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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	20.11.2025
	22.01.2026
	26.11.2025
Pronounced On	08.06.2026

CORAM:

THE HONOURABLE MR. JUSTICE C.SARAVANAN

W.P.Nos.35967, 35970, 35974, 35976 of 2024, W.P.No.2142 of 2026 and W.P.Nos.14487, 14492 and 14500 of 2025
and
W.M.P.Nos.38852, 38858, 38860, 38863 of 2024, W.M.P.Nos.2308 and 2309 of 2026 and W.M.P.Nos.16371, 16375, 16384 of 2025

W.P.Nos.35967, 35970, 35974 and 35976 of 2024

M/s.Fastenex Private Limited,
Represented by its Managing Director
A.L.Shah ... Petitioner in all W.Ps

Vs.

State Tax Officer (Inspection-VI),
Office of the Joint Commissioner (ST) (Intelligence),
No.1, Vallalar Nagar,
Manjakuppam, Cuddalore – 607 001. ... Respondent in all W.Ps

Prayer in W.P.No.35967 of 2024: Writ Petition filed under Article 226 of the Constitution of India, for issuance of a Writ of Certiorari, to call for the records of the Respondent relating to his proceedings in the Impugned

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Notice in Form DRC-01 dated 15.10.2024 relating to GSTIN.33AAACF1146M1ZU/2021-22 and quash the same.

Prayer in W.P.No.35970 of 2024: Writ Petition filed under Article 226 of the Constitution of India, for issuance of a Writ of Certiorari, to call for the records of the Respondent relating to his proceedings in the Impugned Notice in Form DRC-01 dated 15.10.2024 relating to GSTIN.33AAACF1146M1ZU/2022-23 and quash the same.

Prayer in W.P.No.35974 of 2024: Writ Petition filed under Article 226 of the Constitution of India, for issuance of a Writ of Certiorari, to call for the records of the Respondent relating to his proceedings in the Impugned Notice in Form DRC-01 dated 15.10.2024 relating to GSTIN.33AAACF1146M1ZU/2023-24 and quash the same.

Prayer in W.P.No.35976 of 2024: Writ Petition filed under Article 226 of the Constitution of India, for issuance of a Writ of Certiorari, to call for the records of the Respondent relating to his proceedings in the Impugned Notice in Form DRC-01 dated 15.10.2024 relating to GSTIN.33AAACF1146M1ZU/2024-25 and quash the same.

For Petitioner (In all W.Ps) : Mr.K.Ravi
Senior Counsel
for M/s.Rugan and Arya

For Respondent (In all W.Ps) : Mr.C.Harsharaj
Special Government Pleader

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W.P.No.2142 of 2026

M/s.Turbo Energy Private Limited,
Represented by its Authorised Signatory
R.Srivallabhan ... Petitioner

Vs.

1.The Additional Commissioner,
Office of the Commissioner of Central Tax
and Central Excise,
Audit-I Commissionerate,
No.1775, Jawarharlal Nehru Inner Ring Road,
Anna Nagar Western Extension,
Chennai – 600 101.

2.The Assistant / Deputy Commissioner,
Circle-V, GST Audit-I Commissionerate,
1775, Jawarharlal Nehru Inner Ring Road,
Anna Nagar Western Extension,
Chennai – 600 101.

3.The Superintendent,
Chennai-North,
Tamil Nadu. ... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, for issuance of a Writ of Certiorari, to call for the records of the 1st and 3rd Respondents culminating in the issue of Show Cause Notice No.305/2025-AUDIT I dated 26.09.2025 from File C.No.GADT/Tech/108/2025-Tech & Legal by the 1st Respondent and Summary of Show Cause Notice dated 06.01.2026 in Form GST DRC-01 under Reference No.ZD330126029438I issued by the 3rd Respondent respectively and quash the same.

For Petitioner : Mr.S.Murugappan

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For Respondents : Mr.S.M.Deenadayalan
Senior Standing Counsel

W.P.Nos.14487, 14492 and 14500 of 2025

Ispahani Estates Private Limited,
Formerly known as Tamil Nadu Real Estates
Private Limited,
Represented by its Director
P.Kesan ... Petitioner in all W.Ps

Vs.

The State Tax Officer,
Nungambakkam Assessment Circle,
No.88, Mayor Ramanathan Salai,
Chetput, Chennai – 600 031. ... Respondent in all W.Ps

Prayer in W.P.No.14487 of 2025: Writ Petition filed under Article 226 of the Constitution of India, for issuance of a Writ of Certiorari, to call for the records in GSTIN No.33AABCT5912E1ZQ/2022-23 of the Respondent and quashing the impugned order dated 04.12.2024 with the Reference No.ZD331224028329L for the Financial Year 2022-23 as arbitrary, without jurisdiction, and in violation of the Principles of Natural Justice.

Prayer in W.P.No.14492 of 2025: Writ Petition filed under Article 226 of the Constitution of India, for issuance of a Writ of Certiorari, to call for the records in GSTIN No.33AABCT5912E1ZQ of the Respondent and quashing the impugned order dated 07.01.2025 with the Reference No.ZD330125044885E for the Financial Year 2021-22 as arbitrary, without jurisdiction and void.

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Prayer in W.P.No.14500 of 2025: Writ Petition filed under Article 226 of the Constitution of India, for issuance of a Writ of Certiorari, to call for the records in GSTIN No.33AABCT5912E1ZQ/2019-20 on the files of the Respondent and quash the impugned order dated 14.11.2024 with the Reference No.ZD3311241042072 as arbitrary, without jurisdiction and in violation of the Principles of Natural Justice.

For Petitioner : Mr.S.Ramamurthy
(In all W.Ps)

For Respondent : Mr.T.N.C.Kaushik
(In all W.Ps) Additional Government Pleader

COMMON ORDER

By this Common Order, these Writ Petitions are being disposed of.

2. A batch of approximately 250 Writ Petitions were listed before the Court wherein the respective Petitioners have challenged the impugned proceedings initiated against them under Section 74 of the Central Goods and Service Tax Act, 2017 and Tamil Nadu Goods and Service Tax Act, 2017 (hereinafter referred to as 'the respective GST Enactments') for the tax period between 2017 and 2025 i.e., from the inception from 01.07.2017.

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3. In some of the Writ Petitions, Show Cause Notices issued under Section 74 of the respective GST Enactments while in others the respective Assessment Orders were challenged. The impugned Orders have accompanied summary of the order FORM GST DRC-07 for the respective tax periods pursuant to the Show Cause Notices issued under Section 74 of the respective GST Enactments.

4. These cases were heard together as a batch wherein submissions were made on the larger issue regarding Jurisdiction of the proper officer under Section 74 of the respective GST Enactments to issue Show Cause Notices under Section 74 of the respective GST Enactments and to pass orders under Section 74 of the respective GST Enactments. However, as the hearing progressed, many of the Petitioners opted to have their cases remitted back to the Original and / or the Appellate Authority on terms leaving 53 Writ Petitions.

5. Challenge in these Writ Petitions can be broadly categorised as under:-

TABLE-I

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1.	**Challenge to the Show Cause Notices issued to some of the petitioners under Section 74 of the respective GST Enactments; and**
2.	**Challenge to the Orders passed pursuant to such Show Cause Notices issued to the Other Petitioners.**

6. Details of the Show Cause Notices challenged in batch are given below:-

Challenge to the Show Cause Notices issued to the Petitioners

TABLE - IIA

***CENTRAL AUTHORITY*:**

S. No.	Writ Petition No.	Date of Show Cause Notice	Tax Period	Proceedings initiated u/s
1	2142 of 2026	06.01.2026	2020-2021	Section 74
			2021-2022	Section 74
			2022-2023	Section 74
2	34600 of 2025	25.06.2025	2018-2019	Section 74
			2019-2020	Section 74
			2020-2021	Section 74
	34604 of 2025	25.06.2025	2018-2019	Section 74
			2019-2020	Section 74
	34617 of 2025	25.06.2025	2018-2019	Section 74

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TABLE - IIB

***STATE AUTHORITY*:**

S.No	Writ Petition No.	Date of Show Cause Notice	Tax Period	Proceedings initiated u/s
1	35967 of 2024	15.10.2024	2021-2022	Section 74
	35970 of 2024	15.10.2024	2022-2023	Section 74
	35974 of 2024	15.10.2024	2023-2024	Section 74
	35976 of 2024	15.10.2024	2024-2025	Section 74
2	23220 of 2024	10.05.2024	2018-2019	Section 74
	23540 of 2024	10.05.2024	2019-2020	Section 74
3	20935 of 2024	13.07.2024	2019-2020	Section 74
	21399 of 2024	13.07.2024	2017-2018	Section 74
	21403 of 2024	13.07.2024	2018-2019	Section 74

7. Details of the Impugned Assessment Order in DRC-07 in the batch are as under:-

Challenge to the Assessment Order in DRC-07 issued to following the Petitioners

TABLE - IIIA

***CENTRAL AUTHORITY*:**

S.	Writ Petition	Tax Period	Date of Show	Date of	Proceedings

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No.	No.		Cause Notice	Assessment Order	initiated u/s
1	18541 of 2025	2017-2018	27.05.2024	04.02.2025	Section 74
		2018-2019			Section 74
		2019-2020			Section 74
		2020-2021	16.05.2024	26.12.2024	
		2021-2022			Section 74
		2022-2023			
	18697 of 2025	2017-2018			Section 74
		2018-2019			
		2019-2020			
		2020-2021			
		2021-2022			
2	14847 of 2025	July 2017- July 2021*	28.09.2023	04.02.2025 ***	Section 74
		August 2021 - September 2022**			Section 74
3	10854 of 2025	2017-2018	30.06.2022	31.05.2023	Section 74
		2018-2019 #			

* Input Tax Credit paid for a sum of Rs. 62,83,59,982/-

** Reversal of Input Tax Credit for a sum of Rs. 26,24,33,923/-

*** Total credit availed for Rs. 1,03,45,34,884/-

Show Cause Notice was issued under Section 73 on 04.08.2022 for the tax period 2019-2021 and 12.12.2022 for the tax period July 2017 - March 2018.

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TABLE - IIIB

STATE AUTHORITY:

S.No.	Writ Petition No.	Date of Assessment Order	Tax Period	Proceedings initiated u/s
1	14487 of 2025	04.12.2024	2022-2023	Section 74
	14500 of 2025	04.11.2024	2019-2020	Section 74
	14492 of 2025	07.01.2025	2021-2022	Section 74
2	39089 of 2024	28.12.2023	2017-2018	Section 74
3	29744 of 2025	31.01.2025	2017-2018	Section 74
	29747 of 2025	20.03.2025	2019-2020	Section 74
4	26246 of 2025	31.05.2024	2017-2018	Section 74
5	37279 of 2024	05.07.2024	2019-2020	Section 74
6	21110 of 2024	29.09.2023	2021-2022	Section 74
	21113 of 2024	29.09.2023	2017-2018	Section 74
7	21115 of 2024	26.09.2023	2018-2019	Section 74
	21122 of 2024	26.09.2023	2019-2020	Section 74
	21126 of 2024	27.09.2023	2020-2021	Section 74
8	20374 of 2024	05.07.2023	2017-2018	Section 74
	20390 of 2024	05.07.2023	2018-2019	Section 74
	20394 of 2024	05.07.2023	2019-2020	Section 74
	20406 of 2024	05.07.2023	2020-2021	Section 74
	20410 of 2024	05.07.2023	2021-2022	Section 74
9	24897 of 2024	12.08.2024	2017-2018	Section 74
10	31815 of 2025	03.02.2025	2017-2018	Section 74

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11	33258 of 2025	07.11.2024	2018-2019	Section 74
	33262 of 2025	09.11.2024	2019-2020	Section 74
	33268 of 2025	11.11.2024	2020-2021	Section 74
	33272 of 2025	12.11.2024	2021-2022	Section 74
	33275 of 2025	13.11.2024	2022-2023	Section 74
12	29580 of 2025	14.07.2025	2018-2019	Section 74
	30242 of 2025	17.07.2025	2020-2021	Section 74
	29996 of 2025	15.07.2025	2019-2020	Section 74
13	2026 of 2025	23.09.2024	2018-2019	Section 74
	2075 of 2025	23.09.2024	2020-2021	Section 74
	2079 of 2025	10.10.2024	2022-2023	Section 74
	2081 of 2025	23.09.2024	2019-2020	Section 74
	2086 of 2025	23.09.2024	2021-2022	Section 74
	2092 of 2025	10.10.2024	2023-2024	Section 74
14	172 of 2025	20.06.2024	2021-2022	Section 74
	382 of 2025	20.06.2024	2020-2021	Section 74

8. Since, a large number of cases were listed as a batch and submission were made by several counsels on several days and since an important question of law arises for consideration in these Writ Petitions, I have captured the legal submissions advanced on behalf of the Petitioners even though some of the cases were disposed before orders were reserved in the batch as an important question of law arises in these cases.

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9. Although the facts have been narrated in this order for the sake of clarity and to give a perspective, a separate order has been passed today, since intricate facts are involved.

10. In this Order, the final decision in **W.P.No. 2142 of 20269** (M/s.Turbo Energy Private Limited), **W.P.No. 14887 of 2025, 14500 of 2025 & 14492 of 2025** (Ispahani Estates Private Limited) and **W.P.Nos.35967 of 2024, 35970 of 2024, 35974 of 2024, 35976 of 2024** (M/s.Fastenex Private Limited) alone are being pronounced. A separate orders will be pronounced for rest of the Writ Petitions as enumerated in Table II- A, II-B, III-A and III-B, although summary of orders are captured in end as the cases were heard as a batch.

11. In these batch of Writ Petitions, the principal question of law that arises for consideration is whether the "Proper Officer" namely the contesting Respondent(s) in the respective Writ Petition was/were justified in invoking Section 74 of the respective GST Enactments against each of the Petitioners in the facts of the respective cases.

12. The primary ground of attack in these Writ Petitions against the

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invocation of the machinery under Section 74 of the respective GST Enactments is on the ground that in the respective Show Cause Notices issued to the respective Petitioners, the reason for invoking the extended period of limitation under Section 74 of the respective GST Enactments have not been either spelt out or there was total absence of the Jurisdictional/Foundational Facts.

13. To answer the above important question of law, it is just and necessary to embark on a detailed journey backward based on the settled case laws under similar provisions under the Central Excise Act, 1944, Customs Act, 1962, the Finance Act, 1994, and the observations of the Courts and the deliberations of the GST Council, as without it, the present enquiry will be incomplete.

14. In the process, this order will not only encompass the ratio (*ratio decedendi)*, but also the *obiter dicta* and expressions made *sub silentio* as without them, the decision in this order will be incomplete. The views expressed in this order will also encompass the *ratio, decendendi*, *obiter dicta* and expressions made *sub silentio* in the case laws which were referred.

15. The Central Authorities have issued a single Show Cause Notice for multiple Tax Periods. On the other hand, the State Authorities have issued Show Cause Notice for each of the Tax Periods.

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16. The Central Authorities have followed the procedure that was followed by them earlier under the provisions of the **Central Excise Act, 1944** (hereinafter also referred to as CEA, 1944), the **Finance Act, 1994** (hereinafter referred also to as F.A, 1994) and under the **Customs Act, 1962** (hereinafter also referred to as CA,1962).

17. On the other hand, the State Authorities have followed the procedure that was followed by them under the provisions of the **Madras General Sales Tax Act, 1939** (hereinafter also referred to as MGST, 1939), the **Tamil Nadu General Sales Tax Act, 1959** (hereinafter also referred to as TNGST, 1959), the **Central Sales Tax Act, 1956** (hereinafter also referred to as CST,1956) and under the **Tamil Nadu Value Added Tax Act, 2006** (hereinafter also referred to as TNVAT, 2006).

18. Though, in few of the Writ Petitions as detailed in **Table-IIA** composite proceeding initiated under Section 74 of the respective GST Enactments were impermissible in the Scheme of these Enactments, however, no serious arguments were advanced on this aspect. A reference was made to the following Judgements:-

i. **Titan company Limited** Vs. **JC,** 2024 (1) TMI 619

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ii. **R and A Co.** Vs. **ADC, Chennai,** 2025 VIL 754 MAD

iii. **M/s.Chimney Hills Education Society** Vs. **Additional Commissioner of Central Tax and Anr.,** 2024 SCC Online Kar 21844.

iv. **Tharayil Medicals** Vs. **The Deputy Commissioner.,** 2025 SCC Online Ker 2334

v. **Ms.RA and Co., Represented by its Partner** Vs. **The Additional Commissioner of Central Taxes, Chennai** in **W.P.No.17239 of 2025** of this High Court *vide* its Order dated 21.07.2025.

vi. **Eskay Trans., Represented by its Partner Mr.S.A.K.Illumddeen** Vs. **Joint Director, Directorate General of Goods and Services Tax Intelligence & Another** in W.P.No.31105 of 2025 of this High Court *vide* its Order dated 22.08.2025.

vii. **W.P.Nos.29716 of 2024 etc., batch** of this High Court *vide* its Order dated 21.07.2025.

19. *Prima facie*, the views expressed in these decisions are erroneous as Assessment proceedings initiated in time cannot be abated, even if, a composite notice was issued for multiple Tax Periods. At best, a pragmatic view could have been taken to segregate the demand for each year as was done in the first mentioned case. However that would not mean the assessment proceedings initiated under Section 74 of the respective GST enactments had to abate, merely because a composite notice was issued for several tax periods.

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20. When these cases were heard as a batch, there are conflicting views of several High Courts. In this High Court, the issue is said to be pending before the Division Bench of this Court in **W.A.Nos.3448 of 2025 etc., batch.**

21. The Bombay High Court has recently referred the issue to a Larger Bench (LB) *vide* its Order dated **17.04.2026** in **M/s Rollmet LLP & others** Vs. **Union of India & others** [**W.P.No.16848 of 2025 & connected matters** dated April 17, 2026].

22. However, recently, the Division Bench of Karnataka High Court in **Commissioner of Central Tax & others** Vs. **Chimney Hills Education Society,** has reversed the view of the Single Judge of the Karnataka High Court *vide* its order dated 23.04.2026 in W.A.No.1715 of 2024 (T-RES) and held that common Show Cause Notices for Multiple Tax Periods can be issued as Show Cause Notices under Section 74 of the respective GST Enactments are not Financial Year specific.

23. There, the learned Single Judge of the Court had earlier held that the issuance of a common/consolidated Show Cause Notice for Multiple Tax Period

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was impermissible and quashed the Show Cause Notices by giving liberty to the Appellants/Revenue to issue fresh Show Cause Notices, placing reliance on the order dated **07.08.2024** in **M/s.Bangalore Golf Club** Vs. **Assistant Commissioner of Commercial Taxes** of the Karnataka High Court and the decision of the Madras High Court in W.P.No.16500 of 2024 dated 18.12.2023 **M/s.Titan Company Limited** Vs. **Joint Commissioner of GST2**.

24. In fact, the above decision of this High Court in **M/s.Titan Company Limited** (referred *supra*) merely gave a pragmatic solution to the problem faced by the said Tax payer in the light of the submissions made by the Petitioner therein by directing segregation of the demand for each Tax Period separately.

25. The above decision was passed oblivious of the implication of the decision of the Hon'ble Supreme Court in **Nizam Sugar Factory Ltd.** Vs. **Collector of Central Excise 2006** (178 E.L.T 465). There, the Hon'ble Supreme Court had held while issuing 2nd and 3rd Show Cause Notices on the same and/or similar facts, it cannot be held that there was suppression of facts

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on the part of the assessee since facts were already in the knowledge of the authorities.

26. The above decision of the co-ordinate bench of this High Court in **M/s.Titan Company Limited** (referred *supra*) was taken to a different height by a learned Single Judge of the Karnataka High Court by quashing the proceedings.

27. In the light of the above development, the co-ordinate bench of this High Court in **Smt.R.Ashaarajaa** Vs. **The Senior Intelligence Officer and another** in **W.P.No.29716 of 2024** etc., batch, vide Order dated 21.07.2025 revisited the issue afresh and affirmed the views of the Karnataka High Court following the decision of the division bench of the Kerala High Court in **M/s.Tharayil Medicals** Vs. **The Deputy Commissioner and another** reported in 2025-VIL-356-KER and abated the proceedings with the following observations:-

> *"28. In view of the above discussion, this Court pass the following orders:*
>
> *(i) The GST Act permits only for issuance of show cause notice based on the tax period. Therefore, if the annual return is filed, the entire year would be considered as a tax period and accordingly, the*

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show cause notice shall be issued based on the said annual returns.

(ii) If show cause notice is issued before the filing of annual returns, the same can be issued based on the filing of monthly returns;

(iii) If show cause notice is issued after the filing of annual returns or after the commencement of limitation, the said notice shall be issued based on the annual returns with regard to the relevant financial year.

(iv) ***No show cause notice can be clubbed and issued for more than one financial year since the same is impermissible in law.***

(v) In these cases, without any jurisdiction, the impugned show cause notices/orders came to be issued/passed for more than one financial year, which is impermissible in law and hence, the same is liable to be quashed. ***Accordingly, the impugned show cause notices/orders stand quashed based on the aspect of clubbing of show cause notices for more than one financial year."***

28. In Paragraph Nos.57 to 59, the Division Bench of Karnataka High Court *vide* its order dated 23.04.2026 in W.A.No.1715 of 2024 (T-RES) in the case of **Commissioner of Central Tax & others** Vs. **Chimney Hills Education Society** has observed as under:-

"57. For the foregoing discussion and the reasons assigned while analyzing the scheme of the Act, we

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conclude that show cause notices issued under Sections 73/74 do not prohibit coverage of multiple financial years. Such notices are neither tax period–specific nor financial year–specific. There is no statutory bar to issuance of a common show cause notice covering multiple tax periods or financial years. Any interpretation to the contrary would amount to rewriting the language of Sections 73/74, which is impermissible.

58. In the light of the reasons assigned hereinabove, we find ourselves in agreement with the views expressed by the ***High Courts of Delhi, Allahabad, and Jammu & Kashmir****. Accordingly, we concur with the view taken by the said High Courts.*

59. For the reasons assigned hereinabove, we are not inclined to concur with the view taken by the High Courts of ***Bombay, Kerala, Madras, Andhra Pradesh, and Himachal Pradesh****. Accordingly, we respectfully decline to follow the said judgments."*

29. I am in respectful agreement with the above conclusion of the Division Bench of the Karnataka High Court in **Commissioner of Central Tax & others Vs. Chimney Hills Education Society,** for several other reasons as well.

30. However, I am refraining from giving any further opinion on the same at present, as the verdict of the Division Bench of this High Court and that of

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the Larger Bench of the Bombay High Court are also awaited.

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SUBMISSIONS OF THE COUNSEL FOR THE PETITIONERS AND THE RESPONDENTS:

31. In these Writ Petitions, the learned Senior Counsel for some of the Petitioners, the learned Counsel for Petitioners as well as the Learned Special Government Pleader for the State, learned Counsels for the Respondents in the respective Writ Petitions largely argued on the questions of law with regard to invocation of the extended period of limitation for the aforesaid Tax Periods under Section 74 of the respective GST Enactments, thereby attributing more weightage to the questions of law than on the distinctive facts of each case.

32. For the sake of brevity, arguments which were adapted by the other counsel Writ Petitioners during the course of hearing have not been repeated. I have however endeavoured to capture the important arguments of the counsels on the subject.

33. The learned Counsel for the Petitioner **Mr.Ramamurthy** in **W.P.14500**

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of 2025 [Ispahani Estates Private Limited] invited attention to the **Model GST Laws** corresponding to Section 74 of the respective GST Enactments *viz.,* **Section 51B** in the **First Draft GST Model Law**, and Section 67 in **Second Draft GST Model Law**, after a specific query was raised during the course of hearing in these cases as to why the expression "**Where it appears to the Proper Officer**" was adopted both in Section 73 and Section 74 of the respective GST Enactments.

34. It was submitted that the inclusion of the words "**Where it appears to the proper officer**" in of the respective GST Enactments was incorporated to ensure compliance to the "**Due Process of Law**".

35. In this connection, the learned Counsel drew attention to **Issue No.11** of the **Additional Agenda to the 8th GST Council Meeting** held on **3rd** and **4th** of **January 2017**. I shall refer to the same in some in the course of discussion.

36. On a specific query that since Section 73 and Section 74 of the respective GST Enactments were inspired from Section 11A of the Central Excise Act, 1944, Section 28 of the Customs Act, 1962 and Section 73 of the

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Finance Act, 1994 since they adopt almost similar language and that by the incorporating the expression "**Where it appears**" into them, the Parliament and the respective State Legislatures have *prima facie* diluted the threshold / safety that was / is there in Section 11A of the Central Excise Act, 1944, Section 28 of the Customs Act, 1962 and Section 73 of the Finance Act, 1994, the learned Counsel submitted that on the contra with the incorporation of the above expression, an additional Jurisdictional pre-condition of satisfaction was provided as a check against whimsical invocation of Section 74 of the respective GST Enactments.

37. It is further submitted that the GST Council has the constitutional sanctity under Article 279A(4)(c) of the Constitution of India, and the interpretation of Section 74 must be in furtherance of this hallowed objective and the legislative intent of the law makers.

38. The learned Counsel for the Petitioner summarises his argument by stating that the phrase "**Where it appears**" in Section 74 of the respective GST Enactments has twin connotations *viz.,* satisfaction & presence of material. It is submitted that the Proper Officer is the observer and the material is to be presented, and there should be an application of mind by the Proper Officer

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which should result in his satisfaction and that alone would constitute **'Appears'** in Section 74 of the respective GST Enactments.

39. It is further submitted that the above phrase presupposes satisfaction (which has a definite and established legal import) of the Proper Officer as a Jurisdictional Fact and condition precedent for exercise of such power under Section 74(1) and would satisfy the **'due process'** referred to by the GST Council in its deliberation.

40. It is submitted that the phrase "**Where it appears**" has been judicially understood to mean where it appears to their satisfaction, and that the word '**appears'** and **'satisfaction'** are synonymous. In this regard, reliance was placed on a decision of the Apex Court in **Hardeep Singh** Vs. **State of Punjab** 2014 SCC OnLine SC 26, wherein it was held that the word **'appears'** means "**clear to the comprehension**" or a phrase near to, if not synonymous with '**proved**', and that it imparts a lesser degree of probability than proof.

41. It is further submitted that the degree of satisfaction required is in such a way that if the material with the Proper Officer goes unrebutted, then it could result in the conclusion of *mala fides* on the part of the assessee, and that considering the extra-ordinary nature of the power under Section 74, the degree

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of satisfaction necessary on the part of the officer prior to invocation must be that of a reasonable man based on relevant and reliable material, the very purpose for which a pre-notice intimation in Form DRC-01A is introduced under **Rule 142(1A)**, which was absent in the earlier indirect tax laws.

42. It is further submitted that the phrase "**Where it appears**" is followed by the words "**to the Proper Officer**", and therefore, the law looks at the subjective satisfaction of the Proper Officer, and such satisfaction must be explicitly expressed and recorded on the face of the Show Cause Notice and in the Order. Proceedings based on borrowed satisfaction either from the audit or enforcement proceedings would be without Jurisdiction, and subjective satisfaction must necessarily be based on objective material and is open to judicial review.

43. In this regard, reliance was placed on the Judgement of the Hon'ble Supreme Court in **Amarendra Kumar Pandey** Vs. **Union of India**, [2022] 12 SCR 223, wherein the Hon'ble Supreme Court overturned the decision of the Guwahati High Court which had held that the reasons or satisfaction need not be recorded unless the provision mandates it and that a mere notice is sufficient, for the following submissions:-

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i. ***Conditions for valid satisfaction*** *- The exercise of powers under Section 74(1) is dependent upon the satisfaction of the proper officer as mandated by the term "where it appears", and these conditions must be satisfied for it to be valid.*

ii. ***First-Test of jurisdictional facts*** *- The notice issued under Section 74(1) is based on subjective satisfaction of the proper officer, and the same is justiciable to determine if the jurisdictional facts/pre-conditions exist.*

iii. ***Second - Test of reasonable man*** *- The invocation of Section 74 and the notice can be validly challenged if the inferences made by the proper officer with regard to Fraud, wilful misrepresentation or suppression of facts to evade tax does not flow logically and the Court can examine whether on the basis of the facts and circumstances found, a reasonable man would arrive at the same conclusion.*

iv. ***Third - Test of error of law*** *- The invocation of Section 74 and the notice issued thereunder would warrant interference if it is based on an error of law.*

v. ***Fourth - Test of purpose*** *- The notice issued under Section 74 would warrant interference if it has been so issued just to get over the expired limitation under Section 73.*

vi. ***Fifth - Test of relevance*** *- The invocation of Section 74 can be interfered with if the relevant has not been considered and the irrelevant has been considered.*

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44. It is submitted that the Jurisdictional pre-conditions of **fraud**, **wilful misrepresentation** or **suppression of facts to evade tax** must necessarily be specified and alleged in the Show Cause Notice issued under Section 74, and non-mention of it would show an absence of Jurisdiction and would be fatal to the proceedings.

45. In this regard, reliance was also placed on the decision of the Apex Court in the case of **Collector of Central Excise** Vs. **M/S. H.M.M. Limited** [1995 Supp (3) SCC 322], wherein it was held that specific and explicit averments challenging the fides of the assessee must be made in the Show Cause Notice. It is further submitted that, even otherwise, the salutary principle embodied in **Order 6 Rule 4** of Civil Procedure Code, 1908, though not applicable *ipso facto*, could however be applied to assist the Assessee in preparing his defense.

46. The learned Counsel for the Petitioners insists on the *(i) sufficiency & (ii) identification* requirements, *i.e.,* sufficiency of primary facts pleaded and constituting an inference of *mala fides* and not otherwise, and the identification of the primary facts satisfying the sufficiency requirement.

47. Even otherwise, it is submitted by the learned counsel for the

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Petitioners that the notice can be questioned on the first Jurisdictional requirement on satisfaction and limited to particularization and specification.

48. It is submitted that a vague and unspecific Show Cause Notice will not provide sufficient opportunity to the assessee to file objections meeting the grounds / reasons based on which the proposal was made and that such a vague Show Cause Notice will defeat the very purpose of the statute.

49. It is submitted by the learned Counsel for the Petitioner that Section 74 of the respective GST Enactments employs two words of immense importance viz., 'notice' and 'show cause'. Therefore, it is stated that the Jurisdictional pre-conditions upon which the Proper Officer is satisfied should be put in the Show Cause Notice and that there is no scope for assuming that the ground is implicit with the mere issuance of such Notice.

50. In this connection, the learned Counsel for the Petitioner relied on the following decisions from foreign Jurisdictions and that of the Hon'ble Supreme Court and various High Courts for the issues detailed below:-

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A. **Interpretation of phrase 'where it appears':-**

i. **Hardeep Singh** Vs. **State of Punjab & others,** AIR 2014 SC 1400

ii. **Shankar** Vs. **State of Uttar Pradesh.,** AIR 2024 SC 3085

iii. **Re.A.B. (an infant).,** (1954) 2 All ER 287

iv. **A** Vs. **Liverpool City Council & another,** (1981) 2 All ER 385

v. **Commissioner of Income Tax** Vs. **Sabitri Chatterjee,** (1978) 115 ITR 744

B. **There should be subjective satisfaction:-**

i. **Amarendra Kumar Pandey** Vs. **Union of India.,** (2022) 12 SCR 223

ii. **Prabhakar** Vs. **Joint Director Sariculture Department & ANR.,** AIR 2016 SC 2984.

C. **Satisfaction of pre-condition by reason of:-**

i. **Shyam Kishori Devi** Vs. **Patna Municipal Corporation,** AIR 1966 Sc 1678

ii. **State of Gujarat** Vs. **Jamnadass G.Patri.,** (1975) 1 SCC 138.

D. **Satisfaction of Jurisdictional pre-condition must registered**

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on the face of the record:-

i. **Ex.P.Bradlaugh** (1878) 3 Q.B.D. 509

ii. **Anisminic Limited** Vs. **The Foreign Compensation Commission.,** (1969) 1 All ER 208

iii. **Reliance Airport Developers Private Limited** Vs. **Airports Authority of India.**, (2006) 10 SCC 1.

E. **Issue of Jurisdictional Fact:-**

i. **Arun Kumar & others** Vs. **Union of India.,** (2007) 1 SCC 732

ii. **Raza Textiles Limited** Vs. **Income Tax Officer,** (1973) 1 SCC 633

iii. **Kaur Singh** Vs. **Commissioner of Central Excise,** 1997 (94) ELT 289 (SC)

iv. **Raj Bahadur Narain Singh Sugar Mills Limited** Vs. **Union of India.**, 1996 (88) ELT 34 (SC)

v. **Commissioner of Income Tax** Vs. **Ram Commercial Enterprises Ltd.,** (2000) 246 ITR 568.

F. **Explicit and specific averments necessary:-**

i. **Electrosteel Castings Limited** Vs. **UV Asset Reconstruction Company Ltd.,** (2022) 2 SCC 573

ii. **Nasir Ahmed** Vs. **Assistant Custodian General,** AIR 1980 SC 1157

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iii. **Godrej Food Limited** Vs. **Union of India,** 1993 SCC Online MP 66.

G. **Curative position cannot cure Jurisdictional defect:-**

i. **Calcutta Discount Company Limited** Vs. **Income Tax Officer,** AIR 1961 SC 372

51. The learned Senior Counsel for the Petitioner **Mr.Vijaya Narayan** in **W.P.No.14847 of 2025 [**RMZ INFINITY (CHENNAI) PVT LTD**]** submits that the extended period of limitation cannot be invoked based on a mere allegation of "Suppression", where the alleged violation [wrong availment of Input Tax Credit] was known to the Respondent(s). It is submitted that it is a settled position of law that when both parties know the facts, there can be no suppression.

52. It is submitted that the word "Suppression" must be read in context of associated words of "Willful Mis-statement" and "Fraud" used in Section 74(1) - *Noscitur a sociis.* Therefore, intent of suppression is paramount (i.e., the act must be a conscious, deliberate, and positive act of withholding information).

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53. It is further submitted on merits that the Petitioner had not wrongly availed Input Tax Credit, as the Petitioner was renting out immovable property after construction on payment of GST and no case of evasion of tax has been made out in the Impugned Order.

54. In the above context, learned Senior Counsel for the Petitioners makes the following submissions:-

i. The Disputes regarding interpretation of whether ITC on construction of immovable property is blocked u/s 17(5) do not justify invoking extended period of limitation on account of fraud or suppression.

ii. Section 74 applies only where credit is wrongly availed or utilized due to Fraud, Willful mis-statement or Suppression of facts to evade tax.

iii. In the case of **Chief Commissioner of CGST & Ors V Safari Retreats Pvt Ltd & Anr. [(2025) 2 SCC 523];** is is held that ITC on construction ought not be blocked u/s 17(5)(d) when the assessee rents out immovable property (a taxable service under GST law) and does not use the same on its own account.

55. It is submitted that in the present case, the Impugned Order was passed on 04.02.2025, for five Financial Years i.e., 2017-2022, cumulatively, by way

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of a Common Order, out of which demands for the Financial Years 2017-2018 to 2019-2020 become time barred if the Order was to be issued in terms of Section 73 of the Act. Hence, Section 74 cannot be invoked. Further, it is a settled position of law that when an Assessee acts under *bona fide* belief it does not constitute suppression.

56. It is further submitted that the inclusion of the words "shall" under Section 73(10) of the Act, makes compliance with timelines mandatory. The aspect that bunching of orders in terms of Section 74(10) cannot be permitted is well settled through multiple orders of various High Courts.

57. It is submitted that the Central Board of Indirect Taxes & Customs (CBIC) has itself *vide* Instruction No.05/2023-GST dated 13.12.2023 clarified that Section 17 can be invoked only when the elements prescribed therein, are established and evidenced in the Show Cause Notice.

