IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 12626 of 2018

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J.B.PARDIWALA

and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

==========

LINDE ENGINEERING INDIA PVT. LTD. & 1 other(s)
Versus
UNION OF INDIA,

==========

Appearance:
MR.PARTH CONTRACTOR(7150) for the Petitioner(s) No. 1,2
MR NIRZAR S DESAI(2117) for the Respondent(s) No. 1,2,3

==========

CORAM: **HONOURABLE MR. JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 16/01/2020

ORAL JUDGMENT

(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)

1. Rule, returnable forthwith. Mr. Nirzar S. Desai waives service of notice of Rule for and on behalf of respondents.

2. Having regard to the controversy in narrow compass and with the consent of the learned advocate for the respective parties, the matter is taken up for hearing.

3. By this petition under Articles 226 of the Constitution of India, the petitioners have prayed for the following reliefs :

> *"9 (a) This Hon'ble Court may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction quashing the Show Cause Notice (F. N. V ST(Adj) 15/Linde/Commr-I/2017-18) dated 10.11.2017 issued by the Respondent No.3 to the Petitioner No. 1;*
>
> *b) Pending the present Petition, this Hon'ble Court may be pleased to stay further proceedings against the Petitioner No.1 pursuant to the Show Cause Notice (F. No. V ST(Adj)15/Linde/Commr-I/2017-18) dated 10.11.2017 issued by the Respondent No.3;*
>
> *c) Ex-parte ad-interim relief in terms of prayer (c) may kindly be granted;*
>
> *d) Such other and further reliefs as may be deemed appropriate by this Hon'ble Court."*

4. The facts giving rise to this petition may be

summarized as under:

4.1. The petitioner No.1 is a Private Limited Company incorporated under the provisions of the Companies Act, 1956 and is engaged in the business of providing taxable output services under the category of consulting engineer services, erection, commissioning and installation service, construction services other than residential complex, including commercial/industrial buildings or civil structures and works contract services etc. to various entities located in and outside India. Petitioner No.1 is subsidiary of Linde AG, Germany. The petitioner No.1-Company was filing its returns regularly and was paying appropriate service tax in accordance with law.

4.2. It is the case of the petitioners that the petitioners received a communication dated 25.02.2016 from the Superintendent (R-II), Service Tax Division-II, Vadodara on the basis of the letter of Assistant Audit Officer/CERA-(iv), directing the petitioner No.1 to submit various documents.

4.3. According to the petitioners, the Audit Objection was on the following issues :

> *"i. That the Petitioner No.1, which was a 100% subsidiary of Linde AG, Germany, and which was rendering consulting engineering services outside India and claiming the benefit of export of service, without the payment of Service tax;*

ii. That during the scrutiny of records of the Petitioner No.1 for the period 2012-13 to 2014-15, it was found that the Petitioner No. 1 was rendering services to other establishments of the Linde Group, more particularly Linde Engineering Gmbh and was raising an invoice in foreign currency;

iii. That the Linde Group Companies, including Linde AG, Germany would be establishments of the Petitioner No.1, and therefore the provision of service by the Petitioner No.1 would not fall within the ambit of 'Export of Service' under Rule 6A of STR and would therefore be and 'exempted service' in terms of the provisions of Rule 2(e) of the Cenvat Rules."

4.4. The petitioner No.1 submitted its reply dated 13.05.2016 as under :

"i The transaction of provision of service by the Petitioner No.1 to the recipient outside India would clearly fall within the ambit of Rule 3 of the Place of Provision of Service Rules, 2012 (hereinafter referred to as "the PPSR");

ii. The petitioner No. 1 would not be covered by any of the exceptions, namely Rule 4 to rule 12 of the PPSR;

iii. The provision of the service by the Petitioner No.1 would qualify as 'Export of Service' in terms of the provisions of Rule 6A of the STR, and all conditions mandatorily required to be satisfied under the said Rule, stand satisfied by the Petitioner No.1;

iv. *The place of provision of the service, admittedly, was outside India, and the*

payment in relation to the same was also received in convertible foreign exchange;

v. The Petitioner No. 1 and the recipient of service, i.e. Linde AG, Germany are independent legal entities and that the latter are not an establishment of the Petitioner No. 1."

