of declaration or any other writ, order or direction quashing Notification No. 09/2023- Central Tax dated 31.03.2023 (Vide Annexure-E) issued by Respondent No.1 and Notification No. (06/2023) FD 20 CSL 2023 dated 06.04.2023 (Vide Annexure-F) issued by Respondent No.6. as being issued illegally and without jurisdiction;

g) for any such consequential and other reliefs as the nature and circumstances of the case may require."

2. The brief facts giving rise to the present petition as contended by the petitioner are as under:-

The petitioner which is duly registered under the GST Act claims to be a compliant tax payer who regularly files and pays GST every month. The petitioner has a division "Pearson Vue" which is engaged in providing computer based test administration

solutions and pursuant to its contract with GMAC, USA, the petitioner conduct GMAT on behalf of GMAC for candidates in India. It is contended that on 28.07.2004, petitioner entered into a contract with human scorers through their vendor ACT Inc., to ensure that appropriate human competency and knowledge is brought to bear while carrying out human scoring for GMAT tests.

2.1 It is contended that subsequent to the GST regime coming into force in India on 01.07.2017, the petitioner filed an application dated 07.01.2020 before the Authority in Advance Rulings (AAR) seeking a Ruling on whether the services engaged by it would come under the ambit of online Information Data Base Access and Retrieval Services (OIDAR services) under GST Laws. By original order dated 22.05.2020, the AAR held in favour of the petitioner that while Type – II tests of the petitioner would come within the ambit of OIDAR services, but Type – III tests are outside the purview of OIDAR services, since it involved more than minimum human intervention.

2.2 Aggrieved by the aforesaid order dated 22.05.2020 passed by the AAR, the respondents filed an appeal on 27.08.2020 before the Karnataka Appellate Authority for Advance Ruling

(AAAR) on the limited question of classification of Type – III tests conducted by the petitioner. The petitioner having contested the said appeal, the AAAR proceeded to pass an order dated 13.11.2020 allowing the appeal filed by the respondents.

2.3 Aggrieved by the aforesaid order dated 13.11.2020 passed by the AAAR, petitioner has preferred W.P.No.3555/2021 before the Division Bench of this Court which passed an interim orders dated 23.03.2022 and 31.10.2023 directing the respondents not to take any precipitative action for recovery against the petitioner. Subsequently, the 2nd respondent issued the impugned show cause notice at Annexure-A 12.02.2024 demanding payment from the petitioner for the period July, 2017 to June, 2021 under Section 74 of the CGST Act on the ground of wilful suppression. Aggrieved by the impugned show cause notice and also challenging the other Notifications, Circulars etc., issued by respondents, petitioner is before this Court by way of the present petition.

3. The respondents have filed their statement of objections and have contested / opposed the petition by disputing and

denying the various allegations and claim made by the petitioner, who has filed its rejoinder to the said statement of objections.

4. Heard learned Senior counsel for the petitioner and learned counsel for the respondents and perused the material on record.

5. In addition to reiterating the various contentions urged in the petition and referring to the material on record, learned Senior counsel for the petitioner submits that the impugned show cause notice is wholly without jurisdiction as the foundational jurisdictional facts to trigger / invoke Section 74 of the CGST Act i.e., existence of wilful suppression to evade / avoid payment of GST in relation to Type – III tests has not been satisfied by the respondents and the impugned show cause notice deserves to be quashed. It was submitted that the 3rd respondent i.e., Additional Commissioner / Joint Commissioner of Central Tax and Central Excise, Bangalore, is not vested with the powers of adjudication of show cause notice issued by the Directorate General of GST Intelligence, since the said authority has not been conferred with powers of adjudication under Table – V of Notification No.2/2017-CT and accordingly, the impugned show cause notice being illegal and without jurisdiction

or authority of law deserves to be quashed. It was further submitted that the 2nd respondent i.e., Joint Director, Directorate General of GST Intelligence, Chennai, is not the proper officer for the purpose of issuing of Notices under Section 74 of the CGST Act, inasmuch as the Notification No.14/2017-CT dated 01.07.2017 r/w Circular No.3/2017-GST dated 05.07.2017 are *ultra vires* the CGST Act. It was also submitted that the Notifications, Corrigendum, Circulars etc., assailed in the instant petition are illegal and *ultra vires* the provisions of the CGST Act and that the same deserve to be quashed. In support of his contentions, learned Senior counsel places reliance upon the following statutory provisions, notifications, circulars and judgments:

(i) Notification No. 14/2017 Central Tax dated 01.07.2017;

(ii) Section 2(91), Section 3, Section 4, Section 73, Section 167, Section 168 of the Central Goods and Services Act, 2017;

(iii) Section 2(b) of the Central Excise Act, 1944;

(iv) Rule 3 of the Central Excise Rules, 2017 and Service Tax Rules, 1994;

(v) Section 2(34), Section 3, Section 4, Section 6 and Section 28(11) of the Customs Act, 1962;

(vi) Notification No. 17/2002-Cus. (N.T.) dated 07.03.2002;

(vii) Canon India Private Limited v. Commissioner of Customs - 2021 SCC Online SC 200;

(viii) Section 2(34), Section 5(1A), Section 6 of the Customs Act, 1962;

(ix) Competent Authority v. Barangore Jute Factory and Ors., - (2005) 13 SCC 477;

(x) Marathwada University v. Seshrao Balwant Rao Chavan - (1989) 3 SCC 132;

(xi) Circular No. 3/3/2017-GST dated 05.07.2017;

(xii) Section 11A of the Central Excise Act, 1944;

(xiii) UOI v. Kunisetty Satyanarayana- (2006) 12 SCC 28;

(xiv) Commissioner of Police, Bombay v. Gordhandas Bhanji - 1951 SCC 108;

(xv) Anirudhsinhji Karansinhji Jadeja v. State of Gujarat - (1995) 5 SCC 302;

(xvi) State of West Bengal v. Anindya Sundar Das and Ors., - 2022 SCC Online SC 1382;

(xvii) State of Maharashtra and Ors. v. Mohammed Salim Khan and Ors., - (1991) 1 SCC 550;

(xviii) Relevant portions of the Black's Law Dictionary, Tenth Edition;

(xix) The Central Boards of Revenue Act, 1963;

(xx) Raghunath International Ltd. vs. Union of India - 2012 (280) ELT 321 (All)

(xxi) State of Bombay vs. Narottamdas Jethabhai - 1950 SCC 905;

(xxii) R.C. Infra Digital Solutions vs.Union of India, - (2024) 14 Centax 127 (All.);

