PRINCIPLE GOVERNING ATTACHMENT OF PROPERTY UNDER SECTION 83 CGST,ACT,2017 –

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The Section 83 of Central Goods & Services Act, 2017 (hereinafter called CGST Act) says that Commissioner is **of the opinion** that any proceedings are pending under any of the following Sections of CGST Act.

a) Any proceedings under Section 62 covering registered persons who fail to file returns under Section 39, 45 and 46 after service of notice, the proper officer may proceed to assess the tax liability of registered persons to the best of his judgment.

b):Where a person fails to obtain registration though legally obliged to do so or his registration has been cancelled and fails to pay tax, the PO may proceed to assess the tax liability to be best of his judgment.

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c): Where search and seizure, under Sec.67 has been carried out by the Commissioner or any officer authorized by him and he is of the opinion that (i) there is a suppression of supply of goods or services or both (ii) or stock of goods in hand (iii) has claimed inputs tax credit in excess of his entitlement or (iv) indulged in contravention of any provisions of the Act or rules made there-under. This is the powers which could be greatly mis-used by some officers.

d): Where Show Cause Notice has been issued by invoking normal period of limitation under Section 73 seeking to recover the duty not paid, short paid, erroneously refunded or where ITC has been utilized.

e):Where SCN has been issued by invoking extended period of five years under Section 74 seeking to seeking to recover the duty not paid, short paid, erroneously refunded or where ITC has been utilized. The arbitrary powers have been conferred upon the Department by virtue of which they will invariably issue Show Cause Notice under Section 74 of CGST Act, 2013 seeking to invoke the extended period of five years as in much as the department does not stand to lose anything by invoking the extended period of limitation and in case, they fail to established the necessary ingredient for invocation of extended period of limitation, the SCN shall not be bad in law as by virtue of sub-section 2 of Section 75 of CGST Act, the adjudicating authority will adjudicate as if issued under Section 73 of CGST Act – more particularly when both Adjudicating Authority and Commissioner (Appeals) are Departmental Officer.

2: Under Service Tax regime, there existed "The Service Tax (Provisional Attachment of Property) Rules, 2008 which were notified laying down the procedure for provisionally attaching the property. Further, CBIC had also issued a Circular No.103/06/2008 dt.1.7.2008 specifying the manner of making provisional attachment of property of assessee.

3: The Hon'ble Supreme Court in Bhikhubhai Vithlabhai Patel and Ors. vs. State of Gujarat : MANU/SC/7399/2008, on the issue of formation of opinion, has held as under:-

> The record does not reveal that there has been any consideration by the State Government that necessity had arisen to make substantial modifications to the draft development plan. We are of the view that there has been no formation of the opinion by the State Government which is a condition precedent for exercising the power under the proviso to Section 17(1)(a)(ii) of the Act.

4: Therefore, unfortunately the formation of opinion is with respect to "protection of government revenue" and nothing more since Section 83(1) clearly says that the Commissioner is of the opinion for the purpose of protecting the interests of government revenue, may order in writing for provisional attachment of property. The formation of opinion must be on the part of Commissioner and no other office below the rank of Commissioner, who shall, as per Rule 159 of CGST Rule, pass an order in Form GST DRC-22 clearly specifying therein the property sought to be attached. There are no guidelines or any indication for which period, materials would be looked into for the purpose of formation of opinion by the Commissioner in as much as for issuance of SCN, there is a limit of three years U/s 73 or five years U/s 74 as the case may be but under Section 83, there is no time limit. It is gives blanket powers to attach property in respect of transactions pertaining to - may be even for 10 or 15 years - once the property is attached, the party may be perforced to pay the tax, interest and penalty even without adjudication of SCN under Section 73/74..

4.1: A copy of the order shall be served upon the Revenue Authority or any other Authority to take note of such attachment – more particularly in relation to immoveable property so that, at a later stage, Revenue Authority may not register the transfer or alienation of immoveable property which is subject matter of attachment.

5: However, in case, the property is of perishable nature or hazardous in nature and the assessee is willing to pay the value of the property or amount that may become payable, whichever is lower, the property may be released as per Rule 159(3) upon passing an order in Form GST DRC-23 subject to submission of proof of payment. However, if the person fails to pay the amount, the Commissioner may disposed off the property and realize the amount and such amount shall be adjusted against the tax, interest, penalty, fee or any other amount payable by the taxable person.

