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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **W.P.(C) 1144/2016**

Reserved on: 27th July, 2018

% **Date of Decision**: 16th November, 2018

NATIONAL BUILDING CONSTRUCTION COMPANY LIMITED
..... Petitioner

Through Mr. J.K. Mittal and Mr. Rajeev Singh, Advocates.

Versus

UNION OF INDIA & ORS. ..... Respondents

Through Mr. K. Radha Krishnan, Sr. Advocate with Mr. Rupesh Kumar, Mr. Satish Agarwala & Mr. Pritpal Singh Nijjar, Advocates for respondent Nos. 1 to 3.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MS. JUSTICE PRATHIBA M. SINGH

SANJIV KHANNA, J.

National Building Construction Corporation Ltd., hereinafter referred to as the petitioner, is a Public Sector Undertaking under the Ministry of Urban Development of the Government of India.

2. The petitioner has filed the present writ petition under Article 226 of the Constitution of India primarily challenging the letter dated 3rd December, 2015 from the Director General of Central Excise Intelligence informing them about the permission accorded authorizing the Additional

Director General, Directorate General of Central Excise Intelligence, Lucknow Zonal Unit to investigate service tax evasion cases of all the branches of the petitioner, subject matter of letter F.No. DGCEI/LZU/NBCC/190/2015 dated 28th October, 2015.

3. The petitioner has also prayed for quashing of notice/summons dated 21st January, 2016 and 28th January,2016 for production of documents and details issued by the Asst. Director, Director General of Central Excise Intelligence, Regional Meerut Unit on the ground that they are unwarranted and arbitrary.

4. For convenience we have referred to the Directorate General of Central Excise Intelligence in this judgment as DGCEI.

5. The petitioner corporation was and is primarily engaged in carrying out civil work and construction for various departments of the government and public sector undertakings all over India. The petitioner has not opted for centralized registration for the purpose of service tax. The petitioner has 88 service tax registrations in different Commissionerates and consequently files and submits separate service tax returns as per the registrations.

6. Petitioner's unit in Greater Noida was subjected to audit by Additional Commissioner (Audit), Central Excise, Noida for the period between April, 2010 to March, 2013 on 25th and 27th March, 2014. A copy of the audit report dated 6th June, 2014 was forwarded to the petitioner by the Superintendent, Range-2, Division-III, Noida vide their letter dated 28th July, 2014 with a request to deposit service tax in terms of paragraphs 1 to 6 of the audit report and to furnish details of deposits made. The main audit objection is to the petitioner's alleged failure to pay service tax on the Project Management Consultancy Charge (PMC charge, for short) also

known as agency charge or NBCC charge. The report observes that PMC Charge including mobilization advance towards PMC Charge were not exempt from service tax under the exemption Notification No.25/12-ST, which was qualified and restricted to contract services for construction of government buildings. The petitioner vide letter dated 20th October, 2014 has contested the allegation stating that the PMC Charges were exempt under Notification No.25/12-ST as they were a part and parcel of construction services undertaken for the government, governmental authority or local authority and were bundled services as per the terms of Section 66F(3) of the Finance Act, 1994 (Fin Act, for short). A number of letters were thereafter exchanged between the petitioner and the Commissionerate. We must clarify that interpretation and scope of the Notification No.25/12-ST is not directly the issue raised and pressed for adjudication in the present Writ Petition. Scope and ambit of this notification is not being decided and adjudicated.

7. Similarly, the Commissioner of Central Excise and Service Tax, Patna has issued demand-cum-show cause notice dated 13th March, 2015 for recovery of Service Tax, Education Cess and Secondary and Higher Education Cess of Rs.8,71,01,927/- on payments received by the petitioner for rendering service in the nature of advice and consultancy for technical assistance under the heading "Consultancy Engineer" service @ 10% of the total project executed under the *Pradhan Mantri Gram Sadak Yojana.* This demand-cum-show cause notice states that in-spite of repeated letters, the petitioner had failed to furnish requisite details.

8. As per the respondents the issue and question of service tax liability on PMC Charge is almost a universal issue that would arise across most

registrations. Consequently, file F.No. DGCEI/LNZU/NBCC/190/2015 was moved and vide impugned letter dated 3rd December, 2015, the Assistant Director (Investigation), DGCEI has conveyed and authorised the Additional Director General, Lucknow to investigate the case of service tax evasion by all branches of the petitioner. The investigation and enquiry are specific to the PMC Charge. The impugned letter dated 3rd December,2015 was issued for unified detailed enquiry on the PMC Charge by the Additional Director General, Lucknow after approval of the Director General. The respondents submit that centralised investigation is necessary and justified as multiple investigations all over the country on the same issue and question would result in inconvenience, harassment and wastage of time and resources.

9. As per the petitioner Chapter V of the Fin Act as amended from time to time relating to service tax does not permit centralized enquiry and investigation except where search has been conducted or arrest has been made under Section 90 of the Fin Act. Section 14 of the Central Excise Act, 1944 (hereinafter referred to as CE Act) states that summons could be issued by an officer making an enquiry. Therefore, summons cannot be issued by an officer not permitted to conduct enquiry or where no enquiry is pending. Summons under Section 14 of the CE Act can be issued in pending proceedings but not to collect evidence and material to decide whether or not to initiate proceedings for adjudication and recovery. Any authorized officer under Section 73 of the Fin Act during the course of pending proceedings is entitled to ask a person to produce accounts, documents etc. Accordingly, summons/notices under Section 14 of CE Act issued by the Office of Assistant Director, Directorate General of Central Excise

Intelligence, Regional Unit, Meerut asking for details and documents on all India basis are invalid and contrary to law. Rule 5A(1) of the Service Tax Rules,1994 (the Rules, for short) permits "an officer authorized by the Principal Commissioner or Commissioner" to have access to any premises registered under the Rules for purpose of scrutiny, verification and check. Special Audit can be directed under Section 72A of the Fin Act. These are the only prescribed and authorised methods by which details and documents can be summoned and statements recorded, when proceeding under Section 73 of the Fin Act have not been initiated. Further a Senior Intelligence Officer in the DGCEI, whose rank is that of Superintendent, cannot conduct an inquiry except in cases of nominal value of upto Rs.1,00,000/-. As per Section 12E of the CE Act, which applies in terms of Section 83 of the Fin Act to service tax proceedings, a senior officer can exercise power of subordinate officer and not vice versa. As per Sub-section (2) to Section 12E, Principal Commissioner of Central Excise or Commissioner of Central Excise (Appeals) is authorized to exercise power under Section 14 of the CE Act i.e. issue summons.

10. As per the petitioner, the following legal issues arise for consideration in the present writ petition:-

> "a. In the absence of any provision under the Finance Act, 1994, whether the DGCEI is empowered to conduct inquiry/investigation and is so what is the scope and safeguard for the tax payers?
>
> b. Whether the issuance of summons under section 14 Central Excise Act, 1944 has to be preceded by an inquiry, if so, said inquiry should be under specific provision of law or not?

c. Whether DG, DGCEI direction to investigate against Petitioner on all India basis by formation an opinion that "service tax evasion by all branches of NBCC" in impugned letter dated 03.12.2015 is based on any materials and sustainable in law?

d. Whether the Finance Act has provision for reassessment/reinvestigation for the same very period for which investigation/audit/issuance of SCN/Adjudication of SCNs have already been done, if so what is the scope and parameter of the same in the absence of any provisions in law?

e. Whether the officers of DGCEI are permitted to proceed on the change of opinion, if so what are the parameter in the absence of any review power under the law?

f. Whether in the facts and circumstances, the DGCEI investigation and issuance of summons is arbitrary, malicious and motivated?"

11. On the present writ petition being filed, a Division Bench vide order dated 10th February, 2016 had stayed further proceedings pursuant to summons dated 21st and 28th January, 2016. This stay order was made absolute vide order dated 26th April, 2016. Respondent-DGCEI had thereupon filed C.M. No. 21029/2016 requiring the petitioner to furnish information/documents set out in the application. This application was disposed of, vide order dated 27th May, 2015 referring to the stay order passed with reference to the summons with the observation that DGCEI could "gather information from the respective Service Tax Commissionerates in which the petitioner was registered for its operations within those jurisdictions".

12. Thereafter, another Division Bench passed the following detailed order dated 5th July, 2017:-

> "1. This petition, was listed for final hearing today. Mr. J.K. Mittal, learned counsel for the Petitioner addressed arguments.
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> 2. One of the central issues raised in the petition is that the purported enquiry against the Petitioner, which is a Public Sector Undertaking('PSU'), by the Meerut Regional Unit of the Director General of Central Excise Intelligence ('DGCEI') (whose Assistant Director is impleaded as Respondent No. 3) is entirely without jurisdiction. In particular, it is pointed out that the Petitioner, which essentially is undertaking projects of civil works and construction for various departments of the government and other PSUs, and which has 88 service tax registrations under the Finance Act 1994 (FA) is being issued notices by the various Commissionerates of Service Tax (ST)at Delhi, Allahabad, Patna, Noida, etc. While the Petitioner is contesting those proceedings separately, it has been asked by the Meerut Regional(which has become a Zonal unit since July 2017) to supply information and documents regarding the provision by it of project management consultancy services not limited to projects within the jurisdiction of the Meerut unit of the ST department but all over the country. The case of the Petitioner is that the charges for the above service is subsumed in the overall consideration it receives for the execution of various projects.
>
> 3. In any event, one of the central questions that arises is whether there is provision under the FA which vests power in the DGCEI that can enable it to permit one of the regional units of ST in the country to undertake an enquiry into the so-called non-payment

of service tax on the project management consultancy services rendered by the Petitioner throughout the country. In the entire counter-affidavit filed as well as the sur-rejoinder filed by Respondent No. 3 (the Assistant Director working at the Meerut Regional Unit of the ST Department) there is no reference to any such provision either in the FA or any other statute.