4.5. It is the case of the petitioners that after the petitioner No.1 filed the reply dated 13.05.2016, there was no further inquiry or response from the respondent Nos.2 and 3. The petitioner No.1 was therefore, under a *bona fide* belief that the respondents were satisfied with the response submitted by the petitioner No.1. However, the petitioner No.1 again received communication dated 18.08.2017, which was replied by the petitioner No.1 vide its reply dated 28.08.2017.

4.6. It is the case of the petitioners that thereafter, the petitioner No.1 was served with the show cause Notice dated 10.11.2017 based upon the observations of the Audit Officer leveling following allegations against the petitioner No.1 :

"i. Linde AG, Germany which are legal entities, were mere establishments of the Petitioner No.1, as contemplated under Rule 6A of the STR read with Explanation 3 of the Section 65B (44) of the Act;

ii. in view of (I) above, the services rendered by the Petitioner No.1 to Linde AG, Germany would not fall within the ambit of "Export of Services" and would therefore fall within the definition of the term

'exempted service' as defined in Rule 2(e) of the Cenvat Rules;

ii. in view of (ii) above, according to the SCN, Rule 6(3) of the Cenvat Rules becomes applicable and it is therefore alleged that the Petitioner No.1 is in wilful violation of the aforesaid."

4.7. The petitioner No.1 was directed to show cause as to why an amount of Rs. 62,51,39,050/-, inter alia, should not be recovered for the period from 2012-13 to 2016-17.

4.8. Being aggrieved by the aforesaid show cause Notice, the petitioners have preferred this petition with the aforesaid prayers.

5. Mr. Mihir Joshi, the learned senior advocate assisted by Mr. Parth Contractor appearing for the petitioners submitted at the outset that following substantial questions of law are being raised by the petitioners in this petition :

"i. Whether in terms of Explanation 3 to Section 65B(44) of the Act, a holding company of the Petitioner No.1 being Linde AG, incorporated in Germany, or any other subsidiary of Linde AG, can be construed as 'establishments of the Petitioner No. 1'?

ii. Whether in the facts and circumstances of the present case and on a reading of the provisions of Rule 6A of the Service Tax Rules, 1994 (hereinafter referred to as "STR")read with the provisions of Section 65B(44) of the Act, the constituting engineering services rendered outside India

by the Petitioner No.1 to any other subsidiary of Linde AG or holding company would qualify as 'Export of Services' as contended by the Petitioner, or Exempted Service under Rule 2(e) of the Cenvat Rules, thereby requiring proportionate reversal of Credit under Rule 6A of the STR as is contended by the Department"?"

5.1. It was submitted that the action of respondent No.3 is not only without jurisdiction, as being contrary to Rule 6A of the Service Tax Rules, 1994 (for short "the Rules, 1994") read with Section 65B(44) of the Finance Act, 1994 (for short "the Act, 1994"), but would be against public interest since it would act as a deterrent to the trust given for export of services out of India by the respondent No.1, through its various scheme such as "Served from India Scheme" and "Make in India".

5.2. It was submitted that the respondents are seeking to bring within the ambit of service tax law, all services provided by any Indian Company, outside India, to its holding Company or its other group Companies located outside India in an arbitrary manner, despite the fact that the same would qualify as an "export of service" which is not liable for levy of service tax.

5.3. It was submitted that the interpretation made on the part of the respondents is contrary

to the purpose and object of the statute as well as the same is contrary to the language of the provisions, which requires strict interpretation.

5.4. Learned senior advocate submitted that the respondent No.3 has no jurisdiction to issue show cause notice under the provisions of the Act, 1994 and if the proceedings are permitted to continue, it would only lead to a multiplicity of the proceedings and would cause grave and irreparable loss, harm and injuries to the petitioners.