6: As per Sub-rule 5 of Rule 159, a person is entitled to make representation against the order of provisional attachment within seven days of the attachment and the Commissioner, after affording an opportunity of hearing, may release the provisional attachment by passing an order in FORM GST DRC -23. Surprisingly, party has only time of seven days to make representation and but there is no compulsion of time limit for the Commissioner to pass order on such representation – another classic case where assessee is left high and dry.

7: The Section 83(2) CGST provides that order for provisional attachment shall remain valid for a period of one year and fortunately there is no enabling provision for its extension. At the same time, Rule 159(6) CGST Rule provides, in case, the commissioner is of the view that the property is no longer liable for attachment, he may pass order in FORM GST DRC-23 for its release.

CONDITION PRECEDENT FOR INVOCATION OF PROVISION.

8: The DB of Punjab & High Court, in a very latest judgment, in the case of Bindal Smelting Pvt. Ltd. vs. ADG (20.12.2019 - PHHC) : MANU/PH/2993/2019, explained as to how the words " is of the opinion" would be interpreted as appearing in Section 83 of the CGST Act, 2017.

> Expression 'is of the opinion' or 'has reason to believe' are of same connotation and are indicative of subjective satisfaction of Commissioner. It is settled law that 'opinion' must have a rational connection with or relevant bearing on the formation of the opinion. Rational connection postulates that there must be a direct nexus or live link between the protection of interest and available property which might not be available at the time of recovery of taxes after final adjudication of the dispute. The opinion must be formed in good faith and should not be a mere pretence. Courts are entitled to determine whether the formation of opinion is arbitrary, capricious or whimsical.

9: The following observations of Supreme Court in the case of Smt. S.R. Venkatraman vs. Union of India MANU/SC/0359/1978 would be extremely useful for a challenge to action (by way of writ petition under Section 226 of Constitution of India before the High Court having jurisdiction over the Department) under Section 83 of CGST Act:-

> "There will be an error of fact when a public body is prompted by a mistaken belief in the existence of a non-existing fact or circumstances. This is so clearly unreasonable that what is done under such a mistaken belief might almost be said to have been done in bad faith; and in actual experience and as things go, they may well be said to run into one another. The influence of extraneous matters will be undoubtedly there where the authority making the order has admitted their influence. An administrative order which is based on reasons of fact which do not exist must be held to be infected with an abuse of power."

10: The DB of Hon'ble Gujarat High Court in the case of Pranit Hem Desai vs. ADG (28.08.2019 - GUJHC) : MANU/GJ/1855/2019 laid down the principle governing passing of order of provisional attachment.

> Further, the orders of provisional attachment must be in writing. There must be some material on record to indicate that the Assessing Authority had formed an opinion on the basis thereof that it was necessary to attach the property in order to protect the interest of the revenue. The provisional attachment provided under section 83 is more like an attachment before judgment under the Code of Civil Procedure. It is a liability on the property. However, the power conferred upon the Commissioner under Section 83 is very

> drastic, far-reaching power and that power has to be used sparingly and only on substantive weighty grounds and for valid reasons.

WHO CAN EXERCISE POWERS

11: The DB of Gujarat High Court in Valerius Industries vs. Union of India (28.08.2019) : MANU/GJ/1743/2019 observed that it is only the opinion of the Commissioner which is condition precedent for taking action under Section 83 for provisional attachment of any property. However, any exercise of powers by any other officers (other than Commissioner) shall be in violation of mandate of Section 83 and consequently, provisional attachment shall be illegal. In other words, formation of the opinion cannot be by any officer junior to the Commissioner.

> In the case on hand, Section 83 makes it abundantly clear that it is the Commissioner's opinion which is relevant. Whether such power conferred upon the Commissioner by the legislature could have been delegated to the three subordinate officers referred to above by virtue of the order dated 15th January 2018 passed in exercise of power under sub-section (3) of Section 5 read with clause 19 of Section 2 of the Act and the rules framed thereunder. In our opinion, the answer has to be in the negative. Although there is no specific challenge to the order dated 15th January 2015 passed by the Commissioner of State Tax delegating his power under Section 83 to the subordinate officers, yet, we are of the view that by virtue of such order, such impugned order of provisional attachment cannot be defended.