4. Another issue raised is that while issuing summons to the Petitioner, Respondent No. 3 has been invoking Section 14 of the Central Excise Act, 1944 ('Act'). Section 14 (1) of the CE Act talks of a 'duly empowered Central Excise Officer' having the power to issue such summons to a person to give evidence or produce documents "in any enquiry which such officer is making for any of the purposes of this Act." The question raised, therefore, is that where in fact no enquiry is being undertaken against the Petitioner, is it permissible to issue it summons under Section 14 of the CE Act?

5. The third issue relates to the Service Tax Rules, 1994 ('ST Rules'). Rule 5A (1) of the ST Rules permits "an officer authorized by the Principal Commissioner or Commissioner" to have access to any premises registered under these rules for the purpose of carrying out any scrutiny, verification and checks as may be necessary. The Petitioner has raised the question whether there is any such authorization in favour of the Assistant Commissioner and/or Senior Intelligence Officer Commissioner in the Meerut Unit of the ST Department to demand access to the records of the Petitioner pertaining to the projects undertaken by it throughout the county in terms of Rule 5A(1) of the ST Rules.

6. Without prejudice to the above contention, the Petitioner has offered that the officers of Respondent No. 3 can come to its office to inspect any of its documents. This has been declined by Respondent No. 3 who insists that the Petitioner should come to his office with all the documents. The-Petitioner questions the legality of such a demand. The specific contention of the Petitioner is that there is no provision either under the FA or the ST Rules that justifies it.

7. Mr J. K. Mittal, learned counsel for the Petitioner has also pointed out that the Petitioner regularly files ST returns and there is no invocation by Respondent No.3 of Section 72 (b) Of the FA to seek any explanation about alleged non-payment of ST. He drew the attention of the Court to the communication dated 3rd December, 2015 addressed by the DGCEI at New Delhi to the Additional Director General of the Lucknow Zonal Unit stating that the permission has been accorded "to investigate the said case of service tax evasion by all branches of NBCC." He submitted that there was no material whatsoever to come to such conclusion about 'evasion' of tax by the Petitioner.

8.Mr Satish Aggarwala, learned counsel appearing for the ST Department informed the Court that the original file was available in the Court. When asked whether there was any note of the Director General (DG) of the DGCEI himself referring to the specific provisions of the FA permitting the empowering of the officer in the Meerut Unit to undertake a general enquiry into the non-payment of service tax by the Petitioner on the fee for management consultancy services provided by it, Mr. Aggarwala answered while there was an approval on file by the DG, there was no note referring to the statutory provisions that enabled such a decision.

> 9. The Court observes that the counter affidavit and the sur-rejoinder filed by Respondent No.3 is unsatisfactory inasmuch as it fails to meet any of the above grounds urged by the Petitioner. The reply to the factual averments in-the petition is at best casual and by and large vague. In the circumstances, the Court directs that the DG of the DGCEI will himself personally file an affidavit in the matter addressing each of the questions that have been pointed out hereinbefore in this order and also reply to the petition parawise. In particular, the Court would like the DG-to file a proper reply to para10 of the petition. The affidavit of DG should be accompanied by all the circulars, notifications, orders and any other documents that are relevant to the questions that have been raised in the petition. The DG should explain in his affidavit the basis for the statement in the letter, dated 3rd December, 2015 addressed by the DGCEI at New Delhi to the Additional Director General of the Lucknow Zonal Unit that the there is "service tax evasion by all branches of NBCC."If there is any material in support of such a statement that should be enclosed along with the affidavit of DG.
>
> 10. The affidavit of the DG will be filed not later than four weeks from today with an advance copy to learned counsel for the Petitioner. The Petitioner is permitted to file a rejoinder thereto before the next date.
>
> 11. A senior official of DGCEI will remain present in the Court on the next date with all the relevant records.
> Liston22th August, 2017."

13. Thereupon additional affidavit was filed by the Respondents.

14. Contentions raised and to be decided are primarily two-fold. Firstly, whether the respondents can centralize investigation with DGCEI, Lucknow at one place with all India jurisdiction, though the petitioner has opted for 88 service tax registrations for different projects in different States. Secondly, whether an officer of DGCEI can act as the Central Excise Officer to issue summons for production of documents and papers and for recording of statements Section 14 of the CE Act even when no proceedings under Section 73 of the Fin Act or other provision are pending before the said officer. In other words, whether summons to produce documents/papers and for recording of statements on oath can be issued by an officer of DGCEI under Section 14 of CE Act to investigate and enquire into allegations of non-payment and evasion of tax. The two issues and questions overlap are being dealt with together.

15. Provisions for levy and imposition of service tax were introduced vide Chapter V in the Fin Act in 1994 and have been amended, updated and expanded from time to time. Service tax does not have a separate enactment like the CE Act, Customs Act or the Income Tax Act. Section 65B of the Fin Act which deals with interpretation vide clause 55 states that the words and expressions used in Chapter V of the Fin Act relating to service tax but not defined in the Chapter and are defined in the CE Act or the rules made thereunder, shall so far as may be apply in relation of service tax. Explanation clarifies for removal of doubts that provisions of Section 66 of Chapter V of the Fin Act for the purpose of levy and collection of service tax shall be construed as references to the provisions of Section 66B of the Fin Act. Section 66B creates a charge of service tax on or after Finance Act, 2012.

16. Section 83 of the Fin Act reads as under:-

> "83. **Application of certain provisions of Act 1 of 1944**
>
> The provisions of the following sections of the Central Excise Act, 1944, as in force from time to time, shall apply, so far as may be, in relation to service tax as they apply in relation to a duty of excise:-
> sub-section (2A) of section 5A, sub-section (2) of section 9A, 9AA, 9B, 9C, 9D, 9E, 11B, 11BB, 11C, 12, 12A, 12B, 12C, 12D, 12E, 14, 15, 15A, 15B, 31, 32, 32A to 32P (both inclusive), 33A, 34A, 35EE, 35F, 35FF, to 35-O (both inclusive), 35Q, 35R, 36, 36A, 36B, 37A, 37B, 37C, 37D, 38A and 40."

The said Section states that sections of the CE Act as stipulated and in force from time to time shall apply so far as may be in relation to service tax as they apply in relation to duty of excise. Sections 12E and 14 in addition to other provisions of the CE Act have been made applicable. Conspicuously provisions of the Income Tax Act have not been made applicable to service tax. We have made this observation as some of arguments by the petitioner proceed and are predicated on the procedure and principles applicable to the income tax proceeding, notwithstanding the difference in the statutory scheme and procedure prescribed under the Fin Act read-with and as per CE Act. The Fin Act and CE Act do not have provisions akin and similar to issue of notices under Sections 142(1) and 143(2) of the Income Tax Act for taking up service returns for verification and scrutiny assessment followed by an order of assessment under Section 143(3) of the Income Tax Act. In the Income Tax Act each assessment year is separate and self-contained period which is assessed to tax. Income Tax

Act is return-centric and assessment is made year-wise. When income for an assessment year has escaped assessment and notice for scrutiny/regular assessment under section 143(2) of the Income Tax Act cannot be issued on account of limitation or assessment order under Section 143(3) has been passed, procedure under Section 147 read-with Section 148 of the Income Tax Act can be invoked. Additionally, the Commissioner of Income Tax under Section 263 of the Income Tax Act has the power to revise assessments made if the assessment is erroneous and prejudicial to the interest of the Revenue. Requirements and statutory jurisdictional preconditions as stated by the Income Tax Act are to be satisfied for initiation of proceedings under Section 147 or 263 of the Income Tax Act. The statutory scheme and the procedure prescribed as applicable to service tax as noticed below are distinctly different. Differences between procedure and principles applicable under the Fin Act read-with CE Act and the Income Tax Act are manifold and need not be elaborated in entirety for the present judgment. However, we would encounter diametric difficulties if we apply the procedure and principles applicable to income tax proceedings to the procedure applicable to service tax as per the Fin Act. We would therefore elaborate and explain the procedure for assessment and also enquiry, adjudication and recovery of unpaid, unlevied or wrongly refunded service tax under the Fin Act.