5.5. It was submitted that the plain reading of Rule 6A of the Rules, 1994 with Explanation 3 to Section 65B (44) of the Act, 1994, which clearly stipulates that in the event, the conditions prescribed there under stands fulfilled, the provision of service by a service provider in India to a service recipient outside India shall be considered as an “export of service” amenable to the benefits available under the law. It was submitted that the conditions prescribed under Rule 6A of the Rules, 1994 and as to how the conditions stand fulfilled in the facts of the present case are tabulated as under:

Condition under Rule 6A of STR	**Comparison as to how the conditions stand fulfilled in the facts of the present case**
Provider of service is located in taxable territory	Petitioner No.1 is located in Vadodara, Gujarat
Recipient of service is located outside India	Linde AG, Germany is located outside India
Service is not a service specified in Section 66D of the Act	Consulting engineering services and other services rendered by the Petitioner No.1 are not specified in Section 66D of the Act
Place of provision of service is outside India	The services are provided by the Petitioner No.1 at various locations outside India
Payment for such service is received in convertible foreign exchange	The payments, admittedly, are received in convertible foreign exchange
Provider of service and recipient of service are not merely establishments of distinct persons stipulated in Section 65B(44) of the Act	Linde AG Germany is not an establishment of the Petitioner No.1, as contemplated under Section 65B(44) of the Act.

5.6 Learned senior advocate invited the attention of the Court to explanation 3(b) of Section 65B(44) of the Act, 1994 which reads thus :

> "*an establishment of a person in the taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct persons*".

5.7. Referring to the aforesaid explanation, it was submitted that what is contemplated is that there has to be an establishment of the petitioner No.1 in a non-taxable territory, however, there is no establishment of the petitioner No.1, to which the petitioner No.1 has been rendering services outside India so as to treat it as establishments of distinct persons.

5.8. Learned senior advocate relied upon the Explanation 4 read with Explanation 3(b) to Section 65B(44) of the Act, 1994 to submit that what is stipulated under law as an "establishment" is a branch or agency or a representational office of petitioner No.1. It was submitted that in the facts of the case, the Linde AG Germany is neither a branch nor an agency nor a representational office of the petitioner No.1. It was, further submitted that the show cause notice is ultra vires the provisions of the applicable law and is completely contrary to the provisions of the Act and the Rules framed there under and is therefore, fully without jurisdiction in as much as fundamental underlying principle for the exclusion of services provided by a service provider to its establishment in a non-taxable territory is that "one cannot render service to one's own self".

5.9 It was further contended that in the facts of the case, the petitioner No.1 and Linde AG Germany are distinct legal entities and therefore, the provisions of Rule 6A of the Rules, 1994 cannot be applied in the facts of the case.

5.10 Learned senior advocate submitted that the basis of issuance of show cause notice, considering the holding Company of the petitioner i.e. Linde AG Germany as its other establishment is contrary to the object and purpose of encouraging the export of services from India to locations outside India.

5.11 It was submitted that if the interpretation as sought to be adopted by the respondent No.3 is approved, the same would effectively tantamount to brining within the tax ambit every provision of service by an entity incorporated in India to its holding Company or other group Companies located outside India, which is neither the intention of the said provisions nor it is the scheme of the Act. It was therefore, submitted that such interpretation made by the respondent authority is wholly arbitrary and contrary to the scheme and provisions of the Act and the Rules inasmuch as in terms of the definition of “exempted service” provided in Rule 2(e) of the

Cenvat Credit Rules, 2004 (for short the “Rules 2004”) the provision of services by the petitioner No.1, would qualify as an “Export of Service”, and therefore the provisions of Rule 6(3) of the Rules, 2004 would have no applicability.

5.12 It was therefore, submitted that in view of such facts, no penalty can be levied under Rule 15(3) of the Rules, 2004 or under Section 78(1) of the Finance Act, 1994 as no tax is payable by the petitioner No.1, no interest under Rule 14(1) of the Rules, 2004 read with Section 75 of the Act, 1994 can be levied.

5.13 It was submitted that the show cause notice is also without jurisdiction in absence of any evidence/contention to show that there has been any willful misrepresentation or suppression by the petitioner No.1 so as to invoke extended period of limitation beyond the stipulated period of 18 months from the 'relevant date' as stipulated in Section 73 of the Act, 1994.