58. The learned Senior Counsel **Mr.Vijay Narayanan** in W.P.No.14847 of 2025 **[**RMZ INFINITY (CHENNAI) PVT LTD**]** and the learned counsel for the Petitioner **Mr.Raghavan Ramabadran** in W.P.No.14284 of 2025 [Sanmina SCI India Private Limited], which was disposed earlier *vide* order dated

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20.11.2025, relied on the following decisions of the Hon'ble Supreme Court and that of the High Court for the issues detailed below:-

A. **Scope of interference of Courts in the issue regarding the question of limitation:-**

i. **Raza Textiles** Vs. **Income Tax Officer, Rampur.,** 1972 (9) TMI 15
ii. **ITW Signode India** Vs. **Commissioner of Central Excise,** 2003 (158) ELT 403 (SC)
iii. **Arun Kumar & others** Vs. **Union of India.,** (2007) 1 SCC 732
iv. **Chinnathambi Rajeswari** Vs. **Assistant Commissioner of Income Tax,** 2024 SCC Online Mad 8395

B. **The Show Cause Notices and the Assessment Order should contain the reasons to believe by the Assessing Officer for invoking the extended period of limitation:-**

i. **GKN Driveshafts (India) Ltd** Vs. **Income Tax Officer,** (2003) 1 SCC 72

C. **Section 74 cannot be invoked on a Positive Act or when the Assessee acted on bonafide belief:-**

i. **Anand Nishikawa** Vs. **Commissioner of Central Excise, Meerut,** 2005 (188) ELT 149 (SC)
ii. **Uniworth Textiles Limited** Vs. **Commissioner of Central Excise, Raipur,** (2013) 9 SCC 753
iii. **Easland Combines Vs. Commissioner of Central Excise,** 2003 (152) ELT 39 (SC)

D. **Extended period of limitation cannot be invoked when the issue involves Interpretation of Law/Classification:-**

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i. **Commissioner of Central Excise, Hyderabad** Vs. **Chemphur Drugs and Liniments, Hyderabad.,** (1989) 2 SCC 275

ii. **Padmini Products** Vs. **Commissioner of Central Excise,** (1989) 4 SCC 275

iii. **Uniflex Cables Limited** Vs. **Commissioner of Central Excise, Surat,** 2011 (271) ELT 161 SC

iv. **Jaiprakash Industries Limited** Vs. **Commissioner of Central Excise, Chandigarh,** 2002 (146) ELT 481 (SC)

v. **Commissioner of Central Excise Puducherry** Vs. **CESTAT.,** (2015) 317 ELT 211

vi. **Caprihans India Limited** Vs. **Commissioner of Central Excise, Surat,** 2015 (10) TMT 444

vii. **Densons Pultretaknik** Vs. **Commissioner of Central Excise**, 2003 (155) ELT 211

E. **Mere omission and Non-disclosure of the facts does not amount to suppression of facts:-**

i. **Pushpam Pharma** Vs. **Commissioner of Central Excise, Bombay,** 1995 (78) ELT 401 (SC)

ii. **Commissioner of Central Excise** Vs. **H.M.M. Limited,** 1995 (76) ELT 497 (SC)

iii. **Anand Nishikawa Company Limited** Vs. **Commissioner of Central Excise,** (2005) 7 SCC 749

F. **There should be an intent to evade tax:-**

i. **Cosmic Dye Chemicals** Vs. **Commissioner of Central Excise,** (1995) 6 SCC 117

ii. **TNHB** Vs. **Commissioner of Central Excise,** 1995 Supp (1) SCC 50

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iii. **Aban Loyd Chiles Offshore Limited** Vs. **CC, Maharashtra.,** (2006) 6 SCC 482

iv. **Safecon Lifescience Private Limited** Vs. **ADC.,** 2025 (9) TMI 919

v. **M/s Continental Foundation Joint Venture** Vs. **Commissioner of Central Excise, Chandigarh.,** (2007) 216 ELT 177 SC

59.**Mr.Vijay Narayan**, the learned Senior Counsel who also appeared for the Petitioner in **W.P.Nos.23220** and **23540 of 2024 [M/s.Chemplast Sanmar Ltd.],** would submit that a division of the Petitioner Company was merged with M/s.Chemplast Cuddalore Vinyls Limited. Simultaneously, M/s.Sanmar Speciality Chemicals Limited was merged with the Petitioner Company. Similarly, there was also merger of M/s.SHL Securities (Alpha) Limited with M/s.Sanmar Engineering Services Limited. These were subject matter of the Common Order passed by the National Company Law Tribunal (NCLT), Single Bench, Chennai dated 26.04.2019.

60. It is submitted that on account of the amalgamation of M/s.Sanmar Speciality Chemicals Limited with the Petitioner, the Input Tax Credit lying un-utilized in the Electronic Credit Ledger of the latter thus stood transferred in

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accordance with Section 18(3) of the respective GST Enactments which was subject matter of an Audit Report dated 28.02.2023 under Section 65 read with Rule 101 of the respective GST Enactments.

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61. Specifically, the learned Senior Counsel for the Petitioner would draw attention to Item Nos.8 and 9 which dealt with merger and de-merger i.e., merger with M/s.Sanmar Speciality Chemicals Limited and demerger of a Division of the Petitioner and its merger with M/s.Chemplast Cuddalore Vinyls Limited. It is submitted that pursuant to the aforesaid Audit Report as far as Item Nos.8 and 9, no Show Cause Notice was issued under Section 73 of the respective GST Enactments.

62. It is further submitted that the Impugned Show Cause Notice(s) were issued pursuant to the aforesaid Audit Report dated 28.02.2023 under Section 65(6) of the respective GST Enactments. It is further submitted that Show Cause Notice in GST DRC-01 dated 28.08.2023 was issued which has culminated in an Order dated 24.05.2024 against which the Petitioner is in Appeal before the Appellate Authority.

63. The learned Senior Counsel for the Petitioner would submit that as far

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as the issue arises on account of merger/de-merger as the subject matter of Audit Report dated 28.02.2023 is concerned, no Notice was issued earlier. However, subsequently, the Impugned Show Cause Notices dated 10.05.2024 have been issued.

64. It is submitted that the Impugned Show Cause Notices are bereft of details to justify the invocation of the extended period of limitation under Section 74 of the respective GST Enactments.

65. Adding further, the learned Counsel for the Petitioner would submit that having examined the issue under Section 65(6) of the respective GST Enactments earlier which coincided with the issuance of the Audit Report dated 28.02.2023 and having decided not to issue a Notice under Section 73 of the respective GST Enactments earlier in respect of the issue covered by Audit Report dated 28.02.2023, it is not open for the Department to issue the Impugned Show Cause Notice under Section 74 of the respective GST Enactments on 10.05.2024.

66. In this connection, the learned Senior Counsel for the Petitioner would

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endeavour to place reliance on the decision of the Hon'ble Supreme Court in **Nizam Sugar Factory** Vs. **Collector of Central Excise, A.P.**, (2006) 197 ELT 465.

67. On merits, the learned Senior Counsel for the Petitioner would draw a reference that there was no case made out for issuance of a Notice under Section 74 of the respective GST Enactments on account of the order of NCLT dated 26.04.2019.

68. The learned Senior Counsel for the Petitioner has also placed reliance on the decision of the Courts referred to in the following cases:-

i. **Kiran Gems Private Limited** Vs. **Union of India**, (2021-TIOL-237-HC-MUM-ST);

ii. **Rashtriya Ispat Nigam Limited** Vs. **Deputy Commissioner (CT), III**, (2022) 143 Taxmann.com 199 (Madras);

iii. **3i Infotech** Vs. **CST**, (2017) 51 STR 305;

iv. **Pushpam Pharmaceuticals Company** Vs. **Collector of Central Excise, Bombay**, 1995 (78) ELT 401 (SC) and

v. **M/s.Sri Om Sakthi Traders, Represented by its Director** Vs. **The State Tax Officer (Intelligence), Cuddalore** in Writ Petition Nos.895 and 899 2025 vide order dated 05.11.2025.

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69. **Mr.Sujith Ghose**, the Learned Senior Counsel in W.P.Nos.34600, 34604 & 34617 of 2025 [**Siemens Gamesa Renewable Power Private Limited**] relied on the following decisions of the Hon'ble Supreme Court and that of the High Court for the issues relating to Jurisdictional Fact and the scope of invocation of extended period of limitation by the Proper Officer.

i. **Union of India and another** Vs. **Kunisetty Satyanarayana**,

(2006) 12 SCC 28

ii. **Union of India and others** Vs. **Coastal Container Transporters Association and others**, (2019) 20 SCC 446

iii. **Carona Limited** Vs. **Parvathy Swaminathan and Sons**, (2007) 8 SCC 559

iv. **State of Madhya Pradesh and others** Vs. **Sardar D.K.Jadhav & another,** (1968) 2 SCR 823

v. **Nawab Shaqafath Ali Khan & others** Vs. **Nawab Imbad Jah Bahadur and others,** (2009) 5 SCC 162

vi. **Chennai Bunkering Terminal Private Limited** Vs. **Board of Trustees,** O.P. Nos. 415 of 2018

vii. **ITW Signode India Private Limited** Vs. **Collector of Central Excise,** (2004) 3 SCC 48

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viii. **T.C.Basappa** Vs. **T.Nagappa and another,** (1954) 1 SCC 905

ix. **Syed Yakoob** Vs. **K.S.Radhakrishnan and others,** 1963 SCC Online SC 24

x. **Nanha** Vs. **Deputy Director of Consolidation.,** 1973 SCC Online All 116.

xi. **Seema Ghosh** Vs. **Tata Iron and Steels Co., (**2006) 7 SCC 732

xii. **R.J.Trading Company** Vs. **Commissioner of CGST, Delhi., W.P.(C) No. 4847 of 2020.**

xiii. **Barium Chemicals Limited and another** Vs. **Company Law Board and others,** 1966 Supp SCR 311

ix. **Sheo Nath Singh** Vs. **Appellate Asst Commissioner, Calcutta,** (9172) 3 SCC 234

x. **M/s Meenakshi Trendz** Vs. **State of Gujarat,** S.C.A.No.9545 of 2020.

70. Apart from the above mentioned decisions, learned counsel for the Petitioners also relied on few other decisions of the Hon'ble Supreme Court, High Courts and the Tribunal in the above list.

71. Predominantly, the learned Senior Counsel advanced arguments on

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the ground that in absence of foundational facts, the proceedings initiated are liable to be interfered with and therefore the Jurisdiction of the Writ Court can be invoked.

72. It is submitted that only if the Jurisdictional Fact exists a Notice under Section 73 or Section 74 as the case may be, Jurisdiction under Section 73 and Section 74 cannot be invoked.

i. **Union of India and another** Vs. **Kunisetty Satyanarayana** (2006) 12 SCC 28

ii. **Union of India and others** Vs. **Coastal Container Transporters Association and Ors.** (2019) 20 SCC 446

iii. **Syed Yakoob** Vs. **K.S.Radhakrishnan and others,** 1963 SCC Online SC 24

iv. **Nanha** Vs. **Deputy Director of Consolidation,** 1973 SCC Online ALL 116

73. In the above cases, it was stated that it is neither possible nor desirable to attempt either to define or describe adequately all cases of errors which can appropriately be described as errors of law apparent on the face of the record. It was also held that the Courts must always depend upon the facts and

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circumstances and the nature and scope of the legal provision which is alleged to have been misconstrued or contravened deciding on whether it is an error of law or an error of law which is apparent on the face of record.

74. The Court also stated that when it is about a pure question of fact the High Court has no Jurisdiction to interfere with the finding record of the Appellate Tribunal and seek to correct it by a Writ of Certiorari even if no reasons have been given in support of the factual finding. The intervention of the High Court under Article 226 of the Constitution of India cannot be justified. Regarding evidence not being duly considered by the Tribunal would pertain to the realm of appreciation of evidence and will be outside the purview of an enquiry proceedings of a Writ of Certiorari under Article 226 of the Constitution of India.

75. The Court further observed that Article 226 has two fold requirements that there should be a manifest error of law apparent on the face of record and that such error has resulted in manifest injustice.

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76. The Court relied on the following cases and stated that if a finding is based on no evidence, interference can properly be made under Article 226 of the Constitution provided the Court is satisfied that there has been failure of Justice.

i. **Deoria Sugar Mills Limited** Vs. **Government of Uttar Pradesh** (1954 AWR 305)
ii. **Sangram Singh** Vs. **Election Tribunal Kotah** (AIR 1955 SC 425)
iii. **State of Andhra Pradesh** Vs. **S.Sree Rama Rao** (AIR 1963 SC 1723)
iv. **Sales Tax Officer, Jodhpur** Vs. **Shiv Rata G.Mohatta** (AIR 1966 SC 142)
v. **Joint Registrar of Co-operative Societies** Vs. **P.S.Rajagopal Naidu** ((1970) 1 SCC 753: AIR 1970 SC 992)
vi. **Zora singh** Vs. **J.M. Tandon** ((1971) 3 SCC 834: AIR 1971 SC 1537)
vii. **Hindustan Steels Ltd.** Vs. **A.K.Roy** ((1969) 3 SCC 513: AIR 1970 SC 1401).

77. It is submitted that since Jurisdictional Facts are absent, the Impugned Show Cause Notices were liable to be quashed. In this connection, a reference was made to the following decisions of the Hon'ble Supreme Court:

i. **Raza Textiles Limited** Vs. **Income Tax Officer, Rampur** (1973) 1 SCC 633
ii. **Calcutta Discount Company Limited** Vs. **Income Tax Officer, Companies District I Calcutta and another,** (1961) 2 SCR 241

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iii. **Arun Kumar and others** Vs. **Union of India and others,** (2007) 1 SCC 732

78. It is submitted that after erroneously assuming Jurisdictional Fact, an Authority cannot confer upon itself the Jurisdiction which it did not possess. Thus, existence of Jurisdictional Fact is *sine quo non* for assuming Jurisdiction.

79. Learned Senior Counsel also drew attention to the **Calcutta Discount Company Limited** Vs. **Income Tax Officer** (referred to *supra)*. A reference was also made to **Chennai Bunkering Terminal Private Limited** Vs. **Board of Trustees**, O.P.No.415 of 2018.

80. The learned Senior Counsel compared the language in Section 74 of the respective GST Enactments with Section 237(b) of the Companies Act, 1956, which conferred powers on the Central Government to appoint one or more competent person to act as inspectors to investigate etc., based on the opinion of the Central Government.

REASON TO BELIEVE:-

81. In this connection, a reliance was placed on the Judgement of the

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Hon'ble Apex Court in **Barium Chemicals Limited and another** Vs. **Company Law Board**, 1966 SCC OnLine 53, wherein the interpretation of the expression **"in the opinion of"** in Section 237(b) of the Companies Act, 1956 fell for consideration. It is submitted that the Authority is required to arrive at such an opinion from circumstances suggesting what is set out in Sub-clause (i), (ii) or (iii) to Section 237(b) of the Companies Act, 1956.

82. The learned Senior Counsel for the Petitioner also drew attention to the decision of the Hon'ble Supreme Court in **Sheo Nath Singh** Vs. **Appellate Assistant Commissioner, Calcutta** (referred to *supra*) wherein it was held that an Income Tax Officer would be acting without Jurisdiction if the reason for his belief that the conditions are satisfied does not exist or is not material or relevant to form the belief required under Section 34(1-A) of the Income Tax Act, 1922.

83. The learned Senior Counsel for the Petitioner also relied on the Judgement of the Gujarat High Court in **M/s Meenakshi Trendz** Vs. **State of Gujarat** (referred to *supra*), wherein while interpreting the expression "**reason to believe**" and "**in opinion of**" the court relied on **Barium Chemicals Limited** (referred to *supra*).

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84. The learned Senior Counsel for the Petitioner **Mr.Rugan and Arya** in **W.P.Nos.35967, 35970, 35974 and 35976 of 2024 [M/s.Fastenex Private Limited],** placed reliance on **Oryx Fisheries Private Limited** Vs. **Union of India,** (2010) 13 SCC 427 to show how a Show Cause Notice should be drafted. On merits, learned Senior Counsel for the Petitioner also placed reliance on the following decision of the Hon'ble Supreme Court:-

(a) **Plasmac Machine Manufacturing Company Private Limited** Vs. **Commissioner of Central Excise,** 1991 Supp (1) SCC 57

(b) **Purewal Associates Limited** Vs. **Commissioner of Central Excise**, (1996) 10 SCC 752

85. The learned Senior Counsel for the Petitioner further relied on the following decisions of the Hon'ble Supreme Court and that of this Court detailed below:-

i. **Commissioner of Central Excise** Vs. **Videocon Industries Limited,** 2023 SCC Online SC 357

ii. **Dunlop India Limited** Vs. **Union of India,** 1976 (2) SCC 241

iii. **SL Lumax Limited** Vs. **Deputy Commissioner,** 2024 SCC Online Mad 420

iv. **Siemens Limited** Vs. **State of Maharashtra,** 2006 (12)

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86. Learned Senior Counsel for the Petitioner submits that the Jurisdictional Facts necessary for the Proper Officer to issue Notices under Section 74 which are absent in the present case and therefore, the Impugned Show Cause Notices were liable to be quashed.

87. It is submitted that the Respondent has proposed tax at 28% unmindful of the statutory provision which requires levy at tax only at 18% for forged articles and the same was not considered despite the Petitioner filing a detailed response.

88. It is submitted that the question whether 'Nuts' manufactured by the Petitioner(s) would fall under the description 'Nuts' in HSN Code 7318 or under description 'Parts and Accessories of Motor Vehicles' in HSN 8708 is no longer *res integra,* since it is covered by the decision in **Plasmac Machine Manufacturing Company Private Limited** Vs. **Commissioner of Central Excise**, 1991 Supp (1) SCC 57, which was also cited and quoted in **Purewal Associates Limited** Vs. **Commissioner of Central Excise,** (1996) 10 SCC 752.

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89. It is submitted that the question that arose for consideration in **Plasmac Machine Manufacturing Company Case** *(referred to supra)* was whether the 'Nuts' manufactured by the Appellants therein, should be classified as 'Nuts' (attracted more tax) or 'Parts of Injection Moulding Machines' (Attracted less tax). It is submitted that the Hon'ble Supreme Court held that the end use is immaterial and goods must be classified as they are known in the market in common parlance.

90. It is submitted that in **Purewal Associates Case** *(referred to supra),* the question that arose before the Hon'ble Supreme Court was whether the goods were "Bolts" or "Motor Vehicle Parts". It is submitted that the contention that they were "Motor Vehicle Parts" since they were designed for use in Motor Vehicles was rejected by the Tribunal and thereafter, upheld by the Hon'ble Apex Court. In this connection, the following cases were relied on by the Petitioner:-

i. **Commissioner of Central Excise** Vs. **Videocon Industries Limited**, 2023 SCC OnLine SC 357
ii. **Indo International** Vs. **Commissioner of Sales Tax**, 1981 (2) 528

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iii. **Dunlop India Limited** Vs. **Union of India**, (1976) 2 SCC 241

91. It is submitted to this Court that in **SL Lumax Limited** Vs. **Deputy Commissioner**, 2024 SCC OnLine Mad 420, this Court interfered with a Show Cause Notice when there was a *prima facie* indication that pre-judgement has been made inasmuch as the assessee has been called upon to pay the quantified sum and not show cause as to why the said amounts are not payable. In this regard, reliance was also placed on the following cases of the Hon'ble Supreme Court and Calcutta High Court:-

i. **Siemens India** Vs. **State of Maharashtra**, (2006) 12 SCC 33
ii. **Joyous Blocks & Panels Private Limited** Vs. **Assistant Commissioner**, 2022 SCC OnLine Cal 4306.

92. It is submitted that the Respondent has offered no reasoning whatsoever for why the Input Tax Credit availed by the Petitioner was wrongful, except for the reason that the Petitioner failed to file a distinct balance sheet and P & L account for Plant No.2.

93. It is further submitted that there are no material on record to justify the invocation of Section 74, and the said Notice is mute on the additional

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requirements of ingredients stipulated therein *viz.,* Fraud, wilful misstatement, suppression of facts to evade tax.

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94. It is humbly submitted that the levy of Penalty under Section 122 was carried out without giving a reasonable opportunity of personal hearing and therefore runs counter to the Judgement of the Hon'ble Supreme Court in **Union of India** Vs. **Tulsiram Patel**, 1985 (3) SCC 398.

95. It is submitted that the Petitioner had in fact submitted most of the information and documents called for by the Respondent before the issuance of the Impugned Notices and had also expressed its readiness and willingness to furnish all other information and documents, which have also been subsequently furnished, despite the same the Respondent has hastily invoked Section 122.

96. **Mr.G.Shiva Kumar**, the learned Counsel for the Petitioner in **W.P.Nos.11713** & **11793** of **2025 [Kailash Timber & Plywoods]** (disposed on 05.02.2026), submits that the extended period of limitation period for the issuance of a Show Cause Notice under Section 74 can be invoked strictly in circumstances involving **Fraud**, **Wilful Mis-statement**, or **Suppression of**

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Facts with an intent to evade tax.

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97. It is submitted that the existence of Fraud, Wilful Mis-statement, or Suppression of Facts to evade tax, constitute Jurisdictional Facts and are a *sine qua non* to assume power under Section 74. It is further submitted that any other attempt to invoke the extended period under Section 74 would render such exercise without Jurisdiction.

98. It is submitted that Section 75(7) expressly prohibits the Adjudicating Authority from relying upon any grounds not specified in the Show Cause Notice, and if the Show Cause Notice is silent as to the essential predicate required under Section 74 *viz.* Fraud, Wilful Mis-statement, or Suppression of Facts to evade tax, the Proper Officer is divested of the Jurisdiction to invoke the extended period.

99. The learned Senior Counsel further submits that there is a clear distinction between 'sustaining' and 'issuing' a Show Cause Notice under Section 74 of the respective GST Enactments, and the usage of the phrase "the Show Cause Notice cannot be sustained" in Section 75(2) means that only when

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a Show Cause Notice is validly issued under Section 74(1) and but is not sustained under Section 74(9), is it eligible for the deeming fiction provided under Section 75(2).

100. It is further submitted that the use of the words "for the reason that" in Section 75(2) of the respective GST Enactments would necessarily mean that the deeming fiction only applies to a valid Show Cause Notice issued under Section 74, which encapsulates specific grounds stated therein.

101. It is submitted that the restriction of the deeming fiction to a specific 'reason' evidences the legislature's conscious intent to limit conversion only to those cases where the relevant charges made in the Show Cause Notice are not proved upon adjudication to be made under Section 74(9).

102. It is further submitted that for the statutory fiction in Section 75 (2) to operate, there must be a specific charge articulated in the Show Cause Notice, and once a charge has been properly set forth in the Show Cause Notice, the law then requires that the charge be established at the stage of adjudication.

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103. It is submitted that the process of establishing a charge only arises during the adjudication stage, not at the threshold of issuance. At the stage of issuance, the Proper Officer is guided by the standard of "appears" (i.e., reasonable grounds for suspicion), whereas "establishment" demands actual proof or acceptance on the merits after considering all evidence and arguments.

104. It is therefore submitted that the test for application of the deeming fiction under Section 75(2) is not the failure of the Show Cause Notice, but rather the failure of the determination Order to be made thereafter.

105. In this regard, the learned Counsel for the Petitioner placed reliance on the decisions of the Hon'ble Supreme Court in **Pyare Lal Bhargava** Vs. **State of Rajasthan** reported in AIR 1963 1094, and **Hardeep Singh** Vs. **State of Punjab** reported in 2014 AIR 1400, wherein the use of the word 'appears' has been clarified as having a reasonable basis founded on some material, even if it is not ultimately sufficient to secure a conviction or final finding.

106. **Mrs.R.Hemalatha**, the learned Counsel for the Petitioner in **W.P.No.172 & 382 of 2025** [**Tvl. Ezhil Arasan K Contractor**] contends that the wording "**Where it appears**" in Section 74 of the respective GST

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Enactments indicates that the Proper Officer should form an opinion based on existing evidence to issue a Show Cause Notice under Section 74.

107. It is submitted that the word "**appear**" implies the pre existence of materials regarding short payment or non-payment of tax by reason of Fraud, Willful Mis-statement, and Suppression of Fact.

108. The learned Counsel for the Petitioner placed reliance on the Judgement of the Hon'ble Supreme Court in **GKN Driveshafts (India) Limited** Vs. **Income Tax Officer**, wherein the procedure to issue a Notice for income escaping assessment under the provisions of Income Tax Act, 1961 was dilated. In the above case, it was held that when income escapes assessment, the Proper Officer is strapped with the liability to provide reasons for Notice under 147 of the Income Tax Act, 1961. The said rationale can be applied to the present case arising from Section 74 of the respective GST Enactments.

109. It is submitted that the Proper Officer should provide the notice with the reason by which it appeared to the Proper Officer through material evidence that the assessee has short-paid or not paid tax by reason of Fraud, Willful Mis-statement, and Suppression of Fact. This disadvantages the Assessee by not

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being able to defend himself properly and the same gives rise to violation of Principles of Natural Justice.

110. It is further submitted that the Proper Officer shall initiate proceeding under Section 74 of the respective GST Enactments only after he forms an independent opinion based on the material available that there is an existence of Fraud, Willful Mis-statement, and Suppression of Fact. It is submitted that the Show Cause Notice issued under Section 74 cannot come into existence based on mere assumption.

111. The Petitioner also placed reliance on the Judgement of the Delhi High Court in **Parity Infotech Solutions Private Limited** Vs. **Government of National Capital Territory of Delhi,** in W.P.(C) No.7017 of 2022 dated 07.03.2023, where it was held that the invocation of Section 74 of the respective GST Enactments can only come into existence if the Proper Officer formed a *prima facie* opinion based on the records available.

112. It is submitted that the powers conferred to an Officer under Section 27 of the Tamil Nadu Value Added Tax Act, 2006 is analogous to the powers conferred under Section 74 of the respective GST Enactments. The Assessing

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Authority under the Tamil Nadu Value Added Tax Act, 2006 is conferred with wider powers than in the Central Goods and Services Tax Act, 2017. Section 27 of the Tamil Nadu Value Added Tax Act, 2006 empowers the Assessing Authority to assess the taxpayer with mere presumption and assumption.

113. It is submitted that the legislators drafted the title of Section 74 of the respective GST Enactments with the wording 'determination of tax' rather than using the word 'assessment'. It shows that the Proper Officer is not conferred with power to assess but rather to determine the tax based on the records available.

114. The learned Counsel for Petitioner submitted that the meaning of the word "assessment" under the Income Tax Act, 1961 included determination of tax as a part of assessment.

115. In this connection, a reference was made to the decision of the Hon'ble Supreme Court in **S.Sankappa** Vs. **The Income Tax Officer, Central Circle-II, Bangalore,** 1968 AIR 816, wherein it was held that the word "assessment" is used in the Income Tax Act in a number of provisions in a comprehensive sense and includes all proceedings, starting with the filing of the return or issue

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of notice and ending with determination of the tax payable by the Assessee.

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116. It was further held that the proceedings taken for rectification of assessment to tax must be held to be proceedings for assessment, since what the Income Tax Officer does is to correct errors in, or rectify orders of assessment made by him.

117. Therefore, it was submitted that the Proper Officer has the power only to determine the tax based on the records available to him and the GST legislation does not confer the powers to assess and the same is the will of the legislators based on the choice of words used for Section 74 of the respective GST Enactments.

118. It is also contended that when the words “appear” and “determination” are read together, it narrows the scope of the power conferred on the Proper Officer under Section 74 of the respective GST Enactments.

119. It is submitted that an Officer under the Income Tax Act, 1961 can initiate a proceeding if he had reason to believe that the income escaped

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assessment, but in the case of Section 74 of the respective GST Enactments, the word "appear" means that the existence of short-payment or non-payment of tax by reason of Fraud, Wilful Mis-statement and Suppression of Fact, is to be ascertained only from the available records and that too for the limited purpose of determining the tax liability based on the said available records.

120. Therefore, it is submitted that the Proper Officer cannot initiate a proceeding under Section 74 of the respective GST Enactments without fulfilling the above condition provided under the same. The said conditions require the Proper Officer to form an opinion based on the records available that there seems to be short-payment or non-payment of tax by reason of Fraud, Wilful Mis-statement and Suppression of Facts, and that power can be utilised only for the purpose of determining the tax liability of the person.

121. It is submitted that the Telangana High Court in **Rays Power Infra Private Limited** Vs. **Superintendent of Central Tax,** 2024 (84) GSTL 146 (Telangana) held that the Proper Officer should indicate the liability under Section 73 and if the tax payer did not comply with the same under Section 73(5) of the Act, then only Section 74 can be attracted and there should be an existence of strong material evidence.

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122. It is finally by the Counsel that the proceeding under Section 74 can only come into existence for the purpose of determination of tax liability that too upon satisfying the condition of forming of opinion based on the material available on the record.

123. **Mr.Rajkumar**, the learned Counsel for the Petitioner in W.P.Nos.2026, 2079, 2075, 2081, 2086 and 2092 of 2025 [**M/s.Ace Tech Heavy Fab Private Limited**], submitted that an order under Section 74 is penal in nature and therefore, Section 74 shall be invoked only if the party acted either deliberately in defiance of law or was guilty of contumacious conduct or dishonest, or acted in conscious disregard of its statutory obligations.

124. In this regard, the learned Counsel for the Petitioner places reliance on the Judgement of the Hon'ble Supreme Court in the case of **Hindustan Steel Limited** Vs. **State of Orissa**, AIR 1970 SC 253, wherein, the imposition of Penalty under Section 25(1)(a) of the Orissa Sales Tax Act, 1947, was challenged.

125. There, when the Assessee had failed to register itself as a dealer

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under Section 9(1) read with Section 25(1)(a) of the said Act, the Hon'ble Supreme Court held that an Authority competent to impose the Penalty will be justified in refusing to impose Penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a *bona fide* belief that the offender is not liable to act in the manner prescribed by the statute.

126. It is submitted that since the proceedings under Section 74 are penal in nature, the burden is on behalf of the revenue, to establish Fraud, Wilful-misstatement or Suppression of Facts to evade tax, in order to sustain the demand. Reliance was also placed in the following decisions of the Court:-

i. **Commissioner of Income Tax, Madras** Vs. **M/s.Khoday Eswarsa & Sons**, AIR 1972 SC 132

ii. **R.E.M.Ramakutty Nair** Vs. **The State of Madras**, [1973] 31 STC 44 (Mad)

iii. **The Deputy Commissioner (C.T.), Coimbatore** Vs. **V.S.R. Ramaswami Chettiar and brothers,** [19176] 38 STC (Mad)

iv. **Kumudham Printers Private Limited** Vs. **State of Tamil Nadu**, [1994] 95 STC 453 (Mad)

v. **G. Sivasubramanian** Vs. **State of Tamil Nadu**, [1995] 95 STC 597 (Mad)

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vi. **Deputy Commissioner of Commercial Taxes, Trichy Division, Trichy** Vs. **V.R.Kuppusamy Gounder and Sons**, [1995] 98 STC 408 (Mad)

vii. **State of Tamil Nadu** Vs. **K.M.S.Kasinathan Chettiar and Brothers**, [1997] 106 STC (Mad)

127. The learned Counsel further submits that, in the context of Section 16 of Tamil Nadu General Sales Tax Act, 1959, even the use of the words 'suppression', in contradistinction to mere 'omission', is sufficient to satisfy the mental elements necessary to bring home the charge of 'wilful non-disclosure', and in this regard, reliance was placed on the following cases:-

i. **State of Tamil Nadu** Vs. **Sri Swamy and Company**, [1977] 39 STC (Mad)

ii. **The State of Tamil Nadu** Vs. **R.R. Ramachari and Sons**, [1977] 40 STC 542 (Mad)

iii. **The State of Tamil Nadu** Vs. **A.L.Francis**, [1978] 41 STC 133 (Mad)

128. It is submitted that something tangible and concrete facts are required to conclude that the assessee had the necessary *mens rea* to evade tax. In this connection, he placed reliance on the following cases:-

i. **The State of Tamil Nadu** Vs. **S.K.M.Ayya Nadar and Company**, [1978] 41 STC 375 (Mad)

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ii. **R.Abdul Aziz** Vs. **State of Tamil Nadu and Another**, [1987] 67 STC 273 (Mad)

ii. **Vijaya Electricals** Vs. **State of Tamil Nadu**, [1991] 82 STC 268 (Mad)

129. The learned Counsel for the Petitioner also relied on the following cases wherein findings of "Fraud" has been held to be a question of fact, and the burden of proof is on the person who alleges it.

i. **Smt. Shrisht Dhawan** Vs. **M/s.Shaw Brothers**, AIR 1992 SC 1555

ii. **S.P. Chengalvaraya Naidu** Vs. **Jagannath**, 1994 SCC 91 (1) 1

iii. **Gowrishankar & another** Vs. **Joshi Amba Shankar Family Trust & others**, 1999 SCC (3) 310.

iv. **Roshan Deen** Vs. **Preeti Lal**, AIR 2002 SC 33

v. **Anita** Vs. **Rambilas**, AIR 2003 AP 32

vi. **Ram Preeti Yadav** Vs. **U.P.Board of High School**, 2003 (8) SCC 311

v. **Ram Chandra Singh** Vs. **Savitri Devi and others**, AIR OnLine 2003 SC 537

vi. **Ashok Leyland Limited** Vs. **State of Tamil Nadu and Another**, [2004] 134 STC 473 (SC)

130. It is submitted that the Hon'ble Supreme Court had consistently

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rejected the invocation of extended period of limitation under various Enactments ranging from the Central Excise Act, 1944 and the Customs Act, 1962. He also drew attention to the decision of the Hon'ble Apex Court in **M/s.Uniworth Textiles Limited** Vs. **Commissioner of Central Excise**, 2013 (9) SCC 753, which heavily relied on its earlier decisions in the following cases:-

i. **Pushpam Pharmaceuticals Company** Vs. **Commissioner of Central Excise** [1995 Supp (3) SCC 462 (1995) 78 ELT 401]

ii. **Sarabhai M.Chemicals** Vs. **Commissioner of Central Excise** [(2005) 2 SCC 168]

iii. **Cosmic Dye Chemicals** Vs. **Commissioner of Central Excise** [(1995) 6 SCC 117]

iv. **Anand Nishikawa Company Limited** Vs. **Commissioner of Central Excise** [(2005) 7 SCC 749]

v. **Commissioner of Central Excise** Vs. **H.M.M. Limited** [1995 Supp (3) SCC 322]

vi. **Easland Combines** Vs. **Commissioner of Central Excise** [(2003) 3 SCC 410]

vii. **Associated Cement Companies Limited** Vs. **Commissioner of Customs** [(2001) 4 SCC 593]

viii. **Aban Loyd Chiles Offshore Limited** Vs. **Commissioner of Customs** [(2006) 6 SCC 482]

ix. **Union of India** Vs. **Ashok Kumar** [(2005) 8 SCC 760 : 2006 SCC

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131. The learned Counsel for the Petitioner submits that in cases involving imposition of penalty under Section 27 of the Tamil Nadu Value Added Tax, Act, 2006, this Court in a catena of cases has held that mere use of the expression 'wilful' does not make an act or action wilful or deliberate, and it is a question of fact to be proved by the person who makes such allegation. The following cases are cited in this regard:-

i. **Nokia India Private Limited** Vs. **Deputy Commissioner (CT)-IV**, Large Tax Payers Union, Egmore, Chennai and others, [2015] 79 VST 137 (Mad)

ii. **State of Tamil Nadu** Vs. **Golden Homes Private Limited,** [2017] 102 VST 380 (Mad).

iii. **M/s.Saravana Super Market** Vs. **The Commercial Tax Officer**, in W.P.No.35019 of 2016 dated 01.12.2016.

iv. **M/s.G.K.Foundation** Vs. **The Assistant Commissioner (CT)**, in W.P.No.15047 of 2017 dated 13.07.2017.

v. **M/S.Sri Vignesh Jewellers** Vs. **The State of Tamil Nadu**, in Tax Case Revision Nos.151 to 153 of 2018 dated 27.11.2018.

vi. **M/s.Supreme Trading House** Vs. **The Assistant**

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Commissioner, in W.P.Nos.16607, 16610, 16613, 16614 and 16616 of 2023 dated 08.12.2023.