(xxiii) Yasho Industries Ltd. vs. Union of India - 2021 (54) GSTL 19 (Guj.);

(xxiv) Yasho Industries vs. Union of India - SLP (C) No. 11642/2021, Order dated 06.08.2021;

(xxv) Kunhayammed vs. State of Kerala - (2006) 6 SCC 359;

(xxvi) Corporation of Calcutta vs. Liberty Cinema - (1965) 2 SCR 477;

(xxvii) Notification No. 5/2020-CT dated 13.01.2020;

(xxviii) State of Madras vs. Ganon Dunkerley & Co., - (1958) 9 STC 353;

(xxix) Wallace Brothers and Company Ltd. vs. CIT, Bombay City, - 1948 SCC Online PC 9;

(xxx) Member, Board of Revenue vs. Arthur Paul Benthall - 1955 SCC Online SC 47;

(xxxi) Paschimanchal Vidyut Vitran Nigam Ltd. vs. Raman Ispat Pvt. Ltd., - (2023) 10 SCC 60;

(xxxii) Jamshed N. Guzdar vs. State of Maharashtra, - (2005) 2 SCC 591;

(xxxiii) ITW Signode India Ltd. v. Collector of Central Excise - (2004) 3 SCC 48;

(xxxiv) Pandurang Dhondi Chougule and Ors. v. Maruti Hari Jadhav and Ors - AIR 1966 SC 153;

(xxxv) G.R.T. Regency v. Assistant Commissioner of Central Excise, Tuticorin - (2023) 4 Centax 72 (Mad.);

(xxxvi) Raza Textiles Ltd. v. Income Tax Officer, Rampur - (1973) 1 SCC 633;

(xxxvii) Carona Ltd. v. Parvathy Swaminathan & Sons - (2007) 8 SCC 559;

(xxxviii) Commissioner of Income Tax, Chennai v. Alagendran Finance Ltd., - (2007) 7 SCC 215;

(xxxix) M/s Padmini Products v. Collector of Central Excise, Bangalore - (1989) 4 SCC 275;

(xl) Principal Commissioner, CGST, Delhi-South v. M/s Emaar MGF Land Ltd., - SERTA 7/2022 dated 15.02.2023 (Delhi HC)

(xli) Commissioner Central Excise and Customs and Another v. Reliance Industries Limited - 2023 SCC OnLine SC 767;

(xlii) Blue Star Ltd. v. Union of India - (2016) 16 SCC 549;

(xliii) CCE v. Monsanto Manufactures (P) Ltd., - (2011) 2 SCC 754;

(xliv) Amway India Enterprises Pvt. Ltd v. C.C.E. New Delhi - Service Tax Appeal No.ST/687/2011-CU[DB];

(xlv) Assistant Commissioner of Income Tax v. Ahmedabad Urban Development Authority - (2023) 4 SCC 561;

(xlvi) Agenda and Signed Minutes of the 31st GST Council Meeting dated 22.12.2018;

(xlvii) Canon India Pvt. Ltd. v. State of Tamil Nadu - 2014 (305) E.L.T. 255 (Mad.);

(xlviii) Commissioner of Service Tax v. Naresh Kumar Company Pvt. Ltd. - 2022 (67) G.S.T.L 324 (Cal);

(xlix) Rays Power Infra Private Limited v. Superintendent of Central Tax -2024 (84) G.S.T.L 146 (Telangana);

(l) HCL Infotech Ltd v. Commissioner, Commercial Tax & Anr., - Writ Tax No.1396/2024 (Allahabad);

(li) Commissioner, Central Excise and Customs & Anr., v. Reliance Industries Limited - 2023 SCC OnLine SC 767;

(lii) M/s. Filterco and Another v. Commissioner of Sales Tax,Madhya Pradesh and Another - (1996) 2 SCC 103;

(liii) Eastland Combines, Coimbatore v. Collector of Central Excise, Coimbatore - (2003) 3 SCC 410;

(liv) Cosmic Dye Chemical v. Collector of Central Excise, Bombay - (1995) 6 SCC 117;

(lv) Union of India and Anr. vs. Kunisetty Satyanarayana - (2006) 12 SCC 28;

(lvi) Union of India and Ors. v. Coastal Container Transporters Association and Ors., - (2019) 20 SCC 446;

(lvii) Union Public Service Commission v. Bibhu Prasad Sarangi and Ors., - (2021) 4 SCC 516;

(lviii) Whirlpool Corporation v. Registrar of Trademarks, Mumbai and Ors., - (1998) 8 SCC 1;

(lix) Oryx Fisheries Private Limited v. Union of India and Ors., - (2010) 13 SCC 427.

6. Per contra, learned counsel for the respondents would reiterate the various contentions urged in the statement of objections and submit that there is no merit in the petition and that the same is liable to be dismissed.

7. A perusal of the material on record will indicate that 2nd respondent has issued the Impugned Show cause Notice dated 12.02.2024 under Section 74 of the CGST Act seeking to demand GST on supply of Type-III Tests upon alleging that the petitioner, being clearly aware of its GST Liability, has not declared and paid appropriate GST on the services provided in connection with

supply of taxable service from July, 2017 to June, 2021. It is alleged that the petitioner has failed to pay the GST Liability to the extent of the actual GST applicable on the value of supply provided qua GMAT Tests. It is also alleged that petitioner failed to mention the value of service correctly in the GSTR-5A returns and failed to apply the correct GST rate on the consideration received for supply of service. It is further alleged that appropriate GST was not properly assessed and paid to the Government Exchequer and the petitioner, with an intention to evade payment of GST, suppressed such facts by not disclosing the same for the period under dispute in relation to Type-III Tests conducted by the petitioner.

8. Before adverting to the rival contentions, it is necessary to extract Section 74 of the CGST Act, which reads as under:

> ***Section 74. Determination of tax pertaining to the period up to Financial Year 2023-24 not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any willful-misstatement or suppression of facts.-***
>
> *(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 utilised by reason of fraud, or any wilful-misstatement or suppression of*

facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.

(2) The proper officer shall issue the notice under sub-section (1) at least six months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful-misstatement or suppression of facts to evade tax, for periods other than those covered under subsection (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under sub-section (1), pay the amount of tax along with interest payable under section 50 and a penalty

equivalent to fifteen per cent. of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under sub-section (1) pays the said tax along with interest payable under section 50 and a penalty equivalent to twenty-five per cent. of such tax within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section (9) within a period of five years from the due date for furnishing of annual return for the financial year to which the

tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within five years from the date of erroneous refund.