12: The DB of Gujarat High Court in Valerius Industries vs. Union of India : MANU/GJ/1743/2019, while dealing with scope of exercise of powers under Section 83 of CGST Act, has observed as under:-

> In the absence of any cogent or credible material, if the subjective satisfaction is arrived at by the authority concerned for the purpose of passing an order of provisional attachment under Section 83 of the Act, then such action amounts to malice in law. Malice in its legal sense means such malice as may be assumed from the doing of a wrongful act intentionally but also without just cause or excuse or for want of reasonable or probably cause. Any use of discretionary power exercised for an unauthorized purpose amounts to malice in law. It is immaterial whether the authority acted in good faith or bad faith.

WHEN POWERS CAN BE EXERCISED:

13: The DB of Hon'ble Gujarat High Court in the case of Pranit Hem Desai vs. ADG (28.08.2019 - GUJHC) : MANU/GJ/1855/2019, while explaining the scope of Section 83 of the CGST Act, 2017, has observed as under:-

> Section 83 of the State GST Act empowers the Assessing Authority to make a provisional attachment of any property of the assessee during the pendency of any proceeding for the assessment or reassessment of any turnover, even though there is no demand outstanding

against the assessee, if he is of the opinion that it is necessary to do so to protect the interest of the revenue. This provision has been made, in our opinion, in order to protect the interest of the revenue in cases where the raising of demand is likely to take time because of the investigations and there is apprehension that the assessee may default in ultimate collection of the demand. In other words, Section 83 gives a power to be exercised during the pendency of any proceeding for assessment or reassessment, so that the assessee may not fritter away or secrete his resources out of the reach of the Commercial Tax department when the assessment or reassessment is completed. The expression "for the purpose of protecting the interest of the revenue" occurring in Section 83 of the Act is very wide in its meaning.

Further, the orders of provisional attachment must be in writing. There must be some material on record to indicate that the Assessing Authority had formed an opinion on the basis thereof that it was necessary to attach the property in order to protect the interest of the revenue. The provisional attachment provided under section 83 is more like an attachment before judgment under the Code of Civil Procedure. It is a liability on the property. However, the power conferred upon the Assessing Authority under Section 83 is very drastic, far-reaching power and that power has to be used sparingly and only on substantive weighty grounds and for valid reasons.

WHAT CAN BE ATTACHED

14: The Jharkhand High Court in the case of Ramjee Power Construction Ltd. vs. UOI: MANU/JH/0242/2012 observed that attachment of the property should be made to the extent it is required to achieve the object of protecting government revenue. However, exact amount cannot be quantified but this does not mean that power under section 281B (which is para-material with Section 83) is absolutely arbitrary power and it is not necessary to form opinion about quantification of maximum possible liability and also this power cannot be such arbitrary that the Assessing Officer need not to indicate or know that properties of assessee which is being attached is of what value?

15: The DB of Hon'ble Punjab & Haryana High Court in Bindal Smelting Pvt. Ltd. vs. ADG(PHHC) : MANU/PH/2993/2019 has explained at length what is the meaning and scope of the words "property" for the purpose of Section 83 of the CGST Act, 2017 mean "an asset which may be movable, immovable, tangible, intangible or in the form of some instrument. Cash in hand as well bank account is property, in the form of liquidity which is better than immovable property and directly affects working in the form of working capital of a dealer. A dealer may be having cash in hand or in account in the form of fixed deposit or saving account. The mandate of Section 83 in our considered opinion is to attach amount lying in an account in the form of FDR or saving and it cannot be intention or purport of Section 83 to attach an account having debit balance.

16: In subsequent judgments, I have elaborately explained the ratio of various judgments of different Hon'ble High Courts dealing with the different facets of the property. To begin with, issue concerning attachment of bank account is dealt with. The Calcutta High Court in P.C. Chandra and Sons (India) P. Ltd Vs. Dy Com. IT: MANU/WB/1285/2014 has held that cash credit account of the petitioner with Allahabad Bank, Bowbazar Branch cannot be attached as it is not property of the assessee. The Calcutta High Court has relied upon the judgment of Madras High Court in K.M. Adam v. ITO: MANU/TN/0599/1957 wherein it was held that Cash Credit Account or Working Capital Account, cannot be said to be money belonging to the customer/assessee and hence, it cannot be attached.