17. We begin by referring to Sub-section 1 to Section 70 of the Fin Act, which reads as under:

> "**70: Furnishing of returns**. — (1) Every person liable to pay the service tax shall himself assess the tax due on the services provided by him and shall furnish to the Superintendent of Central Excise, a return in such form and in such manner and

> at such frequency and with such late fee not exceeding twenty thousand rupees, for delayed furnishing of return, as may be prescribed."

As per the said provision, every person is required to self-assess the tax due on the services provided by him and furnish and file return in such form and in such manner as stipulated. Rule 7 of the Rules requires every assessee to submit a half yearly service tax returns in the prescribed form. Returns for service tax in the form of digital data are required to be uploaded, albeit without any records and documents. Our attention has not been drawn to any provision in the Fin Act, applicable provisions of the CE Act or the Rules for taking up the service tax returns for scrutiny and regular assessment as is envisaged under the provisions of the Income-tax Act referred to in paragraph 16 above.

18. Section 73 of the Fin Act prescribes the procedure and is the complete code for recovery of service tax not or short levied or paid or erroneously refunded to a person. Sub-sections 1, 1A, 1B, 2, 2A,3,4,4B,5 and 6 of Section 73 of the Fin Act as amended and applicable w.e.f. 14th May, 2016 reads as under:

> "73. **Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded**. —
>
> (1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, Central Excise Officer may, within thirty months from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or

short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

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

(a) fraud; or

(b) collusion; or

(c) wilful mis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax;

by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "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.

(1A) Notwithstanding anything contained in sub-section (1) except the period of thirty months of serving the notice for recovery of service tax), the Central Excise Officer may serve, subsequent to any notice or notices served under that sub-section, a statement, containing the details of service tax not levied or paid or short levied or short paid or erroneously refunded for the

subsequent period, on the person chargeable to service tax, then, service of such statement shall be deemed to be service of notice on such person, subject to the condition that the grounds relied upon for the subsequent period are same as are mentioned in the earlier notices.

(1B) Notwithstanding anything contained in sub-section (1), in a case where the amount of service tax payable has been self-assessed in the return furnished under sub-section (1) of section 70, but not paid either in full or in part, the same shall be recovered along with interest thereon in any of the modes specified in section 87, without service of notice under sub-section (1).

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

[****]

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

(a) fraud; or

(b) collusion; or

(c) wilful misstatement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or the rules made thereunder with intent to evade payment of service tax;

has not been established against the person chargeable with the service tax, to whom the notice was issued, the Central Excise Officer shall determine the service tax payable by such person for the period of thirty months, as if the notice was issued for the offences for which limitation of thirty months applies under sub-section (1).

[* * *]

(3) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer before service of notice on him under sub-section (1) in respect of such service tax, and inform the [Central Excise Officer] of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the amount so paid :

Provided that the Central Excise Officer may determine the amount of short-payment of service tax or erroneously refunded service tax, if any, which in his opinion has not been paid by such person and, then, the Central Excise Officer shall proceed to recover such amount in the manner specified in this section, and the period of "thirty months" referred to in sub- section (1)

shall be counted from the date of receipt of such information of payment.

Explanation.1— For the removal of doubts, it is hereby declared that the interest under section 75 shall be payable on the amount paid by the person under this sub-section and also on the amount of short payment of service tax or erroneously refunded service tax, if any, as may be determined by the [Central Excise Officer], but for this sub-section.

Explanation 2. — For the removal of doubts, it is hereby declared that no penalty under any of the provisions of this Act or the rules made thereunder shall be imposed in respect of payment of service tax under this sub-section and interest thereon.

(4) Nothing contained in sub-section (3) shall apply to a case 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) wilfulmis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax.

4(A) [* * * *]

(4B) The Central Excise Officer shall determine the amount of service tax due under sub-section (2)—

(a) within six months from the date of notice where itis possible to do so, in respect of cases falling under sub-section (1);

(b) within one year from the date of notice, where it is possible to do so, in respect of cases falling under the proviso to sub-section (1) or the proviso to sub-section (4A)].

(5) The provisions of sub-section (3) shall not apply to any case where the service tax had become payable or ought to have been paid before the 14th day of May, 2003.

(6) For the purposes of this section, "relevant date" means, —

(i) in the case of taxable service in respect of which service tax has not been levied or paid or has been short-levied or short-paid —

(a) where under the rules made under this Chapter, a periodical return, showing particulars of service tax paid during the period to which the said return relates, is to be filed by an assessee, the date on which such return is so filed;

(b) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules;

(c) in any other case, the date on which the service tax is to be paid under this Chapter or the rules made thereunder;

(ii) in a case where the service tax is provisionally assessed under this Chapter or the rules made there

under, the date of adjustment of the service tax after the final assessment thereof;

(iii) in a case where any sum, relating to service tax, has erroneously been refunded, the date of such refund.]"

19. Sub-section 1 of Section 73 of the Fin Act states that the Central Excise Officer may within thirty months from the relevant date serve a notice on the person where service tax has not been levied, paid or short levied or short paid or is erroneously refunded. The expression 'relevant date' has been defined in Sub-section 6. Notice under Sub-section 1 to Section 73 of the Fin Act should state the reasons and grounds for the claim for recovery alleging non levy, payment or erroneous refund of service tax and must specify the amount of service tax for which the recovery proceedings have been initiated. Consequently, the show cause notice envisaged and as per the statutory mandate of Section 73(1) of the Fin Act must particularize and specify with factual and legal assertions why recovery of the amount quantified should not be made on account of non or short levy, payment or erroneous refund. Necessarily, these details and particulars should have been previously ascertained, as they would constitute the basis and foundation of the notice under Section 73(1) of the Fin Act. Proviso to Sub-section 1 to Section 73 of the Fin Act permits extended recovery for a period of upto five years in cases of fraud, collusion, wilful misstatement, suppression of facts or contravention of the Fin Act or the Rules with an intent to evade payment of service tax. To rely on and invoke the extended period the show cause notice issued by the Central Excise Officer must alleged and state fraud, collusion, wilful mis-representation, suppression on facts etc. Explanation to the Sub-Section 1 to

Section 73 provides that the period during which the service of notice is stayed by an order of the court shall be excluded in computing the period of limitation as aforesaid. Assessment in terms of Section 73(1) of the Fin Act is clearly period specific and not return specific. The period may or may not co-inside with the assessment year or even one return. At the same-time it may relate to several returns or a case where no return has been filed.

20. Sub-section 1A to Section 73 of the Fin Act as a *non-obstante* clause permits the Central Excise Officer to serve a statement containing details of service tax not levied, paid, short levied, short paid or erroneously refunded for subsequent period not exceeding thirty months where for the earlier period notice on the same grounds has been issued. Sub-section 1B clarifies that where the assessee/person has not paid self-assessment tax as per the return in full or in part, the deficient amount can be recovered along with interest without service of notice under Sub-section 1 to Section 73 of the Fin Act. Recovery of tax not paid in terms of the return does not require issue of notice under Section 73(1) of the Fin Act. Sub-section 2 to Section 73 states that the Central Excise Officer shall after considering the representation, if any, made by the assessee/ person on whom notice under Sub-section 1 has been served, determine and decide the amount of service-tax due or erroneously refunded. Thereupon, the person would be liable to pay the amount determined. Thus Section 73(2) of the Fin Act postulates passing of an adjudication or assessment order by the Central Excise Officer only and only after a show cause notice in terms of sub-section (1) to Section 73 of the Fin Act has been issued. Sub-section 2A states that if the appellate forum/Court holds that the extended period of five years under the proviso to Section 73(1) of the Fin Act is not applicable, service tax shall be

payable by such person for a period of thirty months. Sub-section 4B to Section 73 of the Fin Act fixes the time or limitation period within which the Central Excise Officer has to adjudicate and decide the show cause notice. The time period fixed under Clause A or B is six months and one year, respectively. Limitation period for passing of the adjudication order, described as Order-in-Original, starts from the date of notice under Sub-section 1 to Section 73 of the Fin Act.

21. Section 73(3) of the Fin Act permits any assessee to voluntarily on own assessment or as per the assessment of the Central Excise Officer before issue of show cause notice under Sub-Section 1 of the Fin Act, pay the service tax not levied or paid, short levied or paid or erroneously refunded. If such payment is made, notice under Sub-Section (1) is not issued is respect of the amount paid. This payment without any adjudication, has to be voluntary. However, if the Central Excise Officer is of the view that the amount so paid is not the full or entire amount due, he is empowered to proceed to recover the short payment in the manner provided by Sub-Section (1) to Section 73 of the Fin Act. Explanation 2 states that where the assessee has made payment in terms of sub section (3) to Section73, then no penalty under the provisions of the Fin Act or the Rules shall be imposed. However, interest as stipulated has to be paid. Sub-Section 4 states that nothing in Sub-Section 3 shall apply to cases of fraud, collusion, wilful misstatement, suppression of facts or contravention of any of the provisions of the chapter V or Rules thereunder with the intent to evade payment of tax.