(11) Where any person served with an order issued under sub-section (9) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent. of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded.

(12) The provisions of this section shall be applicable for determination of tax pertaining to the period up to Financial Year 2023-24.

***Explanation 1**.- For the purposes of section 73 and this section,-*

(i) the expression "all proceedings in respect of the said notice" shall not include proceedings under section 132;

(ii) where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under section 73 or section 74, the proceedings against all the persons liable to pay penalty under sections 122 and 125 are deemed to be concluded.

Explanation 2 - For the purposes of this Act, the expression "suppression" shall mean non-declaration of facts or information which a taxable person is required

to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer.

9. A plain reading of Explanation 2 to Section 74 will indicate that the *sine qua non* for an allegation of 'wilful suppression' under Section 74 of the CGST Act, to be made out is the non-declaration of facts or information which an Assessee is required to declare in its return or any other document furnished under the Act etc., or a failure on the part of the Assessee to furnish information sought by a Proper Officer in writing. It is the specific contention of the petitioner that the impugned Show-cause Notice dated 12.02.2024 issued under Section 74 of the CGST Act, by 2nd respondent on the ground of 'wilful suppression' is illegal and arbitrary being manifestly violative of the law for want of satisfaction of the jurisdictional fact of Section 74 of the CGST Act and that the impugned show cause notice is wholly without jurisdiction or authority of law as the foundational jurisdictional facts to trigger / invoke Section 74 of the CGST Act i.e., existence of wilful suppression to evade / avoid payment of GST in relation to Type –

III tests has not been satisfied by the respondents and the impugned show cause notice deserves to be quashed.

10. In this context, it is an undisputed fact borne out from the material on record that Revenue Department had participated in the proceedings before the AAR and the proceedings before the AAAR in relation to the very issue of the classification and taxability of supply of Type-III tests as OIDAR under GST Laws. It follows there from that Revenue had in its knowledge the entire gamut of transactions of supply of Type-III Tests by the petitioner, as a result of which, no question would arise for the petitioner having non-declared facts or information which it is required to declare under law *qua* the supply of Type-III Tests as the Revenue authorities (jurisdictional authorities) already possessed the requisite knowledge of the granular details of such supplies having participated in the proceedings before the AAR and AAAR.

11. In fact, at the very inception, i.e., on 10.01.2020, the petitioner had filed an application before the AAR seeking a ruling on the classification and taxability of Type-II and Type-III tests as supplied by it as OIDAR services and the petitioner had sought the aforesaid Authority's ruling on the questions hereunder:

(i) Whether the service provided for Type-II Tests is classifiable as an OIDAR service?

(ii) If the Type-II Tests provided by the petitioner do not qualify as OIDAR services, whether the petitioner is liable to pay GST on the supply of such services to non-taxable online recipients in India?

(iii) Whether the service provided for Type-III Tests is classifiable as an OIDAR service?

(iv) If the Type-III Tests provided by the petitioner do not qualify as OIDAR services, whether the petitioner is liable to pay GST on the supply of such services to non-taxable online recipients in India?

12. Before the AAR, petitioner described the modalities of the tests in detail and further laid down descriptive grounds to buttress its contention that the tests in question did not qualify as OIDAR services; so also, other supporting evidence, in the form of a video explaining the mode of the tests as also a sample GST Payment Receipt were appended as part of the Application submitted for consideration of the AAR; thus, from the very initial stage of the litigation, the Revenue / Department who participated

in the proceedings before the AAR in the capacity of an opposite/contesting party had possessed the requisite knowledge in relation to the supply of services of Type-II and Type-III Tests by the petitioner. It is a matter of record that the proceedings before the AAR culminated in a ruling dated 22.05.2020, which opined that while Type-II Tests were classifiable as OIDAR services, Type-III tests did not qualify as OIDAR services under GST Laws; significantly, the Ruling recorded the participation of the OIDAR Division Bengaluru West Commissionerate, in the proceedings before the AAR.

13. It is an undisputed fact that in relation to the findings of the AAR that Type-III Tests were not classifiable as OIDAR services, an appeal dated 27.08.2020 against such Ruling of the AAR was carried by the Revenue/Department to the AAAR, wherein they spelled out the modalities and the granular details of the transaction of supply of Type-III Tests by the petitioner which clearly establishes that the entire gamut of supply of Type-III Tests by the petitioner, along with knowledge of the modalities, methodology and manner thereof, was well within the knowledge of the Revenue/Department and its jurisdictional officer/concerned

officer. Further, the AAAR allowed the appeal of the Department/Revenue in relation to Type-III tests and not only expressly recorded that information had been furnished by the petitioner detailing relevant particulars of the supply of Type-III tests by it, but also expressly recorded the participation of the Additional Commissioner of the Jurisdictional Authority, i.e. OIDAR Division Bengaluru West Commissionerate, in the proceedings before it and ultimately held against the petitioner by opining that Type-III Tests qualify as OIDAR services.

14. The aforesaid undisputed facts and circumstances lead to the sole/unmistakable conclusion that from 10.01.2020 onwards, the jurisdictional/concerned authorities (i.e. Revenue) had in its knowledge the entire breadth of relevant details, information and particulars as regards the supply of Type-III Tests by the petitioner and consequently, the allegations made in the impugned show cause notice of non-declaration of facts or information which are required to be declared *qua* Type-III tests supplied by the petitioner and the allegations of wilful suppression under Section 74 of the CGST Act made against the petitioner are clearly illegal, arbitrary and contrary to facts and law.

15. The aforesaid proceedings before the AAR and AAAR in relation to the classification and taxability of Type-III Tests are as hereunder:

Sl.No.	Date	Event	Particulars
1	10.01.2020	Application filed before Petitioner the before the AAR.	Ruling sought the on classification and taxability of Type-II and Type-III Tests by the Petitioner.
2	22.05.2020	Ruling rendered by the AAR	Type-II tests classified as OIDAR services, whereas Type-III Tests held not to quality as OIDAR services.
3	27.08.2020	Appeal filed by jurisdictional authority (Revenue) against ruling of AAR before AAAR	Challenge was made to the finding that Type-III Tests do not qualify as OIDAR services,
4	13.11.2020	Ruling issued by the AAAR	Type-III Tests found to be classifiable as OIDAR services.