17: The DB of Gujarat High Court in Special Civil Application No. 14497 of 2014 (Kaneria Granito Ltd. Vs. Asstt. Comm. Income Tax), observed that all the three bank accounts of the assessee were in the nature of either the Cash Credit Account or term loan account which were opened to borrow money from the bank for the purpose of its business. Any money made available by the bank to the assessee would necessarily be in the nature of a loan or a cash credit facility and would be in the nature of borrowing by the assessee from the bank and hence cannot be attached.

18: The DB of Hon'ble Bombay High Court in case of Sargam Foods (P.) Ltd. v. State of Maharashtra [WP No. 4313 of 2008, dated 8-7-2010] also considered the similar issue and set aside the attachment of the petitioner's cash credit account for recovery of the unpaid taxes.

19: The Gujarat High Court in Pranit Hem Desai vs. Additional Director General and Ors. (28.08.2019 - GUJHC) : MANU/GJ/1855/2019, has relied upon the judgment of the Hon'ble Bombay High Court in the case of Gandhi Trading v. Asst. CIT 3 reported in MANU/MH/0547/1999, has opined that the attachment should be made, as far as possible, of the immovable properties if that can protect the Revenue. **The attachment of bank accounts and trading assets should be resorted to only as a last resort because, the attachment of the bank accounts of the assessee would paralyze the functions and business of the assessee. It is not permissible for the Authority to equate the provisional attachment envisaged under Section 83 of the Act with attachment in the course of the recovery proceedings.**

20: In view of the wide powers conferred under Section 83 of the CGST Act, 2017, it is seriously apprehended that the powers are liable to be mis-used – more particularly in relation to interpretation of availability of ITC to the assesseee. In my humble view, this provision requires to be toned down for the purpose of balancing the interest of both assessee and government.

FOLLOWING IS TEXT OF Naresh Kumar and Co. Pvt. Ltd. vs. Union of India (10.08.2011 - CALHC) : MANU/WB/1484/2011

In Whirlpool Corporation v. Registrar of Trade Marks reported in MANU/SC/0664/1998MANU/SC/0664/1998 : (1998) 8 SCC 1, the Supreme Court discussed its earlier judgments on the question of maintainability of a writ petition when there was an alternative remedy, and held that the High Court was not justified in dismissing the writ petition at the initial stage without examining the contention of the writ petitioner that the show cause notice was without jurisdiction.

19. In this case too, a challenge has been thrown to the jurisdiction of the concerned respondent to issue a show cause notice, after expiry of the period of limitation stipulated in the proviso to Section 73 of the Finance Act, 1994.

20. It is well established that the question of limitation is a question of jurisdiction in the sense that an authority has no jurisdiction to issue a show cause notice which is barred by limitation. In the State of Punjab v. Bhatinda District Cooperative Milk P Union Ltd. reported in MANU/SC/8017/2007MANU/SC/8017/2007 : 2007 (217) E.L.T. 325 (S.C.) : (2007) 11 SCC 363, the Supreme Court held that the question of limitation being a jurisdictional question, a writ petition challenging the validity of a notice of revision of an order of assessment of sales tax, on the ground of the same being barred by limitation, would be maintainable, notwithstanding an alternative statutory remedy.

21. It is well-established that where the jurisdiction of an authority depends upon a preliminary finding of fact, this Court in exercise of its writ jurisdiction is entitled to examine whether the findings on jurisdictional facts are correct or not. This proposition finds support from the judgment of the Supreme Court in the State of Madhya Pradesh & Ors. v. D.K. Yadav reported in MANU/SC/0029/1968MANU/SC/0029/1968 : AIR 1968 SC 1186.

22. In M/s. Raza Textiles Ltd., Rampur v. The Income Tax Officer, Rampur reported in MANU/SC/0333/1972MANU/SC/0333/1972 : AIR 1973 SC 1362, the Supreme Court held that no authority, much less a quasi-judicial authority, could confer jurisdiction on itself by deciding a jurisdictional fact wrongly. The question of whether the jurisdictional fact had rightly been decided or not was a question open to examination by the High Court in an application under Article 226 of the Constitution of India.

23. In M/s. Raza Textiles Ltd. (supra), the Supreme Court held that, if in an application under Article 226 of the Constitution of India, the Income Tax Officer had assumed jurisdiction by deciding a jurisdictional fact erroneously, the assessee would be entitled to a writ of certiorari as prayed for, since it was incomprehensible to think that a quasi-judicial authority could erroneously decide a jurisdictional fact and impose a levy.