5.14 It was further submitted that the impugned show cause notice is solely based on audit objections, which is not tenable in law. Learned senior advocate for the petitioners submitted that on bare perusal of the show cause notice, it appears that the respondent

No.3 on the misinterpretation of the provisions of the Act and Rules as well as the provisions of the Companies Act has come to the *prima facie* conclusion that the holding Company of the petitioner No.1 situated outside India would be an establishment of the petitioner No.1 and therefore, the services rendered by the petitioner to its parent Company would not be an export of service and as such bringing the services rendered by the petitioner No.1 to its holding Company within the purview of the service tax is without jurisdiction.

6. On the other hand, Mr. Nirzar S.Desai, the learned standing counsel appearing for the respondents submitted that the petition is not maintainable under Article 226 of the Constitution of India as it is challenging issuance of the show cause notice which is yet to be adjudicated by the competent authority.

6.1) It was submitted that the petitioners should be relegated to the competent authority to file its reply to the show cause notice so as to enable the adjudication of the show cause notice in accordance with law. It was submitted that the respondent No.3 has jurisdiction to issue show cause notice.

6.2) Learned advocate for the respondents further relied upon the averments made in the

affidavit-in-reply filed on behalf of the respondents to contend that the issuance of show cause notice does not give rise to a cause of action to the writ petitioners under Article 226 of the Constitution of India and it does not amount to an adverse order, which affects the right of any party unless the show cause notice has been issued by a person having no jurisdiction to do so, which is not fact in the present case. Reliance was placed on the following averments made in para 8 of the Affidavit-in-reply wherein various judgments are cited and it reads thus :

> *"8. It is respectfully submitted that the Hon'ble Supreme Court of India has deprecated practice of entertaining writ petitions filed at the show cause notice stage and held that in such cases High Court may refrain from entertaining such petitions. The answering respondent craves leave of this Hon'ble Court to refer to and rely upon the following cases, in support of its preliminary objection as to the maintainability of the captioned writ petition:*
>
> *a) Special Director versus Mohd. Ghulam Ghouse reported in 2004 (164) E.L.T. 141 (S.C.)*
>
> *This Court in a large number of cases has deprecated the practice of the High Courts entertaining writ petitions questioning legality of the show cause notices stalling enquiries as proposed and*

retarding investigative process to find actual facts with the participation and in the presence of the parties. Unless, the High Court is satisfied that the show cause notice was totally non est in the eye of law for absolute want of jurisdiction of the authority to even investigate into facts, writ petitions should not be entertained for the mere asking and as a matter of routine and the writ petitioner should invariably be directed to respond to the show cause notice and take all stands highlighted in the writ petition. Whether the show cause notice was founded on any legal premises is a jurisdictional issue which can even be urged by the recipient of the notice and such issues also can be adjudicated by the authority issuing the very notice initially, before the aggrieved could approach the Court. Further, when the Court passes an interim order it should be careful to see that the statutory functionaries specially and specifically constituted for the purpose are not denuded of powers and authority to initially decide the matter and ensure that ultimate relief which may or may not be finally granted in the writ petition is accorded to the writ petitioner even at the threshold by the interim protection, granted.

b) In Assistant Collector of Central Excise, Chandan Nagar, West Bengal versus Dunlop India Ltd and Ors – (1985(19)E.L.T. 22 (S.C.), the Supreme Court held that Article 226 is 'not meant to short circuit or circumvent statutory provisions' and the HC must entertain the writ petition only when statutory remedies are entirely 'ill-suited to meet the demands of extraordinary

situations' and where interference is necessary to 'prevent public injury and vindication of public justice'.

c) Union of India and another versus Kunisetty Satyanarayana {Appeal (civil) 5145 of 2006} decided on 22.11.2006 wherein the Hon'ble Supreme Court held that