132. The learned Counsel for the Petitioner also relied on the following cases:-

I. **M/s. Vinayaka Alloys Private Limited** Vs. **The Central Sales Appellate Authority**, in **W.P.No.12843 of 2019** dated **25.03.2025**.

ii. **S.S.Communications** Vs. **The Deputy State Tax Officer II**, in **W.P.(MD)No.22420 of 2024** dated **20.09.2024**.

iii. **Dinod Cashew Corporation** Vs. **The Deputy Commercial Tax Officer and Another**, [1986] 61 STC 1 (Mad).

iv. **State of Tamil Nadu** Vs. **Nu-Tread Tyres**, [2006] 148 STC 256 (Mad)

v. **West Coast Industries (Exports) Private Limited** Vs. **State of Tamil Nadu**, reported in [2013] 57 VST 373 (Mad).

vi. **Commissioner of Income Tax West Bengal** Vs. **Anwar Ali**, AIR 1970 SC 1782.

vii. **Kathiresan Yarn Stores** Vs. **The State of Tamil Nadu**, [1978] 42 STC 121 (Mad)

vii. **M/s.NKAS Services Private Limited** Vs. **The State of Jharkhand**, in W.P.(T) No. 2659 of 2021 dated 09.02.2022.

133.**Mrs.G.Vardhini Karthik,** the learned Counsel for the Petitioner in

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W.P.Nos.29744, 29747, 33258, 33268, 33272 and 33275 of 2025 [Tvl.Elgi Sauer Compressors Limited, Coimbatore and others], has relied on the definitions of the words / phrases *viz.,* "**By reason of**", "**Show-Cause**", "**Establish**" and "**Grounds**", in the Advanced Law Lexicon, which appear in Section 74 of the respective GST enactments. She also submitted that the expression "**By reason of**" would mean any thing proximately connected as cause and effect.

134. It is submitted that this Court has power under Section 75(2) of the respective GST Enactments to conclude that the Notice issued under Sub-section (1) of Section 74 is not sustainable for the reason that the charges of Fraud or any Wilful-Misstatement or Suppression of Facts to evade tax has not been established against the person to whom the Notice was issued, and accordingly deem it as a Notice issued under Sub-section (1) of Section 73 of the respective GST Enactments.

135. The learned Counsel relied on the following cases dealing with the interpretation of the phrase "**where it appears to**" in the following cases:-

i. **Afcons Infrastructure Limited & Another** Vs. **Cherian Varkey Construction Company Private Limited and others**, (2010) 8 SCC 24,

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ii. **Commissioner of Income-tax** Vs. **H.P. Global Soft Limited**, [2012] 20 taxmann.com 242 (Kar.),

iii. **Abdul Vahab P.** Vs. **Assistant Commissioner of Income-Tax, Circle - 2(1), Kozhikode**, [2012] 18 taxmann.com 196 (Ker.),

iv. **Income-Tax Officer** Vs. **P.C.A Engineers Limited,** [1984] 8 ITD 518 (BOM.)

136. A reference was also made to Paragraph 3 of **Circular No.8/2024** (A1/553/2024/ Ease of Business cell) dated **29.08.2024** issued by the Commissioner of State Tax, Tamil Nadu, wherein it was clarified that before invoking Section 74 of the respective GST Enactments, specific reference to reason of Fraud or any Wilful Mis-statement or Suppression of Facts has to be established and evidences relied on by the Adjudicating Authority for the proposed action has to be referenced.

137. The learned Counsel also drew attention to the decision of the Hon'ble Supreme Court in **Armour Security (India) Limited** Vs. **Commissioner, CGST, Delhi Commissionerate**, [2025] 177 taxmann.com 478 (SC) and to the decision of the Allahabad High Court in **Eveready Industries India Limited** Vs. **State of Uttar Pradesh**, (2024) 21 Centax 234 (All.), rendered in the context of Section 75 of the respective GST Enactments, wherein it was held taking into account the settled principles of interpretation

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of statutes,

(a) *all Sections of a Statute need to be read together,*
(b) no words, Section in a Statute can be rendered otiose,
(c) any ambiguity in a charging Section must be read in favour of the assessee,
(d) a casus omissus can be supplied if the Court, having an overall view of the scheme of the Statute is convinced that the legislature did intend a certain manner of conducting predecisional hearing but draftsman failed to add the necessary words to make it plain and beyond doubt; and therefore was of the opinion that word "personal" can easily be construed to have been intended to be added but has been left out erroneously.

138. There, the Impugned Order was passed without affording an opportunity of personal hearing.

139. The learned Counsel also placed reliance on the decision of the Hon'ble Supreme Court in **Union of India** Vs. **Rajeev Bansal**, [2024] 167 taxmann.com 70 (SC). It is submitted that to arrive at the conclusion in Paragraph No.114, the Hon'ble Supreme Court considered the following principles of statutory interpretation in Paragraph No.33 as below:-

i. *The dominant purpose in interpreting a taxing statute;*
ii. *Literal rule of construction;*

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iii. *Strict interpretation of a statute does not encompass strict literalism, which leads to absurdity or goes against the express legislative intent.*

iv. *While interpreting a taxing statute, there is no room for any intendment. (Cape Brandy Syndicate v. Inland Revenue Commissioners [[1921] 1 K.B.*

v. *The courts cannot plug in a loophole in a taxing statute "by a strained construction in reference to the supposed intention of the Legislature".*

vi. *The considerations of equity or justice are not relevant in interpreting a taxing statute. (ITO v. T.S. Devinath Nadar [(1968) 68 ITR 252 (SC); 1967 SCC OnLine SC 52.])*

vii. *Where the interpretation of taxing legislation is ambiguous or leads to two possible interpretations, the interpretation most beneficial to the subject of the tax should be adopted.*

viii. *It would not be an unjust result if a taxpayer escapes the tax net on account of the Legislature's failure to express itself clearly.*

ix. *In a taxing statute, the charging section has to be construed strictly, but the machinery provisions must be interpreted in accordance with the ordinary rules of statutory interpretation. The purpose is to give effect to the clear intention of the Legislature.*

x. *A statute is designed to be workable. A statutory provision must be construed in a manner to make it workable to achieve the purpose of the legislation. (K.P. Mohammed Salim v. CIT [(2008) 300 ITR 302 (SC); (2008) 11 SCC 573.]). In J.K. Synthetics Ltd. v. CTO [(1994) 94 STC 422 (SC); (1994) 4 SCC 276.] , a Constitution Bench of this court observed (page 436 of 94 STC):* ***The machinery provisions must, no doubt, be so construed as would effectuate the object and purpose of the statute and not defeat the same."***

xi. *In CIT v. Sun Engineering Works P. Ltd. [(1992) 198 ITR 297 (SC); (1992) 4 SCC 363.] , a two-judge Bench of this court observed that the provision dealing with reassessment contained in section 147 of the Income-*

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tax Act was for the benefit of the Revenue (page 320 of 198 ITR):Since the proceedings under section 147 of the Act are for the benefit of the Revenue and not an assessee and are aimed at gathering the 'escaped income' of an assessee, the same cannot be allowed to be converted as 'revisional' or 'review' proceedings at the instance of the assessee, thereby making the machinery unworkable."

140. Finally, the learned Counsel for the Petitioner submitted that in absence of any tangible material to form an opinion attracting any one or more of the three ingredients under Section 74 of the respective GST Enactments, the machinery under the aforesaid provisions cannot be invoked.

141. In this connection, learned Counsel for the Petitioner drew attention to the decision of the Gujarat High Court in **Vijay Ramanlal Sanghvi** Vs. **Assistant Commissioner of Income-Tax**, [2023] 146 taxmann.com (Gujarat) / [2023] 457 ITR 791 (Gujarati) rendered in the context of Section 148 of the Income Tax Act, 1961.

142. In the light of the above submissions, the learned Senior Counsel for the Petitioners and the learned Counsel for the Petitioners submitted that the impugned proceedings be interfered and quashed and prayed for allowing these Writ Petitions with consequential relief to the respective Petitioners.

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143. **Mr.T.Ramesh,** the learned Counsel for the Petitioner in W.P.No.10854 of 2025 **[M/s.Zyvana Integrated Services Private Limited]** submitted that the Impugned Order dated 31.05.2023 has been passed without considering the reply dated 03.03.2023. It is submitted that out of the total demand of Rs.4,80,03,467/-, the Petitioner had already made the GST payment of Rs.3,62,52,047/- even before the issuance of Show Cause Notice.

144. It is submitted that there is no Suppression or Wilful Mis-statement with intent to evade payment of tax as alleged in Show Cause Notice dated 30.06.2022 and as confirmed in the Impugned Order dated 31.05.2023. Hence, the invocation of Section 74 is misplaced and the ingredients of Section 74 are not satisfied. Therefore, both the Show Cause Notice and the Impugned Order are not in conformity with the provisions of Section 74 of the respective GST Enactments.

145. Further, it is submitted that the Show Cause Notice No.15/2022-GST(JC) dated 30.06.2022 has been issued without following the principles of issuing Show Cause Notice as envisaged under the Act and Rules imposing an equal amount of Penalty under Section 74 is arbitrary and not sustainable.

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146. In this case, the Petitioner does not attract the elements such as by reason of Fraud, Wilful Mis-statement or Suppression of Facts to evade tax as envisaged under Section 74 of the respective GST Enactments but rather attract Section 73 of the respective GST Enactments.

147. It is submitted that the Petitioner has declared the entire value of GST and there is no suppression and exact GST payable has also been determined. The Department has initiated proceedings only based on the statutory returns and demanded the short-paid GST only on the value declared by the Petitioner. Therefore, this case does not attract the ingredients of Section 74 of the respective GST Enactments and the Impugned Order is liable to be quashed.

148. For the period between July 2017 to March 2018, a Show Cause Notice was issued for denial of ITC invoking Section 73 of the respective GST Enactments and for the current disputed Tax Period between April 2017 to March 2019 also Section 73 to be invoked and there is not justification for invoking Section 74 of the respective GST Enactments.

RESPONDENT SUBMISSIONS:

149. The learned counsel for the Respondents submit that the reliance

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placed by the Petitioners on the Circulars/Clarifications/Instructions issued by the Revenue Department are not binding on this Court, and therefore, they can in no way impede this Court in arriving at its conclusion independently. In this connection, reliance was placed on the Judgment of the Constitutional Bench of this Hon'ble Supreme Court in **Commissioner of Central Excise** Vs. **Ratan Melting & Wire Industries**, (2008) 13 SCC 1.

150. It is further submitted that the penalty proceedings in tax statutes are civil in nature, and it is trite law that the threshold of proof in civil proceedings is much lower, and the Respondents are not expected to satisfy their case to the hilt. The following cases were cited as authorities in this regard:-

i. **Guljag Industries** Vs. **Commercial Taxes Officer,** (2007) 7 SCC 269

ii. **Director of Enforcement** Vs. **M.C.T.M. Corporation Private Limited,** (1996) 2 SCC 471

151. It is submitted that the mental elements *i.e., mens rea* is not an essential ingredients for imposing Penalty under a taxing statute, since imposition of Penalty is civil in nature. The following cases were cited for this proposition:-

i. **Suborno Bose** Vs. **Enforcement Directorate,** (2020) 14 SCC 241

ii. **Principal Commissioner of Customs, Bangalore** Vs. **Pigeon International** in Customs Appeal No.7/2024 dated 26.09.2024

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iii. **Securities and Exchange Board of India** Vs. **Cabot International Capital Corporation,** 2004 SCC OnLine Bom 180

152. It is further submitted that even otherwise, to satisfy the requirement of Fraud under Section 74 of the respective GST Enactments, it is sufficient if there is suppression of material particulars involved to gain an unfair advantage. In this connection, the following cases were relied:-

i. **S.P. Chengalvaraya Naidu** Vs. **Jagannath,** (1994) 1 SCC 1
ii. **Uniworth Textiles** Vs. **Commissioner of Central Excise,** (2013) 9 SCC 753

153. It is submitted that the challenge to a Show Cause Notice on the ground that it is premeditated is premature since a Show Cause Notice records only a *prima facie* opinion, and that it is neither a Judgement nor an order made after the completion of an adjudication. In this regard, the learned Counsel relied on the Judgement of the Division Bench of the Bombay High Court in **Vertiv Energy Private Limited** Vs. **Union of India** in W.P.No.17902 of 2024 dated 06.12.2024, for the said proposition.

154. It is further submitted that existence of 'suppression' or otherwise can be very well decided by the Authority after considering the Reply, if any,

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filed by the Petitioner. It is submitted that, even if the expression 'suppression' is not used in the Show Cause Notice, it cannot be conclusively said that there is no 'suppression'.

155. The learned Counsel for the Respondent relied on the Judgement of a Division Bench of the Andhra Pradesh High Court in W.P.No.32046 of 2023 dated 04.01.2024, wherein, when a challenge was made to a Show Cause Notice issued under Section 74 of the Central Goods and Services Tax Act, 2017 on the ground that there was no specific mention of 'suppression' in the said Show Cause Notice, the Court warded off the contention and held that the Show Cause Notice mentioned the grounds for its issuance, even if it be taken that the word 'suppression' was not mentioned to meet the requirement of Section 74 of the respective GST Enactments.

156. It is further submitted that mere non-filing of return constitutes tax evasion and requirement of mental element is immaterial. In support of the same, a Judgement of the Court of Appeals, Criminal Division, United Kingdom in **R** Vs. **Dealy,** [1995] STC 217, was relied on.

DISCUSSION:-

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157. I have considered the arguments advanced by the learned Counsels, Senior Counsels for the various Petitioners and the learned Counsels for the Respondents namely the Central GST Authorities and the State GST Authorities.

158. The point for consideration in these Writ Petitions is whether the Respondents were justified in issuing Show Cause Notices under Section 74 of the respective GST Enactments to the respective Petitioners and whether the Respondents were thereafter justified in confirming the demand under the respective GST Enactments in the case of the Petitioners in Table III-A and III-B of this order by invoking the extended period of limitation under the aforesaid provision?

159. The dispute in these Writ Petitions span tax period starting from **01.07.2017** and ends with **31.03.2025**. Thus, a part of the period is governed by the provisions and Rules as it stood up to **31.12.2020** and thereafter and a part of the demand in **W.P.No.35976 of 2024** in **Table-IIB** is under **Section 74A** of the respective GST Enactments inserted *vide* Finance Act 2024 read with **Notification No.20/2024-Central Tax** dated **08.10.2024** with effect from **01.11.2024**.

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160. In some of these cases, in the Show Cause Notices issued to the respective Petitioners, barring an oblique reference or justifying the invocation of extended period of limitation under Section 74 of the respective GST Enactments, there are no reasons in the Show Cause Notice, though in the Impugned Order, invocation of extended period of limitation, have been justified.

161. In some of the Show Cause Notices, although the ingredients of Section 74 have been specified, it is the submission of the respective Petitioners that there were no foundational facts to justify such an inference to invoke the machinery under Section 74 of the respective GST Enactments in the impugned Show Cause Notices.

162. This deficiency or the above lacunae in the Show Cause Notice is the basis of the primordial ground of attack to the impugned proceedings in these Writ Petitions. It is submitted that invocation of extended period of limitation under Section 74 of the Respective GST Enactments were thus unjustified. It is also the case of some of the Petitioners that where the limitation

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under Section 73 had expired, machinery under Section 74 had been arbitrarily invoked, even though there were no justifiable reasons for invoking the same.

163. In this order, there will be also a detailed discussion regarding the inherent dilution of the machinery in Section 73 and Section 74 of the respective GST Enactments as they stand today as compared to Section 11A of the Central Excise Act, 1944, Section 28 of the Customs Act, 1962, Section 73 of the Finance Act, 1994 on account of an incorrect decision taken in the 8th GST Council Meeting held on **03.01.2017** and **04.01.2017** while recasting Section 67 of the Second Model GST Law in the ensuing paragraphs.

JURISDICTIONAL FACTS / ADJUDICATORY FACTS

164. The Courts have recognised that there is a fine distinction between "Jurisdictional Fact or the Foundational Fact" and the "Adjudicatory Fact". These decisions were rendered in the context of administrative law and have been followed in tax disputes as well.

165. Before, assuming Jurisdiction to initiate a proceeding or issuing Show Cause Notice, existence of Jurisdictional Facts / Foundational Facts are essential. It has been held that it should also be reflected in the Show Cause

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Notice. Only after this initial threshold is crossed, the Authority can issue a Show Cause Notice and thereafter delve into the Adjudicatory Facts.

166. A "Jurisdictional Fact" is a fact which must exist before an Authority can assume jurisdiction over a particular issue. The existence of such facts is a *sine qua non* for the Courts or the Tribunal or the Adjudicatory Authority, to assume jurisdiction over a particular dispute.

167. The Hon'ble Supreme Court in **Arun Kumar & others** Vs. **Union of India & others,** (2007)1 SCC 732, observed as under:-

> *A "**jurisdictional fact**" is a fact which must exist before a Court, Tribunal or an Authority assumes jurisdiction over a particular matter. A jurisdictional fact is one on existence or non-existence of which depends jurisdiction of a court, a tribunal or an authority. It is the fact upon which an administrative agency's power to act depends. If the jurisdictional fact does not exist, the court, authority or officer cannot act. If a Court or authority wrongly assumes the existence of such fact, the order can be questioned by a writ of certiorari. **The underlying principle is that by erroneously assuming existence of such jurisdictional fact, no authority can confer upon itself jurisdiction which it otherwise does not possess**.*

168. There, the definition of 'perquisites' under Section 17(2) of the Income Tax Act, 1961 was under consideration. After hearing both sides, the

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Hon'ble Apex Court concluded that the existence of a 'concession' was a condition precedent for exercising power under Section 17(2) of the Income Tax Act, 1961.

169. In **Corona Limited** Vs. **Parvathy Swaminathan and sons.,** 2007 (8) SCC 559, it was held that Maharashtra Rent Control Act, 1999 was not applicable in case as the paid up Share Capital was more than Rupees One Crore.

170. The question was whether the paid up Share Capital was above the amount was a Jurisdictional Fact or not to assume Jurisdiction. There, it was held to be "*sine qua non*" for assumption of Jurisdiction by the Rent-Controlled Tribunal under the Maharashtra Rent Control Act, 1999.

171. There, the Hon'ble Supreme Court also explained the distinction between the "Jurisdictional Fact" and "Adjudicatory Fact". It held that "Adjudicatory Fact" is something that is required to be decided on merits based on evidence to be produced / adduced by both the parties. However, it reiterated that the existence of "Jurisdictional Fact" was a *sine qua non* for an authority to exercise Jurisdiction.

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172. The Division Bench of this Court in **The Assistant Commissioner of Income Tax Circle-1** Vs. **Seshasayee Paper and Board Limited** in **W.A.No.2759 of 2022** *vide* its Order dated **11.01.2023** had the occasion to consider a similar issue. It held the existence of "Jurisdiction Fact" was necessary for the purpose of invoking extended period of limitation under *Proviso* to Section 147 of the Income Tax Act, 1961.

173. There, the case involved an Assessee for not including bad and doubtful debts in the book profit for the purposes of Section 115JB of the Income Tax Act, 1961, by relying on the Judgement of the Apex Court in **Commissioner of Income Tax** Vs. **HCL Commet Systems & Services Limited**, 305 ITR 409. The Revenue, on the other hand, sought to re-open the Assessment in view of the retrospective amendment made to the Income Tax Act, 1961 *vide* the Finance Act, 2008 with effect from 01.04.2008, whereby doubtful debts were required to be computed for arriving at book profits.

174. After citing a *catena* of cases, the Division Bench of this Court concluded that there was no failure on part of the Petitioner to truly and fully disclose material facts for the purposes of assessment *i.e.,* the "Jurisdictional

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fact" herein, for invoking re-assessment under Section 147 of the Income Tax Act, 1961.

175. The above view in **Seshasayee Board and Paper Limited Case** (*referred to supra),* was also followed by this Court in **Chinnathambi Rajeswari** Vs. **Assistant Commissioner of Income Tax, Circle -2(1) and others** in **W.P.(MD)No. 4155 of 2022** dated **17.04.2024**, wherein, this Court interfered with an Order for re-opening assessment passed under Section 148 of the Income Tax Act, 1961, and concluded that there was no "Jurisdictional Fact" to re-open the assessment.

176. Before proceeding further, it will be apposite to refer to the General Law with respect to the purpose of Show Cause Notice and its significance.

PURPOSE OF SHOW CAUSE NOTICE AND WHAT IT SHOULD SPECIFY AND THE VIEWS OF THE COURTS

177. In **Oryx Fisheries Pvt Ltd** Vs. **Union of India,** 2011(266) ELT 422 (SC), (2010) 13 SCC 427, the Hon'ble Supreme Court observed that the purpose of a Show Cause Notice is to give the person proceeded against a reasonable opportunity of making his objection against the proposed charges

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indicated in the notice.

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178. It further observed that expressions like "a reasonable opportunity of making objection" or "a reasonable opportunity of defence" have come up for consideration before this Court in the context of several statutes.

179. The decision of the Hon'ble Supreme Court in **Oryx Fisheries Private Limited** (referred to *supra*) was rendered by the Hon'ble Supreme Court in the context of Rule 43 of the Marine Products Export Development Authority (MPEDA) Rules, 1972.

180. Rule 43 of the Marine Products Export Development Authority (MPEDA) Rules, 1972 reads as under:-

> *Rule 43: "Cancellation of registration where the Secretary or other officer is satisfied that any person has obtained a certificate of registration by furnishing incorrect information or that he has contravened any of the provisions of this rule or of the conditions mentioned in the certificate of registration, or any person who has been registered as an exporter fails during the period of twelve consecutive months to export any of the marine products in respect of which he is registered, or if the secretary or other officer is satisfied that such*

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person has become disqualified to continue as an exporter, the Secretary or such officer may, after giving the person who holds a certificate a reasonable opportunity of making his objections, by order, cancel the registration and communicate to him a copy of such order."

181. There, a Show Cause Notice dated 23.01.2008 was issued to the Appellant to show cause as to why the Certificate of Registration as an exporter granted to the Appellant should not be cancelled for reasons given therein. The Show Cause Notice read as under:-

*"**Sub.: Show-cause notice***

Your attention is invited to our HQ's Letter No. IV/53/06-MS/HO dated 25-10-2007 and subsequent joint meeting with the buyer held at our head office on 5-9-2007 on the trade complaint received from M/s Cascade Marine Foods, LLC, Sharjah.

At the meeting it was convincingly proved that the cargo shipped by you to the abovementioned buyer was defective and you have not so far settled the complaint. Therefore, in exercise of the powers vested in me vide Office Order Part II No. 184012005 dated 25-11-2005 read with Rule 43 of the MPEDA Rules, I hereby call upon you to show cause why the Certificate of Registration as an exporter granted to you should not be cancelled for reasons given below:

1. It has been proved beyond doubt that you have sent sub-standard material to M/s Cascade Marine Foods, LLC, Sharjah.

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2. You have dishonoured your written agreement with M/s Cascade Marine Foods, LLC, Sharjah to settle the complaint made by the buyer as you had agreed to compensate to the extent of the value of defective cargo sent by you and have now evaded from the responsibility.

3. This irresponsible action have brought irreparable damage to India's trade relation with UAE.

Your reply should reach the undersigned within 10 days from the date of receipt of this letter failing which it will be presumed that you have no explanation to offer and we will proceed with action for cancellation of your registration certificate without further notice to you. If ultimately a decision is reached to deregister you under the provisions of the MPEDA Rules, it will automatically entail deregistration under Registration Exporters' policy also."

182. The 3rd Respondent however cancelled the Registration without giving any personal hearing by an Order dated **19.03.2008** despite a Reply of the Petitioner on **04.02.2008.** Thus, there was a pre-determination in the facts of the case.

183. On further appeal under Rule 44 of the Marine Products Export Development Authority (MPEDA) Rules, 1972 before the Appellate Authority, namely, the 2nd Respondent as an Appellate Authority also dismissed the appeal without hearing the Appellant after fixing a personal

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hearing on **28.04.2008**.

184. It is in this background, the Hon'ble Supreme Court in **Oryx Fisheries Private Limited** (referred to *supra*) observed as under:-

> *"28. It is no doubt true that at the stage of show cause, the person proceeded against must be told the charges against him so that he can take his defence and prove his innocence. It is obvious that at that stage the authority issuing the charge-sheet, cannot, instead of telling him the charges, confront him with definite conclusions of his alleged guilt. If that is done, as has been done in this instant case, the entire proceeding initiated by the show cause notice gets vitiated by unfairness and bias and the subsequent proceeding become an idle ceremony.*
>
> *29. Justice is rooted in confidence and justice is the goal of a quasi-judicial proceeding also. If the functioning of a quasi-judicial authority has to inspire confidence in the minds of those subjected to its jurisdiction, such authority must act with utmost fairness. Its fairness is obviously to be manifested by the language in which charges are couched and conveyed to the person proceeded against. In the instant case from the underlined portion of the show cause notice it is clear that the third respondent has demonstrated a totally close mind at the stage of show cause notice itself Such a close mind is inconsistent with the scheme of Rule 43 which is set out below. The aforesaid rule has been framed in exercise of the power conferred under Section 33 of The Marine Products Export Development Authority Act, 1972 and as such that Rule is statutory in nature.*

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38. Therefore, the bias of the third respondent which was latent in the show cause notice became patent in the order of cancellation of the registration certificate. The cancellation order quotes the show cause notice and is a non-speaking one and is virtually no order in the eye of law. Since the same order is an appealable one it is incumbent on the third respondent to give adequate reasons."

185. As far as the decision of the Hon'ble Supreme Court in **Siemens Limited case** (referred to *supra*) is concerned, it has to be observed that the said decision is not relevant to the facts of the case as the challenge there was to the demand made in a Notice terming it as a Show Cause Notice.

186. In **Siemens Limited case** (referred to *supra*) it was therefore held that since the Respondent had clearly made up its mind, the order passed was liable to be quashed. There, the establishment of the Appellant Company at Kalwa (Kalwe) was however directed to pay tax even though no Jurisdictional Fact exists. There, the Court has not quashed the Show Cause proceedings. It merely remitted the case back to the High Court to pass a fresh order on its own merits.

187. The ratio in the above two decisions have to be thus confined to the peculiar facts of the case. In **Siemens Limited case** (referred to supra), the

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Order was disguised in the form of a Show Cause Notice which is quite different from what is contemplated in Section 73 and Section 74 of the respective GST Enactments and Rule 142 of the respective GST Rules.

188. The Assessee there had a factory at Aurangabad and had Office at Kharghar which were outside the Jurisdiction of the City Limits of Navi Mumbai and thus, outside the Territorial Jurisdiction of the Bombay Municipal Corporation. There, the supplies were made directly from the Appellant at Aurangabad and Office at Kharghar.

189. It is in this background, the demand was made by terming it as a Show Cause Notice to pay the cess with interest in respect of purported supplies made to Navi Mumbai parties from 01.06.1996 following the decisions of the Court in **State of Uttar Pradesh** Vs. **Brahm Datt Sharma**, (1987) 2 SCC 179, **Special Director** Vs. **Mohd. Gulam Ghouse**, (2004) 3 SCC 440 and **Union of India** Vs. **Kunisetty Satyanarayana**, (2006) 12 SCC 28.

190. There, the Court held that when a Notice is issued with pre-meditation, a Writ Petition would lie and in such an event, if the Court directs the statutory authority to hear the matter afresh, ordinarily, such proceedings

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would not yield any fruitful purpose following the decision of the Hon'ble Supreme Court in **K.I.Shephard** Vs. **Union of India**, (1987) 4 SCC 431.

191. In **Commissioner of Central Excise, Ahmedabad Vs. Damodar Poly Fab Private Limited,** 2018 (14) G.S.T.L. 162 (S.C.), the Hon'ble Supreme Court held that "*Section 11A of the Central Excise Act enjoins a duty on the concerned Central Excise Officer to show cause an assessee as to why the assessee should not pay the duty not levied or not paid or short-levied or short paid or erroneously refunded, as the case may be, details of which are required to be mentioned in the show cause notice.*

192. It is further held that *"On cause being shown by the assessee, the notice(s) is required to be adjudicated upon by the Central Excise Officer issuing such notice under Section 11A which order can be the subject matter of further proceedings under the Act. Section 11A of the Act statutorily engrafts the principle of reasonable opportunity which would cast a mandatory duty on the Central Excise Officer to comply with the said requirement.*

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193. A similar view was also taken recently by a co-ordinate bench of this Court in **Neeyamo Enterprises Limited,** 2025 (103) G.S.T.L although without making a specific reference to the Scheme under both Section 73 and Section 74 of the respective GST Enactments and Rule 142 of the respective GST Rules.

194. In fact in a recent decision of the Hon'ble Supreme Court in **Armour Security (India) Limited** Vs. **Commissioner, CGST, Delhi East Commissionerate and another**, (2026) 4 SCC 338, 2025 SCC OnLine SC 1700 / [2025] 177 taxmann.com 478 (SC), the Hon'ble Supreme Court also observed that the Show Cause Notice should contain detailed allegations for an assessee to Reply. The said decision was rendered in the context of cross empowerment under Section 6 (2) of the respective GST Enactments.

195. There, the Hon'ble Supreme Court was really concerned with the exercise of simultaneous power under the respective GST Enactments both by the Central and the State Authority for initiating action against an assessee. Confusion arose on account of the implementation of the Scheme under the respective GST Enactments empowering both the Authorities to investigate and to issue Show Cause Notice.

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196. The said decision beautifully summed up the legal position on the following question of law which fell for consideration it in the context of cross empowerment under Section 6 of the respective GST Enactments and were answered as follows:-

Sl. No.	Question of Law	Answer
I.	***Whether issuance of summons can be regarded as "initiation of proceedings" within the meaning of Section 6(2)(b) of the CGST Act?***	**74.** In the facts of the present case, the mere issuance of summons does not imply that the Department has decided to proceed against the taxpayer for recovery of liability. **Therefore, issuance of summons, by no stretch, can be considered as the initiation of proceedings, since at that stage, the Department still retains the discretion not to initiate any proceedings.** A mere contemplation or possibility of

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		initiating action cannot be equated with "proceedings", as doing so would undermine the framework of cross-empowerment under the Act. Even when a discovery is made during the search proceedings under Section 67 of the CGST Act, the Department is required to bring such proceedings to a definitive conclusion, either by issuing a show cause notice under Section 74 or by dropping the matter altogether.
I	***Whether "subject matter" within the meaning of Section 6(2)(b) of the CGST Act includes all matters dealt with in summons under the Act?***	**90.**Upon crystallization of the subject matter through a show cause notice issued pursuant to an intelligence, no other tax authority may assume jurisdiction over it, provided it is ascertainable that the consequences of any

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		further departmental action would be subsumed within the same subject matter.
III	***Whether "subject matter" within the meaning of Section 6(2)(b) of the CGST Act includes all matters dealt with in summons under the Act?***	**92.**In construing Section 6(2)(a), it is imperative to have due regard to the legislative intent permeating the GST enactments. Section 6, in particular, advances the objective of establishing a unified national market for goods and services and to prevent taxpayers from the undue hardship of being subjected to the rigours of multiple jurisdictions. **93.**The provision serves a twofold purpose : first, to insulate taxpayers from the prospect of being proceeded against by more than one authority for the same **subject matter;** and secondly, to vest in the officers functioning under the CGST Act, the SGST

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		Act, or the UTGST Act, to render a comprehensive order, thereby avoiding multiplicity of proceedings. Such a construction is also in consonance with the well-recognized principle of comity between jurisdictions, which mandates that coordinate authorities must act with mutual respect and due regard for each other's domain, so as to preclude the possibility of conflicting determinations on the same issue. **94.**To give effect to the above intent, Section 6(2)(a) is couched in terms that are both enabling and mandatory. It confers upon, and simultaneously obliges, the proper officer to issue a corresponding order under the SGST Act or the UTGST Act in cases where an order is being issued under the CGST Act. The

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		expression 'order', qualified by the terms *"under this Act"*, occurring in the said provision admits of a broad construction, so as to include every form of order which a proper officer is competent to issue by virtue of the authority vested in them under the statute. Such an interpretation is necessary to ensure that the statutory mandate achieves its intended purpose of avoiding multiplicity of proceedings and securing uniformity of adjudication across the parallel enactments. **95.**Inasmuch as the CGST Act vests the proper officer with authority to issue "orders" under various provisions, **it becomes imperative that such officer duly apprises the jurisdictional counterpart of any action initiated by the Department in relation to a taxable**

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		person who may otherwise fall within the administrative domain of that officer. Given that the statutory framework envisages a regime of cross-empowerment amongst officers, the obligation so cast operates as a safeguard against the prejudice which may arise from the initiation of parallel or overlapping proceedings against the same taxpayer by different wings of the Department.

197. The Hon'ble Supreme Court ultimately concluded as under and gave the following guidelines under Article 142 of the Constitution of India:-

Conclusion / Guidelines	
96. We summarize our final conclusion as under :- (i) Clause (b) of sub-section (2) of Section 6 of the CGST Act	**97.** We issue the following guidelines to be followed in cases where, after the commencement of an

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and the equivalent State enactments bars the "initiation of any proceedings" on the "**same subject matter**". (ii) Any action arising from the audit of accounts or detailed scrutiny of returns must be initiated by the tax administration to which the taxpayer is assigned. (iii) Intelligence based enforcement action can be initiated by any one of the Central or the State tax administrations despite the taxpayer having been assigned to the other administration. (iv) Parallel proceedings should not be initiated by other tax administration when one of the tax administrations has already initiated intelligence-based enforcement action. (v) All actions that are initiated as a measure for probing an inquiry or gathering of evidence or information do not constitute "proceedings" within the meaning of Section 6(2)(b) of the CGST Act. (vi) The expression "initiation of any proceedings" occurring in Section 6(2)(b) refers to the formal commencement of adjudicatory proceedings by way of issuance of a show cause notice, and does not encompass the issuance of	inquiry or investigation by one authority, another inquiry or investigation on the same subject matter is initiated by a different authority. (a) Where a summons or a show cause notice is issued by either the Central or the State tax authority to an assessee, the assessee is, in the first instance, obliged to comply by appearing and furnishing the requisite response, as the case may be. We say, so because, mere issuance of a summons does not enable either the issuing authority or the recipient to ascertain that proceedings have been initiated. (b) Where an assessee becomes aware that the matter being inquired into or investigated is already the subject of an inquiry or investigation by another authority, the assessee shall forthwith inform, in writing, the authority that has initiated the subsequent inquiry or investigation. (c) Upon receipt of such

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summons, or the conduct of any search, or seizure etc. (vii) The expression "subject matter" refers to any tax liability, deficiency, or obligation arising from any particular contravention which the Department seeks to assess or recover. (viii) Where any two proceedings initiated by the Department seek to assess or recover an identical or a partial overlap in the tax liability, deficiency or obligation arising from any particular contravention, the bar of Section 6(2)(b) would be immediately attracted. (ix) Where the proceedings concern distinct infractions, the same would not constitute a "same subject matter" even if the tax liability, deficiency, or obligation is same or similar, and the bar under Section 6(2)(b) would not be attracted. (x) The twofold test for determining whether a subject matter is "same" entails, *first*, determining if an authority has already proceeded on an identical liability of tax or alleged offence by the assessee on the same facts, and *secondly*, if the demand or relief sought is identical.	intimation from the assessee, the respective tax authorities shall communicate with each other to verify the veracity of the assessee's claim. We say, so as this course of action would obviate needless duplication of proceedings and ensure optimal utilization of the Department's time, effort, and resources, bearing in mind that action initiated by one authority enures to benefit of all. (d) If the claim of the taxable person regarding the overlap of inquiries is found untenable, and the investigations of the two authorities pertain to different "subject matters", an intimation to this effect, along with the reasons and a specification of the distinct subject matters, shall be immediately conveyed in writing to the taxable person. (e) The taxing authorities are well within their rights to conduct an inquiry or investigation until it is ascertained that both authorities are examining the identical liability to be discharged, the

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	same contravention alleged, or the issuance of a show cause notice. Any show cause notice issued in respect of a liability already covered by an existing show cause notice shall be quashed. (f) However, if the Central or the State tax authority, as the case may be finds that the matter being inquired into or investigated by it is already the subject of inquiry or investigation by another authority, both authorities shall decide *inter se* which of them shall continue with the inquiry or investigation. In such a scenario the other authority shall duly forward all material and information relating to its inquiry or investigation into the matter to the authority designated to carry the inquiry or investigation to its logical conclusion. We say, so because, the taxable person except for being afforded the statutory protection from duplication of proceedings, otherwise has no *locus* to claim which authority

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	should proceed with the inquiry or investigation in a particular matter. (g) However, where the authorities are unable to reach a decision as to which of them shall continue with the inquiry or investigation, then in such circumstances, the authority that first initiated the inquiry or investigation shall be empowered to carry it to its logical conclusion, and the courts in such a case would be competent to pass an order for transferring the inquiry or investigation to that authority. (h) If it is found that the authorities are not complying with these aforementioned guidelines, it shall be open to the taxable person to file a writ petition before the concerned High Court under Article 226 of the Constitution of India. (i) At the same time, taxable persons shall ensure complete cooperation with the authorities.