24. In Shrisht Dhawan v. Shaw Brother reported in MANU/SC/0295/1992MANU/SC/0295/1992 : (1992) 1 SCC 534, the Supreme Court followed its earlier judgment in M/s. Raza Textiles Ltd. and reiterated the proposition that a Court or Tribunal cannot confer jurisdiction to itself by deciding a jurisdictional fact wrongly. A statutory authority also cannot assume jurisdiction by wrongly deciding a jurisdictional fact.

25. In Calcutta Discount Company Ltd. v. Income Tax Officer, Companies District I, Calcutta & Anr. reported in MANU/SC/0113/1960MANU/SC/0113/1960 : AIR 1961 SC 372, a Constitution Bench of the Supreme Court held:

"The scheme of the law clearly is that where the Income Tax Officer has reason to believe that an underassessment has resulted from nondisclosure he shall have jurisdiction to start proceedings for re assessment within a period of 8 years;.........The argument that the Court ought not to investigate the existence of one of these conditions viz. that the Income Tax Officer has reason to believe that underassessment has resulted from nondisclosure of material facts, cannot therefore be accepted.

It is well settled however that though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts, it is well settled, will issue appropriate orders or directions to prevent such consequences.

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The expression "reason to believe" postulates belief and the existence of reasons for that belief. The belief must be held in good faith: it cannot be merely a pretence. If it be asserted that the Income Tax Officer had reason to believe that income had been under-assessed by reason of failure to disclose fully and truly the facts material for assessment, the existence of the belief and the reasons for the belief, but not the sufficiency of the reasons, will be justiciable. The expression therefore predicates that the Income Tax Officer holds the belief induced by the existence of reasons for holding such belief. It contemplates existence of reasons on which the belief is founded, and not merely a belief in the existence reasons inducing the belief; in other words, the Income Tax Officer must on information at his disposal believe that income has been under-assessed by reason of failure fully and truly to disclose all material facts necessary for assessment. Such a belief, be if said, may not be based on mere suspicion: it must be founded upon information."

26. The Court exercising jurisdiction under Article 226 of the Constitution of India may be required to examine jurisdictional facts to ascertain whether jurisdiction to issue a show cause notice has properly been exercised, or such jurisdiction has been usurped by a pretended invocation of a provision of Statute.

27. This Court is thus entitled to examine whether any cogent grounds have been made out in the impugned show cause notice for invocation of the extended period of limitation and whether the grounds, if any, are supported by materials on record.

28. This Court exercising jurisdiction under Article 226 of the Constitution of India does not, ordinarily interfere with a show cause notice. However, when the show cause notice is without

jurisdiction, or barred by law, or suffers from any patent illegality this Court is duty bound to interfere. To ascertain whether the show cause notice was within jurisdiction and/or within the parameters of law, this Court may examine jurisdictional facts.

29. Furthermore, this Court, in exercise of jurisdiction under Article 226, can also interfere with a show cause notice that is vague, devoid of particulars and incapable of effective reply, for such a show cause is in flagrant violation of principles of natural justice. This Court might also interfere with a show cause notice which does not fulfill the statutory conditions for issuance thereof and/or ex facie discloses no offence, misconduct or other cause of action for which action as contemplated in the show cause notice can be initiated.

30. The petitioner is apparently engaged in coordinating, supervising and liaisoning supply of coal from various collieries to different customers as per agreements executed with them.

31. According to the petitioner, the petitioner was registered with the Service Tax Department in 2004 and has since then been paying service tax on taxable services rendered by the petitioner.

32. On 18th April, 2006, the Directorate General of Central Excise and Intelligence conducted search and seizure at the premises of the petitioner and seized various records relating to service tax, including computer data.

33. It appears that the petitioner received a letter dated 29th August, 2006 from the office of the Assistant Commissioner, of Service Tax, Dhanbad alleging that conversion charges for conversion of coal into coke attracted service tax under the category of 'business auxiliary service'.

34. By a letter dated 30th October, 2006, the petitioner informed the Assistant Commissioner that conversion of coal into coke amounted to manufacture and was thus exempted from service tax in view of the proviso to Section 65(19) of the Finance Act, 1994.

35. Thereafter the petitioner received another letter dated 30th October, 2008 from the Commissioner of Central Excise and Service Tax, Ranchi alleging that conversion of coal into coke constituted 'business auxiliary service'. The petitioner by its letter dated 12th November, 2008 replied to the aforesaid letter of the Commissioner of Central Excise and Service Tax, refuting the contention that conversion of coal into coke constituted business auxiliary service.