22. Thus, as per Section 73, unless payment is made in terms of sub-section 3 and 4 thereof, the starting point for proceedings for adjudicatory

assessment is the issue of the show cause notice under Section 73(1) of the Fin Act. It is not the service tax return *per se*, but the show cause notice which is adjudicated and decided. This is the procedure prescribed by the statute for recovery of service tax in cases of non levy, non payment, short levy, short payment and erroneous refund. The notice under Section 73(1) of the Fin Act should contain and state reasons for issue both factual and legal and specify the amount for which recovery proceedings have been initiated. This requirement and mandate of Section 73(1) of the Fin Act has to be kept in mind when we examine the procedural provisions and power vested with the Central Excise Officer to conduct enquiry and investigate to ascertain details and facts.

23. Similar provisions in the CE Act in the form of Sub-sections 1 and 2 to Section 11A of the CE Act were interpreted by the Supreme Court in ***Golak Patel Volkart Limited Vs. Collector of Central Excise, Belgaum*** (1987) 2 SCC 93, *inter alia* observing that the statutory scheme requires issue of show cause notice by the Central Excise Officer, response by the person served with the show cause notice and final determination by the order in original. Issue of show cause notice is a condition precedent to raising an enforceable demand. This ratio has been followed and elucidated in other judgments of the Supreme Court in ***Commissioner of Central Excise, Vishakhapatnam Vs. Mehta & Co.*** (2011) 4 SCC 435, and ***Union of India &Ors. Vs. MadhumilanSyntexPvt. Ltd &Anr.*** (1988) 3 SCC 348. In ***New Decent Footwear Industries Vs. Union of India*** (2002)150 ELT 71 (Del.), a Division Bench of this court referring to the proviso to Sub-section (1) of Section 11A of the CE Act had held that the Central Excise Officer to take recourse to the extended period as per the proviso must bring on record

sufficient material to prove existence of the jurisdictional facts for the said purpose. In the absence of assertion of jurisdictional facts, proceedings can be considered to be without jurisdiction. The sequitur is that Section 73 of the Fin Act like Section 11A of the CE Act postulates that the authorities are empowered to conduct investigation, collect and examine documents, record statements etc. before they form their opinion whether or not to issue show cause notice under Section 73(1) of the Fin Act. This issue of notice under Section 73 of the Fin Act like Section 11A of the CE Act becomes a starting point for further proceedings and the adjudication order which decides the show cause notice.

24. Reference was made to Section 72 of the Fin Act, which reads as under:-

> **"72. Best judgement assessment**:-
>
> If any person, liable to pay service tax,-
> (a) fails to furnish the return under section 70;
>
> (b) having made a return, fails to assess the tax in accordance with the provisions of this Chapter or rules made there under,
>
> the Central Excise Officer, may require the person to produce such accounts, documents or other evidence as he may deem necessary and after taking into account all the relevant material which is available or which he has gathered, shall by an order in writing, after giving the person an opportunity of being heard, make the assessment of the value of taxable service to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment."

Section 72 of the Fin Act, as the heading empowers best judgment assessment in cases where a person liable to pay service tax (a) fails to submit return or (b) files a return but fails to access the tax in accordance with provisions of chapter or Rules. As per the respondents failure to pay service tax according to the provisions of the chapter V and Rules is the pre-requisite and pre-condition for invoking clause (b) to Section 72 of the Fin Act. Provisions of Section 72(b) would apply only when the assessee had failed to access the tax in accordance with provisions of Chapter V of the Fin Act.

25. Section 72 of the Fin Act, as the heading states, empowers and authorises the Central Excise Officer to make and pass an order known as 'best judgment assessment'. In terms, the Central Excise Officer can make an assessment of the value of the taxable service to the 'best of the judgment' and determine the sum payable by an assessee or refundable to the assessee on the basis of such assessment. The expression 'best judgment assessment' is to be found in Section 144 of the Income Tax Act and is a well-known and understood. Section 144 of the Income-tax Act is applied when an assessee fails to make a return or fails to comply with the notice issued to substantiate the return or directions issued for production of documents, etc. The expression 'best judgment assessment' in tax enactments refers to fair estimate and reasonable determination of the taxable amount made by the Assessing Officer, when it is not possible to compute the taxable amount on the basis of records and material made available. It is a type of assessment authorized by law in the absence of full and complete details and material. 'Best judgment assessment' need not be

exact and precise, *albeit* an objective and fair assessment of the taxable amount based upon the material and evidence available and gathered. This provision cannot be equated with and read as a provision prescribing and authorizing a separate and alternative procedure for adjudication under Section 73 of the Fin Act. Section 72 does not authorise Central Excise Officer to take up returns for service tax for scrutiny assessment and pass an adjudicatory order, except possibly in cases where refund is claimed. This is not only clear from the expression 'best of his judgment' used in the heading and main part of Section 72, but also when we harmoniously read this Section with Section 73 which prescribes a detailed procedure with limitation periods with regard to the period for which show cause notice can be issued quantifying the demand raised as also the time period within which the show cause notice is to be adjudicated. Said prescriptions and stipulations made in Section 73 are missing in Section 72 of the Fin Act, for the Section 72 only allows the Central Excise Officer to make 'best judgment assessment'. Section 72 of the Fin Act does not prescribe a procedure for taking up the service tax returns for assessments, except when refund of tax is due as per the return and has to be adjudicated.

26. Provisions of Chapter V, Section 73(1) in particular, and the Rules are also clear pointers that Section 72 is a provision which authorises and empowers the Central Excise Officer to make 'best judgment assessment' in proceedings for recovery under and in terms of Section 73 of the Fin Act. Neither Section 72 nor Rules postulate passing of an assessment order for recovery of service tax independent of and without following the procedure under Section 73(1) of the Fin Act. Section 72 of the Fin Act only

authorises and states "best judgement assessment" order can be passed when the circumstances so warrant.

27. In view of the above discussion and ratio, we would in a given case accept that there could be more than one show cause notice over-lapping the same period of time for distinct issues and subject matters. The Fin Act does not bar and prohibit different show cause notices on different issues, facts and subject matter. Each show cause notice being independent has to be adjudicated and decided. Once decided the decision under Section 73(2) of the Fin Act would be binding unless challenged and questioned as per procedure prescribed. We would add a note of caution. Repeated or multiple show cause notices under Section 73(1) of the Fin Act can result in harassment and inconvenience and also reflect on the governance and administration of the Fin Act. Every attempt should be made to issue consolidated show cause notices even on divergent issues and subject matters. In addition, because of delay and limitation period prescribed under Section 73(1) of the Fin Act recoveries could lapse.

28. Section 14 of the CE Act, which applies to service tax, in terms of Section 83 Chapter V of the Fin Act, reads as under:-

> "14. **Power to summon persons to give evidence and produce documents in inquiries under this Act**.—
>
> (1)Any Central Excise Officer duly empowered by the Central Government in this behalf shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making for any of the purposes of this Act. A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things

> of a certain description in the possession or under the control of the person summoned.
>
> (2) All persons so summoned shall be bound to attend, either in person or by an authorised agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and to produce such documents and other things as may be required:
>
> Provided that the exemptions under sections 132 and 133 of the Code of Civil Procedure (5 of 1908) shall be applicable to requisitions for attendance under this section.
>
> (3) Every such inquiry as aforesaid shall be deemed to be a "judicial proceeding" within the meaning of section 193 and section 228 of the Indian Penal Code (45 of 1860)."

The aforesaid section empowers the Central Excise Officer to issue summons to any person to give evidence and produce documents. The summons can be issued to any person whose attendance the officer considers necessary. The power can be exercised to collect evidence or a document or any other thing in any inquiry which the officer is making for any purposes under the Act. Use of the words "any inquiry" and "for any purposes under the Act" are significant and important when we examine the contention of the petitioner that the word "inquiry" used in Section 14 of the CE Act would mean enquiry post the issue of show cause notice under Section 73(1) of the Fin Act and not before issue of a notice under the said section. The word "inquiry" has not been defined in the CE Act or in the Fin Act. The said word has to be read contextually and in harmony with the scheme and procedure under CE Act and Fin Act. The statutory requirement

is that the enquiry which the officer is making should be for any of the purposes of the Fin Act. The expression "any of the purposes of this Act" used in Section 14 of the CE Act though a wide and broad expression is also a restriction. When read in this manner, we would not restrict and confine the scope and power to collect evidence, documents etc. to cases where show cause notice under Section 73(1) of the Fin Act has been issued or any other specific proceeding is pending. Summons under Section 14 of the CE Act can be issued to ascertain and verify details and ask for relevant evidence and material for the purpose of the Fin Act. This would be the right way to interpret Section 14 of the CE Act, for the procedure prescribed and followed both in CE Act and Fin Act is that the show-cause notice is issued post and after information, evidence and documents have been collected and facts are ascertained. This is the precondition for initiation of proceedings for recovery under Section 73 of the Fin Act. We are therefore not inclined to accept the contention giving a restricted meaning to the term 'inquiry' in Section 14 of the CE Act, as confined to post notice enquiry after issue of notice under Section 73(1) of the Fin Act. Pendency of proceeding of recovery under Section 73(1) of the Fin Act or any other statutory proceedings is not a condition precedent for issue of notice under Section 14 of the CE Act. Notice or summons under Section 14 of the CE Act can be issued by the Central Excise Officer when required and necessary for any enquiry relating to service tax.