16. The material on record also indicates that in the absence of anything to establish that the petitioner had failed to furnish information sought by the Revenue Authorities, the very invocation of Section 74 of the CGST Act on grounds of wilful suppression is erroneous and illegal; on the other hand, petitioner had furnished all relevant information/details as sought by the 2nd

respondent in relation to the supply of Type-I, Type-II and Type-III tests to non-taxable recipients In India and the GST paid thereon as and when such information was sought by such Revenue authorities during 2021-22 itself as can be seen from the communications, correspondence etc., detailed in paragraph-82 of the memorandum of writ petition, thereby establishing that the petitioner cannot be said to be guilty of having deliberately, consciously or wilfully suppressed any information so as to evade that payment of tax as wrongly alleged in the impugned show cause notice.

17. As stated supra, it is the specific contention of the petitioner that the impugned SCN dated 12.02.2024 issued under Section 74 of the CGST Act, by the 2nd respondent on the ground of 'wilful suppression' is illegal and arbitrary being manifestly violative of the law for want of satisfaction of the jurisdictional fact of Section 74 of the CGST Act and that the impugned show cause notice is wholly without jurisdiction or authority of law as the foundational jurisdictional facts to trigger / invoke Section 74 of the CGST Act i.e., existence of wilful suppression to evade / avoid payment of GST in relation to Type – III tests has not been satisfied by the

respondents who seek the invoke the benefit of the extended period of limitation under Section 74 of the CGST Act. In this context, it is relevant to state that the question of limitation involves a question of jurisdiction and that a finding of fact on the question of jurisdiction would be a jurisdictional fact and issues concerning limitation go to the very root of the matter and an authority cannot clothe itself with jurisdiction by deciding the jurisdictional fact incorrectly or by assuming the jurisdictional fact wrongly.

18. In the case of ***Carona Ltd. vs. Parvathy Swaminathan & Sons - (2007) 8 SCC 559,*** the Apex Court held as under:

> ***Jurisdictional fact***
>
> ***26.*** *The learned counsel for the appellant company submitted that the fact as to "paid-up share capital" of rupees one crore or more of a company is a "jurisdictional fact" and in absence of such fact, the court has no jurisdiction to proceed on the basis that the Rent Act is not applicable. The learned counsel is right. The fact as to "paid-up share capital" of a company can be said to be a "preliminary" or "jurisdictional fact" and said fact would confer jurisdiction on the court to consider the question whether the provisions of the Rent Act were applicable. The question, however, is whether in the present case, the learned counsel for the appellant tenant is right in submitting that the "jurisdictional*

fact" did not exist and the Rent Act was, therefore, applicable.

27. *Stated simply, the fact or facts upon which the jurisdiction of a court, a tribunal or an authority depends can be said to be a "jurisdictional fact". If the jurisdictional fact exists, a court, tribunal or authority has jurisdiction to decide other issues. If such fact does not exist, a court, tribunal or authority cannot act. It is also well settled that a court or a tribunal cannot wrongly assume existence of jurisdictional fact and proceed to decide a matter. The underlying principle is that by erroneously assuming existence of a jurisdictional fact, a subordinate court or an inferior tribunal cannot confer upon itself jurisdiction which it otherwise does not posses.*

28. *In Halsbury's Laws of England (4th Edn.), Vol. 1, Para 55, p. 61; Reissue, Vol. 1(1), Para 68, pp. 114-15, it has been stated:*

> *"Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collateral to the merits of, the issue. If, at the inception of an inquiry by an inferior tribunal, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether to act or not and can give a ruling on the preliminary or collateral issue; but that ruling is not conclusive."*

The existence of a jurisdictional fact is thus a sine qua non or condition precedent to the assumption of jurisdiction by a court or tribunal.

Jurisdictional fact and adjudicatory fact

29. *But there is distinction between "jurisdictional fact" and "adjudicatory fact" which cannot be ignored. An "adjudicatory fact" is a "fact in issue" and can be determined*

by a court, tribunal or authority on "merits", on the basis of evidence adduced by the parties. It is no doubt true that it is very difficult to distinguish "jurisdictional fact" and "fact in issue" or "adjudicatory fact". Nonetheless the difference between the two cannot be overlooked.

30. *In Halsbury's Laws of England (4th Edn.), Vol. 1, Para 55, p. 61; Reissue, Vol. 1(1), Para 68, pp. 114-15, it is stated:*

"There is often great difficulty in determining whether a matter is collateral to the merits or goes to the merits. The distinction may still be important; for an erroneous decision on the merits of the case will be unimpeachable unless an error of law is apparent on the face of the record of the determination or unless a right of appeal lies to a court in respect of the matter alleged to have been erroneously determined. An error of law or fact on an issue collateral to the merits may be impugned on an application for an order of certiorari to quash the decision or in any other appropriate form of proceedings, including indirect or collateral proceedings. Affidavit evidence is admissible on a disputed issue of jurisdictional fact, although the superior courts are reluctant to make an independent determination of an issue of fact on which there was a conflict of evidence before the inferior tribunal or which has been found by an inspector after a local inquiry."

31. *In R. v. Fulham, Hammersmith and Kensington Rent Tribunal, ex p Philippe [(1950) 2 All ER 211 (DC)] it was held that the question whether premium for renewal of tenancy was or was not paid was a jurisdictional fact and, therefore, was held to be a condition precedent for the lawful exercise of jurisdiction by a Rent Tribunal. In Brittain v. Kinnaird [(1819) 1 B&B 432 : (1814-23) All ER Rep 593] however, the factum as to possession of a "boat" with gunpowder on board was held to be a part of the*

offence charged and thus a finding of fact or adjudicatory fact. It was stated:

"The logical basis for discriminating between these cases and other falling on opposite sides of the line, is not easily discernible."

(emphasis supplied)

32. *Likewise, the fact whether the petitioner was an "adult" in adoption proceedings was not held to be a "jurisdictional fact" (Eversole v. Smith [159 SW 2nd 35]).*

33. *In Chaube Jagdish Prasad v. Ganga Prasad Chaturvedi [AIR 1959 SC 492 : 1959 Supp (1) SCR 733] , the question was whether the landlord was entitled to enhancement of rent. Under the Act, he was not entitled to such rent unless a "new construction" had been made after 30-6-1946. It was held by this Court that the question whether construction was new or not was a "jurisdictional fact" and if the court wrongly decided the said fact and thereby conferred jurisdiction not vested in it, the High Court could interfere with the order. The Court stated (at AIR p. 498, para 21) that "once it had the power it could determine whether the question of the date of construction was rightly or wrongly decided". (See also Arun Kumar v. Union of India [(2007) 1 SCC 732] .)*

34. *But, in Roshan Lal Mehra v. Ishwar Dass [AIR 1962 SC 646 : (1962) 2 SCR 947] this Court held that the Rent Controller had jurisdiction to fix standard rent for new construction made after 24-3-1947. The question was as to when the construction was made. The Rent Controller recorded a finding of fact that the construction was put up*

after 24-3-1947. The finding was confirmed by the District Judge. But the High Court interfered in revision.