36. By a letter dated 9th March, 2007 the Superintendent of Central Excise, Paradeep Bench demanded service tax on intra-port transport charges under 'port service' contending that intra-port transportation was covered under the category of port service.

37. By a letter dated 5th April, 2007, the petitioner refuted the demand contending that the petitioner was neither a port nor had been authorized by any port and the service rendered by the petitioner did not constitute port service. The petitioner also filed a writ petition being W.P. (C) No. 6660 of 2007 challenging the letter dated 9th March, 2007.

38. By an Audit Spot Memo No. 3 dated 21st July, 2009, the Principal Director of Audit, Central Kolkata, sought information and/or documents with regard to intra port charges from 2001-2002 to 2008-2009.

39. Another memo being Audit Spot Memo No. 3 dated 21st June, 2009 was issued by the Audits and Accounts Department, calling for documents pertaining to intra-port transportation, conversion bill charges and transportation bills for the year 2001-02 to 2008-09.

40. Thereafter while conducting audit, the office of the Principal Director of Audit issued Audit Spot Memo No. 2 dated 21st July, 2009 calling for documents related to processing of 'pyroxenite'. Service tax is apparently being paid on processing of 'pyroxenite' with effect from 1st June, 2007 was made applicable to when service tax 'mining service', under Section 65(105)(zzzy) of the Finance Act, 1994.

41. According to the petitioner, the petitioner submitted various documents pertaining to bills relating to conversion charges on processing of 'pyroxenite', as required.

42. By a letter dated 17th December, 2009, the Commissionerate, Service Tax sought information on the same issue of bills on account of processing of pyroxenite. There was further correspondence, after which the impugned show cause notice was issued. To avoid prolixity this Court has not adverted to the details of the correspondence.

43. The Director General of Central Excise has also issued a show cause notice dated 23rd April, 2010 for the period from 1st October, 2004 to 28 February, 2005 demanding service tax of Rs. 6,12,979. The aforesaid notice is ex facie barred by limitation.

44. The impugned show cause notice has been issued by Commissioner of Service Tax in purported invocation of the proviso Section 73(1) of the Finance Act, 1994 on the vague allegation that the petitioner had not paid appropriate service tax, not disclosed relevant details to the Department and had as such taken all material steps to suppress pertinent facts willfully, with the sole intention of evading service tax.

45. Apart from the aforesaid vague, omnibus allegation of steps to suppress pertinent facts, with intention of evading payment of service tax, there is nothing in the impugned show cause notice with regard to how the proviso to Section 73(1) of the Finance Act, 1994 has been invoked.

46. The period of limitation for issuing a show cause notice is one year from the relevant date. The expression "relevant date" has not been defined in the Finance Act, 1994 as amended till date. On a reading of the various provisions of the Finance Act, 1994 as amended from time to time and the Rules framed thereunder the expression 'relevant date' would have to be construed as the date on which the tax was payable.

47. Under Rule 6 of the Service Tax Rules, 1994 as they stood at the material time, service tax was to be paid to the credit of the Central Government by the 5th day of the month following the calendar month in which payment towards the value of the taxable service was received. In case of electronic transfer through internet banking, payment could be made within the 6th day of that

month, that is one day later. Limitation, would thus start running from the seventh day of the month following the calendar month in which payment for the taxable service had been received by the petitioner.

48. The onus is on the authority issuing the show cause to disclose relevant facts in the show cause notice or documents annexed therewith to show that the show cause notice was within one year from the relevant date, or in case of invocation of the proviso to Section 73(1) of the Finance Act, within five years from the relevant date.

49. Limitation gives rise to a valuable right to the assessee. Service Tax cannot be recovered after one year from the relevant date except in circumstances stipulated in the proviso to Section 73(1). In no circumstances can any show cause notice be issued beyond the maximum period of 5 years from the relevant date.

50. As held by the Supreme Court in CCE, Ahmedabad-I v. M. Square Chemical reported in 2008 (231) E.L.T. 194 (S.C.), five years was to be computed by back calculation from the date of the show cause notice. The show cause notice having been issued on 30th March, 2010 there could be no question of inclusion of any claim prior to 30th March, 2005.