29. We should not be understood as accepting or stating that notice or summons under Section 14 of the CE Act can be issued without any cause, reason or justification. Any power given cannot be abused and exercised in an arbitrary manner or for ulterior motives. Motivated and capricious

deviations in exercise of power under Section 14 of the CE Act can always be checked by the Court. The respondents have themselves stated that they have not liberally or wantonly exercised the said power. This has been done rarely and in select cases.

30. At this stage, it would be relevant to deal with the contention of the petitioner that the respondents have the power to conduct Special Audit under Section 72A of the Fin Act and access and visit the premises registered with the Service Tax Department under Rule 5A of the Rules. The petitioner referring to Rule 5A had stated that they would have no objection to an authorised officer from the Commissionerate having access to the premises registered under the Rules for the purpose of carrying out scrutiny, verification and check. Even Special Audit could be conducted. Respondents on the other hand submit that Rule 5A is for periodical checks by the officers and notwithstanding the said power, the Board can issue a notification vesting all-India power with the particular Central Excise Officer in view of Rule 2(b) of the CE Act.

31. Rule 5A of the Rules reads as under:-

> "5A. Access to a registered premises. (1) An officer authorised by the [Principal Commissioner or Commissioner, as the case may be] in this behalf shall have access to any premises registered under these rules for the purpose of carrying out any scrutiny, verification and checks as may be necessary to safeguard the interest of revenue.
> (2) Every assessee, shall, on demand make available to the officer empowered under sub-rule (1) or the audit party deputed by the Commissioner or the Comptroller and Auditor General of India, or a cost

> accountant or chartered accountant nominated under section 72A of the Finance Act, 1994,-
> (i) the records maintained or prepared by him in terms of sub-rule (2) of rule 5;
> (ii) the cost audit reports, if any, under section 148 of the Companies Act, 2013 (18 of 2013); and
> (iii) the income-tax audit report, if any, under section 44AB of the Income-tax Act, 1961 (43 of 1961)
>
> for the scrutiny of the officer or the audit party, or the cost accountant or chartered accountant, within the time limit specified by the said officer or the audit party or the cost accountant or chartered accountant, as the case may be."

Rule 5A no doubt vests and authorises the Central Excise Officers with power to access registered premises of a person for scrutiny, verification and check but this would not show that the Central Excise Officer does not have power and cannot take recourse to investigation and issue summons for collection of evidence and documents under Section 14 of the CE Act. The power conferred in the form of Section 14 of the CE Act, like conduct of Special Audit under Section 72A or access to the registered premises under Rule 5A(1) have the same object and purpose i.e. empower the Central Excise Officer to ascertain facts and also collect material and evidence. Normally, we would expect an assessee to object to access under Rule 5A because it may intrude and violates privacy, *albeit* and rather strangely in the present case the petitioner is not objecting to such verification and access under Rule 5A and states that it should be resorted to and exercised. Similarly the power to direct Special Audit under Section 72A of the Fin Act is certainly more intrusive and compelling. These

arguments have to be rejected as power under Section 14 of the CE Act and other powers relating to investigation and enquires cohabit and exist together and also independently. It may not be appropriate to exercise power under Rule 5A, when direction to produce documents and furnish information would be appropriate and suffice.

32. At the same-time we would also observe that the stand of the respondents that Rule 5A(1) is for periodic checks and not for specific investigation or inquiry is wrong and unacceptable. Authorities can certainly resort to Rule 5A(1) in cases where access to the registered premises is required for specific investigation and enquiry. They can exercise power under Rule 5A of the Rules when necessary and justified. We also find it incongruous for the respondents to assert that verification or inspection in terms of Rule 5A(1) would cause inconvenience and create difficulty for the Revenue and, therefore, the petitioner-assessee must produce their records and the officers of the petitioner must remain in attendance. In a given case where the documents and details are voluminous or there are several queries that require authentication and verification from the computerised or otherwise bulky records, invocation of power in terms of Rule 5A(1) may be desirable and more convenient for both the Revenue and the assessee. Convenience of the assessee matters and must be given due consideration as much as convenience of the officers. Neither should be disregarded and ignored as inconsequential by the officers of the respondents, who have been empowered to decide which power or provision should be invoked.

33. Exercise of discretionary power relating to procedure can be challenged on limited number of grounds, like patent and gross misuse, *ex*

facie grave disproportionate hardship and inconvenience to the person when a more convenient and acceptable mode for compliance is available, or *mala fides* in exercise of power etc. Courts would, however, not interfere merely because the authority has exercised discretion that is not acceptable to the assessee. The choice whether or not to exercise power of special audit, summons etc. is for the respondents to decide and exercise, and not for the petitioner to direct.

34. However, we have reservation on the language used in some of the notices/summons requiring presence of the Managing Director and senior officer of the petitioner with threats or warning that they would be punished or prosecuted. Presence of senior officer may not be necessary when legal issues arise for consideration. Assessee on such issues depends and relies on professional advice. Even when facts are to be ascertained and documents are required, personal presence of senior officer may not be necessary unless there are compelling reasons. The respondents would be well advised to refrain and not use and give threats. The letters/notices must be appropriately worded. In a given case they may refer to the penal or prosecution provisions to ensure compliance but they should not intimidate and be minatory.

35. Our findings and observations above are not *res integra*. Similar issue was raised and answered by a Division Bench of this Court in ***L.M.L. Ltd. Vs. R.K. Sharma***, 2000 (117) E.L.T. 34 (Del.). In the said case, the summons issued by the Director General were challenged on the ground of lack of jurisdiction for the summons did not specify the grounds for holding enquiry. No enquiry was pending and the 'assessment' had been completed. It was argued that there was no provision for re-opening. In such

circumstances, authorities could not have asked for documents or papers. Issue of summons, it was asserted was illegal and would cause harassment. Interpreting Section 14 of the CE Act and after referring to Section 2(b) of the CE Act, it was observed that the Assistant Director need not disclose material which had necessitated holding of inquiry and issue of summons. Section 14 of the CE Act gives authority and power to Assistant Director to ask for evidence and production of documents. Relevant observations and ratio elucidated reads:-

> "**8.** Thus it would appear that the Asstt. Director by virtue of he being a Central Excise Officer having been conferred with all the powers of a Central Excise Officer is conducting an inquiry for the purpose of the Act and as such is empowered to summon any person for giving evidence or for production of documents. The notification also makes it clear that the officers who have been appointed as Central Excise Officers, have been conferred all the powers to be exercised by them throughout the territory of India. The notification thus makes it clear that there are no territorial limitations for exercising the powers under the aforesaid notification. We fail to understand as to how the Assistant Director is acting without jurisdiction as contended by learned Counsel for the petitioner. In our opinion, the contention is unfounded. As already stated, the Asstt. Director being a Central Excise Officer duly empowered by Central Govt. under Section 14 has jurisdiction to issue summons for the purposes specified under Section 14 by virtue of the aforesaid notification. We are further of the opinion that it was not necessary for the Asstt. Director to disclose the material which necessitated holding of the inquiry in the summons. The Asstt. Director is holding a statutory inquiry and so is acting within his

> jurisdiction and it cannot be said that the Asstt. Director has no authority to proceed under Section 14 to issue summons for evidence and for production of documents."

36. Similarly a single Judge of the High Court of Calcutta in ***Mira Chemical Industries Ltd. Vs. D.P. Anand, Collector of Central Excise, Calcutta***, 2000 (123) E.L.T. 147 (Cal.) has held that power under Section 14 of the CE Act could be exercised by a duly authorized officer for any kind of investigation under the Act or the Rules and there was no restriction on any particular matter arising out of the CE Act. The officers were entitled to issue summons and ask the party to comply with the directions. In the said case, the contention that the authorities were asking the party to reveal confidential and secret industrial process, was rejected, observing that the authorities had no intention to probe any secret industrial process, nor was the grievance a genuine one.

37. In ***British Physical Laboratories India Ltd. Vs. Assistant Collector, Directorate of Revenue, Intelligence Anti-Evasion (Central Excise) and Anr.***, 1983 (14) E.L.T. 2270 (Kar.), it was observed that Section 14 of the CE Act empowers the Director to summon any person to give evidence and produce documents in inquiries under the Act. The notice issued was within the power of the Director.

38. ***T.T.V. Dinakaran Vs. Enforcement Officer, Enforcement Directorate***, 1995 (80) E.L.T. 745 (Mad.), the Court had dealt with and interpreted Section 40 of the Foreign Exchange Regulation Act, 1973, empowering any Gazetted Officer of Enforcement with the power to summon any person whose attendance was necessary either to give evidence

or to produce a document during the course of any investigation or proceeding under the Act. It was held that non-mentioning of the nature of investigation and purpose of requiring documents would not vitiate the summons. In the context whether unfettered discretionary powers could be given to the authority, the Court observed that the action of issuing summons could be challenged even if there was no need and requirement to record reasons to believe. In such cases, the authority when challenged must produce relevant evidence or basis for issuing summons before the Court. Judgment of the Supreme Court in ***Barium Chemicals Ltd. and Ors. Vs. A.J. Rana and Ors.***, AIR 1972 SC 591, was distinguished in view of difference in language and the wordings of Section 19 (2) of the Foreign Exchange Regulation Act, 1947. It was also observed that there was no vagueness in respect of the documents called for in the said case.