35. *Setting aside the decision of the High Court, this Court stated: (Roshan Lal Mehra case [AIR 1962 SC 646 : (1962) 2 SCR 947] , AIR p. 659, para 17)*

"17. … It is clear from the orders of the Rent Controller and of the District Judge in appeal that the question whether the second floor was newly constructed or not was really a question of fact, though undoubtedly a jurisdictional fact on which depended the power of the Rent Controller to take action under Section 7-A. If the Rent Controller had wrongly decided the fact and assumed jurisdiction where he had none, the matter would be open to reconsideration in revision. The High Court did not, however, go into the evidence, nor did it say that the finding was not justified by the evidence on record. The High Court referred merely to certain submissions made on behalf of the landlord and then expressed the opinion that what was done to the second floor was mere improvement and not a new construction. We think that the High Court was in error in interfering with the finding of fact by the Rent Controller and the District Judge, in support of which finding there was clear and abundant evidence which had been carefully considered and accepted by both the Rent Controller and the District Judge."

36. *It is thus clear that for assumption of jurisdiction by a court or a tribunal, existence of jurisdictional fact is a condition precedent. But once such jurisdictional fact is found to exist, the court or tribunal has power to decide adjudicatory facts or facts in issue.*

19. In the case of ***Raza Textiles vs. Income Tax Officer - AIR 1973 SC 1362,*** the Apex Court held as under:

3. *Aggrieved by that order the appellant went up in appeal to the Appellate Assistant Commissioner. The*

Appellate Assistant Commissioner rejected the appeal on the ground that the same was not maintainable. He took the view that an appeal lay only under Section 30(1-A). But, before such an appeal can be entertained the appellant must satisfy two conditions, namely, (1) he had deducted the tax due from the non-resident in accordance with the provisions of sub-section (3-B); and (2) that he had paid the sum deducted to the Government. The appellant having not complied with those two conditions, the Appellate Assistant Commissioner held that the appeal was incompetent. The order of the Appellate Assistant Commissioner was confirmed by the Tribunal. Thereafter, the appellant moved the High Court under Article 226 of the Constitution. That application came up before a Single Judge. The Single Judge after going into the matter in dated came to the conclusion that Messrs Nathirmal and Sons is not a non-resident firm and that being so the appellant was not required to act under Section 18(3-B). He accordingly set aside the order impugned. The revenue went up in appeal against the order of the learned Single Judge to the Appellate Bench. That Bench allowed the appeal with the observations, "in the present case the question before the Income Tax Officer, Rampur, was whether the firm Nathirmal and Sons was non-resident or not. There was material before him on this question. He had jurisdiction to decide the question either way. It cannot be said that the officer assumed jurisdiction by a wrong decision on this question of residence". The Appellate Bench appears to have been under the impression that the Income Tax Officer was the sole Judge of the fact whether the firm in

question was resident or non-resident. This conclusion in, our opinion, is wholly wrong. No authority, much less a quasi-judicial authority, can confer jurisdiction on itself by deciding a jurisdictional fact wrongly. The question whether the Jurisdictional fact has been rightly decided or not is a question that is open for examination by the High Court in an application for a writ of certiorari. If the High Court comes to the conclusion, as the learned Single Judge has done in this case, that the Income Tax Officer had clutched at the Jurisdiction by deciding a jurisdictional fact erroneously, then the assessee was entitled for the writ of certiorari prayed for by him. It is incomprehensible to think that a quasi-judicial authority like the Income Tax Officer can erroneously decide a jurisdictional fact and thereafter proceed to impose a levy on a citizen. In our opinion, the Appellate Bench is wholly wrong in opining that the Income Tax Officer can "decide either way".

20. In the case of ***ITW Signode India Ltd. vs. Collector of Central Excise (2004) 3 SCC 48***, the Apex Court held as under:

Limitation

63. *Having answered the reference, we are of the opinion that this Court in the peculiar facts and circumstances of this case, at this stage need not go into the question as to whether the processes undertaken by the appellant would amount to manufacture or whether the classification of goods under Sub-Heading 7308.90 is correct, in view of the fact that the question as regards*

limitation and availability of MODVAT had not been considered.

64. *It is not in dispute that in terms of Section 11-A, a show-cause notice for short-levy could have been issued only within six months from the relevant date. Only in the event such short-levy was imposed on account of fraud, collusion, wilful misstatement or suppression of facts with an intent to evade payment of duty on the part of the manufacturer, the extended period of limitation of five years could be invoked.*

65. *The appellant herein in para 15 of reply dated 2-6-1987 categorically stated that such classification has been made to the knowledge of the Department. It was contended:*

"On the contrary, all the processes were carried out openly and they themselves had come up for detailed consideration and eventually the decision was taken under the Assistant Collector's order dated 14-7-1983 after due application of mind and it would, therefore, be incredible to allege as is sought to be done that the Department was not in a position to get first-hand knowledge of the various processes adopted."

The appellant had further contended:

"We deny each and every allegation contained in the show-cause notice. We submit that from the legal point of view the classification cannot be changed as proposed in the show-cause notice, nor does the factual position warrant modification of the classification. When Heading/Sub-Heading 7211.31 is specific (cold-rolled strips), the goods cannot be consigned to Sub-Heading 7308.90 which is not specific and is a residuary item. As long as the subject goods were not classifiable under TI 68 when it existed, they cannot attract the corresponding Sub-Heading 7308.90. We also submit that Rule 9(2) cited in the show-cause notice is not applicable since there was no clandestine clearance."