51. The claim of Rs. 71,394/- towards charges realized for intra-port transportation of ores during the financial year 2004-05 is, as observed above, ex facie barred by limitation. Reference may also be made to the decision of the Supreme Court in Ilavia Enterprises v. CCE, Jaipur reported in 1997 (91) E.L.T. 26 (S.C.).

52. Moreover, when the extended period of limitation is invoked in terms of the proviso to Section 73(1) of the Finance Act, sufficient particulars of the alleged fraud, collusion or willful misstatement would have to be given in the show cause notice to enable the assessee to give a meaningful and effective reply thereto. Similarly, for the same reason particulars have to be given of the facts allegedly suppressed.

53. Contravention simpliciter of the provisions of Chapter V of the Finance Act, 1994, as amended from time to time, does not in itself attract the proviso to Section 73(1) of the said Act. For invocation of the extended period of limitation, the contravention must be coupled with intent to evade payment of service tax.

54. A show cause notice issued upon invocation of the extended period of limitation as provided in the proviso to Section 73(1) on the ground of contravention of Chapter V cannot be sustained in law, unless the authority issuing the show cause notice is able to demonstrate intention to evade payment of Service Tax on the part of the assessee.

55. No case has been made out in the impugned show cause notice of any fraud, collusion or misrepresentation. There is a vague assertion of suppression of facts and contravention of Chapter V with intent to evade payment of Service Tax.

56. In Anand Nishikawa Co. Ltd. v. Commissioner of Central Excise, Meerut reported in MANU/SC/0641/2005MANU/SC/0641/2005 : (2005) 1 SCC 745 : 2005 (188) E.L.T. 149 (S.C.),

the Supreme Court held that mere failure to declare does not amount to wilful suppression. There must be some positive act on the part of the assessee. The judgment in Anand Nishikawa (supra) has been followed by the Supreme Court in Commissioner of Excise, Aurangabad v. Bajaj Auto Ltd. reported in MANU/SC/0945/2010MANU/SC/0945/2010 : 2010 (260) E.L.T. 17 (S.C.) cited by Mr. J.K. Mittal appearing for the petitioner.

57. The extended period of limitation can be invoked when there is a conscious act to evade tax, for example deliberate non-disclosure of some bills pertaining to any particular taxable service rendered by the assessee. Similarly, if an assessee withholds information in spite of requisition to provide the same, with intention to evade tax, the assessee would be guilty of willful suppression.

58. It is not the case of the respondents as made out in the show cause notice that the petitioner has withheld any information in spite of requisition or has refrained from filing returns in spite of any specific direction to do so.

59. This Court is, in view of the judgment of the Supreme Court in Anand Nishikawa (supra) and Bajaj Auto (supra), constrained to hold that the coke, by executing sub-contracts with coke oven plants. The explanation of the petitioner that rendering of the service of conversion of coal did not attract service tax at the material time was accepted. The extended period of limitation cannot be invoked, since it cannot be said that there was any suppression.

60. Mr. Mittal, appearing on behalf of the petitioner, submitted that even if conversion of coal into coke did not amount to manufacture and was covered under business auxiliary service, Notification No. H/05-ST dated 9th March, 2005 exempted processing or production of goods for or on behalf of the clients from service tax. The petitioner was thus exempted under the aforesaid notification.

61. Mr. Mittal argued that intra-port transportation constitutes 'port service' with enactment and enforcement of Finance Act, 2010. Prior to amendment of Section 65(105)(zn) with effect from 1st July, 2010, the said Section provided as follows:

"65(105) "taxable service" means any service provided or to be provided, -

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(zn) to any person, by a port or any person authorised by the port, in relation to port services, in any manner;"

62. It is not in dispute that after the amendment, the petitioner has got itself registered as port service provider. In support of his submission that the extended period of limitation could not have been invoked, Mr. Mittal pointed out that the office of the Superintendent, Central Excise Customs and Service Tax had issued a communication to the petitioner contending that intra-port transportation services provided by the petitioner to M/s. T.M. International Logistic Ltd. within the Paradeep Port constituted taxable service under the category of 'Port Services' and/or 'cargo handling services'.

63. In reply to the aforesaid communication, the petitioner gave a reply contending that the intra-port services rendered by the petitioner did not constitute port service since the petitioner was neither port nor authorized by the port.