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	It is incumbent upon them to appear in response to a summons and/or reply to a notice.

198. The Hon'ble Supreme Court in **Armour Security (India) Limited** Vs. **Commissioner** (2026) 4 SCC 338, (2025) 33 Centax 222 (S.C.);2025 (101) G.S.T.L. 289 (S.C.), made few observations regarding the purpose of issuance of a Show Cause Notice and in a manner in which it has be to issued. These passages are usefully extracted below for easy reference:-

> **65.** *A show cause notice is a document served on a noticee, requiring them to explain why a particular action should not be initiated against them. Under the GST regime, issuance of a show cause notice is a mandatory precondition for raising a demand. It forms the bedrock for proceedings related to the recovery of tax, interest, and penalty. The notice ensures adherence to the principles of natural justice by granting the assessee an opportunity to present their case before any adverse action is taken. In essence, it serves as both a procedural safeguard and a legal necessity, marking the commencement of quasi-judicial adjudication under the Act.*
>
> ***66.*** *A show cause notice sets the law in motion concerning the liability under the statute, containing charges that a specific person is called upon to*

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answer. In other words, it sets out the alleged violations of legal provisions and requires the assessee to explain why the duty should not be recovered from them. Thus, a show cause notice cannot be vague, nor can any allegations be made without evidence being commensurate with the gravity of the charges levelled against the noticee.

67. *It sets forth the framework for the proceedings proposed to be undertaken and provides the noticee with an opportunity to submit their explanation before the adjudicating authority. It outlines the background for the initiation of such proceedings, whether arising from an audit of accounts by the internal audit wing, scrutiny of returns, or intelligence gathered by officers of the Audit and Intelligence Commissionerate. It is further mandated that the authority issuing the notice must meticulously set out all relevant legal provisions under which the alleged contraventions are framed. The materials obtained through summons and relied upon for issuing the show cause notice must be appended and disclosed to the assessee. In essence, a show cause notice enumerates the charges levelled against the notice.*

68. *An assessee may be held liable to pay tax along with interest pursuant to an audit, scrutiny, or investigation. This liability can be discharged either through self-assessment or by way of assessment conducted by the Department. The Act contemplates the issuance of a show cause notice under Sections 73, 74, and 76 respectively, wherein the assessee is afforded one or more opportunities to pay the demanded tax amount. Upon such payment, all proceedings in respect of the said notice stand concluded.*

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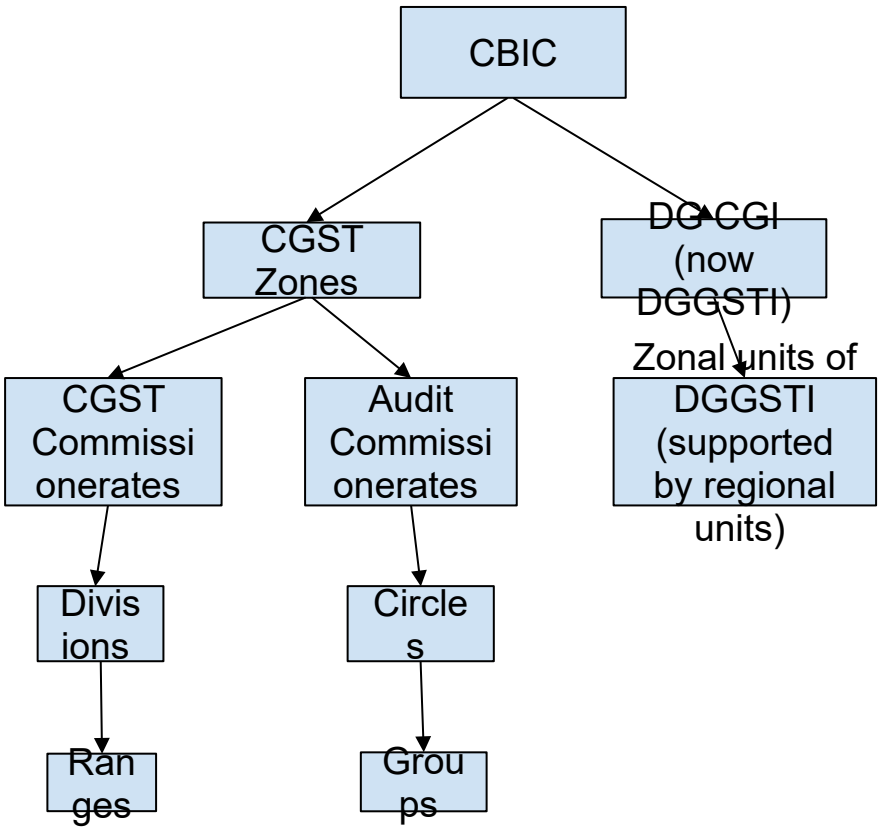
69. *Once a show cause notice is issued under a specific provision and the reply submitted in response is duly considered by the adjudicating authority, the liability is then determined through the issuance of an order of adjudication, commonly referred to as an 'Order-in-Original'.*



70. *The above flowchart, prepared and published by the Comptroller and Auditor General of India in Report No. 1 of 2021 (Indirect Taxes-Goods and Services Tax, Central Excise and Service Tax), illustrates that in cases involving determination of tax not levied, or short levied, or not paid, or short paid, or erroneously refunded, or input tax credit wrongly availed or utilized, the assessee can discharge the liability by voluntarily paying tax alongwith interest and,*

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where applicable, penalty; failing which, the Department contemplates an action. ***At this stage, the Department initiates action aimed towards ascertaining the tax liability and issuing a show cause notice accordingly****.*

199. The Hon'ble Supreme Court in **Armour Security case** referred to *supra* has given its opinion following the views expressed in the following cases:-

i. The Commissioner of Central Excise Vs. **Champdany Industries Limited,** (2009) 9 SCC 466

ii. Commissioner of Customs, Mumbai Vs. **Toyo Engineering India Limited,** (2006) 7 SCC 592

iii. Central Excise, Nagpur Vs. **Ballarpur Industries Limited,** (2007) 8 SCC 89

200. In Paragraphs 83 to 85 of **Armour Security (India) Limited** Vs. **Commissioner** (referred to *supra*), the Hon'ble Supreme Court also observed as under:-

> ***"83.*** *We shall now consider the contents of a show cause notice, bearing in mind the manner in which they facilitate the determination of the subject matter of the proceedings. In* ***Gorkha Security Services v. Govt. (NCT of Delhi),*** *reported in (2014) 9 SCC 105, this Court poignantly explained*

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the cardinal principles behind the issuance of a show cause notice. It held that the service of a show cause notice is made in order to inform the noticee about the case that has been set up against him, which he has to meet. The relevant paragraphs have been supplied below :

'Contents of the show cause notice

> *21. The central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of show cause notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/breaches complained of are not satisfactorily explained. When it comes to blacklisting, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action.'*
>
> ***(Emphasis supplied)***

84. *Primacy is given to the cogency of a show cause notice. The subject matter of the proceedings lies in the contents of the notice. Hence, it ought to be exhaustive, so much so that it is capable of presenting the case of the Revenue in a nutshell. In* ***The Commissioner of***

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Central Excise v. Champdany Industries Limited, *reported in (2009) 9 SCC 466 = 2009 (241) E.L.T. 481 (S.C.), while deciding upon the classification of jute carpets, this Court noted that in the failure of mentioning the application of certain tests which the Revenue relied upon in the proceedings before the Court, the Revenue cannot rely on such tests at a later stage. A show cause notice must lay down the foundation of the case. Such is the importance of a show cause as a starting point in proceedings. The relevant extracts have been supplied below :*

> *"50.Apart from that, the point on Rule 3 which has been argued by the Learned Counsel for the Revenue was not part of its case in the show cause notice.* ***It is well settled that unless the foundation of the case is made out in the show cause notice, Revenue cannot in Court argue a case not made out in its show cause notice. See : Commissioner of Customs, Mumbai v. Toyo Engineering India Limited MANU/SC/3625/2006 : (2006) 7 SCC 592, para 16.***
>
> ***51.*** *Similar view was expressed by this Court in the case of Commissioner of* ***Central Excise, Nagpur v. Ballarpur Industries Ltd****. MANU/SC/ 3595/2007 : (2007) 8 SCC 89. In paragraph 27 of the said report, Learned Judges made it clear that if there is no invocation of the concerned rules in the show cause notice, it would not be open to the Commissioner to invoke the said Rule."*
>
> ***(Emphasis supplied)***

85. *From the above exposition of law, we can safely*

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conclude that a show cause notice delineates the scope of the proceedings in the expression of subject matter with which the authority would be dealing. ***It would be impermissible for an authority to invoke such rules, claims or grounds at a later stage which do not figure in the show cause notice.*** *That is to say, any ground, reasoning or claim which does not figure out in the show cause notice cannot be permitted to adversely affect the noticee. Such recognition has even been made statutorily, as per sub-section (7) of Section 75 of the Act, which reads as thus :*

> ***'75. General provisions relating to determination of tax. -*** *...*
>
> *xx xx xx*
>
> *(7) The amount of tax, interest and penalty demanded in the order shall not be in excess of the amount specified in the notice and no demand shall be confirmed on the grounds other than the grounds specified in the notice."*

201. The above observations have been made without specific reference to Section 73 and Section 74 of the respective GST Enactments and Rule 142 of respective GST Rules. The said observations made regarding issuance of Show Cause Notice particularly in Paragraph Nos.83 to 85 are general in nature and not the *ratio decidendi* as the Hon'ble Supreme Court in **Armour Security** (referred to *supra*) was not really concerned with the scope of either Section 73

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and Section 74 of the respective GST Enactments and / or Rule 142 of respective GST Rules. The observations made therein at best are "*obiter dicta*" or opinion or observation made or expressed *sub silentio*. In any event, the conclusion in Paragraph 70 from the above decision makes it clear that even if Fraud, Wilful-misstatement or Suppression of Fact is discernible, an assessee or the tax payer can voluntarily pay tax / interest / penalty only if there is a failure to pay tax.

202. In **Sarwan Singh Lamba** Vs. **Union of India,** AIR 1995 SC 1729 /1995 (4) SCC 546, the Hon'ble Supreme Court in a Bench of Five judges once again reiterated the above Principle in Paragraph No.17 that normally even an *obiter dictum,* the Hon'ble Supreme Court is expected to be obeyed and followed. Thus, even an *obiter dictum* and passage / observation made *sub silentio* normally deserves considerable weightage. In paragraph No.17, it was observed as under:-

> *"**17.** Now we come to the next question, viz., whether non-compliance with the direction regarding the High Powered Selection Committee vitiates the amendment. Normally even an obiter dictum is expected to be obeyed and followed. In our view further discussion would be purely academic for the simple reason that without amending Section 6(7) the dicta of the Court has in fact been made effective by the appointment of High Powered Selection Committees both at the Central level as well as at*

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the State levels with minor modifications. Since these Committees are now expected to make the choice of candidates whose names may be recommended to the Chief Justice of India for final approval, the order of 5-5-1987 is fully complied with. Of course, names may be suggested to the Committee by any source but the ultimate decision has to be taken by the Committee and if the Chief Justice of India is not personally heading the Committee, the final decision would have to be taken by him on the recommendation of the Committee. It would, thus, be seen that without amending Section 6(7), the Government has given effect to the Court's view expressed in the order dated 5-5-1987 which renders the challenge academic and unnecessary to examine."

203. Therefore, it has to be acknowledged that not only *obiter dicta* in a Judgment but also observations made *sub silentio* in a Judgment have now been recognized to have precedential value in law like a *ratio decidendi* in a Judgment. A brief note in the same is given in the ensuing paragraphs.

204. In this context, it is apposite to the dictum of the Eleven Judge Bench of the Hon'ble Supreme Court **Madhava Rao Scindia** Vs. **Union of India** (1971) 1 SCC 85. There the Hon'ble Supreme Court distinguished its earlier decision in **Nawab Usman Ali Khan** Vs. **Sagarmal** (1965) 3 S.C.R. 201 and **Kunvar Shri Vir Rajendra Singh** Vs. **Union of India and others**, (1970) 2 S.C.R 631 and held that ***"It is difficult to regard a word or a clause occurring in a judgment of this Court, divorced from its context, as containing a full***

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exposition of the law on a question when the question did not fall to be answered in that judgment.”

BINDING NATURE OF *RATIO DECIDENDI / OBITER DICTA* and OBSERVATION MADE IN *SUB SILENTIO*

205. In **Mumbai Kamgar Sabha Vs. Abdulbhai Faizullabhai** in (1976) 3 SCC 832, the Hon’ble Supreme Court held as follows:-

> *“**It is trite, going by Anglophonic principles, that a ruling of a superior court is binding law. It is not of scriptural sanctity but is an of ratio-wise luminosity within the edifice of facts where the judicial lamp plays the legal flame. Beyond those walls and de hors the milieu we cannot impart eternal vernal value to the decision, exalting the doctrine of precedents into a prison-house of bigotry; regardless of varying circumstances and myriad developments. Realism dictates that a judgment has to be read, subject to the facts directly presented for consideration and not affecting those matters which may lurk in the record. Whatever be the position of subordinate courts' casual observations, generalisations and sub silentio determinations must be judiciously read by courts of coordinate jurisdiction and, so viewed, we are able to discern no impediment in reading Ghewar Chand as confined to profit-bonus, leaving room for non-statutory play of customary bonus.** The case dealt with a bonus claim by two sets of workmen, based on profit of the business but the workmen fell outside the ambit of the legislation by express exclusion or exemption. Nothing relating to any other type of bonus arose and cannot be impliedly held to have been decided. The governing principle we have*

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to appreciate as a key to the understanding of Ghewar Chand is that it relates to a case of profit bonus urged under the Industrial Disputes Act by two sets of workmen, employed by establishments which are either excluded or exempted from the Bonus Act. The major inarticulate premise of the statute is that it deals with- and only with-profit-based bonus as has been explained at some length earlier. There is no categorical provision in the Bonus Act nullifying all other kinds of bonus, nor does such a conclusion arise by necessary implication....."

206. The Hon'ble Supreme Court in **Municipal Corporation of Delhi** Vs. **Gurnam Kaur** (1989) 1 SCC 101, held that Pronouncements of law, which are not part of the *ratio decidendi* are to be classified as *obiter dicta* and are not authoritative. This view has been diluted over a period of time.

207. The Hon'ble Supreme Court in **Municipal Corporation of Delhi** Vs. **Gurnam Kaur** (referred *supra*) held that a decision should be treated as given ***per incuriam*** when it is given in ignorance of the terms of a statute or of a rule having the force of a statute.

208. There, the Hon'ble Apex Court refused to follow the view in **Jamna Das** Vs. **Delhi Administration in W.P.No.981 and 982 of 1984** as it was

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delivered without an argument and without reference to the relevant provisions of the Act conferring express power on the Municipal Corporation to direct removal of encroachments from any public place like pavement or public streets, and without any citation of authority.

CONCEPT OF *SUB SILENTIO* IN LAW

209. The Hon'ble Supreme Court also referred to the commentary of Professor P.J.Fitzgerald, Editor of the Salmond on Jurisprudence, 12th Edition, who explains the concept of *sub silentio* at Page No.153 in these words:-

> ***"A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. The Court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio.***

210. Sir Wilfrid Greene, M.R., in **Lancaster Motor Co. (London) Ltd.** Vs. **Bremith, Ltd.**, [1941] 1 KB 675 said that he could not help thinking that the point now raised had been deliberately passed *sub silentio*

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by counsel in order that the point of substance might be decided.

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211. There, he went on to say that the point had to be decided by the earlier Court before it could make the order which it did; nevertheless, since it was decided "without argument, without reference to the crucial words of the rule, and without any citation of authority", it was not binding and would not be followed.

212. In **Gerard** Vs. **Worth of Paris Limited (k).,** [1936] 2 All E.R. 905 (C.A.), the only point argued was on the question of priority of the claimant's debt, and, on this argument being heard, the Court granted the order. No consideration was given to the question whether a garnishee order could properly be made on an account standing in the name of the liquidator. When, therefore, this very point was argued in a subsequent case before the Court of Appeal. The Court held itself to be not bound by its previous decision.

213. If the above passage of Professor P.J.Fitzgerald which was quoted with approval by the Hon'ble Supreme Court in **Municipal Corporation of**

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Delhi Vs. **Gurnam Kaur** (referred to *supra*), the observation in Paragraph Nos.83 to 85 of the Hon'ble Supreme Court in **Armour Security** (referred to *supra*) case at best has to be construed to have been made *sub silentio* without specific reference to Section 73 / Section 74 and Rule 142 of the respective GST Enactments and the Rules made thereunder.

214. The above observations in Paragraph Nos.83 to 85 of **Armour Security (India) Limited** Vs. **Commissioner** (referred *supra*) though are not the *ratio decidendi* and are at best *obiter dicta* and/or observation made *sub silentio.* Yet, it still has a persuasive value.

215. In **Municipal Corporation of Delhi** Vs. **Gurnam Kaur,** (referred *supra*), the Hon'ble Supreme Court held as under:-

> **"101 , ……..it was observed that "*Precedents sub silentio and without argument are of no moment. This rule has ever since been followed. One of the chief reasons for the doctrine of precedent is that a matter that has once been fully argued and decided should not be allowed to be reopened. The weight accorded to dicta varies with the type of dictum. Mere casual expressions carry no weight at all. Not every passing expression of a Judge, however eminent, can be treated as an ex cathedra statement, having the weight of authority."***

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216. The Hon'ble Supreme Court erstwhile in **Commissioner of Income Tax** Vs. **Vazir Sultan & Sons,** 1959AIR814/(1959) 36 ITR 175 : 1959 SCC OnLine SC 125, referring to the views expressed in **Commissioner of Income tax and Excess Profits Tax, Madras** Vs. **South India Pictures Limited,** (1956) SCR 223, 228, and observed as under:-

> "***31.*** *It is no doubt true that this Court was not concerned with any agency agreement in the last mentioned case and the observations made by this Court there were by way of obiter dicta.* ***The obiter dicta of this Court, however, are entitled to considerable weight and we on our part fully endorse the same.*** *The earlier case of* ***Commissioner of Income tax and Excess Profits Tax, Madras v. South India Pictures Ltd. [****(1956) SCR 223, 228] was indeed a case where the assessee had entered into agency agreements for the exploitation of the three films in question, but in that case the conclusion was reached that entering into such agency agreements for acquiring the films was a part of the assessee's business and the agreements in question having been entered into by the assessee in the ordinary course of business the cancellation of those agreements was also a part of the assessee's business and was resorted to in*

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order to adjust the relation between the assessee and the producer of those films."

217. Again in **Amritsar Municipality** Vs. **Hazara Singh** 1975 AIR 1083, the Hon'ble Supreme Court Bench consisting of three Judges affirmed the decision of the Kerala High Court which had held that judicial propriety, decorum and dignity demanded that even *obiter dictum* of the Hon'ble Supreme Court should be accepted as binding declaration of law. It thereafter went on to say that statements on all matters other than law have no binding force.

INSTRUCTION OF THE CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS IN INSTRUCTION No. 05/2023-GST DATED 13.12.2023

218. The Central Board of Indirect Taxes and Customs in **Instruction No. 05/2023-GST** dated **13.12.2023** has issued a clarification in the light of the decision of the Hon'ble Supreme Court in **CC, CE & ST, Bangalore (Adj) etc.,** Vs. **Northern Operating Systems Private Limited (NOS),** 2022 (61) G.S.T.L 129 (S.C.) in Civil Appeal No.2289-2293 of 2021.

219. The said decision was rendered in the context of Section 73 of the Finance Act, 1994. However, the clarification states that only in the cases where the investigation indicates that there is a material evidence of **Fraud** or **Wilful-**

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misstatement or **Suppression of Facts to evade tax** on the part of a taxpayer, provisions of Section 74(1) of the respective GST Enactments can be invoked for issuance of Show Cause Notice, and such evidence should also be made a part of the Show Cause Notice.

220. The above clarification neither considers the express language of Section 74(1) of the respective GST Enactments nor was issued as a direct fall out from the said decision of the Hon'ble Supreme Court in **CC, CE & ST, Bangalore (Adj.) etc.** Vs. **Northern Operating Systems Private Limited (NOS)** referred to *supra.*

221. Text of **Instruction No. 05/2023-GST** dated **13.12.2023** issued by the Central Board of Indirect Taxes and Customs is extracted as under:-

> "…..
>
> ***Subject: Judgment of the Hon'ble Supreme Court in the case of Northern Operating Systems Private Limited (NOS).***
>
> *Attention is invited to the Hon'ble Supreme Court's judgment dated 19.5.2022 in the case of* ***CC, CE & ST, Bangalore (Adj.) etc. Vs. Northern Operating Systems Private Limited (NOS)*** *in Civil Appeal No. 2289-2293 of 2021 on the issue of nature of secondment of employees by*

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overseas entities to Indian firms and its Service Tax implications. Representations have been received in the Board that, subsequent to the aforesaid judgment, many field formations have initiated proceedings for the alleged evasion of GST on the issue of secondment under section 74(1) of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the 'CGST Act').

2.1 The matter has been examined by the Board. It appears that the Hon'ble Supreme Court in its judgment inter-alia took note of the various facts of the case like the agreement between NOS and overseas group companies, and held that the secondment of employees by the overseas group company to NOS was a taxable service of 'manpower supply' and Service Tax was applicable on the same. ***It is noted that secondment as a practice is not restricted to Service Tax and issue of taxability on secondment shall arise in GST also. A careful reading of the NOS judgment indicates that Hon'ble Supreme Court's emphasis is on a nuanced examination based on the unique characteristics of each specific arrangement, rather than relying on any singular test.***

3.1 It has also been represented by the industry that in many cases involving secondment, the field formations are mechanically invoking extended period of limitation under section 74(1) of the CGST Act.

3.2 In this regard, Section 74(1) of CGST Act reads as follows:

"(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilized by reason of fraud, or any wilful-mistatement or suppression of facts to evade tax"

3.3 From the perusal of wording of Section 74(1) of CGST Act, it is evident that Section 74(1) can be invoked only in cases where there is a fraud or wilful misstatement or

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suppression of facts to evade tax on the part of the said taxpayer. Section 74(1) cannot be invoked merely on account of non-payment of GST, without specific element of fraud or wilful misstatement or suppression of facts to evade tax. Therefore, only in the cases where the investigation indicates that there is a material evidence of fraud or wilful misstatement or suppression of facts to evade tax on the part of the said taxpayer, provisions of Section 74(1) of CGST Act may be invoked for issuance of show cause notice, and such evidence should also be made a part of the show cause notice.

4. The above aspects may be kept in consideration while investigating such cases and issuing show cause notices.

5. Difficulties, if any, in implementation of these instructions may be informed to the Board."

222. As per the above instruction, Section 74(1) of the respective GST Enactments cannot be invoked merely on account of non-payment of GST without specific element of Fraud or Wilful-misstatement or Suppression of Facts to evade tax and that only in the cases where the investigation indicates that there is material evidence of Fraud or Wilful-misstatement or Suppression of Fact to evade tax on the part of the taxpayer, Section 74 may be invoked for issuance of Show Cause Notice, and such evidence should also be made a part of the Show Cause Notice issued by the Central Board of Indirect Customs and Taxes.

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223. The said decision was rendered in the context of levy of Service Tax on secondment of employees of the Holding Company / Group Company situated outside India to a Subsidiary / Group Company in India and to levy of Service Tax on such secondment of employees on Reverse Charge Mechanism under the provisions of Finance Act, 1994.

224. If the views expressed by the Central Board of Indirect Taxes and Customs in **Instruction No.05/2023-GST** dated **13.12.2023** is to be accepted, Section 74(1) of the respective GST Enactments can be invoked only in the cases where the investigation indicates that there is a material evidence of Fraud or Wilful-misstatement or Suppression of Facts to evade tax on the part of the said taxpayer, provisions of Section 74(1) of the Central Goods and Services Tax Act, 2017 may be invoked for issuance of Show Cause Notice, and such evidence should also be made a part of the Show Cause Notice.

225. However, it has to be stated that the above instruction is not binding on Courts as held by the Hon'ble Supreme Court in **Commissioner of Central Excise Vs. M/s.Ratan Melting & Wire Industries,** 2008 (231) ELT 22 (SC).

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226. Since discussion in this order centres around limitation under Section 74 of the respective GST Enactments, it will be also useful to make a passing reference to the general principles of law governing the law of limitation. Therefore, I shall refer to the same.

LIMITATION UNDER LAW:

227. The law of limitation has two important facets, namely:-

A. The time within which proceedings have to be initiated; and
B. The time within which rights expire.

228. The doctrine of limitation is structured on two latin maxims, namely *viz.,*

i) ***Interest reipublicae ut sit finis litium*** (public interest requires an end to litigation); and

ii) ***Vigilantibus non dormientibus jura subveniunt*** (law assists the vigilant, not those who sleep over their rights).

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229. The general law of limitation is prescribed under the Limitation Act, 1963. Even where no limitation is prescribed, or where the limitation clause in a Statute are vague, Courts have typically interpreted limitation to protect the right of the private party, by recognizing the need to balance the competing public interest and the private rights and interests of the litigant.

LIMITATION UNDER TAXING STATUTES:

230. As far as taxing statutes are concerned, not only there are special period of limitations prescribed for redressing grievances against an action of an Authority under these Enactment(s) but also special period of limitations prescribed for initiating any proceedings both by or against an Authority under such Enactment(s).

231. Several decisions of the Hon'ble Supreme Court which were cited were rendered in the context of **Section 11A** of the **Central Excise Act, 1944**, **Section 28** of the **Customs Act, 1962** and few other decisions of the Hon'ble Supreme Court were in the context of **Section 73** of the **Finance Act, 1994** and **Tamil Nadu General Sales Tax Act 1959**, **Central Sales Tax Act, 1956**, **Tamil Nadu Value Added Tax Act, 2006** and **Income Tax Act, 1961**.

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232. The decisions of the Hon'ble Supreme Court particularly rendered in the context of **Section 11A** of the **Central Excise Act, 1944** have to be understood in the context of the **Central Excise Rules, 1944** as they stood prior to **1994** and **1995**.

233. Similarly, the decision of the Hon'ble Supreme Court rendered in the context of the **Section 28** of the **Customs Act, 1962** prior to the amendment in 2011 cannot be blindly applied in the context of either Section 73 or Section 74 of the respective GST Enactments without proper and a granular examination of the provisions.

234. Since the arguments were primarily advanced based on the decisions of the Hon'ble Supreme Court rendered in the context of Section 11A of the Central Excise Act, 1944, Section 28 of the Customs Act, 1962 and Section 73 of the Finance Act, 1994, it is proposed to first refer to the Scheme under the Central Excise Act, 1944 and the ratio and the facts and circumstances of the case in those decisions when the decisions were rendered which also formed the basis of few later decision of the Hon'ble Supreme Court rendered under Section 28 of the Customs Act, 1962 and Section 73 of the Finance Act, 1994.

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235. The decisions of the Hon'ble Supreme Court rendered in the context of the above Enactments cannot be borrowed in the context of Section 74 respective GST Enactments.

SCHEME UNDER SECTION 11A OF THE CENTRAL EXCISE ACT, 1944:-

236. Earlier, prior to amendment of Section 11A of the Central Excise Act, 1944 (formerly the Central Excises and Salt Act, 1944), Approval of Classification List and Approval of Price List were contemplated under **Rule 173B** and **Rule 173C** in Chapter VII-A of the Central Excise Rules, 1944.

237. These Rules were amended *vide* **Notification No.11/1995 CE (NT)** dated **16.03.1995** with effect from **01.04.1995** and *vide* **Notification No.04/1994 CE (NT)** dated **01.03.1994** with effect from **01.04.1994** respectively.

238. Decision cited for recovery of duty under Section 11A of the Central Excise Act, 1944 were tested in the light of pre-amended Rule 173B and Rule 173C in Chapter VII-A of the Central Excise Rules, 1944 as they stood in force

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before **01.04.1944** and **01.04.1995** respectively under the aforesaid Rules. Therefore, the decisions cited cannot be relied on context of Section 74 of the respective GST Enactments.

239. The following **Table,** explains the legal position:-

TABLE-IV

Provision for Determination and Recovery	**Rule / Section**	**Amendment to the Rule / Section**	**Remarks**
Section 11A of the Central Excise Act, 1944	Rule 173B	Notification No.11/95-CE(NT) Dated 16.03.1995 w.e.f 01.05.1995	In view of the amendment to Rule 173B, the procedure for Approval of the Classification List by a proper officer was dispensed with and substituted with filling of declaration by a Manufacturer. Prior to 01.05.1995, the self assessment in RT-12 Return filed under Rule 173 F and G of

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			the Central Excise Rules, 1944.
	Rule 173C	Notification No.04/94-CE(NT) Dated 01.03.1994 w.e.f 01.04.1994	In view of the amendment to Rule 173C, the procedure for Approval of Price List was substituted with declaration
Section 28 of Customs Act, 1962	Section 17	Section 38 of Finance Act, 2011 w.e.f 08.04.2011	

240. Prior to the above amendment to Rule 173B and Rule 173C of the Central Excise Rules, 1944, a manufacturer was required to have the **Classification List** approved under Rule 173B of the aforesaid Rules and the **Price List** approved under Rule 173C of the Central Excise Rules, 1944, from the Proper Officer.

241. The manufacturer was required to file a Self Assessed Monthly Return in RT-12 under Rule 173F of the Central Excise Rules, 1944 based on the

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approved **Classification List** and the **Price List** of the Proper Officer.

242. The Self Assessed Returns filed under Rule 173F of the Central Excise Rules, 1944 were to be strictly in consonance with the Approval of Proper Officer under Rule 173B and / or Rule 173C of the Central Excise Rules, 1944.

243. Any Self Assessment made contrary to the Approval given by the Proper Officer under Rule 173B and Rule 173C of the Central Excise Rules, 1944 or where duty was not paid contrary to the returns or short paid or not paid, invited machinery under Section 11A of the Central Excise Act,1944 in the hands of the Proper Officer to recover of duty.

244. The scheme under Rule 173F of the Central Excise Rules,1973 (both before and after the above amendments) contemplated Self-Assessment of the duty liability in consonance with the Approved **Classification List/Declaration** and / or **Price List/ Declaration** filed under Rule 173B and Rule 173C of the Central Excise Rules,1944 respectively. Thus, if duty was paid based on approved **Classification List** / **Price List**, invocation of extended period of limitation was not available.

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245. Thus, under the Scheme as it stood then, duty can said to have been evaded where there was failure to give proper particulars before approval of the **Classification List** / **Price List** or failure to pay duty on goods manufactured contrary to the **Classification List** / **Price List**.

MACHINERY FOR RECOVERY OF DUTY UNDER CENTRAL EXCISE ACT, 1944 & CENTRAL EXCISE RULES, 1944

246. Prior to incorporation of Section 11A of the Central Excise Act, 1944 machinery for recovery of duty short paid was under Rule 10 read with Rule 173J of the Central Excise Rules, 1944 prior to its omission by M.F(D.R.) Notification No.**177/80-CE** dated **12.11.1980** with effect from **17.11.1980**.

247. Section 11A of the Central Excise Act, 1944 was inserted by the Customs, Central Excises and Salt and Central Board of Revenue (Amendment) Act, 1978 (Act No.25 of 1978) dated 06.06.1978 with effect from **17.11.1980** *vide* **Notification No.182/1980** dated **15.11.1980.** Section 11A of the Central Excise Act, 1944 was further amended.

248. Rule 10 as it stood up to 06.08.1977 and between 06.08.1977 and 16.11.1980 specify different period of limitation. They read as under:-

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Rule 10 of the Central Excise Rules,1944		
Recovery of duties or charges short-levied, or erroneously refunded		
Sub- Rule	**Upto 06.08.1977**	**From 06.08.1977 till 16.11.1980**
(1)	When duties or charges have been short-levied **through inadvertence, error, collusion, or misconstruction on the part of an officer, or through misstatement as to the quantity, description or value of such goods on the part of the owner, or when any such duty or charge, after having been levied, has been owing to any such cause, erroneously refunded, the proper officer may, within three months** from the date on which the duty or charge was paid or adjusted in the owner's account-current, if any, or from the date of making the refund, serve a notice on the person from whom such deficiency in duty or charges is or are recoverable requiring him to show-cause to the Assistant Collector of Central Excise why he should not pay the amount specified in the notice.	Where any duty has not been levied or paid or has been short-levied or erroneously refunded or any duty assessed has not been paid in full, the proper officer may, **within six months from the relevant date**, serve notice on the person chargeable with the duty which has not been levied or paid, or which has been short-levied, or to whom the refund has erroneously been made, or which has not been paid in full, requiring him to show-cause why he should not pay the amount specified in the notice: Provided that- (a) where any duty has not been levied or paid, has been short-levied or has not been paid in full, by reason of **fraud, collusion or any wilful misstatement or suppression of facts by such person or his agent**, or (b) where any person or his agent, contravenes any of the provisions of these rules with intent to evade

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		payment of duty and has not paid the duty in full, or (c) where any duty has been erroneously refunded by reason of collusion or any wilful misstatement or suppression of facts by such person or his agent, the provisions of this sub-section shall, in any of the cases referred to above, have effect as if for the words **"six months"**, the words **"five years"** were substituted.
(2)	The Assistant Collector of Central Excise, after considering the representation, if any, made by the person on whom notice is served under sub-rule (1), shall determine the amount of duty or charges due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined within ten days from the date on which he is required to pay such amount or within such extended period as the Assistant Collector of Central Excise may, in any particular case, allow.	

249. However, for issuing a Notice under Rule 10 of the Central Excise

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Rules, 1944, an Officer had to serve a Notice on the person chargeable to duty which was not levied or paid or which has been short-paid or short-levied or to whom refund was erroneously made or which has not been paid in full, only where the Officer had definite information about the same.

250. Prior to **06.08.1977**, Rule 9 of the Central Excise Rules, 1944 corresponded to Section 11-A of the Central Excise Act. It provided a period of **One Year** for initiating proceedings while Rule 10 of the aforesaid Rules and corresponded to the Section 11 of the Act as it stood when the Hon'ble Supreme Court rendered its decision in **Mysore Rolling Mills Private Limited** Vs. **Collector of Central Excise, Belgaum** 1987 (28) E.L.T 50 (S.C.) on **18.02.1987.**

251. There, the Hon'ble Supreme Court held as under:-

> ***"4.*** *The Tribunal has recorded a finding that the appellant had suppressed the disclosure of receipt of handling charges and, therefore, the longer period of limitation applied. The same view had been taken by the departmental authorities. We see no justification to take the different view on the facts."*

252. Rule 9 of the Central Excise Rules, 1944 prescribed a period of 3

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months for such purpose. However, with effect from **06.08.1977**, when the Rules were amended, the period of **Six Months** was substituted for the period of **Three Months** and the period of **Five Years** substituted for the **Period of One Year**.

253. Rule 10A of the Central Excise Rules, 1944 gave residuary powers to recover sums due to Government where the Rules did not make any specific provision for the collection of any duty, or of any deficiency in duty if the duty has for any reason been short-levied, or of any other sum of any kind payable to the Central Government under the Act or these Rules.