66. *It is, therefore, evident that the contention of the appellant was that Rule 9(2) cited in the show-cause notice was not applicable. But, unfortunately, despite the same it had not been adverted to by the Tribunal. We must notice that the appellant herein succeeded before the Appellate Collector. The Revenue went up in appeal. The Tribunal was, therefore, bound to take the aforementioned question into consideration inasmuch as a finding of fact was required to be arrived at that the period of limitation for issuing such notices under Section 11-A of the Act would depend upon the question as to whether such short-levy was due to any act of fraud, collusion, wilful misstatement or suppression of facts, (sic) the extended period of limitation of five years could not have been invoked.*

67. *Such an extended period of limitation can be invoked only if a positive act of fraud etc. on the part of the assessee is found. Such a positive act must be in contradistinction to mere inaction like non-taking of licence etc. It has to be pleaded and established. (See Padmini Products [(1989) 4 SCC 275 : 1989 SCC (Tax) 616 : (1989) 43 ELT 195] , P&B Pharmaceuticals Ltd. [(2003) 3 SCC 599 : (2003) 153 ELT 14] and Pushpam Pharmaceuticals Co. [1995 Supp (3) SCC 462 : (1995) 78 ELT 401])*

68. *Even in Easland Combines [(2003) 3 SCC 410 : (2003) 152 ELT 39] this Court held : (SCC pp. 424-25, para 31)*

"31. It is settled law that for invoking the extended period of limitation duty should not have been paid, short-levied or short-paid or erroneously refunded because of either fraud, collusion, wilful misstatement, suppression of facts or

contravention of any provision or rules. This Court has held that these ingredients postulate a positive act and, therefore, mere failure to pay duty and/or take out a licence which is not due to any fraud, collusion or wilful misstatement or suppression of fact or contravention of any provision is not sufficient to attract the extended period of limitation."

69. *The question of limitation involves a question of jurisdiction. The finding of fact on the question of jurisdiction would be a jurisdictional fact. Such a jurisdictional question is to be determined having regard to both fact and law involved therein. The Tribunal, in our opinion, committed a manifest error in not determining the said question, particularly, when in the absence of any finding of fact that such short-levy of excise duty related to any positive act on the part of the appellant by way of fraud, collusion, wilful misstatement or suppression of facts, the extended period of limitation could not have been invoked and in that view of the matter no show-cause notice in terms of Rule 10 could have been issued.*

21. In the instant case, a perusal of the material on record will indicate that the 2nd respondent has decided the jurisdictional facts in relation to the alleged wilful suppression by the petitioner erroneously/incorrectly by attempting to vest itself with the jurisdiction under Section 74 of the CGST Act and saddle a GST liability upon the petitioner for the period under dispute, which is impermissible in law and consequently, the very issuance of the impugned SCN dated 12.02.2024 under Section 74 of the CGST

Act is illegal and violative of Article 265 of the Constitution inasmuch as the impugned SCN seeks to realize monies from the petitioner under the guise of tax without the authority of the law and the impugned SCN deserves to be quashed.

22. The impugned SCN also fails to consider and appreciate that the issue of classification of Type-III Tests had not attained finality on account of W.P.No.3555/2021 preferred by the petitioner against the order of the AAAR pending adjudication before the Division Bench of this Court, in which there is an interim order in favour of the petitioner as stated supra; despite the sub-judice nature of the issue of classification and taxability of Type-III Tests pending before this Court, and interim orders having been granted in favour of the petitioner, the 2nd respondent has issued the impugned SCN relating to Type-III Tests, even though this very issue/question relating to classification and taxability of such supply of service was pending consideration of this Court and the impugned SCN deserves to be quashed on this score also.

23. A perusal of the impugned SCN will indicate that Section 74 of the CGST Act cannot be invoked in cases involving the mere omission to pay tax or the mere omission to give correct

information, without there being any intention to evade tax; the allegations of wilful suppression of appropriate GST not being paid and the failure of the petitioner to mention the value of services correctly in the GSTR-5A returns and failing to apply the correct GST rate, ignores the fact that the very *mens rea* element of consciously or deliberately suppressing information/details for the purpose of evading the payment of tax which forms the *sine qua non* of Section 74 of the CGST Act, is not satisfied in the instant case; the jurisdictional fact for invoking the stringent provisions of Section 74 of the CGST Act, that is of wilful suppression with a view to evade payment of tax are neither satisfied nor fulfilled in the impugned SCN, which deserves to be quashed on this ground also.

24. In the case of ***Cosmic Dye Chemical vs. Collector of Central Excise, Bombay - (1995) 6 SCC 117,*** the Apex Court held that the word 'wilful', which precedes suppression, requires the existence of an intent to evade duty as hereunder:

> ***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.*

25. In the case of ***Eastland Combines vs. CCE - (2003) 3 SCC 410***, the Apex Court held that wilful suppression postulates a positive act and that a mere failure to pay duty which is not due to any suppression of facts is not sufficient to attract the extended period of limitation and that the mere default or failure of the assessee to pay duty, without the existence of any intent to wilfully suppress information/details in itself would attract the extended period of limitation as hereunder:

> ***31.*** *It is settled law that for invoking the extended period of limitation duty should not have been paid, short-levied or short-paid or erroneously refunded because of either fraud, collusion, wilful misstatement, suppression of facts or contravention of any provision or rules. This Court has held that these ingredients postulate a positive act*

and, therefore, mere failure to pay duty and/or take out a licence which is not due to any fraud, collusion or wilful misstatement or suppression of fact or contravention of any provision is not sufficient to attract the extended period of limitation.

26. Similarly, in the case of ***Anand Nishikawa Co. Ltd. vs. Commissioner of Central Excise Meerut - (2005) 7 SCC 749,*** the Apex Court held that a mere failure to declare does not amount to wilful suppression as hereunder:

26. *In Tata Iron & Steel Co. Ltd. v. Union of India [(1988) 3 SCC 403 : 1988 SCC (L&S) 381 : (1988) 35 ELT 605] this Court held that when the classification list continued to have been approved regularly by the Department, it could not be said that the manufacturer was guilty of "suppression of facts". As noted herein earlier, we have also concluded that the classification lists supplied by the appellant were duly approved from time to time regularly by the Excise Authorities and only in the year 1995, the Department found that there was "suppression of facts" in the matter of post-forming manufacturing process of the products in question. Furthermore, in view of our discussion made herein earlier, that the Department has had the opportunities to inspect the products of the appellant from time to time and, in fact, had inspected the products of the appellant. Classification lists supplied by the appellant were duly approved and in view of the admitted fact that the flow-*

chart of manufacturing process submitted to the Superintendent of Central Excise on 17-5-1990 clearly mentioned the fact of post-forming process on the rubber, the finding on "suppression of facts" of CEGAT cannot be approved by us. This Court in the case of Pushpam Pharmaceuticals Co. v. CCE [1995 Supp (3) SCC 462] while dealing with the meaning of the expression "suppression of facts" in the proviso to Section 11-A of the Act held that the term must be construed strictly, it does not mean any omission and the act must be deliberate and wilful to evade payment of duty. The Court further held: (SCC pp. 463-64, para 4)

"In taxation, it ['suppression of facts'] can have only one meaning that the correct information was not disclosed deliberately to escape payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."