39. In ***Rainbow Trading Co. Vs. Assistant Collector of Customs***, AIR 1963 Madras 434, a Division Bench of the Madras High Court had examined and interpreted Section 171-A of Sea Customs Act, 1878 empowering any officer of the customs to summon any person whose attendance he considers necessary to give evidence in any enquiry, which the officer was making in connection with the smuggling of goods. Referring to this section and Sections 169 and 170 of the Sea Customs Act, it was held that the purpose of the first provision was to enable the officer to gather information with regard to smuggling offences though no one was an accused or charged with any offence, but someone may be suspected of having committed an offence. Summons could be issued asking the said person to give information and not as a witness to depose against someone. The enquiry could be to ascertain whether or not a wrongful act or even

breach of law was done. Proceedings under Section 171-A need not be in relation to any criminal prosecution and could even be an essential preliminary to such proceedings. It was held that there was little doubt having regard to the difficulties attendant to tracing a smuggler that the power to obtain compelled testimony from anyone in possession of the relevant information would constitute a just relation to the object of the enactment. The power could very much be exercised for detection, which would be covered and could be treated as enquiry and, therefore, the provision was valid as it had conferred power of detection and right to compel parties having requisite documents, knowledge and information and to produce the document and furnish the information.

40. We would now examine whether officers of DGCEI are Central Excise Officers and have all India jurisdiction. We would begin by reproducing the statutory definition of Central Excise officer in Section 2 (b) of the CE Act, which reads:-

> "[(b)] "Central Excise Officer" means the [6][Principal Chief Commissioner of Central Excise, Chief Commissioner of Central Excise, Principal Commissioner of Central Excise], Commissioner of Central Excise, Commissioner of Central Excise(Appeals), Additional Commissioner of Central Excise, 7[Joint Commissioner of Central Excise,] [8][Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] or any other officer of the Central Excise Department, or any person (including an officer of the State Government) invested by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) with any of the powers of a Central Excise Officer under this Act;"

41. In ***Duncan Agro Industries Limited Vs. Union of India***, 1989 (39) E.L.T. 211 (Del.), it was observed that Central Excise Officer as defined in Section 2(b) of the CE Act would mean any officer of the Central Excise Department mentioned in the sub-section or any person, including an officer of the State Government invested by the Central Board of Excise and Customs ('the Board' for short) with any of the powers of a Central Excise Officer. The aforesaid definition is wide and broad. Rule 4 of the Central Excise Rules relates to appointment of officers and provides that the Board could appoint such persons as it thinks fit to be a Central Excise Officer or to exercise all or any of the powers conferred under the Rules on such officer.

42. Rule 3 of the Rules reads:-

> "3. **Appointment of officers**
>
> "The Central Board of Excise and Customs may appoint such Central Excise Officers as it thinks fit for exercising the powers under Chapter V of the Act within such local limits as it may assign to them as also specify the taxable service in relation to which any such Central Excise Officer shall exercise his powers."

Rule 3 of the Rules states that the Board may appoint such Central Excise Officers as they think fit for exercising the powers under Chapter V of the Fin Act. Rule thus empowers and authorises the Board to appoint Central Excise Officers to exercise power relating to service tax. Thus investigation/inquiry functions and adjudicatory functions can be demarcated and divided between/amongst different Central Excise Officers. While dividing and demarcating the functions, the Board for the said

purpose can fix local limits within which the Central Excise Officer would exercise power and also specify the taxable service in relation to which such power can be exercised. Thus, the Fin Act or the Rules i.e. Chapter V of the Finance Act, 1994 or Service Tax Rules,1994, do not refer to and specify territorial or pecuniary jurisdiction to the Central Excise Officer in relation to powers to be exercised under the Fin Act. This is left to the Board to decide and confer power on the Central Excise Officers. We would observe that Rule 3 of the Rules confers very wide discretion to the Board without any restriction and limitation to confer jurisdiction on the Central Excise Officers to exercise powers under the Fin Act and the Rules. The Board is empowered to assign, withhold, and confer jurisdiction amongst different officers and for this purpose demarcate and divide the functions to be performed. Rule 3 of the Rules, no doubt, refers to local limits i.e., the area or the 'Venue'. However, taxation laws recognise difference and distinction between 'jurisdiction' and 'venue'. The term 'venue' refers to place of assessment i.e. location at which the party may request the case to be tried. The question of 'jurisdiction' relates to the subject matter i.e. jurisdiction of an officer to exercise power. A person who is not the Central Excise Officer, lacks subject matter jurisdiction and consequently any action, act or order would suffer from lack of 'jurisdiction' in a sense that it cannot be waived. Lack of jurisdiction by way of subject matter can be challenged at any time, even in the execution proceedings and cannot be waived by consent. Lack of jurisdiction by 'venue' can be waived by consent or when not raised within reasonable time by applying principle of estoppel. No assessee has a vested right to be assessed at a particular location and 'venue'.

43. Consequently, it follows and we hold that the Board has wide discretion in power while fixing the local limit assigned to a Central Excise Officer. Local limit can be pan or all India. This position must be accepted as in cases of centralized registrations all India jurisdiction is exercised. Argument and contention that use of the expression 'local limit' impliedly excludes all India jurisdiction is without foundation and fallacious. The provision permits and allows the Board to fix 'local limits' and does not bar and prevent the Board from conferring all India jurisdiction. The Board is equally empowered to authorize centralised or pan India investigations to be undertaken by the Central Excise Officers. This may indeed be desirable and necessary to curtail delay, facilitate complete and detailed investigation at one location rather than multiple investigations and enquiries which would be overlapping. Multiple enquiries would be inconvenient and cause harassment to many-a-assessee specially when similar or identical issues are involved. A pragmatic and practical approach is required in matters of procedure.

44. The Bench in ***Duncan Agro Industries Limited*** (supra) referred to notification dated 29th May, 1986 by which the Director of Inspection and Audit (Customs and Central Excise), New Delhi was appointed as the Central Excise Officer and invested with the powers of Collector of Central Excise throughout the territory of India. It was observed that the statute and the Rule had empowered the Board to confer jurisdiction for the purpose of investigation and adjudication and the expression "any person" would include an officer of Central Excise Department or even for that matter an officer of the State Government, who could be vested with the power by the Board. There was no warrant to give a limited or narrow scope to the

language employed by the Legislature in the second part of Section 2(b). Use of the word "invested" in Sub-section (b) to Section 2 meant that the Board was competent to invest powers in any person, which power was not circumscribed and controlled by territorial or pecuniary limits, which means both investigation and adjudication of cases could be assigned to the officers by the Board from time to time. Accordingly, notification dated 29th May, 1986 vesting the power of investigation with the Director General of Inspection and Audit, Customs and Central Excise, New Delhi for the entire territory of India was upheld as this was permissible under the provisions of Sub-section (b) to Section 2 of the CE Act. Reference was made to an earlier decision of a Division Bench of this Court in Writ Petition No. 2918/1987, decided on 12th October, 1987.

45. In ***Duncan Agro Industries Limited*** (supra), one of the contentions raised was that the statute, i.e., Central Excise Act does not specifically provide for power of transfer of a case and hence the order under challenge in the said case transferring the pending cases to the Director (Audit) in the Directorate General of Inspection and Audit, Customs and Central Excise, New Delhi was impermissible and contrary to law. Reliance and reference was made to several statutory provisions. The Court rejected the contention for the following reasons:-

> "**34.** The Central Board of Excise and Customs is constituted under the Central Board of Revenue Act, 1963 and we have held that it is vested with the power to appoint and invest under Section-2(b) read with Rule 4. It empowers the Board to appoint such persons as it thinks fit to be Central Excise Officers and to invest them with the powers under the Act and the Rules. In exercise of those powers, the Board has

invested the Director (Audit) with the power of a Collector of Central Excise with territorial jurisdiction extended to all over India. Mr. Ramaswamy, the learned Addl. Solicitor General, has invited our attention to the averments made in the counter-affidavit as to the considerations of assigning the case between two competent Collectors. It is stated that the object of assigning the cases to the Director (Audit) is that since he is vested with All India jurisdiction, it will be convenient and expedient in public interest both for the petitioners as well as for the department to have the case adjudicated by him at one place as in the present case the petitioner's activities are spread over many other places than the State of Andhra Pradesh. There is no requirement of law that the exercise of administrative power has necessarily to be canalised or guided. In the context of modern conditions and the complexity of the situations, it is not possible for the legislature to envisage in detail every possible variety that presents itself for solution. A wide discretion is, therefore, left for investing of powers and then assignment of cases. The Courts will scrutinise the exercise of power and if it is a colourable exercise of power or for extraneous considerations, then the exercise of power will be struck down. Mr. Ramaswamy further stated at the Bar that the Department undertakes to hold the hearings in adjudication proceedings at Guntur or at such other convenient place as the notices desire. This is recorded.