254. Rule 10 of the Central Excise Rules, 1944 stood deleted by **M.F. (D.R.) Notification No.177/80-Central Excise** dated **12.11.1980** with effect from **17.11.1980**. Earlier, Rule 10A of the Central Excise Rules, 1944 was omitted / deleted by **M.F.(D.R.) Notification No.267/1977-Central Excise** dated **06.08.1977** which provided machinery for recovery of duty.

255. This High Court in **Murugan & Company Vs. DCCE,** 1977 ELT J 193, **Agarwal Brothers Vs. Union of India,** 1973 Tax LR 2213 (Mad), **Government of India Vs. Riechold Chemicals (India) Limited,** 1986 (24) ELT 251 (Mad), **S.Sarnam Vs. ICE,** 1982 ELT 49 (Mad), **Affirmed in ICE**

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Vs. S.Sornam, 1973 (1) MLJ 99 (Mad) had held that Rule 10A of the Central Excise Rules, 1944 was *ultra vires* the Act and there was no specific Rule making power conferred under Section 37 of the Act for recovery of excise duty which had escaped levy at the time of clearance and therefore demands issued under Rule 10A of the Central Excise Rules, 1944 could not be legally enforced.

256. The Court followed its earlier decision wherein Rule 12 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1955 (which was similar to Rule 10A of the Central Excise Rules, 1944) was held to be invalid.

257. The Kerala High Court had taken a contrary view and held that Rule 10A to be *intra vires*. The controversy is now settled as the Hon'ble Supreme Court has held that Rule 10A of the Central Excise Rules, 1944 was valid and not *ultra vires* the Rule making power.

258. Thus, Between 06.09.1977 and till 16.11.1980, Rule 10 of the aforesaid Rules read similar to Section 11A of the Central Excise Act, 1944. Thus, after the above amendments, Rule 10 of the Central Excise Rules, 1944

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was substituted and the machinery for recovery of duty stood replaced with Section 11A of the Central Excise Act, 1944.

259. Section 11A which was inserted *vide* **Customs, Central Excises & Salt and Central Board of Revenue (Amendment) Act 1978 - (No. 25 of 1978)** and notified by **Notification No.182/80** dated **15.11.1980** was later amended by the F**inance Act, 2000** and thereafter in 2011 *vide* **Finance Act, 2011**.

260. Text of Section 11A of the Central Excise Act, 1944 as it stood with effect from **17.11.1980** and its amendment in 2000 and 2011 are reproduced below:-

Section 11A of the Central Excise Act,1944		
Before Amendment *vide* Finance Act, 2000.	**After Amendment *vide* Finance Act, 2000.**	**After amendment *vide* Finance Act, 2011.**
Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.—		
Sub- Section (1)		
When any duty of	When any duty of excise	Where any duty of

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excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, a Central Excise Officer may, **within six months from the relevant date**, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:	has not been levied or paid or has been short-levied or short-paid or erroneously refunded, whether or not such non-levy or non-payment, short-levy or short-payment or erroneous refund, as the case may be, was on the basis of any approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods under any other provisions of this Act or the rules made thereunder, a Central Excise Officer may, **within one year from the relevant date**, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:	excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, **for any reason, other than the reason of fraud or collusion or any wilful mis-statement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty**,- (a) the Central Excise Officer shall, within [2] two years] from the relevant date, serve notice on the person chargeable with the duty which has not been so levied or paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to

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		show cause why he should not pay the amount specified in the notice; (b) the person chargeable with duty may, before service of notice under clause (a), pay on the basis of,- (i) his own ascertainment of such duty; or (ii) the duty ascertained by the Central Excise Officer, the amount of duty along with interest payable thereon under section 11AA.
1st Proviso to Sub-Section 1		**Sub- Section (4)**
Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or	**Provided that** where any duty of excise has not been levied or paid or has been short-levied or short-paid or	Where any duty of excise has not been levied or paid or has been short-levied or shortpaid or

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erroneously refunded **by reason of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent,** the provisions of this sub-section shall have effect, as if for the words '**six months**', the words '**five years**' were substituted."	erroneously refunded **by reason of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent,** the provisions of this sub-section shall have effect, as if, for the words **one year,** the words **'five years'** were substituted."	erroneously refunded, **by the reason of -** **(a) fraud; or** **(b) collusion; or** **(c)any wilful misstatement; or** **(d)suppression of facts or** **(e)contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,** by any person chargeable with the duty, the Central Excise Officer shall, **within five years from the relevant date**, serve notice on such person requiring him to show cause why he should not pay the amount specified in the notice along with the interest payable thereon under section 11AA

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		and a penalty equivalent to the duty specified in the notice.

261. In fact, the above tabulation was also captured in **Collector of Central Excise** Vs. **Urmin Products Private Limited**, 2024 (388) ELT 418(SC), (2023) 11-Central Tax (S.C), I shall refer to the ratio in chronology to give a perspective regarding the march of law under Section 11A of the Central Excise Act, 1944.

DECISIONS OF THE COURTS UNDER PROVISO TO SECTION 11A OF THE CENTRAL EXCISE ACT, 1944:

262. The decision of the Hon'ble Supreme Court in **Collector of Central Excise, Hyderabad** Vs. **Chemphar Drugs and Liniments, Hyderabad** 1989 (40) ELT 276 (SC), (1989) 2 SCC 127 which was cited was rendered for the Tax Period 1979-1980 when Rule 10 of the Central Excise Rules was in force between **06.09.1977** and till **16.11.1980**. There, the Hon'ble Supreme Court however gave its ruling under Section 11A of the Central Excise Act, 1944. The

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language in these provisions were *pari materia.*

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263. In **Collector of Central Excise, Hyderabad** Vs. **Chemphar Drugs And Liniments, Hyderabad**, 1989 (40) ELT 276 (SC) referred to *supra,* the Hon'ble Supreme Court observed whether in a particular set of facts and circumstances there was any Fraud or Collusion or Wilful Mis-statement or Suppression of Facts or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case. It was held as under:-

> *"9. ... In order to make the demand for duty sustainable beyond a period of six months and up to a period of 5 years in view of the proviso to sub-section (1) of Section 11-A of the Act, it has to be established that the duty of excise has not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. ... Whether in a particular set of facts and circumstances there was any fraud or collusion or wilful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case."*

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264. In **Padmini Products** Vs. **Collector of Central Excise, Bangalore**,1989 (43) E.L.T. 195 referred *supra*, it was held as under:-

> *"12…… Failure to pay duty or take out a licence is not necessarily due to fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act. Suppression of facts is not failure to disclose the legal consequences of a certain provision."*

265. There, in the facts and circumstances of this case, the Court concluded that the materials available indicated to suggest that there was scope for confusion and the appellants believing that the goods came within the purview of the concept of handicrafts and as such were exempt and if there was scope for entertaining such a belief or opinion, then failure either to take out a licence or to pay duty on that belief, when there was no contrary evidence that the producer or the manufacturer knew that these were excisable or required to be licensed, would not attract the penal provisions of Section 11-A of the Act. If the facts are otherwise, then the position would be different.

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266. Thus, the invocation of machinery under *Proviso* to Section 11A of the Central Excise Act, 1944, were not justified, if an assessee entertained a *bona fide* belief or the tax was paid on the basis of the Approved Classification or Price List or in absence of any indication that there was deliberate attempt to evade duty. Unless there was a deliberate attempt to evade tax, no question of invoking the extended period of limitation could be countenanced.

267. The Hon'ble Supreme Court in **Collector of Central Excise, Hyderabad** Vs. **M/s. Chemphar Drugs and Liniments, Hyderabad,** 1989 (40) E.L.T. 276 (S.C.) / 1989 (2) SCC 127, observed that in order to sustain an order of the Tribunal for a period beyond six months and up to a period of 5 years under the *Proviso* to sub-section (1) of Section 11-A of the Act, it had to be established that the duty of excise had not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either Fraud or Collusion or Wilful Mis-statement or Suppression of Facts or contravention of any provision of the Act or Rules made thereunder, with an intent to evade payment of duty.

268. There, the said manufacturer was engaged in manufacture of both **Patents & Proprietary** under **Tariff Item 14E** and **Pharmacopoe**

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Preperations under **Tariff Item 68** during the period between **01.04.1979 – 31.03.1980**. The consolidated value of these goods cleared by the said manufacturer during the aforesaid period was **Rs.20,59,338.60/-**.

269. On **30.07.1980** the said manufacturer filed a Classification List in Respect of Patent and Proprietary Medicines alone claiming exemption under Notification No.80/1980 dated 19.06.1980. The manufacturer had also filed a declaration for exemption under **Notification No.71/1978** dated **01.03.1978**, and furnished particulars of only the value of **Patents and Proprietary Medicines** under **Tariff Item 14E** manufactured and cleared by it during the aforesaid period and did not include the particulars of the value of **Pharmacopoe Preperations** cleared under Tariff Item 68 during the said period.

270. Under the provisions of Sub-clause (ii) of clause 2 of Notification No.80/1980 and Sub-clause (iii) of Clause (a) of Notification No.71/1978, a manufacturer was not eligible for exemption if the aggregate value of the clearances of all such excisable goods exceeded Rs.20,00,000/- during the preceding Financial Year cleared by the manufacturer or on his behalf are cleared for home consumption from one or more factories.

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271. Relevant portion of Clause (iii) reads as under:-

> *" Who manufacture excisable goods falling under more than one item number of the said First Schedule and the aggregate value of all excisable goods cleared by him or in his behalf for home consumption, from one or more factories during the preceding Financial Year, had exceeded rupees twenty lakhs."*

272. The Tribunal had accepted the explanation of the manufacturer that it was plausible that the Department had full knowledge of the facts about manufacture of all the goods manufactured by the said manufacturer. The Tribunal had also accepted that the declaration was filed by the said manufacturer by not including the value of the product other than those falling under **Tariff Item 14E**. These findings of the Tribunal were also neither challenged before the Hon'ble Supreme Court nor before the Tribunal.

273. It was in this context, the Hon'ble Supreme Court held that if the assessee declared the goods on the basis of their belief of the interpretation of the provisions of the law that the exempted goods were not required to be included in the decision and were not included in the value of the exempted

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goods which they manufactured during the Previous Year, invocation of extended period of limitation was not available at the relevant time.

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274. Thus, the case hinged on peculiar facts of the case and during that regime when approval of Classification List and Price List were in vogue under Rule 173B and Rule 173C of the Central Excise Rules, 1944. Therefore, the above decision is of not much relevance under the new regime either under Section 73 or Section 74 of the respective GST Enactments.

275. There, it was observed by the Court that something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability beyond the period of six months had to be established.

276. In **Cosmic Dye Chemical** Vs. **Collector of Central Excise, Bombay,** (1995) 6 SCC 117/ 1995 (75) ELT 721 (referred to *supra*), the Hon'ble Supreme Court held as under:-

> *"5. ..... But the said period of six months gets extended to five years where such non-levy, short levy, etc. is "by*

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reason of fraud, collusion or any wilful misstatement or suppression of facts or contravention of any of the provisions of this Act or of the rules with intent to evade payment of duty….

*6. Now so far as **fraud and collusion** are concerned, it is evident that the requisite intent, i.e., **intent to evade duty is built into these very words.** So far as **misstatement or suppression of facts are concerned,** they are clearly **qualified** by the word '**wilful**' preceding the words "misstatement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or rules" are again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or misstatement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11-A. Misstatement or suppression of fact must be wilful."*

277. The decision of the Hon'ble Supreme Court in **Collector of Central Excise** Vs. **H.M.M. Limited,** 1995(76) E.L.T 497, 1995 SCC OnLine SC 82, and 1995 Supp (3) SCC 322, was heavily relied by the counsels for the Petitioners cannot be said to be a universal application so as to apply even in the context of Section 74 of the respective GST Enactments.

278. In **H.M.M. Limited** (referred to *supra*) challenge was against CEGAT's **Final Order No.31/1988-C** dated **20-1-1988** in **Appeal No.ED(SB)**

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376/84-C, Cross Objection ED(SD) CO 251/84-C in **H.M.M. Limited** Vs. **Collector,** 1989 (40) E.L.T. 422 (Tribunal).

279. The Tribunal by the aforesaid Order had accepted the contention of the assessee that "**coal cinder**" a residue / waste sold by the assessee between **01.04.1981** and **31.01.1983** was not liable to duty under Tariff Item No.68 of the Central Excise Act, 1944. The Tribunal referred to Rule 50 of the Central Excise Rules, 1944. Rule 50 of the aforesaid Rules read as under:-

> "**Rule 50**
>
> *For the purpose of facilitating the collection of duty on excisable goods, the Collector may require that a manufacturer shall not, without the permission of the proper officer and except in accordance with such procedure as may be prescribed by the Collector, remove from the approved premises any non-excisable goods produced in such premises, or any intermediate or residual product,* ***except waste matter and such other material as may be specified by the Collector in writing."***

280. In this connection, three Show Cause Notices were issued to the assessee. This is captured in Paragraph No.2 of the Tribunal Order referred to *supra* dated 20.01.1988.

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281. There, the Additional Collector had issued the First Notice after expiry of normal period of limitation of six months prescribed in Section 11-A(1) of the Central Excise Act, 1944 but had proceeded to observe that there was wilful action of withholding of vital information apparently for evasion of excise duty due on the waste/by-product.

282. The Tribunal allowed the Appeal of the assessee based on the decisions of the **Delhi High Court** and that of the **Bombay High Court** and one of its own decision in the following three cases:-

(a) **Modi Rubber Limited, Modinagar, Uttar Pradesh and another** Vs. **Union of India and others,** 1987 (29) E.L.T. 502 (DEL.) [Paras 3 & 6]
(b) **Collector of Central Excise, Allahabad** Vs. **Captainganj Distiller, Captaingang,** 1987 (29) E.L.T. 122 [Paras 3 & 6]
(c) **Indian Aluminium Company Limited and another** Vs. **A.K.Bandyopadhyay & others,** 1980 E.L.T. 146 (BOM.) [PARA 7]

283. Paragraph No.7 of the Order of the Tribunal observed as under:-

> *"Delhi High Court in **Modi Rubber Ltd case** (supra) has held that waste/scrap " though capable of fetching some sale price could not be treated as goods or obtaining of the same manufacture within the meaning of Central Excise law. In para 13 of the decision dealing with Rule 50 of Central Excise Rules, 1944, they have also held that so far as waste*

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matter is concerned, it has been treated as non-excisable product with no restrictions on its removal. It is also not shown or suggested that waste obtained by burning of coal is specified in any Tariff item. Besides the above High Court decision, the Tribunal in ***Collector of Central Excise, Allahabad v. Captainganj Distillery, Captainganj*** *(supra) relying on a number of decisions including one of Bombay High Court in* ***M/s. Indian Aluminium Co. Ltd and Another v. A.K. Bandyopadhyay and Other****s [1980 E.L.T. 146 (Bombay)] held that spent wash arising during process of manufacture of alcohol is waste and not excisable.* ***It appears to us that ratio of these decisions would be applicable in the present case and based on the Trade Notice issued by the Collectorate, cinder cannot be held to be excisable or goods."***

284. In **Collector of Central Excise** Vs. **H.M.M. Limited,** 1995 SCC OnLine SC 82 (referred to *supra*), the Hon'ble Supreme Court held as under:-

"2. ..... Admittedly, it is beyond the period of limitation of six months prescribed under Section 11-A(1) but it is within the extended period of 5 years under the proviso to that sub-section. Now in order to attract the proviso it must be shown that the excise duty escaped payment by reason of fraud, collusion or wilful misstatement or suppression of fact or contravention of any provision of the Act or of the Rules made thereunder with intent to evade payment of duty. In that case the period of six months would stand extended to 5 years as provided by the said Proviso.

..... There is no averment that the duty of excise had been intentionally evaded or that fraud or collusion had been practised or that the assessee was guilty of wilful

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misstatement or suppression of fact. In the absence of any such averments in the show-cause notice it is difficult to understand how the Revenue could sustain the notice under the proviso to Section 11-A(1) of the Act.

> ***……. If the department proposes to invoke the proviso to Section 11-A(1), the show-cause notice must put the assessee to notice which of the various commissions or omissions stated in the proviso is committed to extend the period from six months to 5 years. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the department."***

285. Before the Hon'ble Supreme Court in **Collector of Central Excise** Vs. **H.M.M. Limited,** 1995(76) E.L.T 497, 1995 SCC OnLine SC 82, and 1995 Supp (3) SCC 322, it was argued there is no averment that the duty of excise had been intentionally evaded or that Fraud or Collusion had been practised or that the assessee was guilty of Wilful Mis-statement or Suppression of Fact. This was accepted by the Hon'ble Supreme Court.

286. Before the Hon'ble Supreme Court, it was the submission of the Counsel for the Respondent Assessee that a mere non-declaration of the waste / by-product in their "Classification List" under Rule 173B of the Central Excise Rule, 1944 could not establish any **"wilful withholding of vital information"**

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to infer evasion of excise duty due on the waste viz., cinder and that the assessee was entitled to a *bona fide* belief that the said waste / by-product did not attract excise duty and hence may not have been included in their Classification List under Rule 173B of the Central Excise Rules, 1944 and that *per se* cannot go to prove that there was an intention to evade payment of duty or that the assessee was guilty of **Fraud, Collusion, Misconduct or Suppression** to attract the *Proviso* to Section 11A(1) of the Act as it stood. This view was accepted by the Hon'ble Supreme Court.

287. There, the Counsel for the assessee before the Hon'ble Supreme Court contended that the Assessee was not put to notice regarding the specific allegation for invoking the extended period of limitation under the *Proviso* to that Sub-section.

288. It was under these circumstances, the Hon'ble Supreme Court there held that a mere non-declaration of the waste / by-product in the 'Classification List" under Rule 173B of the Central Excise Rules, 1944 did not establish any wilful withholding of vital information for the purpose of evasion of excise duty due on the said product.

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289. The Hon'ble Supreme Court thus held that *per se* failure of mere declaration cannot go to prove that there was the intention to evade payment of duty or that the Assessee was guilty of Fraud, Collusion, Misconduct or Suppression to attract the *Proviso* to Section 11A(1) of the Act and there is considerable force in this contention.

290. The Hon'ble Supreme Court further held that if the Department proposes to invoke the *Proviso* to Section 11-A(1), the Show Cause Notice must put the assessee to notice of the various commissions or omissions stated in the *Proviso* to Section 11A to invoke the extended the period of limitation from six months to 5 years.

291. This decision of the Hon'ble Supreme Court has been strangely reported twice in E.L.T. The full text has been reported in 1995(76) E.L.T 497, 1995 SCC OnLine SC 82 and 1995 Supp (3) SCC 322 and again the summary of the Order in 1997 (95) E.L.T. A74 (S.C). Text of the summary of the Order in 1997 (95) E.L.T. A74 (S.C), reads as under:-

> *"The Appellate Tribunal in its order in question had observed with regard to coal cinder that burning of coal in boiler leaves* ***cinder as residue****, and after the coal is burnt the residue cinder is removed and it is in fact waste which has brought some money to the appellants.*

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Coal cinder sold by the appellants between 1-4-1981 and 31-3-1983 had been held liable to duty under T.I. 68 of the erstwhile Central Excise Tariff in the impugned order of the Department. The Tribunal held that the ratio of the Delhi High Court judgment in the case of ***Modi Rubber Ltd. v. Union of India & Others*** *[1987 (29) E.L.T. 502] and the Tribunal's order in the case of* ***Collector v. Captainganj Distillery*** *[1987 (29) E.L.T. 122] were applicable and that based on the Trade Notice issued by the Collectorate cinder cannot be held to be excisable goods, and set aside the impugned order."*

292. Thus, it is evident that the Assessee failed to include in the Classification List filed under Rule 173C of the Central Excise Rules, 1944 that cinder which emerged as waste / by-product under a *bona fide* belief was not liable to excise duty.

293. There, the Additional Collector conceded that the Notice had been issued after the period of six months prescribed in Section 11-A(1) of the Act but had proceeded to observe that there was wilful action of withholding vital information apparently for evasion of excise duty due on this waste / by-product.

294. The view of the Hon'ble Supreme Court in **Collector of Central Excise** Vs. **H.M.M Limited** referred to *supra* that *"There is no averment that*

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the duty of excise had been intentionally evaded or that fraud or collusion had been practised or that the assessee was guilty of wilful misstatement or suppression of fact." and that *"In the absence of any such averments in the show-cause notice it is difficult to understand how the Revenue could sustain the notice under the proviso to Section 11-A(1) of the Act"* at best has to be confined to the facts of the above case and has no universal application.

295. Thus, the decision of the Hon'ble Supreme Court was not on the basis of the reasoning in Order-in-Original dated 03.02.1984 of the Original Authority in **H.M.M Limited case** referred to *supra*. The challenge before the Tribunal was purely on the strength of the decision of the Delhi High Court, Bombay High Court and the Tribunal.

296. Thus, it is evident that the Hon'ble Supreme Court had accepted the oral submission of the Assessee made before it although the Tribunal did not deal with the issue related to the extended period of limitation. The said decision of the Tribunal was purely based on Rule 50 of the Central Excise Rules, 1944.

297. It was therefore held that in the absence of any averments in the Show

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Cause Notice, it was difficult to understand how the Revenue could sustain the Notice under the *Proviso* to Section 11-A(1) of the Act.

298. Therefore, the decision of the Hon'ble Supreme Court in **Collector of Central Excise** Vs. **H.M.M. Limited** which was heavily relied upon is also not applicable in the context of Section 74 of the respective GST Enactments.

299. In **Tamil Nadu Housing Board** Vs. **Collector of Central Excise, Madras & another** 1995 Suppl (1) SCC 50/1994 (74) E.L.T.9 (SC), the Hon'ble Supreme Court followed its views in **Padmini Products** Vs. **Collector of Central Excise, Bangalore,** 1989 (43) E.L.T. 195 and held as under:-

> *"A bare reading of the proviso indicates that it is in nature of an exception to the principal clause. Therefore, its exercise is hedged on one hand with existence of such situations as have been visualised by the proviso by using such strong expression as fraud, collusion etc. and on the other hand it should have been with intention to evade payment of duty. Both must concur to enable the Excise Officer to proceed under this proviso and invoke the exceptional power."*

300. The Hon'ble Supreme Court further observed that *"Since the proviso extends the period of limitation from six months to five years, it has to be construed strictly"*. It is further held that the initial burden is on the

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Department to prove that the situations visualised by the proviso existed. But once the Department is able to bring on record material to show that the appellant was guilty of any of those situations which are visualised by the Section, the burden shifts and then applicability of the proviso has to be construed liberally.

301. The ultimate test in the above case was as under:-

> *"When the law requires an intention to evade payment of duty then it is not mere failure to pay duty. It must be something more.* ***That is, the assessee must be aware that the duty was leviable and it must deliberately avoid paying it. The word `evade' in the context means defeating the provision of law of paying duty. It is made more stringent by use of the word `intent'.*** *"*

302. In **Pushpam Pharmaceuticals Company** Vs. **Collector of Central Excise, Bombay,** 1995 Supp (3) SCC 462 (referred to *supra*), it was held as under:-

> *"4. A perusal of the Proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be*

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deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty."

303. Several decisions of the Hon'ble Supreme Court including its decision in **H.M.M. Limited Case** referred to *supra* formed the basis of the decision of the Hon'ble Supreme Court in **Uniworth Textiles Limited** Vs. **Commissioner of Central Excise**, 2013 (288) E.L.T. 161 (S.C.). There, the Hon'ble Supreme Court referred to the following decisions while passing its Judgment in the above case:-

i. **Aban Loyd Chiles Offshore Ltd.** Vs. **Commissioner,** 2006 (200) E.L.T. 370 (S.C.)
ii. **Anand Nishikawa Company Limited** Vs. **Commissioner,** 2005 (188) E.L.T. 149 (S.C.)
iii. **Associated Cement Companies Limited** Vs. **Commissioner,** 2001 (128) E.L.T. 21 (S.C.)
iv. **Collector** Vs. **H.M.M. Limited,** 1995 (76) E.L.T. 497 (S.C.)
v. **Easland Combines** Vs. **Collector,** 2003 (152) E.L.T. 39 (S.C.)
vi. **Pushpam Pharmaceuticals Company** Vs. **Collector,** 1995 (78) E.L.T. 401 (S.C.)
vii. **Sarabhai M. Chemicals** Vs. **Commissioner,** 2005 (179) E.L.T. 3 (S.C.)
viii. **Union of India** Vs. **Ashok Kumar,** (2005) 8 SCC 760

304. In the following cases also, Section 11A of the Central Excise Act, 1944 as it stood between 1995 and 2011 also fell for consideration, wherein,

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the Hon'ble Supreme Court observed as under:-

Easland Combines Vs. **CCE** [(2003) 3 SCC 410]	**Anand Nishikawa Co. Ltd.** Vs. **CCE** [(2005) 7 SCC 749]	**Sarabhai M. Chemicals** Vs. **Collector of Central Excise,** [(2005) 2 SCC 168];2005 (179) E.L.T. 3 (S.C.)
31. *It is settled law that for invoking the extended period of limitation duty should not have been paid, short-levied or short-paid or erroneously refunded because of either fraud, collusion, wilful misstatement, suppression of facts or contravention of any provision or rules. This Court has held that these ingredients postulate a positive act and, therefore,* ***mere failure to pay duty and/or take out a licence which is not due to any fraud, collusion or wilful misstatement or suppression of fact or contravention of***	27. *Relying on the aforesaid observations of this Court in* ***Pushpam Pharmaceuticals Co. v. CCE*** *[1995 Supp (3) SCC 462 : (1995) 78 ELT 401] we find that 'suppression of facts' can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty. When facts were known to both the parties, the omission by one to do what he might have done and not that he must have done, would not render it suppression.* ***It is***	*23.* Now *coming to the question of limitation, at the outset, we wish to clarify that there are* ***two concepts*** *which are required to be kept in mind for the purposes of deciding this case.* ***Reopening of approvals/assessments is different from raising of demand in relation to the extended period of limitation.*** *Under Section 11-A(1) of the Central Excise Act, 1944,* ***a proper officer can reopen the approvals/assessments in cases of escapement of duty on account of non-levy, non-payment,***

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any provision is not sufficient to attract the extended period of limitation."	***settled law that mere failure to declare does not amount to wilful suppression. There must be some positive act from the side of the assessee to find wilful suppression.*** *Therefore, in view of our findings made hereinabove that there was no deliberate intention on the part of the appellant not to disclose the correct information or to evade payment of duty, it was not open to the Central Excise Officer to proceed to recover duties in the manner indicated in the proviso to Section 11-A of the Act."*	***short-levy, short-payment or erroneous refund, subject to it being done within one year from the relevant date.*** *On the other hand, the demand for duty in relation to extended period is mentioned in the proviso to Section 11-A(1).* ***Under that proviso, in cases where excise duty has not been levied or paid or has been short-levied or short-paid or erroneously refunded on account of fraud, collusion or wilful misstatement or suppression of facts, or in contravention of any provision of the Act or Rules with the intent to evade payment of duty, demand can be made within five years from the relevant date. In the present case, we are concerned with the proviso to***

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		Section 11-A(1).”

305. In **Sarabhai M. Chemicals case** referred to *supra*, approval given was not opened. It was thus held that even if the classification was revised subsequently, it would not clothe the Department with the power under *Proviso* to invoke the extended period of limitation under Section 11A as there is no suppression of facts. Paragraph No.27 from the said decision is reproduced below:-

> ***27.*** *The question is, whether in the present case, there was any wilful suppression of facts. On facts, as stated above, we find that the appellant had filed a classification list indicating Notification No. 234/86, dated 3-4-1986 as well as the chapter under which the goods fell. We have gone through the classification list. It indicates the claim for exemption. The classification list was duly approved by the department. So also monthly returns were filed by the appellant in the form of RT-12, in which there was a complete disclosure regarding the nature of the goods. These returns were regularly assessed by the department. The material placed on record shows filing of gate passes, invoices, classification list. They indicated the names of the consignees. A mere reading of these names would indicate that sorbitol solution was sold to non-pharmaceutical companies like, M/s. Golden Tobacco Co. Ltd. Despite such disclosure, the department approved the classification list as well as RT-12 returns.* ***There was no reopening of the approvals and assessments within the stipulated period.*** *In the circumstances,*

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the Judicial Member of the Tribunal was right in holding that no case was made out for invoking the extended period of limitation. As stated above, the end use was built in the exemption notification. Therefore, the department could have demanded duty within one year from the relevant date under Section 11A(1). However, this was not done. In the absence of evidence of suppression of facts, the J.M. was right in setting aside the show cause notices."

306. Thus, the decision of the Hon'ble Supreme Court in **H.M.M. Limited case** referred to *supra,* in **Pushpam Pharmaceuticals Co.** referred to *supra* and **Sarabhai M. Chemicals** case referred to *supra* which in turn rely on the other decisions of the Hon'ble Supreme Court which were rendered in the context of Section 11A of the Central Excise Act, 1944 before the amendment to Rule 173B and Rule 173C of the Central Excise Rules, 1944 are of no relevance nor are of any major significance in the context of both Section 73 and Section 74 of the respective GST Enactments.

307. In **Continental Foundation Joint Venture** Vs. **Commissioner of Central Excise Chandigarh - I**, 2007 (216) E.L.T. 177 (S.C.);(2007) 10 SCC 337, the disputed period was from 1997-1998. Post 1997-1998 the Tariff Entry provided nil duty on Ready Mix Concrete. The Tribunal answered the issue against the said Company which was a co-noticee in the proceedings along

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with **M/s.Nathpa Jhakri Power Corporation** (in short "NJPC"), a joint venture between the Government of India and the Government of Himachal Pradesh, set up for the purpose of construction of a power project between the towns of Nathpa-Jhakri in Himachal Pradesh known as Nathpa Jhakri Power Corporation was funded by World Bank.

308. There, the civil work relating to the project was allotted to three construction Companies viz., **M/s.Continental Foundation Joint Venture** (in short "CFJV"), M/s.Nathpa Jhakri Joint Venture (in short "NJJV") and **M/s.Jai Prakash Hyundai Consortium** (in short "JPHC"). The Agreement was entered into by **M/s.NJPC** and the three construction Companies to provide *inter alia* "mix concrete" for execution of various items of work under the contract.

309. Although the Tribunal had answered the case against **M/s.Continental Foundation Joint Venture Commissioner,** 2002 (150 E.L.T. 216), on reference to a Larger Bench of the Tribunal, the views expressed by the Tribunal in 2002 (150 E.L.T 216) referred to *supra* was reversed by the Larger Bench of the Tribunal in **Chief Engg. Ranjit Sagar Dam Vs. Commissioner of Central Excise, Jalandhar,** (2006 SCC OnLine CESTAT 1605 : (2006) 198 ELT 503)

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following the view of this High Court in **Larsen & Tubro Limited**, 2006 (194) ELT A57, wherein in Paragraph No.6, it was observed as under:-

> "*At the hearing the learned Additional Central Government Standing Counsel specifically took a stand that Ready Mix Concrete is not leviable even if it is manufactured at the site of construction, but it is leviable only if such Ready Mix Concrete, which is manufactured in a place other than the place of construction for the one's own purpose or for its use somewhere else or by sale and by transportation of the same from Ready Mix Plant to such site of third parties or consumers as the case may be.*"

310. In the light of the decision of this High Court in **Larsen & Turbo** referred *supra*, the Court held that the assessee there entertained a *bona fide* doubt in the list of Circular dated 06.01.1988. There, the Hon'ble Supreme Court observed as under:-

> "***13.*** *Factual position goes to show that the Revenue relied on the Circulars dated 23-5-1997 and 19-12-1997. The Circular dated 6-1-1998 is the one on which the appellant places reliance. Undisputedly, view expressed by* ***CEGAT*** ***in Continental Foundation Joint Venture case [Continental Foundation Joint Venture v. CCE,*** *(2002) 150 ELT 216 (Tri-Del)] was held to be not correct in a subsequent larger Bench judgment. It is, therefore, clear that there was scope for entertaining doubt about the view to be taken. The Tribunal apparently has not*

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considered these aspects correctly. Contrary to the factual position, CEGAT has held that no plea was taken about there being no intention to evade payment of duty as the same was to be reimbursed by the buyer. In fact such a plea was clearly taken. The factual scenario clearly goes to show that there was scope for entertaining doubt, and taking a particular stand which rules out application of Section 11-A of the Act.

14. *As far as fraud and collusion are concerned, it is evident that the intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word "wilful", preceding the words "misstatement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or Rules" are again qualified by the immediately following words "with intent to evade payment of duty". Therefore, there cannot be suppression or misstatement of fact, which is not wilful and yet constitute a permissible ground for the purpose of the proviso to Section 11-A. Misstatement of fact must be wilful.*

15. *That being so, the adjudicating authorities were not justified in raising the demand and CEGAT was not justified in dismissing the appeals.*

16. *On the ground of adjudication beyond the normal period of limitation and non-availability of the extended period of limitation, the appeals are allowed. No costs."*

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311. In the case before this Court, there is no indication of any clarification of the Board for any of the Petitioner to entertain a *bona fide* doubt.

312. In **Collector of Central Excise** Vs. **Urmin Products private Limited**, 2024 (388) ELT 418(SC), (2023) 11-Central Tax (S.C), the Hon'ble Supreme Court also relied on several of its earlier decision including its own decision in **Continental Foundation Joint Venture** Vs. **Commissioner of Central Excise Chandigarh-I**, 2007 (216) E.L.T. 177 (S.C.);(2007) 10 SCC 337, wherein it was observed as under:-

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

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cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a wilful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct."

"14.As far as fraud and collusion are concerned, it is evident that the intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word "wilful", preceding the words "misstatement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or Rules" are again qualified by the immediately following words "with intent to evade payment of duty". Therefore, there cannot be suppression or misstatement of fact, which is not wilful and yet constitute a permissible ground for the purpose of the proviso to Section 11-A. Misstatement of fact must be wilful."

313. In **Collector of Central Excise** Vs. **Urmin Products private Limited**, (referred to *supra*), the Appellant had intimated their intention to change classification. Therefore, there it was held that machinery under extended period of limitation under section 11A of the Central Excise Act, 1944 was not justified.

314. As mentioned above, in the beginning of the discussion in this Order,

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the Hon'ble Supreme Court in **Commissioner** Vs. **Cotspun Limited,** 1998 (99) E.L.T. 24 (S.C.) referred to *supra,* dissented from its earlier views in **Ballapur Industries** referred to *supra* and affirmed its views in **Rainbow Industries** referred to *supra.*

315. The above decision of the Hon'ble Supreme Court in **Cotspun Limited Case** referred to *supra* was nullified by a retrospective validation in Section 110 of the Finance Act, 2000.

316. The above validation in Section 110 of the Finance Act, 2000 was subject matter of discussion in **ITW Signode India Limited** Vs. **Collector,** 2003 (153) E.L.T. 501 (S.C.). There, the Hon'ble Supreme Court observed as under:-

> ***"54. Cotspun (supra)*** *was decided when the matters relating to classification, approval thereof as also short-levy or upon detection of a mistake were governed by the rules. Rule 10 and Rule 173B were to be read in conjunction with each other and the Constitution Bench merely followed the said principle of interpretation of statute. A different situation has arisen now having regard to the fact that not only the substantive provision dealing with the consequence of non-levy, non-payment or short levy or short-payment or erroneous refund but also has laid down the procedure therefor."*
>
> "55.*A statute, it is trite, must be read as a whole. The plenary*

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power of legislation of the Parliament or the State Legislature in relation to the legislative fields specified under Seventh Schedule of the Constitution of India is not disputed. A statutory Act may be enacted, prospectively or retrospectively. A retrospective effect indisputably can be given in case of curative and validating statute. In fact curative statutes by their very nature are intended to operate upon and affect past transaction having regard to the fact that they operate on conditions already existing. However, the scope of the Validating Act may vary from case to case."