> *"It is well settled by a series of decisions of this Court that ordinarily no writ lies against a charge sheet or show-cause notice vide Executive Engineer, Bihar State Housing Board vs. Ramdesh Kumar Singh and others JT 1995 (8) SC 331, Special Director and another vs. Mohd. Ghulam Ghouse and another AIR 2004 SC 1467, Ulagappa and others vs. Divisional Commissioner, Mysore and others 2001(10) SCC 639, State of U.P. vs. Brahm Datt Sharma and another AIR 1987 SC 943 etc. The reason why ordinarily a writ petition should not be entertained against a mere show-cause notice or charge-sheet is that at that stage the writ petition may be held to be premature. A mere charge-sheet or show-cause notice does not give rise to any cause of action, because it does not amount to an adverse order which affects the rights of any party unless the same has been issued by a person having no jurisdiction to do so. It is quite possible that after considering the reply to the show-cause notice or after holding an enquiry the authority concerned may drop the proceedings and/or hold that the charges are not established. It is well settled that a writ lies when some right of any party is infringed. A mere show-cause notice or charge-sheet does not infringe the right of any one. It is only when a final order imposing some punishment or*

otherwise adversely affecting a party is passed, that the said party can be said to have any grievance."

d) Binani Cement versus Union of India 2014 (313) E.L.T. 27 (Guj.)- The Hon'ble Lordships of this Hon'ble Court held that they do not encourage litigation at the stage of issuance of show cause notice as noticee would have sufficient opportunity to meet with all the allegations and produce such material on record as may be required to refute the same- Furthermore, as statute provides detailed mechanism for adjudication of disputes, and as petitioner neither contended nor established any inherent lack of jurisdiction or gross violation of principles of natural justice on part of adjudicating authority, the Petition rejected."

6.3) Relying upon the dictum of the aforesaid decisions cited in the Affidavit-in-reply, it was submitted that the show cause notice only expresses *prima facie* opinion and the petitioners have failed to make out a case of non application of mind by the competent authority to issued show cause notice and even if the show cause notice is issued on the basis of the points raised by the Audit Officer, it cannot be construed as intervention in the judicial function of the adjudicating authority.

6.4) It was further submitted that there is nothing on record to show that a fair

adjudication would not be done by the respondent-authority.

7. Having heard the learned advocates for the respective parties and having gone through the materials on record, short question which arises for consideration is whether the action of the respondents in issuing show cause notice is without jurisdiction and contrary to the provisions of Rule 6A of the Rules, 1994 read with Section 65B (44) of the Act, 1994 or not.

8. A Co-ordinate bench of this Court has passed the following order on 11.09.2018 :

"1. Heard Mr. Mihir Joshi, learned Senior Counsel appearing for the petitioners.

2. At the outset, our attention is invited to show cause notice dated 10.11.2017 issued by respondent no.3 seeking reasons why the amount of Rs.62,51,39,050/- along with permissible interest and penalty should not be recovered from the petitioners under Rule 14 of the Cenvat Credit Rules read with proviso to Sub-section (1) of Section 73 of the Finance Act, 1994. It is submitted that paragraph 3 of the show cause notice along with paragraphs 4 and 5 vis-a-vis Cenvat Credit Rules 2004, Rule 6A of the Service Tax Rules, 1994 so referred to in paragraph 3 of the show cause notice, is to be interpreted in the backdrop of following substantial question of law:-

> *"i. Whether in terms of Explanation 3 to Section 65B(44) of the Act, a holding company of the Petition No.1 being Linde AG, incorporated in Germany, or any other subsidiary of Linde AG, can be construed as 'establishments of the Petition No.1'?*

ii. Whether in the facts and circumstances of the present case and on a reading of the provisions of Rule 6A of the Service Tax Rules, 1994 (hereinafter referred to as "STR") read with the provisions of Section 65B(44) of the Act, the consulting engineering services rendered outside India by the Petition No.1 to any other subsidiary of Linde AG or holding company would qualify as 'Export of Services' as contended by the Petitioner, or Exempted Service under Rule 2 (e) of the Cenvat Rules, thereby requiring proportionate reversal of Credit under Rule 6A of the STR as is contended by the Department?"

3. Accordingly, it is submitted that action of the respondent in issuing show cause notice is without jurisdiction and contrary to the provisions of Rule 6A of Sales Tax Rules read with Section 65B (44) of the Act.