(emphasis supplied)

27. *Relying on the aforesaid observations of this Court in the case of Pushpam Pharmaceuticals Co. v. CCE [1995 Supp (3) SCC 462] we find that "suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty. When facts were known to both the parties, the omission by one to do what he might have done and not that he must have done, would not render it suppression. It is settled law that mere failure to declare does not amount to wilful suppression. There must be*

some positive act from the side of the assessee to find wilful suppression. Therefore, in view of our findings made hereinabove that there was no deliberate intention on the part of the appellant not to disclose the correct information or to evade payment of duty, it was not open to the Central Excise Officer to proceed to recover duties in the manner indicated in the proviso to Section 11-A of the Act. We are, therefore, of the firm opinion that where facts were known to both the parties, as in the instant case, it was not open to CEGAT to come to a conclusion that the appellant was guilty of "suppression of facts". In Densons Pultretaknik v. CCE [(2003) 11 SCC 390] this Court held that mere classification under a different sub-heading by the manufacturer cannot be said to be wilful misstatement or "suppression of facts". This view was also reiterated by this Court in CCE v. L.M.P. Precision Engg. Co. Ltd. [(2004) 9 SCC 703]

27. So also, in ***Continental Foundation Joint Venture vs. Commissioner of Central Excise, Chandigarh -(2007) 216 ELT 177 (SC),*** it was held by the Apex Court that mere omission to give correct information is not suppression of facts, unless it was deliberate to stop the payment of duty and that when the facts are known to both the parties, omission by one party to do what he might have done would not render it to be suppression as hereunder:

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

28. As stated earlier, though the respondents allege in the impugned SCN that the petitioner failed to mention the value of services correctly in the GSTR - 5A returns and apply the correct GST rate on the consideration received, the mere omission to mention the value of services correctly in the returns and/or apply the correct GST rate would not be tantamount to wilful suppression, in light of the principles laid down in the aforesaid judgments, particularly when the respondents-Revenue had in their knowledge the complete gamut of transactions of supply of Type-III tests by the

petitioner, thereby leading to the sole conclusion that an intention to evade payment of tax could in no manner be imputed or attributable to the petitioner and the impugned SCN deserves to be quashed.

29. In the case of ***Commissioner, Central Excise and Customs vs. Reliance Industries Ltd., - 2023 SCC OnLine SC 767,*** the Apex Court held as under:-

> ***14.*** *In Pushpam Pharmaceuticals Co. v. CCE [Pushpam Pharmaceuticals Co. v. CCE, 1995 Supp (3) SCC 462] , this Court, while dealing with a similar fact circumstance wherein the extended period of limitation under the abovementioned proviso had been invoked, held that since the expression "suppression of facts" is used in the company of terms such as fraud, collusion and wilful misstatement, it cannot therefore refer to an act of mere omission, and must be interpreted as referring to a deliberate act of non-disclosure aimed at evading duty, that is to say, an element of intentional action must be present.*
>
> ***15.*** *Similarly, in CCE v. Chemphar Drugs & Liniments [CCE v. Chemphar Drugs & Liniments, (1989) 2 SCC 127 : 1989 SCC (Tax) 245] , this Court, while dealing with a similar situation of invocation of extended period of limitation under Section 11-A of the Act, this Court held as under : (SCC p. 131, para 9)*
>
> *"9. … In order to make the demand for duty sustainable beyond a period of six months and up to a period of 5 years in view of the proviso to sub-section (1) of Section 11-A of the Act, it has to be established that the duty of*

excise has not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, before (sic beyond) the period of six months. Whether in a particular set of facts and circumstances there was any fraud or collusion or wilful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case. The Tribunal came to the conclusion that the facts referred to hereinbefore do not warrant any inference of fraud. The assessee declared the goods on the basis of their belief of the interpretation of the provisions of the law that the exempted goods were not required to be included and these did not include the value of the exempted goods which they manufactured at the relevant time. The Tribunal found that the explanation was plausible, and also noted that the Department had full knowledge of the facts about manufacture of all the goods manufactured by the respondent when the declaration was filed by the respondent. The respondent did not include the value of the products other than those falling under Tariff Item 14E manufactured by the respondent and this was in the knowledge, according to the Tribunal, of the authorities. These findings of the Tribunal have not been challenged before us or before the Tribunal itself as being based on no evidence."

23. *We also find no merits in the other argument urged by the learned counsel for the Revenue that the Tribunal's order in IFGL Refractories [IFGL Refractories Ltd. v. CCE, 2000 SCC OnLine CEGAT 1771 : (2001) 134 ELT 230] could not have constituted a valid basis for the belief entertained by the assessee in view of the fact that the relevant valuation provisions had undergone amendments in the year 2000. The argument of the Revenue's counsel was*

that in view of the amendments to Section 4 and Rule 6 of the Valuation Rules the ratio of the Tribunal's decision in IFGL case [IFGL Refractories Ltd. v. CCE, 2000 SCC OnLine CEGAT 1771 : (2001) 134 ELT 230] was no longer relevant for the period under consideration in these appeals. We have no hesitation in rejecting this contention for two independent reasons. Firstly, this contention too has not been urged in the civil appeal filed by the Revenue and has been urged only during the course of the hearing before this Court. On this count alone the contention deserves to be ignored. Secondly, we also find this contention to be diametrically opposite to what the Revenue itself has been contending on merits right from the show-cause notice till the appeal filed before this Court.

24. *On merits, the Revenue's case throughout had been that the issue of valuation is covered against the assessee by the judgment of this Court in IFGL Refractories [CCE v. IFGL Refractories Ltd., (2005) 6 SCC 713] . Even in the order of CESTAT under challenge the Tribunal has proceeded on the basis that the principle of valuation laid down by this Court in IFGL Refractories [CCE v. IFGL Refractories Ltd., (2005) 6 SCC 713] holds good and remains valid even under the amended valuation provisions for the period post July 2000. We therefore find it strange that for the purposes of justifying its case on limitation, the Revenue wishes to take a position exactly contrary to what it has taken in the show-cause notice on merits. We cannot allow the Revenue to blow hot and cold in the same breath by relying upon IFGL*

case [CCE v. IFGL Refractories Ltd., (2005) 6 SCC 713] on merits while at the same time arguing that the same had no relevance for the purposes of examining the plea for a bona fide belief.