56. For the reasons aforementioned, we are of the opinion that the Section 11A of the ***Act as amended is a valid piece of legislation."***

317. A similar view was taken by the Hon'ble Supreme Court in **Commissioner of Central Excise** Vs. **J.K. Synthetics Private Limited,** 2006 (194) ELT 15.

318. In **Commissioner of Central Excise, Ahmedabad** Vs. **Damodar Poly Fab Private Limited,** 2018 (14) G.S.T.L. 162 (S.C.), the Hon'ble Supreme Court held as under:-

"10. *While it is correct that duty has to be paid as per classification determined, acceptance of classification may not necessarily amount to acknowledgment of the liability to pay duty. This is because the particular Chapter Sub-Heading under which classification has been made and which has been accepted by the assessee may be covered by an exemption notification or the question of exemption may be reasonably argued in the*

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reply of the assessee, as may be. Alternatively, Section 11A contemplates a period of limitation for giving of the notice which gets extended in case of suppression, mis-statement etc. This could be another defence open to an assessee in support of his claim of nil duty liability while, at the same time, accepting the classification made."

319. In other words, it has to be inferred that even if Notice to revise the classification was to be issued, unless a corresponding demand was made within the stipulated time by specifying the reason, the demand cannot be sustained. This view is relevant in the context of the Central Excise Act, 1944 prior to the amendment to the Rule 173B and Rule 173C to which there shall be further reference in the ensuing paragraphs.

320. In **Commissioner of Central Excise, Ahmedabad** Vs. **Damodar Poly Fab Private Limited,** referred to *supra*, the Hon'ble Supreme Court further observed as under:-

"11. The situations in which an assessee can legitimately deny its liability to pay duty even after accepting a classification may be so myriad that it is not for the Court to speculate the same. The very fact that the requirement of giving notice has been statutorily engrafted casting a mandatory character to the said requirement is sufficient for the Court to take the view that in the present appeals the demands raised for payment of duty following the

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classification under Chapter sub-heading 3920.32 without giving the assessee an opportunity as contemplated by Section 11A of the Act is legally impermissible and therefore would not be tenable in law."

321. Thus, it is evident that in all cases, invocation of extended period of limitation was tested in the light of the provisions under Rules as they stood before the amendment in 1994 and 1995.

322. To invoke the machinery under Section 11A of the Central Excise Act, 1944, the Central Excise Officer should have definite facts before issuing a Notice to such an assessee. Existence of such "Foundational Fact" was a must, which should be reflected in the Notice.

323. This is evident from the language in Section 11A of the Central Excise Act, 1944 which itself came to be inserted by the Customs, Central Excises and Salt and Central Board of Revenue (Amendment) Act, 1978 (Act No.25 of 1978) dated 06.06.1978 with effect from 17.11.1980 *vide* Notification No.182/1980 dated 15.11.1980.

324. Therefore, the decisions of the Hon'ble Supreme Court which were rendered earlier when the practice of Approval of the Classification List and

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Price List under Rule 173B and Rule 173C of the Central Excise Rules,1944 respectively were in vogue prior to the said amendment cannot be applied in the context of Scheme under Section 74 of the respective GST Enactments.

325. Therefore, the decisions of the Hon'ble Supreme Court referred to *supra* more particularly rendered in the context of Section 11A as it operated along with unamended Rule 173B and Rule 173C before 1995 and 1994 cannot be imported into the Scheme for determination of tax under the respective GST Enactments as the assessments are fully dependent on the correct self-assessment under Section 59 of the respective GST Enactments.

MACHINERY UNDER SECTION 28 OF THE CUSTOMS ACT, 1962

326. Similarly, the decisions rendered in the context of *Proviso* to Section 28(1) of the Customs Act, 1962 as it stood prior to its amendment in 2011 and thereafter under Sub-section (4) to Section 28 of the Customs Act, 1962 also cannot be applied under the Scheme of the respective GST Enactments for the same reasons.

327. Section 28 of the Customs Act, 1962 has to be read along with Section 17 of the Customs Act, 1962. Under Section 17 of the Customs Act, 1962, as

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it stood prior to amendment *vide* Finance Act, 2011 with effect from 08.04.2011, the assessment in the Bill of Entry for import of goods and / or the Shipping Bill in case of export of the goods, was to be made by the Proper Officer.

328. Only after the above amendment to Section 17 of the Customs Act, 1962 *vide* Section 38 of the Finance Act, 1994, importer was required to make a self-assessment of the Bill of Entry and the Proper Officer is now merely required to accept or reject the assessment in the Bill(s) of Entry and/or Shipping Bill(s) as the case maybe.

329. Thus, only after the above amendment, the Bill of Entry was to be self-assessed by an Importer under Section 17 of the Customs Act, 1962. Thus, the decisions of the Hon'ble Supreme Court which were rendered under the Customs Act, 1962 based on the decisions of the Hon'ble Supreme Court referred to *supra* under Section 11A of the Central Excise Act, 1944 in the context of pre-amended Rule 173B and Rule 173C of the Central Excise Rules, 1944 in 1995 and 1994, cannot be imported for the purpose of Section 74 of the respective GST Enactments.

330. This change to the Scheme under the Customs Act, 1962 was brought

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out by this Court in **N.C.Alexander** Vs. **Commissioner of Customs,** 2022 (381) ELT 148 (Mad) while holding that the Officers of the Directorate of Revenue Intelligence (DRI) were Proper Officers within the meaning of Section 2(34) of the Customs Act, 1962.

331. The above decision was approved by the Hon'ble Supreme Court in **Commissioner of Customs** Vs. **Canon India Private Limited,** 2024 (390) ELT while reviewing its earlier decision in **Canon India Private Limited** Vs. **Commissioner,** 2021 (376) ELT (3).

OTHER IMPORTANT CASE LAWS UNDER SECTION 28 OF THE CUSTOMS ACT, 1962:-

(i) **Associated Cement Companies Limited** Vs. **Commissioner of Customs** [(2001) 4 SCC 593]/2001 (128) E.L.T. 21 (S.C.)

(ii)**Aban Loyd Chiles Offshore Limited and others** Vs. **Commissioner of Customs, Maharashtra**, [2006 SCC OnLine SC 806] 2006 (200) E.L.T. 370 (S.C.)

(iii)**Uniworth Textiles Limited** Vs. **Commissioner of Central Excise [**(2013) 9 SCC 753]/2001 (128) E.L.T. 21 (S.C.)

(iv) **Canon India Private Limited** Vs. **Commissioner,** 2021 (376) ELT (3).

(v) **N.C. Alexander** Vs. **Commissioner of Customs,** 2022 (381) ELT 148 (Mad).

(vi) **Commissioner of Customs** Vs. **Canon India Private Limited,** 2024 (390) ELT.

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332. In **Associated Cement Companies Limited** Vs. **Commissioner of Customs** (2001) 4 SCC 593/2001 (128) E.L.T. 21 (S.C.), the imports were made during 1995-1996 when the assessment was to be made by the Proper Officer under Section 17 of the Customs Act, 1962. Relying on several decisions of the Hon'ble Supreme Court rendered in the context of the Central Excise Act, 1944 referred to *supra,* the Hon'ble Supreme Court observed as under:-

> *"53. ... Our attention was drawn to the cases of* ***CCE v. Chemphar Drugs and Liniments*** *[(1989) 2 SCC 127 : 1989 SCC (Tax) 245],* ***Cosmic Dye Chemical v. CCE [(1995) 6 SCC 117]***, ***Padmini Products v. CCE*** *[(1989) 4 SCC 275 : 1989 SCC (Tax) 616],* ***T.N. Housing Board v. CCE*** *[1995 Supp (1) SCC 50] and* ***CCE v. H.M.M. Ltd.*** *[1995 Supp (3) SCC 322] In all these cases the Court was concerned with the applicability of the proviso to Section 11-A of the Central Excise Act which, like in the case of the Customs Act, contemplated the increase in the period of limitation for issuing a show-cause notice in the case of non-levy or short-levy to five years from a normal period of six months. ...*
>
> *54. While interpreting the said provision in each of the aforesaid cases, it was observed by this Court that for proviso to Section 11-A to be invoked, the intention to evade payment of duty must be shown.*

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This has been clearly brought out in Cosmic Dye Chemical case [(1995) 6 SCC 117] where the Tribunal had held that so far as fraud, suppression or misstatement of facts was concerned the question of intent was immaterial.

55. Though it was sought to be contended that Section 28 of the Customs Act is in pari materia with Section 11-A of the Excise Act, we find there is one material difference in the language of the two provisions and that is the words ***'with intent to evade payment of duty' occurring in proviso to Section 11-A of the Excise Act which are missing in Section 28(1) of the Customs Act and the proviso*** *in particular. ...*

56. The proviso to Section 28 can inter alia be invoked when any duty has not been levied or has been short-levied by reason of collusion or any wilful misstatement or suppression of facts by the importer or the exporter, his agent or employee. Even if both the expressions 'misstatement' and 'suppression of facts' are to be qualified by the word 'wilful', as was done in Cosmic Dye Chemical case [(1995) 6 SCC 117] while construing the proviso to Section 11-A, ***the making of such a wilful misstatement or suppression of facts would attract the provisions of Section 28 of the Customs Act.*** *In each of these appeals, it will have to be seen as a fact whether there has been a* ***non-levy or short-levy and whether that has been by reason of collusion or any wilful misstatement or suppression of facts by the importer or his agent or employee****."*

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333. In **Aban Loyd Chiles Offshore Limited and others** Vs. **Commissioner of Customs, Maharashtra,** referred to *supra* also dealt with cases under *Proviso* to Section 28(1) and Section 17 of the Customs Act, 1962 as they stood prior to 2011 amendment.

334. There also, the assessment was to be made by the Proper Officer, the Court relied on its earlier decision in **Collector** Vs. **H.M.M Limited** rendered in the context of Section 11A of the Central Excise Act, 1944. In **Aban Loyd Chiles Offshore Limited,** the Hon'ble Supreme Court observed as under:-

> "20. *The Proviso to Section 28(1) can be invoked where the payment of duty has escaped by reason of collusion or any wilful misstatement or suppression of facts. So far as "misstatement or suppression of facts" are concerned, they are qualified by the word "wilful". The word "wilful" preceding the words "misstatement or suppression of facts" clearly spells out that there has to be an intention on the part of the assessee to evade the duty.*"

335. In **Uniworth Textiles Limited** Vs. **Commissioner of Central Excise** (referred *supra)*, the Show Cause Notice was issued after the lapse of six months. There, the Hon'ble Supreme Court held that in the eye of the law, the Revenue can take refuge only under the *Proviso* to Section 28 of the Customs

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Act, 1962. The Court referred to some of the above cited decisions rendered in the context of Section 11A of the Central Excise Act, 1944 and Section 28 of the Customs Act, 1962.

336. There, the Show Cause Notice did not specify the mandatory ingredients for commencement of action under the said *Proviso* to Section 28 of the Customs Act, 1962.

337. The Hon'ble Supreme Court thus observed that nothing on record displayed a wilful default on the part of the Appellant and therefore hold that the extended period of limitation under the said provision could not be invoked against the Appellant.

338. The Court in **Tata Chemical** Vs. **Commissioner of Customs** , (2015) 11 SCC 628 referred to the language in Section 18 of the Customs Act, 1962. As per Section 18(1)(b) of the Customs Act, 1962, where the **Proper Officer** deems it necessary to subject any imported goods or exported goods to any chemical or other test for the purpose of assessment of duty thereon, the Proper Officer may direct that the duty leviable on such goods may, pending the production of such documents or furnishing of such information

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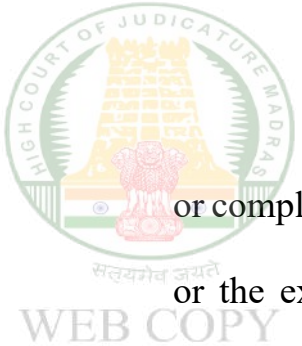

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or completion of such test or enquiry, be assessed provisionally, if the importer or the exporter, as the case may be, furnishes such security as the proper officer deems fit for the payment of the deficiency, if any, between the duty finally assessed and the duty provisionally assessed. The Court held as under:-

> *"In our opinion, the expression "deems it necessary" obviously means that the proper officer must have good reason to subject imported goods to a chemical or other tests. And, on the facts of the present case, it is clear that where the importer has furnished all the necessary documents to support the fact that the ash content in the coking coal imported is less than 12%,* ***the proper officer must, when questioned, state that, at the very least, the documents produced do not inspire confidence for some good prima facie reason.*** *In the present case, as has been noted above, the Revenue has never stated that Casco's certificate of quality ought to be rejected or is defective in any manner. This being the case, it is clear that the entire chemical analysis of the imported goods done by the Department was ultra vires Section 18(1)(b) of the Customs Act."*

MACHINERY UNDER SECTION 73 OF FINANCE ACT, 1994:

339. Similarly, *Proviso* to Section 73(1) to Finance Act, 1994 can be invoked by a Central Excise Officer against a person chargeable to tax or against his agent, where no tax has been levied or paid short-levied or short-paid or to whom tax has been erroneously refunded only in the case of:-

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(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 an intent to evade payment of service tax.

DECISIONS OF THE COURT RENDERED IN THE CONTEXT OF SECTION 73 OF THE FINANCE ACT, 1994

340. In **C.C., C.E. & S.T., Bangalore (Adjudication)** Vs. **Northern Operating Systems Private Limited,** 2022 (61) G.S.T.L. 129 (S.C.), the Hon'ble Supreme Court held that the invocation of the extended period of limitation was unjustified and unreasonable. Thus, the Assessee was held liable to service tax liability only for the normal period or periods, covered by the four Show Cause Notices issued to it.

341. There, the Hon'ble Supreme Court again referred to its earlier decisions rendered in the context of Section 11A of the Central Excise Act, 1944 *in* **Cosmic Dye Chemical** Vs. **Collector of Central Excise,** (1995) 6 SCC 117 = 1995 (75) E.L.T. 721 (S.C.)] rendered in the context of Section 11A of the Central Excise Act, 1944.

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342. In **Stemcyte India Therapeutics Private Limited** Vs. **Commissioner of Central Excise and Service Tax, Ahmedabad-III**, 2025 (394) E.L.T. 3 (S.C.) / (2025) 32 Centax 226 (S.C.), the Hon'ble Supreme Court held that there was nothing on record to suggest that the Appellant suppressed any material facts and thus concluded that in the absence of Fraud, Collusion, Wilful Mis-statement, or Suppression of Facts with an intent to evade payment of service tax, the invocation of the extended period of limitation under Section 73 of the Finance Act, 1994 was held wholly unwarranted.

343. The Court observed that a mere non-payment of Service Tax, by itself, would not justify the invocation of the extended limitation period and thus held that the Show Cause Notice issued by the Department was clearly time-barred and therefore the Impugned Order deserved to be set aside. There, again the Hon'ble Supreme Court relied on some of the decisions rendered in the context of Section 11A of the Central Excise Act, 1944.

i. **Padmini Products** Vs. **Commissioner of Central Excise,** [(1989) 4 SCC 275 = 1989 (43) E.L.T. 195 (S.C.)],
ii. **Commissioner of Central Excise** Vs. **Chemphar Drugs and Liniments** [(1989) 2 SCC 127 = 1989 (40) E.L.T. 276 (S.C.)],
iii. **Pushpam Pharmaceuticals Company** Vs. **Commissioner of Central Excise,** [1995 Supp (3) SCC 462 = 1995 (78) E.L.T. 401 (S.C.)],
iv. **Commissioner of Central Excise** Vs. **Punjab Laminates**

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Private Limited, [(2006) 7 SCC 431 = 2006 (202) E.L.T. 578 (S.C.)]

344. There, the Assessee namely **Stemcyte India Therapeutics Private Limited** had sought for a clarification as to whether the services rendered by stem cell banks qualified as "**Healthcare Services**" after Notification No.GSR 899(E) notifying the Drugs and Cosmetics (3rd Amendment) Rules, 2011 dated 27.12.2011 was issued by the by the Ministry of Health and Family Welfare and it was clarified services rendered by stem cell banks are part of "**Healthcare Services**" and may be considered for exemption from service tax. It is in this context, the Hon'ble Supreme Court held that there was nothing on record to suggest that the Appellant suppressed any material facts.

345. In **Linde Engineering India Private Limited** Vs. **Commissioner of Central Excise and Service Tax, Vadodara,** (2024) 24 Centax 249 (S.C.), the Hon'ble Supreme Court held that the invocation of extended period of limitation under Section 73 of Finance Act, 1994 can be justified if there were Suppression and Mis-representation of Facts with an intent to evade service tax, which could not have been detected by audit of Assessee's financial records.

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346. In **Chemplast Sanmar Limited** Vs. **Commissioner of GST and Central Excise,** (2023) 13 Centax 218 (S.C.), the Hon'ble Supreme Court held that the Assessee could not have claimed the benefit of confusion over the law and therefore the invocation of the extended period of limitation under Section 73(1) of the Finance Act, 1994 was justified even if the Department had undertaken audit of its records.

347. In **International Merchandising Company, LLC** Vs. **Commissioner of Service Tax, New Delhi,** (2022) 1 Centax 31 (S.C.), the Hon'ble Supreme Court held that the extended period of limitation would not clearly stand attracted in respect of the first Show Cause Notice dated **20 October, 2009** and the demand was to be confined to the normal period of limitation excluding the extended period.

348. There, the Tribunal had decided that upon an interpretation of the provisions of Section 65(68) and Section 65(86b) of the Finance Act, 1994, there was no warrant to allow the invocation of the extended period of limitation and remanded the case back for determination of the Penalty following the re-quantification of the demand. The Hon'ble Supreme Court extended the benefit in the light of the decision of the Court in **Padmini**

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Products case referred to *supra*. Thus, benefit of doubt was extended to the Assessee.

349. In the under mentioned cases, Orders of the Tribunal were upheld against invocation of Extended Period of Limitation against the assessee.

i. **Om Sai Fabricators** Vs. **Commissioner of Central Excise and Service Tax, Raigad** (2023) 6 Centax 210 (S.C.) / 2023 (74) G.S.T.L. 145 (S.C.).

ii. **M.M.T.C. Limited** Vs. **Commissioner of GST and Central Excise, Chennai** (2024) 24 Centax 66 (S.C.)

iii. **Patanjali Yogpeeth Trust** Vs. **Commissioner of Central Excise, Meerut-I,** (2024) 17 Centax 350 (S.C.)

CONCLUSION ON THE SCOPE OF LAW UNDER SECTION 11A OF THE CENTRAL EXCISE ACT, 1944, SECTION 28 OF THE CUSTOMS ACT, 1962 AND SECTION 73 OF THE FINANCE ACT, 1993:

350. A snap shot of the relevant portion of Section 11A of Central Excise Act, 1944, Section 28 of the Customs Act, 1962 and Section 73 of the Finance Act, 1994 are reproduced below for the sake of clarity:-

Section 11A of	**Section 28 of the**	**Section 73 of the**

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Central Excise Act, 1944	**Customs Act, 1962**	**Finance Act, 1994**
Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded -	**Recovery of [duties not levied or not paid or short-levied or short-paid] or erroneously refunded.—**	**Recovery of Service tax not levied or paid or short levied or short paid or erroneously refunded –**
(4) Where any duty of excise has not been levied or paid or has been short-levied or shortpaid or erroneously refunded, **by the reason of -**	(4) Where any duty has not been [levied or not paid or has been short-levied or short-paid] or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of, —	(1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the **Central Excise Officer** may, within 'eighteen 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 :
(a) fraud; or	**(a) collusion; or**	**Provided that**

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(b) collusion; or (c) any wilful misstatement; or (d) suppression of facts or (e)contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,	**(b) any wilful mis-statement; or (c) suppression of facts,**	**where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of — (a) fraud; or (b) collusion; or (c) wilful mis-statement; or (d) suppression of facts; or (e) contravention of any of the provisions of this Chapter or of the rules made there under**
by any person chargeable with the duty, the Central Excise Officer shall, within five years from the relevant date, serve notice on such person requiring him to show cause why he should not pay the amount specified in the notice along with the interest payable thereon under section 11AA and a penalty equivalent	by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within **five years** from the relevant date, serve notice on the person chargeable with duty or interest which has not been 4 [so levied or not paid] or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring	**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.**

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to the duty specified in the notice.	him to show cause why he should not pay the amount specified in the notice.	

351. In fact, some of these decisions cited also could not have applied even in the context of the **Central Excise Act, 1944**, **Finance Act, 1994** and the **Customs Act, 1962** after their amendments as there were sweeping changes to the Rules / Enactments in 1994, 1995 and in 2011. I shall give my opinion on the same in the course of this Judgment.

352. In this connection, the following observation of the Hon'ble Supreme Court in **Collector of Central Excise, Baroda** Vs. **Cotspun Limited,** 1999 (113) E.L.T. 353 (S.C.) is relevant. It reads as under:-

> *"14. The levy of excise duty on the basis of an approved classification list is the correct levy, at least until such time as to the correctness of the approval is questioned by the issuance to the assessee of a show cause notice. It is only when the correctness of the approval is challenged that an approved classification list ceases to be such.*
>
> *15. The levy of excise duty on the basis of an approved classification list is not a short levy. Differential duty cannot be recovered on the ground that it is a short levy. Rule 10 has then no application.*
>
> *16. We are, therefore, of the opinion that the judgment in **Ballarpur Industries***, which did not advert to Rule 173B, does not lay down the*

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law correctly and it is over-ruled. The decision in ***Rainbow Industries#****, on the other hand, correctly lays down the law. It was delivered in the context of Rule 173C dealing with approved price lists and the provisions of Rule 173C and 173B are analogous.***

17. ***We are informed that the position in law has changed since the year 1995 or thereabout. We have not considered these altered provisions. Nothing that we have said in this judgment shall ipso facto apply thereto.***

18. The appeal is dismissed. Having regard to the fact that the assessee does not appear, there shall be no order as to costs."

*Note:-(***Ballarpur Industries Ltd. v. Asstt. Collector** — 1995 (76) E.L.T. 499 (S.C.)*

***#Rainbow Industries (P) Ltd. v. Collector** — 1994 (74) E.L.T. 3 (S.C.)*

*** Rule provided for machinery for recovery of duty)*

353. In **Rainbow Industries Private Limited Vs. Collector,** 1994 (74) E.L.T. 3 (S.C.), the Hon'ble Supreme Court held as under:-

> *"However, once the Department accepted the price list, acted upon it and the goods were cleared with the knowledge of the Department, then in absence of any amendment in law or judicial pronouncement, the reclassification should be effective from the date the Department issued the show-cause notice. The reason for it is clearance with the knowledge of the Department and no intention to evade payment of duty."*

354. Thus, the ratio of Hon'ble Supreme Court rendered particularly in the context of pre-amended Scheme of Section 11A of the Central Excise Act,

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1944 when read with Rule 173B-**Approved Classification List** (ACL) prior to **01.05.1995** and **Approved Price List (APL)** under Rule 173C prior to **01.04.1994** of the Central Excise Rules, 1944 and Section 28 of the Customs Act, 1962 prior to amendment to Section 17 of the aforesaid Act *vide* Section 38 of the Finance Act, 2011 with effect from **08.04.2011** cannot be applied blindly especially in the context of the Scheme in Section 74 of the respective GST Enactments and the Scheme of the Assessment and the Rules made thereunder. These judgments at best can serve as a useful guide.

355. Few decisions of other High Courts which have been rendered in the context of Section 74 of the respective GST Enactments have heavily relied upon the decisions of the Hon'ble Supreme Court rendered in the context of **Section 11A** of the **Central Excise Act, 1944**, **Section 28** of the **Customs Act, 1962** and few other decisions of the Court in the context of **Section 73** of the **Finance Act, 1994** and the above mentioned Enactments.

356. Few other decisions of this Court and the Hon'ble Supreme Court rendered in the context of **Tamil Nadu General Sales Tax Act 1959**, **Central Sales Tax Act, 1956**, **Tamil Nadu Value Added Tax Act, 2006** and **Income**

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Tax Act, 1961 were also relied upon and at best can serve as a useful guide.

357. They are not of great relevance as both Section 73 and Section 74 of the respective GST Enactments are neither *pari materia* with the provisions in **Tamil Nadu General Sales Tax Act 1959**, **Central Sales Tax Act, 1956**, **Tamil Nadu Value Added Tax Act, 2006** and **Income Tax Act, 1961**. I shall give my opinion on the same in the course of this Judgment.

358. For invocation of machinery whether under Section 73 or Section 74 and particularly under Section 74 of the respective GST Enactments for recovery and determination of tax, a totally different yardstick is to be applied, although the decision rendered under Section 73 of the Finance Act, 1994 may serve as a guide for resolving the dispute.

359. Thus, Sub-Section (4) to Section 11A of the Central Excise Act, 1944 and Sub-Section (4) to Section 28 of the Customs Act,1962 and under *Proviso* to Section 73 of the Finance Act, 1994, the Proper Officer or the Central Excise Officer are / were empowered to issue a notice in case of Collusion, any Wilful Mis-statement or suppression of facts to evade tax or duty as the case may be. The threshold under these provisions is much higher as compared to Section 74 of the respective GST Enactments as existence of definite

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information should be true.

360. Under these provisions, the Proper Officer or the Central Excise Officer as the case may should have definite information in their hands that any [duty of the tax has not been levied or not paid or short-levied or short-paid] or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded before issuing a notice, whether within the shorter period of limitation or extended period of limitation.

361. At the same time, it has to be emphasised that on a plain reading of these provisions it is clear that a mere impression or appearance in the mind of the Proper Officer regarding non-levy, short-levy, non-payment or short payment of tax or duty or erroneous refund is not sufficient for the Proper Officer or the Central Excise Officer as the case may be, is not competent to issue a notice, and without the existence of such "Foundational Fact", which is *sine quo non,* Notice would be liable to be quashed as arbitrary.

MACHINERY UNDER TAMIL NADU GENERAL SALES TAX ACT, 1959 / TAMIL NADU VALUE ADDED TAX ACT, 2006:

362. The machinery prescribed under the Central Excise Act, 1944, Customs Act, 1962 and Finance Act, 1994 and Section 27 of the Tamil Nadu

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Value Added Tax Act, 2006 contemplate definite information in the hands of the Proper Officer, Central Excise Officer or the Assessing Authority before a notice can be issued. The threshold for exercising the Jurisdiction under these provisions are much higher as compared to the threshold under Section 73 and under Section 74 of the respective GST Enactments.

363. Both Section 16(1)(a) / Section 27(1)(a) and Section 16(1)(b) / Section 27(1)(b) of the Tamil Nadu General Sales Tax Act, 1959 and the Tamil Nadu Value Added Tax Act, 2006, make it clear, that an Assessing Authority before issuing Notice under them should have definite information regarding,

> i. tax having either escaped assessment or
> ii. having been under paid when the turnover of a dealer was assessed earlier and it was on account of the fact that such turnover was assessed to lower rate of tax.

364. These provisions are reproduced below:-

Section 16 (1)(a)	**Section 27 (1)(a)**
***Where, for any reason**, the whole or any part of the turnover of the business of a dealer has escaped assessment to tax, the assessing authority may, subject to the*	***Where, for any reason**, the whole or any part of the turnover of the business of a dealer has escaped assessment to tax, the assessing authority*

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provisions of the sub – section (2), at any time within a period of five years from the date of order of the final assessment by the assessment by the assessing authority, determine to the best of its judgment the turnover which has escaped assessment and assess the tax payable on such turnover after making such enquiry as it may consider necessary and after giving the dealer a reasonable opportunity to show cause against such assessment.	*may, subject to the provisions of sub-section (3), at any time within a period of six years from the date of assessment determine to the best of its judgment the turnover which has escaped assessment and assess the tax payable on such enquiry as it may consider necessary.*
Section 16 (1)(b)	**Section 27 (1)(b)**
***Where, for any reason**, the whole or any part of the turnover of business of a dealer has been assessed at a rate lower than the rate at which it is assessable, the assessing authority may, at any time within a period of five years from the date of order of the final assessment by the assessing authority, reassess the tax due after making such enquiry as it may consider necessary and after giving the dealer, a reasonable opportunity to show cause against such re-assessment.*	***Where, for any reason**, the whole or any part of the turnover of the business of a dealer has been assessed at a rate lower than the rate at which it is assessable, the assessing authority may, at any time within a period of six years from the date of the assessment, re-assess the tax due after making such enquiry as it may consider necessary.*

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365. The phrase "**Where, for any reason**" in both Section 16(1)(a) / Section 27(1)(a) and Section 16(1)(b) / Section 27(1)(b) of the above mentioned respective Sales Tax Enactments were to be read in conjunction with other phrases used in them.

366. The Assessing Authority has the following options to either make an "assessment" or "reassessment" after making such enquiry as it may consider necessary and after giving the dealer a reasonable opportunity to show cause against such "assessment" or "reassessment" as the case may be within a period of five (5) years / six (6) years from "Final Assessment" or "Assessment". Following Table illustrates the provisions under the respective Sales Tax Enactments:-

PROVISIONS OF THE TAMIL NADU GENERAL SALES TAX ACT, 1959 / TAMIL NADU VALUE ADDED TAX ACT, 2006	Where, for any reason,	The Assessing Authority may,	Type of Assessment
SECTION 16(1)(a) / SECTION 27(1)(a)	the whole or any part of the turnover of business of a	Determine the turnover which has escaped assessment and assess the tax	Assessment

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PROVISIONS OF THE TAMIL NADU GENERAL SALES TAX ACT, 1959 / TAMIL NADU VALUE ADDED TAX ACT, 2006	Where, for any reason,	The Assessing Authority may,	Type of Assessment
	dealer has escaped assessment in a Final Assessment / Assessment, as the case may be	to the best of its judgement.	
SECTION 16(1)(b) / SECTION 27(1)(b)	A dealer who has been under assessed during Final Assessment/Assessment, as the case may be, at a rate lower than the rate at which the turnover is assessable.	**reassess** the tax due.	Reassessment

367. Thus, the threshold for exercising the Jurisdiction under these provisions are much higher as compared to the threshold under Section 73 and under Section 74 of the respective GST Enactments, as in the latter two provisions, a mere appearance is sufficient to assume power to issue Notice.

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368. Both under Sub-section (2) of Section 16 of the Tamil Nadu General Sales Tax Act, 1959 and Sub-section (3) to Section 27 of the Tamil Nadu Value Added Tax Act, 2006, an Assessing Authority could impose a Penalty in addition to tax determined under Section 16(1)(a) and Section 27(1)(a) of the respective Sales Tax Enactments, if the Assessing Officer is satisfied if the escape from assessment was due to wilful non-disclosure of the assessable turnover of the dealer.

369. The language of Section 73 and Section 74 of the respective GST Enactments are materially different insofar as imposition of Penalty is concerned. The Penalty under Section 73 and Section 74 of the respective GST Enactments are inspired from Section 11AC of the Central Excise Act, 1944. For the sake of clarity, language of the above-mentioned provisions are extracted below:-

Section 16(2) of TNGST Act, 1959 and Section 27(3) of TNVAT Act, 2006	In making an assessment under Clause (a) of Sub-section (1), the Assessing Authority may, if it is satisfied that the escape from the assessment is due to willful non-disclosure of assessable turnover by the dealer, direct the dealer, to pay, in addition to the tax assessed under Clause (a) of Sub-section

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	(1), by way of penalty a sum which shall be- (a) fifty per cent of the tax due on the turnover that was willfully not disclosed if the tax due on such turnover is not more than ten per cent of the tax paid as per the return; (b) one hundred per cent of the tax due on the turnover that was willfully not disclosed if the tax due on such turnover is more than ten per cent but not more than fifty per cent of the tax paid as per the return; (c) one hundred and fifty per cent of the tax due on the assessable turnover that was willfully not disclosed, if the tax due on such turnover is more than fifty per cent of the tax paid as per the return; (d) one hundred and fifty per cent of the tax due on the assessable turnover that was willfully not disclosed in the case of self-assessment referred to in Sub-section (1) of Section 12. **Provided that** no penalty under this Sub-section shall be imposed unless the dealer

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	effected has had a reasonable opportunity of showing cause against such imposition *
Section 11AC(1)(c) of Central Excise Act, 1944	(1)The amount of penalty for non-levy or short-levy or non-payment or short-payment or erroneous refund shall be as follows- (c) where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reason of fraud or collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the Rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under Sub-section (10) of Section 11A shall also be liable to pay a penalty equal to the duty so determined: **Provided that** in respect of the cases where the details relating to such transactions are recorded in the specified record for the period beginning with the 8th April, 2011 up to the date on which the Finance Bill, 2015 receives the assent of the President (both days inclusive), the penalty shall be fifty per cent of the duty so determined;

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Section 74(1) of the respective GST Enactments	(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under Section 50 and a penalty equivalent to the tax specified in the notice.

(* Note: Not there in Section 27(3) of TNVAT Act, 2006)

370. A plain reading of Sub-section (2) of Section 16 of the Tamil Nadu General Sales Tax Act, 1959 as also Section 27(3) of the Tamil Nadu Value Added Tax Act, 2006, makes it clear that the threshold was higher before Penalty could be imposed on such an errant dealer against whom machinery under Section 16(1)(a) of the Tamil Nadu General Sales Tax Act,

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1959 and / or Section 27(1)(a) of the Tamil Nadu Value Added Tax Act, 2006 were invoked.

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371. Since the phrase "***the assessing authority may, if it is satisfied***" is used in both Sub-section (2) of Section 16 of the Tamil Nadu General Sales Tax Act, 1959 and Section 27(3) of the Tamil Nadu Value Added Tax Act, 2006, it implies that Penalty under these two provisions can be imposed only if there is a determination of tax having escaped assessment as in Sub-clause (1)(a) to the respective provisions.

372. While interpreting the invocation of penal clause under the above-stated provisions, this Court in a spate of decisions has consistently held that the burden of proof was on the Revenue, and the finding of intent needs to be stated while imposing Penalty under these provisions.

373. In **Jaya Hill Produce** Vs. **The State of Tamil Nadu**, 1979 SCC OnLine Mad 410: (1980) 45 STC 384, it was held that as the non-disclosure cannot be taken to be other than wilful, and therefore the levy of Penalty under Section 16 of the Tamil Nadu General Sales Tax Act, 1959 was held not to be bad.

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374. Thus, there is no comparison between the phrase *i.e.,* "**Where it appears to the Proper Officer**" in Section 74(1) when read with 74(9) of the respective GST enactments and the phrase "**Where, for any reasons**" in Section 16 of the Tamil Nadu General Sales Tax Act, 1959 and Section 27 of the Tamil Nadu Value Added Tax, 2006.

375. In Section 16(2) of TNGST Act, 1959 and Section 27(3) of TNVAT Act, 2006, the expression used is the Assessing Authority may, if it is satisfied that the escape from the assessment is due to **wilful non-disclosure** of assessable turnover by the dealer.

376. The Hon'ble Supreme Court in **Union of India** Vs. **Dharamendara Textiles Processors**, 2008 (231) ELT 3; 2008 (13) SCC 369 while rendering its Judgement in the context of Section 11AC of the Central Excise Act, 1944 held that, once tax was imposable under extended period of limitation under Section 11A of the Central Excise Act, 1944 as in force with effect from 28.09.1996, there is no discretion to impose a lesser Penalty under Section 11AC of the Central Excise Act, 1944. Relevant portion from the said

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decision is extracted hereunder:-

> *"12. The stand of learned counsel for the assessee is that the absence of specific reference to mens rea is a case of casus omissus. If the contention of learned counsel for the assessee is accepted that the use of the expression "assessee shall be liable" proves the existence of discretion, it would lead to a very absurd result. In fact in the same provision there is an expression used i.e. "**liability to pay duty**". **It can by no stretch of imagination be said that the adjudicating authority has even a discretion to levy duty less than what is legally and statutorily leviable.** Most of cases relied upon by learned counsel for the assessee had their foundation on Bharat Heavy Electrical's case (supra). As noted above, the same is based on concession and in any event did not indicate the correct position in law.*
>
> *13. It is a well-settled principle in law that the court cannot read anything into a statutory provision or a stipulated condition which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. Similar is the position for conditions stipulated in advertisements."*

377. The above decision of the Hon'ble Supreme Court was also clarified by the Hon'ble Supreme Court in **Union of India** Vs. **Rajasthan Spinning & Weaving Mills**, 2009 (238) ELT 3 (SC). There, the Hon'ble Supreme Court held that once Section 11AC of the Central Excise Act, 1944 was applicable in a case, **the concerned Authority would have no discretion to impose a penalty less than the duty determined under Sub-section (2) of Section 11-A of the Central Excise Act, 1944. In other words, the Penalty was to be equal to the tax determined under Sub-section (2) of the**

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378. The above ruling was with a caveat to the effect that, what was stated with regard to the decision in **Dharamendara Textile** referred to supra was only insofar as Penalty under Section 11AC of the Central Excise Act, 1944. It was also made clear that it did not make any observations with regard to the several other statutory provisions that may come up for consideration. In this connection, the following observations from the said decision are reproduced below:-

> *"23. The decision in* ***Dharamendra Textile*** *must, therefore, be understood to mean that though the application of section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section,* ***once the section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of section 11A****. That is what Dharamendra Textile decides.*
>
> *24. It must, however, be made clear that what is stated above in regard to the decision in Dharamendra Textile is only in so far as section 11AC is concerned. We make no* observations (as a matter of fact there is no occasion for it!) with regard to the several other statutory provisions that came up for consideration in that decision."