4. *Considering the above and upon reading the contents of the show cause notice impugned in juxtaposition to statutory provisions, we are inclined to issue NOTICE returnable on 27th September 2018. Meanwhile, there shall be ad-interim relief in terms of paragraph 9 (b) of the petition. Direct service is permitted."*

9. The facts of the case are not in dispute that the petitioner No.1, who is 100% subsidiary of Linde AG, Germany, which is a leading worldwide technology partner for plant engineering and construction, and is inter alia engaged in the provision of consulting engineering and other services to various entities located in India and outside. On the basis of the scrutiny of the records of the petitioner No.1 by

Central Excise Revenue Audit (CERA), it was observed by the respondents that the petitioner No.1 was rendering services to other organizations located in different countries out of India and was not charging service tax on such services treating the same as “export of services”, more particularly, the petitioner No.1 rendered services to its parent Company and other establishments of Linde Group outside India without payment of service tax by wrongly treating the same as 'export of service'.

10. Therefore, to consider the contentions raised by the petitioners that the impugned show cause notice is without jurisdiction, it would be germane to refer to the various provisions of the Act, 1994 and the Rules, 1994 read with Rules, 2004, which are made applicable to assume the jurisdiction by the respondent No.3 to issue impugned show cause notice.

(i) Section 65B (44) of the Act, 1994 reads thus :

*“**65B.** In this Chapter, unless the contest otherwise requires,-*

xxxxx

(44) “service” means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include–

(a) an activity which constitutes merely,–

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or
(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or

(iii) a transaction in money or actionable claim;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any Court or tribunal established under any law for the time being in force.

Explanation 1 . – For the removal of doubts, it is hereby declared that nothing contained in this clause shall apply to,–

(A) the functions performed by the Members of Parliament, Members of State Legislative, Members of Panchayats, Members of Municipalities and Members of other local authorities who receive any consideration in performing the functions of that office as such member; or

(B) the duties performed by any person who holds anypost in pursuance of the provisions of the Constitution in that capacity; or

(C) the duties performed by any person as aChairperson or a Member or a Director in a body established by the Central Government or State Governments or local authority and who is not deemed as an employee before the commencement of this section.

'Explanation 2. - For the purposes of this clause, the expression "transaction in money or actionable claim" shall not include–

(i) any activity relating to use of money or its conversion by cash or by any other

mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged;
(ii) any activity carried out, for a consideration, in relation to, or for facilitation of, a transaction in money or actionable claim, including the activity carried out–

(a) by a lottery distributor or selling agent on behalf of the State Government, in relation to promotion, marketing, organising, selling of lottery or facilitating in organising lottery of any kind, in any other manner, in accordance with the provisions of the Lotteries (Regulation) Act, 1998;. (Finance Act 2016)

(b) by a foreman of chit fund for conducting or organising a chit in any manner.;

Explanation 3. – For the purposes of this Chapter,–

(a) an unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons;

(b) an establishment of a person in the taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct persons.

Explanation 4. – A person carrying on a business through a branch or agency or representational office in any territory shall be treated as having an establishment in that territory;"

(ii) Section 66B of the Act, 1994 reads thus :

"Charge of service tax on and after Finance Act, 2012.–

66B. *There shall be levied a tax (hereinafter referred to as the service tax) at the rate of*

fourteen percent. on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed."

(iii) Section 66C of the Act, 1994 reads thus :

"Determination of place of provision of service.—

66C. *(1) The Central Government may, having regard to the nature and description of various services, by rules made in this regard, determine the place where such services are provided or deemed to have been provided or agreed to be provided or deemed to have been agreed to be provided.*

(2) Any rule made under sub-section (1) shall not be invalid merely on the ground that either the service provider or the service receiver or both are located at a place being outside the taxable territory."

(iv) Section 73 of the Act, 1994 reads thus :

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

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

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

(a) fraud; or
(b) collusion; or
(c) wilful mis-statement; or
(d) suppression of facts; or
(e) contravention of any of the provisions of this Chapter or of the rules made there under with intent to evade payment of service tax, by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "thirty months", the words "five years" had been substituted.

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

(v) Rule-6A of the Rules, 1994 reads thus :

"[Export of services.-

'6A. *(1) The provision of any service provided or agreed to be provided shall be treated as export of service when,-*

(a) the provider of service is located in the taxable territory,

(b) the recipient of service is located outside India,

(c) the service is not a service specified in the section 66D of the Act,

(d) the place of provision of the service is outside India,

(e) the payment for such service has been received by the provider of service in convertible foreign exchange, and

(f) the provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b) of

Explanation 3 of clause (44) of section 65B of the Act

(2) Where any service is exported, the Central Government may, by notification, grant rebate of service tax or duty paid on input services or inputs, as the case may be, used in providing such service and the rebate shall be allowed subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification.]"