25. *We are in full agreement with the finding of the Tribunal that during the period in dispute it was holding a bona fide belief that it was correctly discharging its duty liability. The mere fact that the belief was ultimately found to be wrong by the judgment of this Court does not render such belief of the assessee a mala fide belief particularly when such a belief was emanating from the view taken by a Division Bench of the Tribunal. We note that the issue of valuation involved in this particular matter is indeed one where two plausible views could co-exist. In such cases of disputes of interpretation of legal provisions, it would be totally unjustified to invoke the extended period of limitation by considering the assessee's view to be lacking bona fides. In any scheme of self-assessment it becomes the responsibility of the assessee to determine his liability of duty correctly. This determination is required to be made on the basis of his own judgment and in a bona fide manner.*

30. In the instant case, as stated supra, in the light of pendency of W.P.No.3555/2021 preferred by the petitioner before this Court assailing the order of the AAAR, the very issue/question relating to classification of Type-III tests supplied by the petitioner as OIDAR services, remains in a significant state of flux inasmuch

as at the very initial stage of the litigation, the AAR vide its order dated 22.05.2020 held that Type-III tests were outside the purview of OIDAR services which was reversed by the AAAR, thereby indicating that the very classification of Type-3 tests as OIDAR services was uncertain and in a constantly fluid state and thus an interpretative issue which has not attained finality and the classification and taxability of Type-III Tests continues to be in a state of flux, even as of the present day; it follows there from that when there is a scope for doubt concerning the interpretation of legal provisions and the entire facts have been placed before the Revenue Authorities, the assessee cannot be attributed with any suppression or misstatement of facts with intent to evade duty and hence, cannot be saddled with demand by invoking the extended period of limitation and impugned SCN deserves to be quashed.

31. The respondents placed reliance upon the decision of the Gujarat High Court in ***Commissioner of Central Excise vs. Neminath Fabrics Pvt. Ltd., -2010 (256) ELT 369 (Guj.)*** to justify the invocation of the extended period of limitation under Section 74 of the CGST Act by submitting that the concept of knowledge cannot be an appropriate defence; in this context, it is relevant to

state that the said judgment is circumscribed and applicable only to cases wherein 'suppression' is established or admitted as can be seen from the relevant portion of the judgment as hereunder:

> ***"18.*** *The Proviso comes into play only when suppression etc. is established or stands admitted. It would differ from a case where fraud, etc. are merely alleged and are disputed by an assessee. Hence, by no stretch of imagination the concept of knowledge can be read into the provisions because that would tantamount to rendering the defined term "relevant date" nugatory and such an interpretation is not permissible."*

32. The aforesaid judgment in ***Neminath's case supra*** was considered by the CESTAT in ***Amway India Enterprises Pvt. Ltd. vs. Commissioner of Central Excise, New Delhi - 2017 (3) GSTL 69 (Tri.-Del),*** wherein it was held as under:

> *"7. The show cause notice in this case has been issued by the Department alleging 'wilful and intentional suppression' of facts by the appellant. It is trite in law that the suppression (intentional and deliberate) can never be said to exist when material and relevant fact forming the basis of the demand were already within the knowledge of the department. Accordingly, the pre conditions for applicability of the proviso to Section 73(1) ibid cannot be said to be made and in such eventuality, the extended*

period of limitation cannot be invoked and the demand to be confined to the normal period of one year.

10. On a collective reading of the decisions cited by both the counsels, it is clear that the consistent position of law with regard to applicability of the proviso to Section 73(1)/Section 11A ibid has been that suppression cannot be established where material facts were within the knowledge of the Revenue. Accordingly, where there is no suppression, the pre-condition for applicability of proviso to Section 73(1) cannot be said to be met and hence, extended period of limitation contemplated therein cannot be invoked. On the contrary, where the ingredients for invoking proviso to Section 73(1) are established or admitted and thus the pre-conditions for applicability of such proviso stands satisfied, and only in such cases, the period of 5 years is required to be computed from the date when the evasion came to the knowledge of the Department."

33. In the instant case, the material on record clearly indicates the allegation of suppression made by the respondents are neither admitted nor established and on the other hand, the same are seriously/specifically disputed and denied by the petitioner and the said allegation remains merely an allegation and nothing more; it is therefore clear that the judgment of Gujarat High Court in ***Neminath's case supra*** is not applicable to the facts of

the instant case and as such, the said contention of the respondents cannot be accepted. In fact, it must also be stated here that initially the Type III tests were held to be outside the purview of OIDAR by the AAR, which was reversed in appeal by the AAR and therefore, the issue itself is not without doubt and when conflicting views are available with the revenue itself entertaining two views, it is impermissible to allege that the petitioner had suppressed any information with an intention to evade payment of taxes; the petitioner having approached the revenue for an advance ruling with all data available cannot be foisted with a demand alleging suppression of facts.

34. The aforesaid discussion clearly establishes that the impugned Show Cause Notice dated 12.02.2024 issued under Section 74 of the CGST Act, by the 2nd respondent is illegal and arbitrary being manifestly violative of the law for want of satisfaction of the jurisdictional facts contemplated in Section 74 of the CGST Act and that the impugned show cause notice is wholly without jurisdiction or authority of law as the foundational jurisdictional facts to trigger / invoke Section 74 of the CGST Act i.e., existence of wilful suppression to evade / avoid payment of GST in relation to

Type – III tests has not been satisfied by the respondents and the impugned show cause notice deserves to be quashed.

35. Insofar as the various other contentions, claims and reliefs urged and sought for by the petitioner are concerned, having regard to the findings recorded hereinbefore that the impugned SCN is illegal, arbitrary and without jurisdiction or authority of law and is contrary to law and the provisions contained in Section 74 of the CGST Act and that the same deserves to be quashed, I deem it just and appropriate not to deal with all other claims, contentions, reliefs, issues, questions etc., which are hereby kept/left open to be decided in an appropriate case and no opinion is expressed on the same in the present order.

36. In the result, I pass the following:

ORDER

(i) Petition is hereby partly allowed.

(ii) The impugned Show Cause Notice at Annexure-A dated 12.02.2024 issued by the 2nd respondent under Section 74 of the CGST Act, 2017 is hereby quashed;

(iii) All other claims, contentions, reliefs, issues, questions etc., urged by both sides are hereby kept / left open to be decided

in an appropriate case and no opinion is expressed on the same in the present order.

Sd/-
(S.R.KRISHNA KUMAR)
JUDGE

Srl.