379. Since the language in Section 11AC of the Cenral Excise Act, 1944 and Section 74(1) of the respective GST Enactments are *pari materia* with

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each other, the reference to the other decisions rendered in the context of the provisions in the Tamil Nadu General Sales Tax Act, 1959 and in the Tamil Nadu Value Added Tax Act, 2006 are not relevant and the ratio of the Courts cannot be imported for the purpose of interpreting Section 74 of the respective GST Enactments when read along with the Rules made thereunder.

380. That apart, there can be no comparison with the Jurisdiction of the Assessing Authority imposing Penalty under Section 16(2) of the Tamil Nadu General Sales Tax Act, 1959 and Section 27(3) of the Tamil Nadu Value Added Tax Act, 2006 with the power of the Proper Officer to determine tax and to levy penalty under Section 74 of the respective GST Enactments.

381. Therefore, the contentions of **Mr.P.Rajkumar**, learned Counsel for the Petitioner in W.P.Nos.2026, 2079, 2075, 2081, 2086 and 2092 of 2025 [**M/s.Ace Tech Heavy Fab Private Limited**] has to be rejected.

MACHINERY UNDER INCOME TAX ACT, 1961

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382. Income Tax Act, 1961 also contemplates filing of self-assessed Return of Income under Section 139 of the Income Tax Act, 1961 within the stipulated period like in any other modern tax laws. The burden is on the assessee to make a proper self-assessment and file a self-assessed Return of Income by declaring the correct taxable income and the tax liability.

383. In case, self-assessment made by an Assessee results in "income escaping assessment", machinery under Section 147 and Section 148 of the Income Tax Act, 1961 is always available with the Assessing Officer. It is similar to Section 34 of the Income Tax Act, 1922.

384. In the following cases, the Hon'ble Supreme Court dealt with the expression "**reason to believe**" under Section 34 of the Income Tax Act, 1922.

i. **Calcutta Discount Company Limited** Vs. **Income Tax Officer,** AIR 1961 SC 372

ii. **Sheo Nath Singh** Vs. **Appellate Assistant Commissioner of Income Tax**, (1972) 3 SCC 234;1971 I SCR175

iii. **Chhugamal Rajpal** Vs. **S.P.Chaliha**, 1971 (1) SCC 453.

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385. Earlier, the Direct Tax Laws (Amendment) Act, 1987, had given Tax Authorities overly broad and unfettered discretion to reopen past assessments by recasting Section 147 of the Income Tax Act, 1961. The Direct Tax Laws (Amendment) Bill, 1987 received the assent of the President on 24th January, 1988 and was enacted as Act 4 of 1988.

386. In the light of the above amendment, slew of representations were received, which impelled the then Finance Minister to give an assurance in the Lok Sabha. Thus, while presenting the Budget for the Financial Year 1988-1989, the Finance Minister stated that a further Amendment Bill will be introduced in the Parliament which would take care of genuine grievances pointed out in the representations received. (Source:- refer Paragraph 94 of Part B of the Budget Speech)

387. In his speech, the Finance Minister mentioned four areas where amendments relating to the provisions introduced by the Direct Tax Laws (Amendment) Act, 1987 could be considered. They were:-

(*i*) **reopening of assessments**;
(*ii*) assessment of religious and charitable institutions and trusts as also scientific research associations;
(*iii*) levy of additional tax; and

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(*iv*) assessment of the income of the firms and partners.

388. Thus, the 1989 Amendment Act stepped into reinstate this Clause (effective from 1st April 1989) as a mandatory check against arbitrary tax scrutiny. This was also noted by the Hon'ble Supreme Court in **Commissioner of Income Tax, Delhi** Vs. **Kelvinator of India Limited**, (2010) 2 SCC 723.

389. Simultaneously, Section 148(2) was introduced with effect from 01.04.1989. As per Section 148(2), the Assessing Officer before issuing Notice under Section 148(1), shall record his reasons.

390. Section 147 of the Income Tax Act, 1961 before and after Amendment Act, 1989 reads as under:-

Prior to the Direct Tax Laws (Amendment) Act, 1987	***Direct Tax Laws (Amendment) Act, 1987***	***Direct Tax Laws (Amendment) Act, 1989***
Section 147		
147. Income escaping assessment.-		
" —If—	*If the Assessing Officer, for* ***reasons to be***	*If the Assessing Officer* ***has***

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(a) the Income Tax Officer has reason to believe that, by reason of the omission or failure on the part of an assessee to make a return under Section 139 for any assessment year to the Income Tax Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year, or *(b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Income Tax Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year,* *he may, subject to the provisions of Sections 148 to 153, assess or reassess such income or recompute the loss*	***recorded** by him in writing, is of the **opinion** that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year).*	***reason to believe** that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as*

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or the depreciation allowance, as the case may be, for the assessment year concerned (hereafter in Sections 148 to 153 referred to as the relevant assessment year).”		*the relevant assessment year).*

391. Thus, if the Assessing Officer has “**reasons to believe”** based on available information that any income chargeable to tax had escaped assessment for any Assessment Year, then the Assessing Officer can issue a Notice under Section 148 for the purpose of making assessment / re-assessment / re-computation of income under Section 147 of the Income Tax Act, 1961.

392. This could be only after recording the reasons under Section 148(2) with effect from 01.04.1989. Thus, *sine qua non* for issuance of Notice under Section 148(1) for the aforesaid purpose, is recording of reason as is evident from the language in Section 148(2) with effect from 01.04.1989.

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COMMUNICATION OF REASON:-

393. Section 148 of the Income Tax does not contemplate communication of such reason after the issuance of Notice under Sub-section (1). The Hon'ble Supreme Court, however, in **GKN Driveshafts (India) Ltd.** Vs. **Income Tax Officer** 2003 (1) SCC 72 stepped in and held that the reasons recorded under Section 148(2) are to be communicated to an assessee, if the Assessee so desires, after return is filed after a Notice is issued under Section 148(1).

394. Thus, there is no dispute that an Assessing Officer has to not only record his reasons for the purpose of issuing Notice under Section 148(1) of the Income Tax Act, 1961 as it stood prior to 01.04.2021, where income has escaped assessment, but also furnish the same, if the Assessee so desired. The Assesee could also give their objections which was to be disposed by a Speaking Order of the Assessing Officer.

395. This is now statutorily incorporated under Section 148A(b) of the Income Tax Act, 1961 with effect from 01.09.2021 and under Section 148A(2) of the Income Tax Act, 1961 with effect from 01.09.2024.

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396. The Hon'ble Supreme Court in **Calcutta Discount Company Limited** Vs. **Income Tax Officer**, AIR 1961 SC 372, rendered its decision in the context of Section 34 of the Income Tax Act, 1922. It also dealt with a case of **"Income Escaping Assessment"** where the interpretation of the expression "**reason to believe**" fell for consideration.

397. In Paragraph No.6, the Hon'ble Supreme Court observed that the following two conditions have to be satisfied to confer Jurisdiction under Section 34 of the Act, before issuing a Notice beyond four Assessment Years but within eight years, namely:-

> *(i) The first condition is that the Income Tax Officer has a "**reason to believe**" that income, profits or gains chargeable to income have been under - assessed.*
> *(ii) The second condition is that such underassessment is due to omission or failure on the part of an assessee to disclose fully and truly all material facts necessary for his assessment for that year."*

398. Both these conditions were held as condition precedents to be satisfied before the Income Tax Officer could have Jurisdiction to issue a Notice for the assessment or re-assessment beyond the period of four years but

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within the period of eight years, from the end of the year in question.

399. On facts, the Hon'ble Supreme Court held that the Income Tax Officer who issued the Notice under Section 34 of the Indian Income Tax Act, 1922 had sufficient material before him before the assessment was made. Therefore, it was held that he could not have invoked Section 34 stating income had escaped assessment due to non-disclosure of material fact.

400. The Hon'ble Supreme Court observed that in the affidavit filed, the Income Tax Officer did not say that the articles or the memorandum of association were not shown during the assessment proceedings for the years 1942-1943, 1943-1944 and 1944-1945, and that if the Income Tax Officer had any reason to believe that these were not shown, he would have certainly mentioned the fact, for that would undoubtedly amount to non-disclosure of a material fact.

401. Thus, it was held as follows,

> *"**23.** It must therefore be held that the Income-tax Officer who issued the notices had not before him any non-disclosure of a material fact and so he could have no material before him for*

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believing that there had been any material non- disclosure by reason of which an under-assessment had taken place."

402. There, the Hon'ble Supreme Court held that the conditions precedent to the exercise of the jurisdiction under Section 34 of the Income Tax Act did not exist and the Income Tax Officer had no jurisdiction to issue Impugned Notices under Section 34 in respect of the years 1942-1943, 1943-1944 and 1944-1945 after the expiry of four years.

403. In **Sheo Nath Singh** Vs. **Appellate Assistant Commissioner of Income Tax** (1972) 3 SCC 234/1971 I SCR175, it was observed as under:-

> ***"10.*** *In our judgment, the law laid down by this Court in the above case* is fully applicable to the facts of the present case. There can be no manner of doubt that the words "**reason to believe**" suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds and that the Income Tax Officer may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. The Income Tax Officer would be acting without jurisdiction if the reason for his belief that the conditions are satisfied does not exist or is not material or relevant to the belief required by the section. The Court can always examine this aspect though the declaration or sufficiency of the reasons for the belief cannot be investigated by the Court."*
>
> *(* In **Chhugamal Rajpal v. S.P. Chaliha** 1971 (1) SCC 453,*

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the Court held that the Income Tax Officer had not mentioned the material before him for arriving at his reason.)

404. The phrase **"reason to believe",** also fell for interpretation in the case of **Income Tax Officer** Vs. **Lakhmani Mewal Das,** (1976) 3 SCC 757. There, the Hon'ble Apex Court held that the reasons for the formation of the belief must have a rational connection with or relevant bearing on the formation of the belief and the rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income Tax Officer and the formation of his belief that there has been escapement of the income of the Assessee from assessment in the particular year because of his failure to disclose fully and truly all material facts. Almost an identical view was expressed by the Hon'ble Supreme Court in **Commissioner of Income-Tax, Delhi** Vs. **Kelvinator of India Limited,** [2010] 187 Taxman 312.

405. It was further held that the Court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the Income Tax Officer on the point as to whether action should be initiated for reopening assessment.

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406. The Court however cautioned that it was not any and every material, howsoever vague and indefinite or distant, remote and far-fetched, which would warrant the formation of the belief relating to escapement of the income of the Assessee from assessment, and went on to observe as follows:-

> ***"11.……The fact that the words "definite information" which were there in Section 34 of the Act of 1922 at one time before its amendment in 1948 are not there in Section 147 of the Act of 1961 would not lead to the conclusion that action can now be taken for reopening assessment even if the information is wholly vague, indefinite, farfetched and remote. The reason for the formation of the belief must be held in good faith and should not be a mere pretence.***
> ***12.****The powers of the Income Tax Officer to reopen assessment though wide are not plenary.* ***The words of the statute are "reason to believe" and not "reason to suspect" The reopening of the assessment after the lapse of many years is a serious matter.*** *The Act, no doubt, contemplates the reopening of the assessment if grounds exist for believing that income of the assessee has escaped assessment. The underlying reason for that is that instances of concealed income or other income escaping assessment in a large number of cases come to the notice of the Income Tax Authorities after the assessment has been completed. The provisions of the Act in this respect depart from the normal rule that there should be, subject to right of appeal and revision, finality about orders made in judicial and quasi-judicial proceedings.* ***It is, therefore, essential that before such action is taken the requirements of the law should be satisfied. The live link or close nexus which should be there between the***

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material before the Income Tax Officer in the present case and the belief which he was to form regarding the escapement of the income of the assessee from assessment because of the latter's failure or omission to disclose fully and truly all material facts was missing in the case. In any event, the link was too tenuous to provide a legally sound basis for reopening the assessment. The majority of the learned Judges in the High Court, in our opinion, were not in error in holding that the said material could not have led to the formation of the belief that the income of the assessee respondent had escaped assessment because of his failure or omission to disclose fully and truly all material facts. We would, therefore, uphold the view of the majority and dismiss the appeal with costs."

407. In **Assistant Commissioner of Income Tax** Vs. **Rajesh Jhaveri**, (2008) 14 SCC 208, citing the decision of Hon'ble Supreme Court in **Central Provinces Manganese Ore Company Limited** Vs. **Income Tax Officer** [(1991) 4 SCC 166 : (1991) 191 ITR 662], the Hon'ble Supreme Court observed as under:-

> **"*20.*** *As observed by the Delhi High Court (sic the Supreme Court) in Central Provinces Manganese Ore Co. Ltd. v. ITO [(1991) 4 SCC 166 : (1991) 191 ITR 662] for initiation of action under Section 147(a) (as the provision stood at the relevant time) fulfilment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is "reason to believe", but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would*

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conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the assessing officer is within the realm of subjective satisfaction [see ITO v. Selected Dalurband Coal Co. (P) Ltd. [(1997) 10 SCC 68 : (1997) 217 ITR 597] ; Raymond Woollen Mills Ltd. v. ITO[(2008) 14 SCC 218 : (1999) 236 ITR 34]].

408. In **Assistant Commissioner of Income Tax, Gujarat** Vs. **Dhariya Construction Company**, (2010) 15 SCC 251, the Hon'ble Supreme Court observed that the opinion of the District Valuation Officer *per se* is not an information for the purpose of reopening assessment under Section 147 of the Income Tax Act, 1961. The Assessing Officer has to apply his mind to the information given and must form a belief thereon.

409. In **Commissioner of Income-Tax, Delhi** Vs. **Kelvinator of India Limited,** [2010] 187 Taxman 312, the Hon'ble Supreme Court had the occasion to interpret Section 147 of the Income Tax Act, 1961 post Amending Act, 1989 with effect from 01.04.1989. While doing so, the Hon'ble Apex Court pointed out the deletion of the word "**opinion**" in the Amendment Act, 1989 and concluded that the power of re-assessment under Section 147 cannot be carried out merely on a change of opinion.

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410. In **VIP Housing and Properties** Vs. **The Deputy Commissioner of Income Tax, Central Circle-2 and others** in **W.P.No.7774 of 2022** dated **25.02.2025**, the Assessee challenged the issuance of Notice under Section 148 of the Income Tax Act, 1961 to re-open the Assessment.

411. The Court there relied on the case of the Hon'ble Supreme Court in **Kelvinator of India Limited** (referred to *supra*), to conclude that mere change of opinion was insufficient for the purposes of re-opening assessment under Section 148 of the Income Tax Act, 1961.

412. The Gujarat High Court in **Vijay Ramanlal Sanghvi** Vs. **Assistant Commissioner of Income-Tax**, [2023] 146 taxmann.com (Gujarat) / [2023] 457 ITR 791 (Gujarati) held that the power of re-assessment can be invoked only in the presence of tangible material suggesting that the income chargeable to tax has escaped assessment.

413. Thus, the threshold for exercising jurisdiction under Section 148 for assessment / re-assessment / re-computation of income under Section 147 of the Income Tax Act, 1961, is much higher as compared with the threshold for

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exercising power under Section 73/74 of the respective GST Enactments.

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414. Both Section 34 of the Indian Income Tax Act, 1922 and Section 147 read with Section 148 of the Income Tax Act, 1961 contemplate "subjective satisfaction" of an Assessing Officer where Income has escaped assessment as the phrase **"reason to believe**" has been used.

415. Therefore, the case laws settled under Section 147 of the Income Tax Act, 1961 are not of much relevance for the present purposes, since there is a marked difference between the phrases "**reason to believe**" in Section 147 of the Income Tax Act, 1961 when compared to "**where it appears**" in Section 73 and 74 of the respective GST Enactments. However, cadence in the case laws referred to *supra* continue to serve as a beacon and a guiding light.

416. Similarly, the decisions of the Hon'ble Supreme Court in **Barium Chemicals and another** Vs. **The Company Law Board & others** (1996) Supp SCR 311 and **Rohtas Industries** Vs. **S.D.Agarwal and others,** AIR 1969 SC 707; (1969) 1 SCC 325 are not of much relevance for the present discussion, considering the phraseology involved therein is **"in the opinion of"** which is materially different from the phraseology "**Where it appears**" in

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Section 73 and Section 74 of the respective GST Enactments. However, the ratios laid therein have served as a useful guide in coming to the ultimate conclusion in this order.

CASE LAWS UNDER SECTIONS 73 & 74 OF THE RESPECTIVE GST ENACTMENTS

417. In the case of **S.S. Communications** Vs. **The Deputy State Tax Officer II**, in **W.P.(MD) No.22420 of 2024** dated **20.09.2024**, the question that fell for consideration was whether a Show Cause Notice can be issued under Section 74 of the respective GST Enactments, without rendering a finding that the alleged short-payment of tax was in view of Fraud, Wilful Mis-statement or Suppression of Fact to evade tax.

418. The said issue was answered in the negative and in favour of the Petitioner/Assessee, by placing reliance on a spate of decisions of the Hon'ble Apex Court and more particularly its decision rendered in the case of **Commissioner of Central Excise** Vs. **H.M.M. Limited,** 1995 Supp (3) SCC 322.

419. While doing so, the learned Single Judge of this Court had held that

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the existence of the ingredient *viz.,* Fraud, Wilful Mis-statement, Suppression of Facts to evade tax, constitute "Jurisdictional Facts", absence of which vitiates the entire proceedings.

420. In the same context, this Court in **Neeyamo Enterprises Solutions Private Limited** Vs. **The Commercial Tax Officer,** 2025 (103) G.S.T.L, held that in the Show Cause Notice it is mandatory and a must spell out the elements/ingredients for non-payment or short-payment or erroneous refund of tax or wrongful availing or utilization of Input Tax Credit.

421. The Court further held that the presence of the Jurisdictional Fact alone confers power on the Authority to initiate action and proceed in the matter. The absence of Jurisdictional Fact would completely undermine the very foundation itself.

422. In the case of **M/s.Armour Security (India) Limited case** referred to *supra* also, the Hon'ble Supreme Court explained the significance of a Show Cause Notice and delineated the contents to be stated therein. Content of which has been extracted above. Only a reference is made at this

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juncture, since a detailed analysis of **M/s.Armour Security (India) Limited case** was made earlier.

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423. Having referred to the Judgments rendered in the context of above-mentioned Direct and Indirect Tax Enactments, a brief reference is made to the history, the General Architecture of the respective GST Enactments and the Rules made thereunder followed by the Scheme thereunder.

BRIEF INTRODUCTION TO GST LAWS:-

424. GST Enactments as in force today replaced a very complex indirect tax structure in India with a unified system ostensibly to simplify tax compliance, with an aim to reduce tax litigation and to rationalise rate and to reduce cascading effect of tax on consumers and thereby to promote economic growth by integrating various union and state tax laws in India. This idea of a unified tax system in the arena of indirect taxes was first mooted in the year

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2002 by the Kelkar Task Force.

425. On the **1st of July, 2017**, most of the GST Enactments were implemented in the Country, replacing a web of complex various Central and State Tax Enactments after the **101st Constitutional Amendment** to the Constitution of India *vide* **Constitutional Amendment Act, 2016** which came into effect from 12.09.2016.

426. In a way, GST regime replaced a myriad of a complete tax and integrated them into Main Tax Enactments namely Central Goods and service Tax Act, 2017, various State Goods and Services Tax Act, 2017, Union Tax Goods and Services Tax Act, 2017 and Integrated Goods and Services Tax Act, 2017. Several Central Indirect Tax Enactments together with several such State Enactments have been now subsumed into the provisions of the respective GST Enactments.

427. Apart from the above, following Enactments have been enacted namely Central Goods and Service Tax (Extension to Jammu and kashmir) Act, 2017, Integrated Goods and Service Tax (Extension to Jammu and Kashmir) Act, 2017, Goods and Services Tax (Compensation to States) Act, 2017.

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428. Though the self-assessments were contemplated under the old regime as well, a Notice could be issued only where there was a definite conclusion that tax or duty was evaded by an Assessee.

429. To prepare for the implementation of future GST Laws, extensive efforts were made to build the necessary Information Technology Infrastructure and support system and by training the tax officials and the other stake holders, namely businesses houses/entities. For successful rollout of the GST regime Information Technology, preparedness was mandatory. The Government faltered there.

430. Thus, despite implementation of the GST regime close to a decade, many micro, small and medium scale business entities are said to be still facing difficulties in complying with the procedures as its compliance is predominantly Information Technology based and technically enabled with which the assesses are still not savvy. The law also however has several loopholes which has led to its frustration and is costing the exchequer.

431. Despite efforts to get tech savvy, assessees have been bogged down with complications due to techniques involved in the GST portals and/or in accessing information. Tech savvy litigants with the help of a new generation

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of tax practitioners, who have mushroomed have also sometimes felt the brute force of the rules leading the Courts to intervene time and again.

432. Initial roll out of the provision and its implementation through the Rules made thereunder and Notification issued thereunder coupled with technical glitches in the Web Portal lead to extension of timelines prescribed for compliance under Notifications and insertion of Section 16(5) & 16(6) to the respective GST Enactments *vide* Finance (No.2) Act, 2024, dated **16.08.2024** with effect from **27.09.2024** *vide* **SO 4253(E)** with retrospective effect from **01.07.2017**.

433. Likewise, under the same notification, Section 128A was also inserted into the respective GST Enactments *vide* Finance (No.2) Act, 2024 which came into effect from 01.11.2024 vide **SO 4253(E)** dated **27.09.2024**.

434. In this regard, the Agenda for the 31st GST Council Meeting held on **22.12.2018** is relevant. Text of deliberation in the said GST Council Meeting is extracted hereunder:-

> *"**Agenda Item 7(xx): Proposal for amendment of SSection 50 of CGST Act, 2017 to allow payment of interest on net cash liability***
>
> *The liability to pay interest in case of non-payment*

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of tax arises out of the provisions contained in Section 50(1) of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the "CGST Act") which reads as follows:

> *"Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made thereunder, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council."*

2. Various other Section related to payment of tax are as follows:

> *i. Section 49(2) of the CGST Act provides that the Input Tax Credit as self-assessed in the return (not necessarily be a valid return) of a registered person shall be credited to his electronic credit ledger.*
>
> *ii. Section 49(3) and 49(4) of the CGST Act provides that the amount available in the electronic cash ledger may be used for payment towards tax, interest, penalty, fees or any other amount whereas the amount available in the electronic credit ledger may be used for payment towards output tax. The term "tax dues" has been defined, as per Explanation (b) to Section 49 of the CGST Act and does not include interest, fee and penalty.*
>
> *iii. Section 39(7) of the CGST Act provides that the tax payable as per the return is required to be paid not later than the last date on which return is required to be*

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furnished.

iv. Section 2(117) of the CGST Act provides that a valid return means a return furnished under Section 39(1) of the CGST Act on which self-assessed tax has been paid in full.

3. A perusal of above provisions indicate that the law permits furnishing of a return without payment of full tax as self-assessed as per the said return but the said return would be regarded as an invalid return. The said return, however, would not be used for the purposes of matching of ITC and settlement of funds. Thus, although the law permits part payment of tax but no such facility has been yet made available on the common portal. This being the case, a registered person cannot even avail his eligible ITC as he cannot furnish his return unless he is in a position to deposit his entire tax liability as self-assessed by him. This inflexibility of the system increases the interest burden. The same is illustrated as below:

Suppose a registered person has self-assessed his tax liability as Rs.100/- for a particular tax period. He has an amount of Rs.10/- as balance in his electronic credit ledger and he is eligible to avail Rs.80/- as input tax credit (which would be credited to his electronic credit ledger only on furnishing of return). He is, therefore required to pay only Rs.10/- from his return (and therefore the ITC of Rs.80/- will not be credited in his electronic credit ledger) until he is in a position to discharge his complete self-assessed liability of Rs.100/-. He would be liable to pay interest on the entire self-assessed tax liability of Rs.100/- as he is not able to pay Rs.10/- or part thereof from his electronic cash ledger.

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It may be seen from the above that if the facility for part payment, as permitted under law, was available, the registered person would have been required to pay interest only on Rs.10/- but presently he is liable for interest on the entire tax liability of Rs.100/-."

435. The said Agenda records that the initial years of implementation were marked by significant changes, frequent amendments, and evolving compliance mechanism, and during such initial period, taxpayers were not adept with the new laws and its procedures.

436. In this regard, a large number of demand notices and orders have been issued. Hence, it was requested to grant a relief or waiver of interest and penalty in view of the above factors experienced in the initial years of implementation of GST.

437. Thus, there are gaps between the law and technology adopted for its implementation and there was an inherent gap between the law envisaged and its actual implementation in the GST Portal. To iron out the discrepancies, Section 128A was inserted.

438. Likewise, prior to the insertion of Section 128A in the respective GST

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Enactments in the Agenda for the 53rd GST Council Meeting, it was also acknowledged that initial turbulence were experienced while implementing the provisions of the respective GST Enactments.

439. Though all the GST Enactments were enacted pursuant to 101st Amendment to the Constitution of India and were intended to simplify the tax laws, their implementation was not smooth as it was dependent on Information Technology (IT) preparedness.

JUDICIAL NOTE OF DIGITAL DIVIDE:

440. A co-ordinate Bench of this High Court (Madurai Bench) has also recently given a novel interpretation in **Sharp Tanks and Structurals Private Limited** Vs. **The Deputy Commissioner (GST) (Appeals) & another**, 2025 (102) G.S.T.L. 199 (Mad.) / (2025) 34 Centax 426 (Mad.). In the said decision, the Court passed its order in the context of Section 73, Section 74, Section 107 and Section 169 of the respective GST Enactments and Rule 142 of the respective GST Rules.

441. The Madurai Bench of this Court acknowledged that a digital divide exists in the Country and observed that many consultants render services for a

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nominal fee and that after the registration is cancelled, there is no occasion to access the Web Portal by such dealer. The Court also held that although uploading of the information in the electronic portal is mandatory, it is not sufficient in certain circumstances.

442. The Court also noted the difference between the word "Service of Notice" in Section 169 and the word "Communicated" in section 107 of the respective GST Enactments and concluded that there is no obligation cast on an Assessee to access the Web Portal [see Paragraph 12 of **Sharp Tanks and Structurals Private Limited case** (referred to *supra*)]. This view is little far-fetched and substantially dilutes the scheme of GST.

443. On a daily basis, Courts are burdened with several cases filed by assessees who challenge *ex-parte* Assessment Orders passed against them for their failure to comply with the timelines prescribed under the provisions of the respective GST Enactments and the Rules made thereunder.

444. Several glitches in the GST portal are still being creased out even now. Coupled with digital divide in the Country, there have been deficiencies in compliance by the taxpayers, leading to tax disputes and litigations. This

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has also been pointed out by this Court in **Sharp Tanks and Structurals Private Limited case** (referred to *supra*).

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DELIBERATIONS OF THE GST COUNCIL AND ITS BINDING NATURE ON THE RESPECTIVE GST ENACTMENTS:-

445. During the course of the arguments, counsels were asked to get the details of the deliberations for drafting Section 74 of the respective GST Enactments in the GST Council in the manner in which it now reads.

446. **Mr.Ramamurthy**, the learned Counsel for the Petitioner in **W.P.No.14500 of 2025** produced the details of the deliberations of the **GST Council** in this regard with reference to Section 67 of the **Second Draft GST Model Law** of November 2016, which was engrafted as Section 74 of the respective GST Enactments.

447. The **First Draft GST Model Law** was released in **June 2016**. Later, the **Second Draft GST Model Law** was released in **November 2016**. They were the precursor to Section 73, Section 74 and Section 75 of the respective GST Enactments as it reads now. They were intended to receive feedback from the stake holders.

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448. Section 51 of the **First Draft GST Model Law** released in June 2016 had three parts. For the sake of clarity, Section 51 of the **First Draft GST Model Law** is tabulated below in the following Tabular Column:

Chapter XIV		
Demands and Recovery		
A	**B**	**C**
Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized for any reason other than fraud or any willful-misstatement or suppression of facts.	**Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized by reason of fraud or any willful-misstatement or suppression of facts**	**General provisions relating to demand of tax**
(1) Where any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilized for any reason, **other than** the reason of fraud or any willful-misstatement or suppression of facts to evade tax, the proper officer shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilized input tax credit, requiring him to show cause why he should not pay the amount specified in the notice along with interest	(1) **Where any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilized by reason of fraud, or any willful-misstatement or suppression of facts to evade tax, the proper officer shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has**	(1) Where the service of notice or issuance of order is stayed by an order of a Court or Tribunal, the period of such stay shall be excluded in computing the period of three years or five years, as the case may be.

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payable thereon under section 36 and penalty leviable under the provisions of this Act or the rules made thereunder. **(2)** Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized for such periods other than those covered under subsection(1), on the person chargeable with tax. The service of such statement shall be deemed to be service of notice on such person under the aforesaid sub-section (1), subject to the condition that the grounds relied upon for such tax periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice. **(3)** The person chargeable with tax may, before service of notice under sub-section (1) or, as the case may be, the statement under sub-section (2), pay the amount of tax along with interest payable thereon under section 36 on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper	**wrongly availed or utilized input tax credit requiring him to show cause why he should not pay the amount specified in the notice along with interest payable thereon under section 36 and a penalty equivalent to the tax specified in the notice.** **(2)** Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized for such periods other than those covered under sub-section (1), on the person chargeable with tax. The service of such statement shall be deemed to be service of notice on such person under the aforesaid sub-section (1), subject to the condition that the grounds relied upon for such periods other than those covered under sub-section(1) are the same as are mentioned in the earlier notice.	**(2)** Where any Appellate Authority or Tribunal or Court concludes that the notice issued under sub-section B (1) or B (2) is not sustainable for the reason that the charges of fraud or any wilful mis-statement or suppression of facts to evade tax has not been established against the person to whom the notice was issued, the proper officer shall determine the tax payable by such person for the period of three years, deeming as if the notice were issued under sub-section A (1) or A (2).

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officer in writing of such payment. The proper officer, on receipt of such information, shall not serve any notice under sub-section (1) or, as the case may be, the statement under sub-section (2), in respect of the tax so paid or any penalty leviable under the provisions of this Act or the rules made there under.	**(3)** The person chargeable with tax may, before service of notice under sub-section (1) or, as the case may be, the statement under sub-section (2), pay the amount of tax along with interest payable under section 36 and a penalty equivalent to fifteen per cent of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment. The proper officer, on receipt of such information, shall not serve any notice under sub- section (1) or, as the case may be, the statement under sub-section (2), in respect of the tax so paid or any penalty leviable under the provisions of this Act or the rules made there under.	**(3)** An opportunity of personal hearing shall be granted where a request is received in writing from the person chargeable with tax or penalty, or where any adverse decision is contemplated against such person.
(4) Where the proper officer is of the opinion that the amount paid under sub-section (3) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.		
(5) Where any person chargeable with tax under sub-section (1) or under sub-section(2) pays the said tax along with interest payable under section 36 within thirty days of issue of show cause notice, no penalty shall be payable and all proceedings in respect of the said tax shall be deemed to be concluded.	**(4)** Where the proper officer is of the opinion that the amount paid under sub-section (3) falls short of the amount actually payable, he shall proceed to issue the notice as provided	**(4)** The proper officer shall, if sufficient cause is shown by the person chargeable with tax, grant time, from time to time, to the said person and adjourn the hearing for reasons to be recorded in writing: **Provided that** no such adjournment shall be

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	for in sub-section (1) in respect of such amount which falls short of the amount actually payable.	granted more than three times to a person during the proceeding.
(6) The proper officer shall, after considering the representation, if any, made by person chargeable with tax, determine the amount of tax, interest and a penalty not exceeding ten percent of tax or ten thousand rupees, whichever is higher, due from such person and issue an order. Page 72 of 191	**(5)** Where any person chargeable with tax under sub-section (1) or under sub-section (2) pays the said tax along with interest payable under section 36 and a penalty equivalent to twenty five per cent of such tax within thirty days of communication of the notice, all proceedings in respect of the said tax shall be deemed to be concluded.	**(5)** The proper officer, in his order, shall set out the relevant facts and the basis of his decision.
(7) The proper officer shall issue the order under sub-section (6) within three years from the due date or the actual date, whichever is earlier, for filing of annual return for the year to which the tax not paid or short paid or input tax credit wrongly availed or utilized relates or, as the case may be, within three years from the date of erroneous refund.	**(6)** The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order.	**(6)** The amount of tax, interest and penalty demanded in the order shall not be in excess of the amount specified in the notice and no demand shall be confirmed on grounds other than the grounds specified in the notice.
		(7) Where the Appellate Authority or Tribunal or Court modifies the amount of

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	(7) The proper officer shall issue the order under sub-section (6) within a period of five years from the due date or the actual date, whichever is earlier, for filing of annual return for the year to which the tax not paid or short paid or input tax credit wrongly availed or utilized relates or, as the case may be, within five years from the date of erroneous refund. **(8)** Where any person served with an order issued under sub-section (6) pays the tax along with interest payable thereon under section 36 and a penalty equivalent to fifty percent of such tax within thirty days of the communication of order, all proceedings in respect of the said tax shall be deemed to be concluded.	tax determined by the proper officer, the amount of interest and penalty shall stand modified accordingly, taking into account the amount of tax so modified. **(8)** Interest on the tax short paid or not paid shall be payable whether or not specified in the order determining the tax liability. **(9)** The adjudication proceedings shall be deemed to be concluded if the order is not issued within three years as provided for in sub-section A (7) or within five years as provided for in sub-section B (7). **(10)** An issue on which the First Appellate

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		Authority or the Appellate Tribunal or the High Court has given its decision which is prejudicial to the interest of revenue in some other proceedings and an appeal to the Appellate Tribunal or the High Court or the Supreme Court against such decision of the First Appellate Authority or the Appellate Tribunal or as the case may be, the High Court is pending, the period spent between the date of the decision of the First Appellate Authority and the date of decision of the Appellate Tribunal or the date of decision of the Appellate Tribunal and the date of the decision of the High Court or as the case may be, the date of the decision of the High Court and the date of the decision of the Supreme Court shall be excluded in computing the period referred to in sub-section A (7) or sub-section B (7), as the case may be, where proceedings are initiated by way of issue of a show cause notice under this

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		section.
D. (1) The provisions of sub-section A, B, C above shall apply, mutatis mutandis, to the recovery of interest where interest payable has not been paid or part paid or erroneously refunded.		

449. **Part A** was intended to cover for eventually Determination of Tax, **"for any reason other than fraud or any wilful-misstatement or suppression of facts"**, **Part B** was intended to cover for eventually Determination of Tax **"by reason of fraud or any wilful-misstatement or suppression of facts"**, **Part C** was intended to cover general provisions relating to Demand of Tax.

450. Thus, a composite provision was envisioned prescribing a fool proof mechanism for demand and recovery of tax in line with Section 11A of the Central Excise Act, 1944, Section 28 of the Customs Act, 1962 and Section 73 of the Finance Act, 1994. The above Draft GST Model law if adopted would have at least given better clarity to the Assessees, Officers of the Department and the Courts.