(vi) Rule 2(e) as well as Rule 6 of the CENVAT Rules, 2004 reads thus :

"2. In these rules, unless the context otherwise requires,-

xxx

[(e) "exempted service" means a-

(1) taxable service which is exempt from the whole of the service tax leviable thereon; or

(2) service, on which no service tax is leviable under section 66B of the Finance Act; or

(3) taxable service, whose part of value is exempted on the condition that no credit of inputs and input services, used for providing such taxable service, shall be taken,

[*but shall not include a service-*

(a) which is exported in terms of rule 6A of the Service Tax Rules, 1994; or

(b) by way of transportation of goods by a vessel from customs station of clearance in India to a place outside India];]"

xxxx

"[Obligation of a manufacturer or producer of final products and a provider of [output] service.]

> ***6.*** *(1) The CENVAT credit shall not be allowed on such quantity of input as is used in or in relation to the manufacture of exempted goods or for provision of exempted services or input service as is used in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for provision of exempted services and the credit not allowed shall be calculated and paid by the manufacturer or the provider of output service, in terms of the provisions of sub-rule (2) or sub-rule (3), as the case may be:"*

11. On perusal of the above provisions of the Act, 1994 and the Rule, 1994 read with Rules, 2004, it emerges that Rule 6A of the Rules, 1994 provides that services rendered would be treated as "Export of services" when clause (a) to clause (d) refers to provider of service is located in the taxable territory and recipient of service is located outside India and the service is not a service specified in Section 66D of the Act and the place of the provision of the service is outside India and as per clause (e) the payment for such service has been received by the provider of service in convertible Foreign Exchange. It emerges that the petitioner is fulfilling all the conditions, however, so far as the clause (f) of Rule 6A of Rules, 1994 is concerned, it provides that the provider of service and recipient of service are not merely establishments of a distinct person in accordance with Item (b) of explanation 3 of clause (44) of Section 65B of the Act. As per clause (44) of Section 65B of the Act, 1994 "service" means any activity carried out by a person for another for

consideration, and includes a declared service. Item (b) of the explanation 3 stipulates that an establishment of a person in taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct persons. Therefore, a question arises in the fact of the present case, whether the services provided by the petitioner No.1 located in India which is a taxable territory and the recipient of the service i.e. holding Company of the petitioner No.1 located outside India which is a non- taxable territory, whether both of them would be two establishments of the same Company or not so as to treat them as distinct persons liable for service tax. If the answer to this question is in affirmative, as interpreted in the impugned show cause notice that providing the services by the petitioner No.1 to its parent Company would be to the establishment of the petitioner and therefore it would be a distinct person. then rendering of service by the petitioner No.1 cannot be treated as “Export of Services” as per Rule 6A (f) of Rules, 1994 because as per explanation 3(b) to Section 65B(44) of the Act, 1994, the petitioner and holding Company are to be treated as distinct person as per the understanding of the respondent No.3, and therefore the petitioner would be liable to pay service tax.

12. However, on analysis of the aforesaid provisions, it appears that the respondents have assumed the jurisdiction on mere misinterpretation of

the provisions of explanation 3 (b) to Section 65B(44) of the Act,1994 read with Rule 6A of the Rules, 1994 as by no stress of imagination, it can be said that the rendering of services by the petitioner No.1 to its parent Company located outside India was service rendered to its other establishment so as to deem it as a distinct person as per Item (b), explanation 3 of clause (44) of Section 65B of the Act, 1994, the petitioner No.1 which is an establishment in India, which is a taxable territory and its 100% holding Company, which is the other company in non taxable territory cannot be considered as establishments so as to treat as distinct persons for the purpose of rendering service. Therefore, the services rendered by the petitioner No.1-Company outside the territory of India to its parent Company would have to be considered “export of service” as per Rule 6A of the Rules, 1994 and Clause (f) of Rule 6A of the Rules, 1994 would not be applicable in the facts of the case as the petitioner No.1, who is the provider of service and its parent Company, who is the recipient of services cannot be said to be merely establishment so as to be distinct persons in accordance with Item (b) explanation 3 of Clause (44) of Section 65B of the Act, 1994.