64. Rendering of service which constitutes 'port service' under Section 65(105)(zn), as amended, could not have constituted a business auxiliary service. Had services of such nature constituted business auxiliary service, there would not have been any need to amend the definition of port services. Moreover, the petitioner would not have been registered as service provider in relation to 'port services'.

65. The facts disclosed in the pleadings and/or documents annexed thereto, which are matters of record, clearly reveal that there was confusion, as to whether Service Tax was payable at the material time for the service of conditions precedent for exercise of jurisdiction to issue a show cause notice by invoking the proviso to Section 73(1) of the Finance Act, 1994 were absent.

66. As held in Bajaj Auto (supra) once the Service Tax Authorities discharge there initial onus of producing materials to show that the assessee is guilty of any of the acts specified in the proviso to Section 73(1), the burden would shift on the assessee. In this case, the respondents have failed to discharge their initial onus.

67. Section 73(1) of the Finance Act, 1993 being substantially in pari materia with Section 11A(1) of the Central Excise Act, 1944, the judgments of the Supreme interpreting Section 11A(1) of the Central Excise Act, 1944 including Bajaj Auto (supra), operate as a binding precedent for interpretation of identical provisions of Section 73(1) of the Finance Act.

68. On the face of the impugned show cause notice, service tax of Rs. 49,93,998/- has been demanded for service of conversion of coal into coke under the head business auxiliary service. The definition of 'business auxiliary service' expressly excludes activities which amount to manufacture.

69. Moreover, as argued by Mr. Mittal since the definition of business auxiliary service had numerous sub-clauses, enumerating the activities which would constitute 'business auxiliary service', the absence of any indication in the show cause notice of the specific sub-clause and/or sub clauses under which the alleged activities of the petitioner were covered, vitiates the show cause notice.

70. In Amrit Foods v. CCE, U.P. reported in 2005 (190) E.L.T. 433 (S.C.) cited by Mr. Mittal, the Supreme Court upheld the decision of the Central Excise and Service Tax Appellate Tribunal setting aside a show cause notice on the ground that it did not specify which of the various clauses of the concerned rule had allegedly been contravened. The Supreme Court, in effect, held that the assessee should be put on notice of the exact nature of contravention. In this case, the petitioner has not been put to notice of the exact clause and/or clauses of Section 65(19) of the Finance Act, 1994, under which the petitioner was allegedly taxable.

71. Conversion of coking coal into coke, would certainly not amount to business auxiliary service. However, the job of getting others to convert coal by sub-contract for commission may have, in my view, amounted to rendering of business auxiliary service.

72. However, the service tax authorities were aware that the petitioner was rendering the service of getting coking coal of TISCO converted into conversion of coke into coal, inter-port services and service of processing of pyroxenite. As pointed out by Mr. Mittal, in the impugned show cause notice, it is admitted that the petitioner is registered under mining services and has been paying service tax on processing of pyroxenite since 1st June, 2007. The activities are covered under Section 65(105)(zzy), that is, mining services which have been made taxable only with effect from 1st June, 2007.

73. An activity which amounted manufacture having been excluded from the definition of 'business auxiliary services' there may have been doubt as to whether conversion of coke into coal on behalf of clients constituted taxable service. Moreover, Service Tax Authorities were also not sure of the exact Clause of Section 65(19) into which the activity of conversion of coke into coal on behalf of clients would fall at the material time, and accordingly did not specify the clause.

74. The correspondence on record reveals that there was also confusion with regard to intra-port service. Sometimes the authorities contended that intra-port services constituted 'cargo handling services'. At other times they contended that the services constituted 'port services'. The services did not fit into the definition of port-services prior to its amendment with effect from 2010 or into the definition of 'cargo handling services'. In the impugned show cause notice it is claimed that the activities constituted business auxiliary service. If the services clearly fell within the ambit of business auxiliary service, there would be no need to amend the definition of port-services.

75. In any case there was some confusion. If there was any confusion or doubt which had to be cleared by amendment, it cannot be said that there was willful suppression or contravention of Chapter V to evade payment of Service Tax, so as to attract the proviso to Section 73(1) of the Finance Act, 1994.

76. It is immaterial that the petitioner is registered in Kolkata but explanation had been given to the authorities of Paradeep, Ranchi and Dhanbad. If the queries were answered, it cannot be said that there was willful suppression. It appears that the concerned authorities initially accepted the explanation of the assessee, but later proceeded to issue the impugned show cause notice upon change of opinion. The impugned show cause notice is barred by limitation.