35. As we have held earlier, there is no territorial limitation laid in the statute and more than one officer is envisaged in the statute to have territorial jurisdiction over the land or premises of the producer of any excisable goods. If two or more Collectors are competent to adjudicate the cases of a manufacturer or producer, then the power inheres in the Board to

assign a case to one of the competent authorities. There is an implied authority to assign a case to one for investigation and adjudication. There is no vested right in a manufacturer or producer to be assessed by a particular functionary. The Rules do not either expressly or by necessary implication apply the rules of *audi alteram partem* in assignment of cases to one out of two competent authorities. The impugned order dated February 11, 1987 only assigns to the Director (Audit) the cases annexed to that order for the purpose of investigation and adjudication. It is merely a ministerial act of assigning between two competent jurisdictions. It is purely an administrative function by the Board. The principles of natural justice have been reiterated in "*S.R. Dass* v. *Union of India*", 1986 Supp SCC 617 : A.I.R. 1987 S.C. 593 in these words:

> "In the instant cases statutory Regulations do not expressly or by implication apply the rule of *audi alteram partem* in making the selection. On the other hand the scheme contained under the regulations exclude the applicability of the aforesaid fule by implication. Select list is prepared each year which ordinarily continues to be effective for a year or till the fresh select list is prepared. If during the process of selection a senior officer is proposed to be superseded by virtue of not being included in the select list, and if opportunity is afforded to him to make represervation and only thereafter the list is finalised, the process would be cumbersome and time consuming. In this process it will be difficult for the committee to prepare and finalise the select list within a reasonable period of time and the very purpose of preparing the select list would be defeated. Scheme of the Regulations therefore clearly

> warrants exclusion of principle of *audi alteram partem*. No vested legal right of a member of the State Civil Service who after being considered is not included in the select list, is adversely affected. Non-inclusion in the select list does not take away any right of a member of the State Civil Service that may have accrued to him as a Government servant, therefore no opportunity is necessary to be afforded to him for making representation against the proposed supersession."

The statutory rules do not compel a notice on assignment of cases. It appears from the record that the assignment of the cases to the Director (Audit) was motivated with the purpose of centralising the various cases of the petitioners scattered over a number of Col-lectorates of Central Excise because of the petitioner's business being spread over many States. The jurisdiction had inter-collectorate ramifications. It was, therefore, for administrative convenience to assign particular cases to an authority having all India jurisdiction. It did not take away the normal jurisdiction of the Collector, Guntur who still retains the power under the Act and the Rules to investigate new cases coming up from within the jurisdiction. He continues to have an account of the petitioners as the land or premises where the excisable goods are being produced falls within his jurisdiction. It is because of this that the Collector, Guntur has competency to issue the supplementary show cause notice.

36. It is true that a judicial power cannot ordinarily be delegated unless the law expressly or by clear implication permits it. Section 37A of the Act empowers the Central Government to direct by a notification, *inter alia*, that any power exercisable by

> a Collector of Central Excise under the Act may be exercisable by a Deputy Collector etc."

The aforesaid paragraphs are relevant for they clearly observe that in the CE Act there was no concept of territorial jurisdiction laid in the Statute itself and it was possible that more than one officer may have concurrent jurisdiction to adjudicate the cases of a manufacturer or producer. The Board was empowered to assign cases to one of the competent authorities. There was no vested right in a manufacturer or producer to be assessed by a particular functionary. The Board when it would assign adjudication or investigation function to a particular officer, would act purely in administrative capacity and, therefore, the rule of *audi alteram partem* would not expressly or by necessary implication apply. The decision observed that there was no requirement in the statute or the law that this exercise of administrative power must be canalised or guided, as in the context of modern conditions, complexity of situations, etc., it was impossible for the Legislature to envisage in detail every possible variety of situations. The Court held that the investing of power on Director (Audit) in the said case with All-India jurisdiction was convenient and expedient in public interest both for the Revenue and the assessee as this would ensure that the proceedings were held at one place and not spread over other places. Of course, the Court could scrutinise exercise of power if it was colourable or for extraneous consideration. Distinction between existence of power, and exercise of power was emphasised.

46. The petitioner has relied upon judgment of a Division Bench of Andhra Pradesh High Court in ***Sri Balaji Rice Company versus Commercial Tax Officer No. 1, Nallore*** **and Others** reported as (1984) 55

STC 292 (AP). The said judgment relates to Andhra Pradesh General Sales Tax Act and Section 4 thereof, which states that officers shall perform functions within such local limits as the State Government or any authority or officer empowered may assign. In the context of statutory provision and with reference to the Rules, the Division Bench had observed that the expression "within such local limits as assigned" would not empower the officer to function and exercise such power throughout the State of Andhra Pradesh for making the assessments under the Act. It was held that the statute did not postulate jurisdiction over whole State of Andhra Pradesh as the provision was designed to avoid inconvenience and hardship to the dealers outside and beyond their local limits where they were registered. Thus, while Section 4 permits fixing of territorial limits, the same should be less than the entire or whole State of Andhra Pradesh. The said judgment relates to a different enactment. We are bound and would prefer to follow the ratio and reasoning of this Court in ***Duncan Agro Industries Limited*** (supra) referred to above.

47. Somewhat connected issue raised by the petitioner relates to the question whether a Senior Intelligence Officer, who is of the rank of Superintendent, can issue notice under Section 14 of the CE Act. Rule 3 of the Rules, as noted above, states that Board may appoint such Central Excise Officers as it think fit for exercising the power under Chapter V of the Fin Act. It stipulates that such powers can be exercised within such local limits as may be assigned to them and also specify taxable service in relation to which the Central Excise Officer can exercise his powers. In terms of the said Rule, the Board has issued Notification Nos. 20/2014 and 22/2014 both dated 16th September, 2014. Notification No. 20/2014 (the

first notification) is a master notification which defines territorial jurisdiction (local limits) of the field formations on geographical basis. It specifies territorial jurisdiction for exercise of powers by officers in service tax matters. Notification No. 22/2014 (the second notification) specifies jurisdiction of officers of DGCEI throughout territory of India and empowers them with all powers under Chapter V of the Fin Act. The second notification clearly answers the contention raised. Validity of this notification is not challenged in the writ petition. Learned counsel for the petitioner in the written submission had questioned validity of the second notification, but in the absence of pleadings and prayer in the writ petition the contention cannot be examined and adjudicated.

48. The show cause notice dated 21st July, 2015 issued by the Allahabad Commissionerate relates to alleged evasion of service tax on account of under-valuation of valuable services or works contract and the show cause notice dated 17th April, 2015 issued by the Delhi-1 Commissionerate is for alleged evasion of service tax under the head "construction services and applicability of service tax under the reverse charge mechanism". These two notices are based upon entirely different and distinct issues, which are not subject matter of the present writ petition. These show cause notices have not been challenged before us. However, as noticed above, the show cause notice dated 13th March, 2015 issued by the Patna Commissionerate is on the same issue and relates to alleged evasion of service tax under the head "consultancy fee" payable as PMC Charge. Identical/similar issue has been raised by the Noida Commissionerate pursuant to audit report. Interestingly, the petitioner in their letter dated 31st August, 2015 had asked the Noida Commissionerate to stop investigation as the issue was being

investigated by DGCEI. Perceptively, the petitioner has changed their stand. It is also the case of the respondents that the petitioner in spite of show cause notice issued by the Patna Commissionerate has not furnished and given appropriate reply and comments. We need not go into the said aspect. However, it is clear that the respondents have been asking for and have written several letters seeking information in respect of PMC Charges.

49. We do not agree with the Petitioner's assertion that centralisation of investigation would lead to harassment and inconvenience. Normally, it would be desirable that investigation are centralised when identical and similar issues in case of an assessee arise for consideration in different Commissionerates. Interestingly, the petitioner in their letter bearing despatch No. 1244 dated 8th July, 2015 had stated that they have centralised accounting system and all transactions were recorded at their head office level and they did not have unit-wise accounting system. The respondents, therefore, plead that information sought whether in form of figures or documents would be available centrally. Even if the information sought is not available and has to be collected from the different locations, this can be done and with a request to the respondents to grant reasonable time. In most cases possibly furnishing of self-certified true copies would be sufficient.

50. In view of the aforesaid discussion, we leave it to the Central Excise Officer to decide how to go about and proceed while deciding and exercising discretion whether or not he or she would invoke the power under Rule 5A(1) or seek enforcement of directions by production of documents and papers by recourse to Section 14 of the CE Act. While deciding on the said option, due regard would be given to any representation or submission made by the petitioner-assessee. Further, in case papers and

documents can be supplied by post or other means or by hand, the said option should be given. Repeated notices, one after the other, should be avoided unless for some reason examination of earlier documents requires furnishing of further particulars and papers.