13. In such circumstances, the respondents would not have any jurisdiction to invoke the provisions of the Act, 1994 read with Rules, 1994 to bring the services rendered by the petitioner No.1 to its parent Company within the purview of levy of service tax under the

provisions of the Act, 1994.

14. Moreover, the impugned show cause notice is also not tenable in law as the same is issued invoking Section 73 of the Act,1994 for extending the period for the issuing the Notice on the ground of alleged willful mis-statement or suppression of the facts on the part of the petitioner No.1. The petitioners cannot be said to have made any willful mis-statement or suppressed any fact as the petitioners cannot be made liable for levy of service tax by wrongly treating the petitioners and its parent Company as establishment of the same Company. It is trite law that the petitioner no.1 Company, which is incorporated under the provisions of the Companies Act, 1956 and its holding Company incorporated at Germany are both distinct persons and therefore, both cannot be treated to be establishments of the same Company distinct artificial jurisdiction person.

15. In view of the above facts and circumstances of the case and the discussion, the impugned show cause notice issued by the respondent No.1 is without jurisdiction and as such the petition is maintainable under Article 226 of the Constitution of India as held by the Apex Court in the case of Whirlpool Corpn. V. Registrar of Trade Marks reported in (1998)8 SCC page 1 as under:

> **"14.** The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised

by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".

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

16. *Rashid Ahmed* v. *Municipal Board, Kairana*[1] laid down that existence of an adequate legal remedy was a factor to be taken into consideration in the matter of granting writs. This was followed by another Rashid case, namely, *K.S. Rashid & Son* v. *Income Tax Investigation Commission*[2] which reiterated the above proposition and held that where alternative remedy existed, it would be a sound exercise of discretion to refuse to interfere in a petition under Article 226. This proposition was, however, qualified by the significant words, "*unless there are good grounds therefor*", which indicated that alternative remedy would not operate as an absolute bar and that writ petition under Article 226 could still be entertained in exceptional circumstances.

17. A specific and clear rule was laid down in *State of U.P.* v. *Mohd. Nooh*[3] as under:

"But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies."

18. This proposition was considered by a Constitution Bench of this Court in *A.V. Venkateswaran, Collector of Customs* v. *Ramchand Sobhraj Wadhwani*[4] and was affirmed and followed in the following words:

> "The passages in the judgments of this Court we have extracted would indicate (*1*) that the two exceptions which the learned Solicitor General formulated to the normal rule as to the effect of the existence of an adequate alternative remedy were by no means exhaustive, and (*2*) that even beyond them a discretion vested in the High Court to have entertained the petition and granted the petitioner relief notwithstanding the existence of an alternative remedy. We need only add that the broad lines of the general principles on which the Court should act having been clearly laid down, their application to the facts of each particular case [11] must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the Court."
>
> **19.** Another Constitution Bench decision in *Calcutta Discount Co. Ltd.* v. *ITO, Companies Distt. I*[5] laid down:
>
> "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 will issue appropriate orders or directions to prevent such consequences. Writ of certiorari and prohibition can issue against the Income Tax Officer acting without jurisdiction under Section 34, Income Tax Act."
>
> **20.** Much water has since flown under the bridge, but there has been no corrosive effect on these decisions which, though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a writ petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation."

16. In view of the above legal position, the reliance placed on behalf of the respondents on the various decisions of the Apex Court, which are based on the facts of each case, would not be applicable as the impugned show cause notice is held to be issued without jurisdiction as the respondents could not

have issued the same invoking the provisions of Section 73 of the Act, 1994 read with Section 65B(44) and Rule 6A of the Rules, 1994.

17. For the foregoing reasons, the petition succeeds and is accordingly allowed. The impugned show cause notice dated 10.11.2017 is hereby quashed and set aside. Rule is made absolute to the aforesaid extent with not order as to costs.

(J. B. PARDIWALA, J)

(BHARGAV D. KARIA, J)

KUMAR ALOK