51. We have already referred to the interim orders passed by the Court, restraining DGCEI from conducting investigation and collecting material and documents pursuant to the notice under Section 14 of the CE Act. Interim orders dated 7th May, 2015 and 5th July, 2017 had permitted DGCEI to collect information from the requisite Commissionerate, but the Commissionerate themselves did not have information, material and documents.

52. The petitioner had filed application CM No.19529/2018 pointing out that some Commissionerates had issued notices to them to furnish details or documents as the same were required. This application for appropriate directions and re-hearing refers to the factum that the petitioner has filed Writ Petition (Civil) No. 3800/2018 before this Court challenging and questioning a number of notices issued by Commissionerates from Guntur, Kolkata, Chennai, Patna and Haldia in the matter of investigation being conducted by DGCEI for non-payment of service tax on the PMC charge. The assertion made is that the said Commissionerates could not have asked for this information as the present writ petition is pending and that too for the purpose of investigation being conducted by DGCEI. Reliance is placed upon the interim order passed by this Court in the present writ petition vide orders dated 10th February, 2016, 26th April, 2016, 5th July, 2017 and 21st December, 2017. Another assertion made in the application relates to the letter issued by the Chief Commissioner, Service Tax-I, New Delhi under

Rule 5(2) for the audit conducted for the periods 2010-2011 to 2014-15 and 2015-16 to 31st June, 2017. Petitioner submits that they have not been furnished copy of the audit report in violation and defiance of Circular dated 22nd September, 2014. It is also stated that show cause notices dated 21st May, 2014 and 17th April, 2015 issued under Section 73(1) of the Fin Act have culminated in adjudication by order-in-original dated 25th April, 2016 whereby the demand in respect of construction services was dropped. However, demand of Rs.2.07 crores was confirmed in respect of manpower supply against which an appeal has been preferred. In addition, the Delhi Commissionerate has also issued show cause notice dated 13th April, 2016 for the period 2014-15 demanding service tax of Rs.11,61,840/- to which reply has been submitted. Reference is also made to show cause notice dated 6th April, 2014 issued by the Commissionerate at Chennai for the period 2013-14 to 2015-16.

53. The respondents have filed reply to the application and contested the factual and legal assertions made. They rely upon the interim order passed by this Court on 27th May, 2016 whereby the Court had left it open to DGCEI to gather information from respective Commissionerates in which the petitioner was registered. Accordingly, DGCEI had written letters to the respective Commissionerates in which the petitioner was registered, who in turn have written letters to the petitioner's unit registered within their jurisdiction. With regard to other show cause notices, etc., it is submitted that they relate to different aspects, which are not subject matter of the PMC charge investigation before the DGCEI. Further, desk review is done by jurisdictional Additional Commissioner, who draw the audit plan based upon the actual audit of the unit undertaken by scrutiny of documents, viz.,

purchase bills, sale bills, ledgers, bank statements, etc., at the premises of the assessee. It is stated that audit report for Delhi unit has been issued to the petitioner.

54. In ***Grindlay's Bank Ltd. Vs. Income Tax Officer, Calcutta and Ors.*** 1980 (2) SCC 191, Division Bench of the High Court while accepting the appeal filed against the order of the learned single Judge of the High Court, had permitted the Assessing Officer to pass a fresh assessment order, though the limitation period had expired and the Assessing Officer had already passed an assessment order in terms of the directions given by the learned single Judge. Rejecting the prayer of the assessee that the directions given were impermissible and would be contrary to statute, the Supreme Court observed that when passing orders in writ jurisdiction, the High Court can draw on its inherent power to make all such orders as are necessary for doing complete justice between the parties. The interest of justice requires that no party should derive unfair and undeserved advantage by initiating and invoking jurisdiction of the Court. Such advantage must be neutralized, for institution of litigation itself should not be permitted to confer an advantage on the party responsible for it. A party, which has enjoyed benefit of an interim order which is vacated on final decision, can be put to terms and should not protest when the Court passes a just and fair order. Accordingly, fresh assessment could be directed even when it is barred by limitation to set at naught the advantage which the party would derive by mere circumstance by filing a writ petition. Defect in issue of notice etc. would be at best the procedural flaw/lapse not affecting fundamental or subject matter jurisdiction of the Income Tax Officer to make the assessment. Reference was made to an earlier decision of the Supreme

Court in ***Director of Inspection of Income Tax (Investigation), New Delhi Vs. Pooran Mal and Sons***, (1974) 96 ITR 390 and ***Rajinder Nath Vs. Commissioner of Income Tax***, (1979) 4 SCC 282. In ***Pooran Mal*** (supra), it was held as under:-

> **"6.** Even if the period of time fixed under Section 132(5) is held to be mandatory that was satisfied when the first order was made. Thereafter if any direction is given under Section 132(12) or by a court in writ proceedings, as in this case, we do not think an order made in pursuance of such a direction would be subject to the limitations prescribed under Section 132(5). Once the order has been made within ninety days the aggrieved person has got the right to approach the notified authority under Section 132(11) within thirty days and that authority can direct the Income Tax Officer to pass a fresh order. We cannot accept the contention on behalf of the respondents that even such a fresh order should be passed within ninety days. It would make the sub-sections (11) and (12) of Section 132 ridiculous and useless. It cannot be said that what the notified authority could direct under Section 132 could not be done by a court which exercises its powers under Article 226 of the Constitution. To hold otherwise would make the powers of courts under Article 226 wholly ineffective. The court in exercising its powers under Article 226 has to mould the remedy to suit the facts of a case. If in a particular case a court takes the view that the Income Tax Officer while passing an order under Section 132(5) did not give an adequate opportunity to the party concerned it should not be left with the only option of quashing it and putting the party at an advantage even though it may be satisfied that on the material before him the conclusion arrived at by the Income Tax Officer was correct or dismissing the petition because otherwise the party would get unfair advantage. The power to quash an order under Article 226 can be exercised not merely when the order sought to be quashed is one made without jurisdiction in which case there can be no room for the same authority to be directed to deal with it. But in the circumstances of a case the court might take the view that another authority has the jurisdiction to deal with the matter and may

> direct that authority to deal with it or where the order of the authority which has the jurisdiction is vitiated by circumstances like failure to observe the principles of natural justice the court may quash the order and direct the authority to dispose of the matter afresh after giving the aggrieved party a reasonable opportunity of putting forward its case. Otherwise, it would mean that where a court quashes an order because the principles of natural justice have not been complied with it should not while passing that order permit the Tribunal or the authority to deal with it again irrespective of the merits of the case."

55. In the given circumstances we would hold and treat the period between 10th February 2016 when the stay order was passed in respect of the summons dated 21st and 28th January, 2016 till the pronouncement of judgment should be excluded for the purpose of computing limitation and period specified for issue of show cause notice under Section 73(1) of Fin Act. This would be in terms of Explanation to Sub-Section 1 to Section 73 of the Fin Act. It would be just and fair in terms of the decision in ***Grindlay's Bank Ltd. (supra)***. Officers from DGCEI and Commissionerates who had issued notice under Section 14 of CE Act by the interim orders have been barred and prohibited from taking action in terms of the notices issued by them. The court must ensure that when the stay order is vacated no party should suffer on account of limitation because of the interim stay order.

56. In view of the aforesaid discussion, it is held as under:

(i) Central Excise Officers of DGCEI have all India jurisdiction and can issue notices and enquire into the matters relating to service-tax against any assessee/ person even if the said person or assessee is registered with one or multiple Commissionerates.

(ii) Notice under Section 14 of the CE Act i.e. Central Excise Act can be issued even if proceedings under Section 73 of the Fin Act i.e. Finance Act, 1994 are not pending. However the notice should relate to matters and issues relating to provisions of services and imposition of service tax.

(iii) The petitioner should comply with the notices issued or would be issued by the Central Excise Officers, DGCEI to furnish evidence and documents pertaining to the PMC charge i.e. Project Management Consultancy Charge in respect of Commissionerate/ registration except those subject matter of show cause notice dated 13th March, 2015 issued by the Commissionerate of Central Excise and Service Tax, Patna.

(iv) Interim orders are accordingly, vacated except and limited to evidence and documents, subject matter of demand-cum-show cause notice dated 13th March, 2015 issued by the Patna Commissionerate.

(v) Period between 10th Februrary,2016 when the stay order was passed till the pronouncement of the judgement would be excluded for purpose of computing limitation period specified for issue of show cause notice under Section 73(1) of the Fin Act.

57. Recording the aforesaid and in terms of the observations made above, the writ petition is dismissed, albeit holding and clarifying that the proceedings before the Central Excise Officer relating to PMC Charges would not include the subject matter of the show cause notice issued by the

Patna Commissionrate. As noted in paragraph 6 above, we have not examined scope and ambit of the Notification No. 25/12-ST. Question and issue of chargeability of service tax on PMC Charge etc. is left open. In the facts of the present case, there would be no order as to costs.

(SANJIV KHANNA)
JUDGE

(PRATHIBA M. SINGH)
JUDGE

NOVEMBER 16, 2018
VKR/NA/SSN