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451. It would have been advisable to adopt the same as the law to an extent was settled in this regard under the provisions of the above named three Central Enactments under the previous regime namely the Central Excise Act, 1944, the Customs Act, 1962 and the Finance Act, 1994.

452. However, on account of several criticisms received to the **First Draft GST Model Law** from the stake holders, **the Second Draft GST Model Law** was released in **November, 2016**. Section 51 of the **First Draft GST Model Law** which had three parts to it was split into three separate provisions namely, **Section 66**, **Section 67** and **Section 68** in the **Second Draft GST Model Law**.

453. Section 67 of the **Second Draft GST Model Law** has been eventually recast as Section 74 of the respective GST Enactments with certain modifications pursuant to **8th GST Council Meeting** held on **3rd** and **4th** of **January, 2017**.

454. Section 66 of the **Second Draft GST Model Law** is the precursor to Section 73 of the respective GST Enactments, while Section 67 of the **Second Draft GST Model Law** is the precursor to Section 74 the respective GST

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Enactments and Section 88 of the **Second Draft GST Model Law** is the precursor to Section 75 the respective GST Enactments. In this case, the Court is however not concerned with Section 73 of the respective GST Enactments.

455. As far as the deliberation on **Section 67** of the **Second Draft GST Model Law** during the **8th GST Council Meeting** held on **3rd** and **4th** of **January, 2017** is concerned, it was subject matter of **Issue No.11** of the **Additional Agenda.** Text of the said deliberation in the said meeting in **Issue No.11** is extracted below:-

> ***"Issue No. 11 – Amendments to provision of section 67:***
>
> *As per the present provision in section 67 (1), the proper officer shall have to first establish the mentioned criteria before giving notice. However section 67(1) doesn't provide the due process for coming to the decision that such criteria exist. It is proposed to amend the said section so as to provide for said process."*

456. The **GST Council** was of the view that section 67(1) does not provide the due process for coming to the decision that such criteria exist and that it is proposed to amend the said section so as to provide for said process. The **GST Council** which was responsible for deliberating on the GST Enactments, however, did not really spell out the inherent lacunae if any in Section 67 of the

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Second Draft GST Model Law (presently Section 74), as it stood prior to being rephrased, except for stating that before issuing notice, it did not satisfy the due process for coming to the decision that such criteria exist and therefore it is proposed to amend the said Section so as to provide for said process. Thus, *S*ection 67 of the **Second Draft GST Model Law** was amended which was renumbered as Section 74 in the respective GST Enactments.

457. Text of Section 67 of the **Second Draft GST Model Law** as in the draft in **November 2016** prior to its amendment and amendment proposed in the said meeting are reproduced below:-

Section 67 of GST Draft Model Law prior to the proposed Amendment	***Section 67 of GST Draft Model Law after the proposed Amendment***
Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized by reason of fraud or any willful-misstatement or suppression of facts.	***Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized by reason of fraud or any willful misstatement or suppression of facts.***
(1) Where any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed	*(1) Where* ***it appears to the proper officer that*** *any tax has not been paid or short paid or erroneously refunded*

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or utilized ***by reason of fraud, or any willful-misstatement or suppression of facts to evade tax, the proper officer shall serve*** *notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilized input tax credit requiring him to show cause why he should not pay the amount specified in the notice along with interest payable thereon under section 45 and a penalty equivalent to the tax specified in the notice.*	*or where input tax credit has been wrongly availed or utilized* ***by reason of fraud, or any willful-misstatement or suppression of facts to evade tax, he*** *shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilized input tax credit requiring him to show cause why he should not pay the amount specified in the notice along with interest payable thereon under section 45 and a penalty equivalent to the tax specified in the notice.*

458. In the opinion of this Court, the rigours of Section 67 of the **Second Draft GST Model Law** as was recast in November 2016, was substantially diluted during the deliberations of the **8th GST Council Meeting** held on **3rd** and **4th** of **January**, **2017**, under a mistaken notion that the Section 67 of the **Second Draft GST Model Law** as drafted and presented in November 2016 for deliberation before **8th GST Council Meeting** held on **3rd** and **4th** of **January**, **2017** did not meet the test of due process of law and that the

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amended provision insulated assesses from any arbitrary activity of the Proper Officer.

459. In the said meeting, contrary to the avowed and ostensible reason for amending Section 67 of the **Second Draft GST Model Law** on a mistaken notion that Section 67 of the **Second Draft GST Model Law** did not comply with the due process for the 'Proper Officer', it was recast.

460. The GST Council came to a contra decision that the criteria to come to a decision to issue notice was not there in the original draft of **Section 67** of the **Second Draft GST Model Law**. It has to be held that the views entertained by the GST Council was erroneous and were based on a mistaken impression of Section 67 of the **Second Draft GST Model Law** as it was present in the draft before its amendment and did not comply with the due process.

461. It is clear that the contrary result was thus achieved by the GST Council unwittingly on a mistaken impression and thereby diluting the safeguards that were pressed in the draft Section 67 of the **Second Draft GST Model Law**.

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462. In the opinion of this Court that both **Section 51B** and the **Section 67(1)** as were originally drafted in the respective GST Model Laws contemplated a higher threshold before a Notice could be issued by a Proper Officer in case of "**Fraud**", "**Wilful-Misstatement**" and "**Suppression of Facts to evade tax**" by an Assessee for the tax period.

463. They were substantially diluted pursuant to the deliberation in the **8th GST Council Meeting** held on **3rd** and **4th** of **January, 2017** although under a mistaken notion they did not meet the due process criteria by inserting the expression "**it appears to the Proper Officer that**" in Section 67(1) of the **Second Draft GST Model Law**. This is a classic instance of the "law of unintended consequence".

464. Further, it is not clear from the deliberation of the GST Council, as to how the GST Council concluded that the draft of Section 67 in the **Second Draft GST Model Law** that was presented, did not meet the "**due process criteria**" and how the amended Section 67 of the **Second Draft GST Model Law** meet the "**due process criteria"** by inserting the expression "**it appears to the Proper Officer that**" after the word "**where**" in Section 67(1) of the

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465. It has to be also noted that when the above deliberations were made at the **GST Council**, when the GST Rules were not ready and had not been discussed. The Rules itself came to be deliberated over a period of time in a piece-meal manner starting from the **Second GST Council Meeting** held on **30.09.2016**.

466. It is the opinion of the Court that, though Section 67 of the **Second Draft GST Model Law** was diluted in the **8th GST Council Meeting** held on **03.01.2017** and **04.01.2017**, the GST Rules that were framed simultaneously and had taken care of all the safeguards that are required to be followed before embarking jurisdiction under Section 74 of the respective GST Enactments as discussed above.

467. It appears the opinion of the **GST Council** in its **8th Meeting** held on **03.01.2017** and **04.01.2017** "*due process for coming to the decision that such criteria exist*" to issue a Notice under Section 67 of the **Second Draft GST Model Law** was perhaps without proper understanding of the concept of "due process of law" which is alien to the Constitution of India.

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DUE PROCESS OF LAW IN INDIA:

468. The phrase "**Due Process of Law**" is traceable to Clause 39 of the 13th Century **Magna Carta** (1215) and thereafter in King Edward's Statute of 28 in the 14th Century. Likewise, in the American context, "**Due Process of Law**" was brought in through the 5th and 14th Amendments to the American Constitution.

469. It was incumbent on the part of the **GST Council** to have first understood what the expression **"Due Process of Law"** means and its applicability in the Indian context and with specific reference to draft of Section 67 of the **Second Draft GST Model Law** before embarking on the exercise of tweaking it and before diluting it.

DUE PROCESS OF LAW AND THE INDIAN CONSTITUTION:

470. The Indian Constitution does not employ the expression "**Due Process of Law**". In India, **Article 21** (Article 15 of the Draft Constitution of India, 1948) was intensely debated on the question of incorporating the "**Due Process**" clause.

471. To add confusion, Justice Felix Frankfurter of the American Supreme

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Court had also forewarned Dr.B.N.Rao, a Constitutional Advisor to the Constituent Assembly about the complexities involved in adopting the said clause in the Indian context.

472. Thus, in **Article 21** of the Indian Constitution, the phrase "**Procedure Established by Law**" was adopted Under **Article 21** of the Indian Constitution, no person shall be deprived of personal liberty except in accordance with the **procedure established by law**. The said phrase "**Procedure Established by Law**" was borrowed from **Article 31** of the Japanese Constitution.

473. Similarly, under **Article 265** of the Indian Constitution, "no tax shall be levied **except by an authority of law**" and under **Article 300A** of the Indian Constitution, "was inserted into the Constitution by the 44th Amendment to the Constitution in 1978" no person shall be deprived of his property save by **authority of law**.

474. Prior to the 44th Amendment to the Constitution by the 44th Amendment Act, 1978, right to property was a fundamental right **Article 19(1)(f)** of the Indian Constitution. By the same Amendment, **Article 19(1)(f)** was deleted.

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475. For the sake of clarity, the text of **Article 21, 265** and **300A** of the Indian Constitution reads as under:-

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Article 21	**Article 265**	**Article 300A**
Protection of life and personal liberty.	Taxes not to be imposed save by **authority of law**.	Persons not to be deprived of property save by **authority of law**.
No person shall be deprived of his life or personal liberty except according to **procedure established by law.**	No tax shall be levied or collected except by **authority of law.**	No person shall be deprived of his property save by **authority of law.**

476. The expression "*Save by Authority of Law*" in the title of Article 265 of the Indian Constitution was also employed in the body of Article 31 of the Indian Constitution (since repealed *vide* Section 6 of the Constitution 44th Amendment Act, 1978 with effect from 20.06.1979).

477. Article 31 dealt with Compulsory Acquisition of Property. As per Article 31, "*No person shall be deprived of his property Save by Authority of Law*". Likewise, a similar expression was also there in Sub-clause (2) of the

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repealed Article 31. Suffice to state that, only the above mentioned expression as in Article 21, repealed Article 31, Article 265 & Article 300A, are / were employed in the Indian Constitution.

CASE LAW ON DUE PROCESS OF LAW: INDIAN PERSPECTIVE

478. In **A.K.Gopalan** Vs. **Union of India,** 1950 SCC 228 : AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383, the Hon'ble Supreme Court of India refused to acknowledge the applicability of "**Due Process of Law**" in the Constitution of India.

479. In **A.K.Gopalan** (referred to *supra),* the history of **"Due Process of Law"** or what is considered to be its equivalent "Law of the Land" was traced back to Magna Carta, and its subsequent incorporation in the 5th and 14th Amendment to the American Constitution.

480. Though the Hon'ble Supreme Court in **A.K.Gopalan** (referred to *supra),* expressed its difficulty to define the phrase **"Due Process of Law",** acknowledged that the said phrase "**Due Process of Law**" appeared in **Article 15, Article 21** of the draft Indian Constitution and took note of the fact that the said phrase was not employed in Article 21 of the Indian Constitution. However the said phrase was indeed recognised as a fetter on the powers of the legislature

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as well as the Government.

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481. The Hon'ble Supreme Court in **A.K.Gopalan** (*referred to supra*) thus rejected the application of the "**Due Process of Law**" Clause in the Indian context by giving a narrow interpretation to Article 21 in the following passage:-

> ***"277.*** *It does not appear that in any part of the Constitution the word "law" has been used in the sense of "general law" connoting what has been described as the principles of natural justice outside the realm of positive law. On the other hand, the provision of Article 31 of the Constitution, which appears in the chapter on fundamental rights, makes it clear that the word "law" is equivalent to State-made law and to deprive a person of his property, the authority or sanction of such law is necessary. As has been said already, the provision of Article 21 of the Indian Constitution reproduces, save in one particular, the language of Article 31* of the Japanese Constitution and it is quite clear from the scheme and provisions of the Japanese Constitution that in speaking of law it refers to law passed or recognised as such by the State. In the Irish Constitution also, there is provision in almost similar language which conveys the same idea. Article 40(4)(1) provides that "no citizen shall be deprived of his personal liberty save in accordance with law," and by law is certainly meant the law of the State.*
>
> ** since repealed vide Section 6 of the Constitution 44th Amendment Act, 1978 with effect from 20.06.1979*

482. In this connection, views of his Lordship Hon'ble Mr. Justice Fazl Ali, J., who was in a minority, in **A.K.Gopalan's case** (*referred to supra*) stated

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that the procedure must include the four essentials set out in Prof. Willis' book on Constitutional Law, namely,

i. **Notice**;
ii. **Opportunity to be heard**;
iii. **Impartial tribunal**; and
iv. **Ordinary course of procedure**.

483. His lordship Hon'ble Mr.Justice Patanjali Sastri, J., did not go as far as that. However, he did say that "**certain basic principles emerged as the constant factors known to all those procedures and they formed the core of the procedure established by law**".

484. His Lordship Hon'ble Mr.Justice Mahajan, J., had observed that Article 21 of the Constitution requires that **"there should be some form of proceeding before a person can be condemned either in respect of his life or his liberty"** and **"it negatives the idea of fantastic, arbitrary and oppressive forms of proceedings"**.

485. The concept of "**Due Process of Law**" appears to have found acceptance by the Hon'ble Supreme Court in **Maneka Gandhi** Vs. **Union of India and another** [AIR 1978 SC 597, 1978 SCR (2) 621], where Articles 14, 19 and 21 of the Indian Constitution were interpreted.

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486. There, the Hon'ble Supreme Court held that these provisions of the Constitution of India are not mutually exclusive rather they were intertwined with each other.

487. The Hon'ble Supreme Court thus observed in Paragraph No.6 as under:-

> ***"6. Now, if a law depriving a person of "personal liberty" and prescribing a procedure for that purpose within the meaning of Article 21 has to stand the test of one or more of the fundamental rights conferred under Article 21 has to stand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation, ex-hypothesi it must be also be liable to be tested with reference to Article 14……..."***

488. It will be also useful to refer to the following passage from the above decision of the Hon'ble Supreme Court in **Maneka Gandhi** Vs. **Union of India** (referred to *supra)* which trace the history from **A.K.Gopalan** Vs. **State of Madras** *[1950 SCC 228 : AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383]* :-

> **"5.** *It is obvious that Article 21, though couched in negative language, confers the fundamental right to life and personal liberty. So far as the right to personal liberty is concerned, it is ensured by providing that no one shall be deprived of personal liberty except according to procedure prescribed by law. The first question that arises for consideration on the language of Article 21 is : what is the*

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*meaning and content of the words "personal liberty" as used in this article? This question incidentally came up for discussion in some of the judgments in A**.K. Gopalan v. State of Madras [1950 SCC 228 : AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383]** and the observations made by Patanjali Sastri, J., Mukherjea, J., and S.R. Das, J., seemed to place a narrow interpretation on the words "personal liberty" so as to confine the protection of Article 21 to freedom of the person against unlawful detention. But there was no definite pronouncement made on this point since the question before the Court was not so much the interpretation of the words "personal liberty" as the inter-relation between Articles 19 and 21.*

*……**The decision in A.K. Gopalan case [1950 SCC 228 : AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383] gave rise to the theory that the freedoms under Articles 19, 21, 22 and 31 are exclusive — each article enacting a code relating to the protection of distinct rights, but this theory was overturned in R.C. Cooper case[(1970) 2 SCC 298 : (1971) 1 SCR 512] where Shah, J., speaking on behalf of the majority pointed out that "Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields they do not attempt to enunciate distinct rights." The conclusion was summarised in these terms:"In our judgment, the assumption in A.K. Gopalan case [1950 SCC 228 : AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383] that certain articles in the Constitution exclusively deal with specific matters — cannot be accepted as correct".** It was held in **R.C. Cooper cas**e [(1970) 2 SCC 298 : (1971) 1 SCR 512] — and that is clear from the judgment of Shah, J., because Shah, J., in so many terms disapproved of the contrary statement of law contained in the opinions of Kania, C.J., Patanjali Sastri, J., Mahajan, J., Mukherjea, J., and S.R. Das, J., in A.K. Gopalan case — that even where a person is. detained in accordance with the procedure prescribed by law, as mandated be Article 21, the protection conferred by the various clauses of Article 19(1) does not cease to be available to him and the law authorising such*

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*detention has to satisfy the test of the applicable freedoms under Article 19, clause (1). This would clearly show that Articles 19(1) and 21 are not mutually exclusive, for, if they were, there would be no question of a law depriving a person of personal liberty within the meaning of Article 21 having to meet the challenge of a fundamental right under Article 19(1).....**The re was some discussion in A.K. Gopalan case [1950 SCC 228 : AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383] in regard to the nature of the procedure required to be prescribed under Article 21 and at least three of the learned Judges out of five expressed themselves strongly in favour of the view that the procedure cannot be any arbitrary, fantastic or oppressive procedure. Fazl Ali, J., who was in a minority, went to the farthest limit in saying that the procedure must include the four essentials set out in Prof. Willis' book on Constitutional Law, namely, notice, opportunity to be heard, impartial tribunal and ordinary course of procedure. Patanjali Sastri, J., did not go as far as that but he did say that "certain basic principles emerged as the constant factors known to all those procedures and they formed the core of the procedure established by law". Mahajan, J., also observed that Article 21 requires that "there should be some form of proceeding before a person can be condemned either in respect of his life or his liberty" and "it negatives the idea of fantastic, arbitrary and oppressive forms of proceedings". <u>But apart altogether from these observations in A.K. Gopalan case [1950 SCC 228 : AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383] which have great weight, we find that even on principle the concept of reasonableness must be projected in the procedure contemplated by Article 21, having regard to the impact of Article 14 on Article 21</u>."*

<u>[Emphasis supplied]</u>

489. In the context of Tax Enactments in India, at best, the Due Process

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of Law can be construed to be violated, if the procedure established by law under **Article 21** and under the Authority of law under **Article 265** read with **Article 279-A** of the Constitution does not satisfy the test of justice, fair play, reasonableness and the action is oppressive, arbitrary and capricious contrary to Article 14 of the Indian Constitution.

490. In **Menaka Gandhi case**, the Hon'ble Supreme Court further observed that *".... apart altogether from the above observations in **A.K.Gopalan case** [1950 SCC 228 : AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383] which have great weight, we find that even on principle the concept of reasonableness must be projected in the procedure contemplated by Article 21, having regard to the impact of Article 14 on Article 21."*

491. Thus, it has to be held that Section 67 of the **Second Draft GST Model Law** of November 2016 as extracted above in Table provided an adequate protection and complied with "**Due Process of Law**" which was however unwittingly diluted in the **8th GST Council Meeting** held on **3rd** and **4th January, 2017** on a mistaken notion that the Section 67 of the **Second Draft GST Model Law** presented for discussion did not address the "Due Process" criteria and therefore, proposed many amendments to it.

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492. However, it has to be held that even if amended Section 67 of the **Second Draft GST Model Law** which has been incorporated as Section 74 in the respective GST Enactments, the Rules framed under the respective GST Enactments have provided for adequate protections and safeguards, against any arbitrary and abusive invocation of extended period of limitation or a misadventure by a Proper Officer.

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FLAWED APPROACH OF THE GST COUNCIL:

493. The threshold under the draft **Sections 51B** and later **Section 67** of the respective GST Model Laws were much higher as compared to the amended **Section 67** of the GST Model Laws which has now been incorporated as **Section 74** in the respective GST Enactments. The Parliament also unwittingly adopted the same, as the GST Enactments were passed in a hurry.

494. It is evident that the respective GST Enactments as also other allied Enactments which were enacted in a hurry to rollout the GST law with effect from **1st July, 2017** within 10 months of the **101st Amendment to the Constitution** *vide* **101st Constitution Amendment Act, 2016** after it received presidential assent on 8th September, 2016.

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495. The respective GST Enactments were not deliberated in the Parliament. The Parliament went by deliberation in the GST Council's Meetings.

496. However, it has to be emphasized that when these Enactments were passed and received the Presidential Assent on **12.04.2017**, the understanding was that the GST Council constituted under Article 279A of the Constitution was having an extraordinary power to dictate future GST laws as it consisted of an elite body

(a) the Union Finance Minister;
(b) The Union Minister of state in charge of Revenue or Finance;
(c)The Minister in charge of Finance or Taxation / any other Minister nominated by each State Government.

497. The Hon'ble Supreme Court in **Union of India** Vs. **Mohit Minerals Private Limited, (**2022)10 SCC 700, has however debunked this myth and held that both Parliament and the State Legislatures possess simultaneous power to legislate on GST and that Article 246-A does not envisage a repugnancy provision to resolve the inconsistencies between the Central and the State laws on GST.

498. There, the Hon'ble Supreme Court further observed that the

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"recommendations" of the GST Council under Article 279-A(4) are the product of a collaborative dialogue involving the Union and the States and are recommendatory in nature and therefore regarding them as binding edicts would disrupt fiscal federalism, where both the Union and the States are conferred equal power to legislate on GST.

499. The Hon'ble Supreme Court further observed that ***"It is not imperative that one of the federal units must always possess a higher share in the power for the federal units to make decisions and that the Indian federalism is a dialogue between cooperative and uncooperative federalism where the federal units are at liberty to use different means of persuasion ranging from collaboration to contestation."***

500. The Hon'ble Supreme Court in Paragraph in 171 of **Union of India** Vs. **Mohit Minerals Private Limited** (referred *supra)* concluded as under:-

> ***"E. Conclusion***
>
> ***171.*** *Based on the above discussion, we have reached the following conclusion:*
>
> ***171.1. The recommendations of the GST Council are not binding on the Union and States for the following reasons****:*

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171.1.1. *The deletion of Article 279-B and the inclusion of Article 279(1) by the Constitution Amendment Act, 2016 indicates that Parliament intended for the recommendations of the GST Council to only have a persuasive value, particularly when interpreted along with the objective of the GST regime to foster cooperative federalism and harmony between the constituent units.*

171.1.2. Neither does Article 279-A begin with a non-obstante clause nor does Article 246-A state that it is subject to the provisions of Article 279-A. Parliament and the State Legislatures possess simultaneous power to legislate on GST. Article 246-A does not envisage a repugnancy provision to resolve the inconsistencies between the Central and the State laws on GST. The "recommendations" of the GST Council are the product of a collaborative dialogue involving the Union and the States. They are recommendatory in nature. To regard them as binding edicts would disrupt fiscal federalism, where both the Union and the States are conferred equal power to legislate on GST. It is not imperative that one of the federal units must always possess a higher share in the power for the federal units to make decisions. Indian federalism is a dialogue between cooperative and uncooperative federalism where the federal units are at liberty to use different means of persuasion ranging from collaboration to contestation.

171.1.3. *The Government while exercising its rule-making power under the provisions of the CGST Act and the IGST Act is bound by the recommendations of the GST Council. However, that does not mean that all the recommendations of the GST Council made by virtue of the power Article 279-A(4) are binding on the legislature's*

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power to enact primary legislations.

171.2. *On a conjoint reading of Sections 2(11) and 13(9) of the IGST Act, read with Section 2(93) of the CGST Act, the import of goods by a CIF contract constitutes an "inter-State" supply which can be subject to IGST where the importer of such goods would be the recipient of shipping service.*

171.3. *The IGST Act and the CGST Act define "reverse charge" and prescribe the entity that is to be taxed for these purposes. The specification of the recipient—in this case the importer—by Notification No. 10 of 2017 is only clarificatory. The Government by notification did not specify a taxable person different from the recipient prescribed in Section 5(3) of the IGST Act for the purposes of reverse charge.*

171.4. *Section 5(4) of the IGST Act enables the Central Government to specify a class of registered persons as the recipients, thereby conferring the power of creating a deeming fiction on the delegated legislation.*

171.5. *The impugned levy imposed on the "service" aspect of the transaction is in violation of the principle of "composite supply" enshrined under Section 2(30) read with Section 8 of the CGST Act. Since the Indian importer is liable to pay IGST on the "composite supply", comprising of supply of goods and supply of services of transportation, insurance, etc. in a CIF contract, a separate levy on the Indian importer for the "supply of services" by the shipping line would be in violation of Section 8 of the CGST Act."*

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501. The Hon'ble Supreme Court in **Peddinti Venkata Murali Ranganatha Desika Iyengar** Vs. **Government of Andhra Pradesh,** (1996) 3 SCC 75 referred to the **Principles of Statutory Interpretation by Justice G.P. Singh,** (5th Edition1992 at Page Nos.186 & 187) under the caption "**Reference to other statutes**" in Chapter IV (**External Aids to Construction**) wherein it has been stated that "*a legislation proceeding upon an erroneous assumption of the existing law without directly amending or declaring the law is ineffective to change the law*".

502. There, the Hon'ble Supreme Court observed that *"**The beliefs or assumptions of those who frame Acts of Parliament cannot make the law" and a mere erroneous assumption exhibited in a statute as to the state of the existing law is ineffective to express an 'intention' to change the law; if, by such a statute, the idea is to change the law, it will be said that "the legislature has plainly misfired".***

503. The Hon'ble Supreme Court further observed that *"legislation founded on a mistaken or erroneous assumption has not the effect of making the law which the legislature had erroneously assumed to be so". The court will disregard such a belief or assumption and also the provision inserted in that*

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belief or assumption. A later statute, therefore, is normally not used as an aid to construction of an earlier one."(emphasis supplied)

504. The Hon'ble Supreme Court in **Hariprasad Shivshanker Shukla** Vs. **A.D.Divelkar**, 1956 SCC OnLine SC 21 observed as under:-

> *"...19.That history shows indubitably the aim and purpose of the enactment of Section 25-FF. as Lord Atkinson pointed out in his speech in* ***Ormond Investment Co. Limited v. Betts*** *[(1928) AC 143, 164] "an Act of Parliament does not alter the law by merely betraying an erroneous opinion of it".* ***Legislation founded on a mistaken or erroneous assumption has not the effect of making that the law which the legislature had erroneously assumed to be so…"*** *(emphasis supplied)*

505. The Hon'ble Supreme Court in **Dharangadhra Chemical Works** Vs. **Dharangadhra Municipality**, (1985) 4 SCC 92 observed as under:-

> *"...12. If the insertion of Rule 3 or Bye-law 3 was because of a wrong belief or assumption made in the matter of the legal position the Court has to disregard such belief or assumption, for, it is well settled that "the beliefs or assumptions of those who frame Acts of Parliament cannot make the law"*

506. These decisions were also referred by a Coordinate Bench of this

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High Court in **M/s.Tata Play Limited** Vs. **Union of India** in **W.P.Nos.17184 of 2024 etc., batch** *vide* **its order dated 12.06.2025** (Modified on 05.11.2025) rendered in the context of Notifications issued under Section 168A of the respective GST Enactments. There, the Court has also made the following observations:-

> *"9.71…… It is trite that legislation based on mistaken or erroneous assumption has not the effect of making that the law which the legislature had erroneously assumed to be so. In this regard, it may be relevant to refer to the following judgments :*

507. At the same time, there cannot be a vacuum in law merely because Section 73 and Section 74 in the respective GST Enactments were incorporated by jettisoning the safeguards that were originally there in **1st** and **2nd GST Draft Model Law**.

508. Section 74A was inserted into the respective GST Enactments *vide* Finance (No.2) Bill, 2024 with effect from 01.11.2024. Section 74A applies for the Tax Period 2024-2025 onwards.

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OSTENSBILE REASONS FOR INCORPORATING SECTION 74A INTO THE RESPECTIVE GST ENACTMENTS FOR THE TAX PERIODS 2024-2025 ONWARDS

509. In 53rd GST Council Meeting held on 22.06.2024 in Item 3(iv) of its Agenda had deliberated the incorporation of Section 74A. Section 73 and Section 74 of the respective GST Enactments have been fused to Section 74A.

510. There it was acknowledged that due to the different time limits specified in Section 73 and Section 74 of the respective GST Enactments, revenue can be lost on account of the demand getting time-barred for issuing Demand Notices under Section 73 and Section 74.

511. It was stated that cases which were initially issued under Section 74 are subsequently found to be covered under Section 73, as charges of Fraud, Wilful Mis-statement, etc., are not found substantiated. This was identified to be due to the shorter time limit in Section 73 as compared to Section 74 in the respective GST Enactments.

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512. That it was perceived that a short span of 3 months and 6 months under Section 73 and Section 74 respectively, for issuing an adjudication order was found to be insufficient and therefore some flexibility was found wanting in this regard.

513. It was therefore advised to take a re-look at the time period provided for payment of entire tax demanded along with interest and reduced penalty by the taxpayer for concluding the proceedings under the said sections. Thus, changes were to be made prospective in respect of demands for the Financial Year 2023-2024 onwards.

514. Section 74A of the respective GST Enactments as we see now fused Section 73 and Section 74 into one composite provision similar to the one under the old regime under Central Excise Act, 1944, Customs Act, 1962 and Finance Act, 2000 was aimed to bring a consolidated approach for initiating proceedings for determination and to recover tax which has not been paid.

515. With the insertion of Section 74A into the respective GST Enactments with effect from 01.11.2024 for the tax disputes for the **Tax Period 2024-2025**

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onwards, both Sections 73 and 74 of the respective GST Enactments have been made inoperative for tax disputes for the Tax Period prior to 2024-2025. Therefore, no opinion expressed in this order on Section 74A of the respective GST Enactments.

516. As mentioned elsewhere the provisions of the respective GST Enactments and the Rules made thereunder together with Notifications issued therein constitute a complete code by themselves.

517. With the above framework of GST Enactments, the GST Rules and various deliberations of the GST Council, I shall now proceed to discuss the scope of Section 73 and Section 74 of the respective GST Enactments.

DISCUSSION ON SECTION 73 & 74 OF THE RESPECTIVE GST ENACTMENTS

518. Both Section 73 and Section 74 of the respective GST Enactments commonly use the phrase "**Where it appears**" along with the phrase "**for any reason, other than the reason of**" and "**by reason of**" respectively along with the phrase "**Fraud or any Wilful-Mis-statement or**

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Suppression of Facts to evade tax".

519. For the sake of convenience and clarity, both Section 73 and Section 74 of the respective GST Enactments are extracted hereunder:-

Section 73 of CGST Act	Section 74 of CGST Act
(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised ***for any reason, other than the reason of fraud or any wilful-misstatement or suppression of facts to evade tax,*** *he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty leviable under the provisions of this Act or the rules*	*(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised* ***by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax,*** *he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under*

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made thereunder.	*section 50 and a penalty equivalent to the tax specified in the notice.*
*(2) The proper officer shall issue the notice under sub-section (1) at least **three months** prior to the time limit specified in sub-section (10) for issuance of order.*	*(2) The proper officer shall issue the notice under sub-section (1) at least **six months** prior to the time limit specified in sub-section (10) for issuance of order.*
(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.	
(4) The service of such statement shall be deemed to be service of notice on such person under sub-section (1), subject to the condition that the grounds relied upon for such tax periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.	*(4) The service of statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful-misstatement or suppression of facts to evade tax, for periods other than those covered under subsection (1) are the same as are mentioned in the earlier*

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	notice.
*(5) The person chargeable with tax may, **before service of notice** under subsection (1) or, as the case may be, the statement under sub-section (3), pay the amount of tax along with interest payable thereon under section 50 on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.*	*(5) The person chargeable with tax may, **before service of notice** under sub-section (1), pay the amount of tax along with interest payable under section 50 and a penalty equivalent to fifteen per cent. of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.*
(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1) or, as the case may be, the statement under sub-section (3), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.	*(6) The proper Officer on receipt of such information, shall not serve any notice under sub-section (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder;*
(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.	

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(8) Where any person chargeable with tax under sub-section (1) or sub-section (3) pays the said tax along with interest payable under section 50 within thirty days of issue of show cause notice, no penalty shall be payable and all proceedings in respect of the said notice shall be deemed to be concluded.	*(8) Where any person chargeable with tax under sub-section (1) pays the said tax along with interest payable under section 50 and a penalty equivalent to **twenty-five per cent**. of such tax **within thirty days** of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded.*
*(9) The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, **determine** the amount of tax, interest and a penalty equivalent to ten per cent. of tax or **ten thousand rupees**, whichever is higher, due from such person and issue an order.*	*(9) The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, **determine** the amount of tax, interest and penalty due from such person and issue an order.*
*(10) The proper officer shall issue the order under sub-section (9) within **three years** from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within **three years** from the date of erroneous refund.*	*(10) The proper officer shall issue the order under sub-section (9) within a period of **five years** from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within **five years***

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	from the date of erroneous refund.
(11) Notwithstanding anything contained in sub-section (6) or sub-section (8), penalty under sub-section (9) shall be payable where any amount of self-assessed tax or any amount collected as tax has not been paid within a period of thirty days from the due date of payment of such tax.	*(11) Where any person served with an order issued under sub-section (9) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent. of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded.*
*The **Explanation 1.— For the purposes of section 73 and this section,—*** *(i) the expression —all proceedings in respect of the said notice‖ shall not include proceedings under section 132;* *(ii) where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under section 73 or section 74, the proceedings against all the persons liable to pay penalty under sections 122, 125, 129 and 130 are deemed to be concluded.* ***Explanation 2.**—For the purposes of this Act, the expression —suppression‖ shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer.*	

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520. The language in both Section 73 and Section 74 of the respective GST Enactments, make it clear that before invoking the power under them, it has to "**appear"** to the "**Proper Officer"** that the person liable to pay tax:-

(i) has not paid tax; or
(ii) has short paid tax; or
(iii) to whom tax was erroneously refunded; or
(iv) who has erroneously availed and/or utilised Input Tax Credit.

521. The limitation for issuance of Notice and for passing order under Section 73 and 74 of the respective GST Enactments are as under:-

Time limit specified for	**Section 73 of the respective GST Enactments**	**Section 74 of the respective GST Enactments**
Issuance of Show Cause Notice	At least **three months prior to the time limit** specified in sub-section (10) for issuance of order	At least **six months** prior to the time limit specified in sub-section (10) for issuance of order
Issuance of Order under sub-section (10)	**Within three years from**	**Within a period of five years from**
	the **due date for furnishing of annual return** for the financial year, where tax was not paid or short paid or where there was wrong	

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	availing or utilization of input tax credit; or erroneous refund of tax.	
Circumstances, Under which a notice can be issued.	**for any reason, other than the reason**	**by reason**
	of **fraud**, or any **wilful-misstatement** or **suppression of facts to evade tax**	

522. The implications under Section 73 of the respective GST Enactments is that a shorter period of limitation of three years is available to the Proper Officer to initiate proceedings to recover the tax, where tax has not been paid, or short-paid, or where the tax has been refunded erroneously, or where Input Tax Credit was wrongly availed or utilized for "**for any reason, other than Fraud, or any Wilful-Mis-statement or Suppression of Facts to evade tax".**

523. On the other hand, where there is a F**raud**, or any **Wilful-Mis-statement** or **Suppression of Facts to evade tax**, the Proper Officer has a period of five years to initiate proceedings under Section 74 of the respective GST Enactments against such Assessee from the relevant

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date. The dichotomy between Section 73 and Section 74 of the respective GST Enactments can be explained below in the following Table:-

SECTION 73	SECTION 74
IT SHOULD APPEAR TO THE PROPER OFFICER	
that any tax	*(iv)*
(i)	*(ii)*
Has has not been Paid; or	has been Short paid; or
For any reason, other than the reason of	**By reasons of**
(i) **fraud**, or (ii) any **wilful-misstatement** or (iii)**suppression of facts to evade tax**	

524. Since, both in Section 73 and Section 74 of the respective GST Enactments, the expression "**Where it appears**" has been used, it will be therefore useful to refer to few case laws rendered in other Enactments.

525. In **Pyare Lal Bhargava** Vs. **State of Rajasthan** [AIR 1963 SC 1094 : (1963) 2 Cri LJ 178], a four-Judge Bench of the Hon'ble Supreme

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Court interpreted the meaning of the word "**appear**" in Section 24 of the Indian Evidence Act, 1872. The Court there held that the appropriate meaning of the word "**appears**" is "**seems"** and therefore held that it imports a lesser degree of probability than proof.

526. In **Afcons Infrastructure Limited and another** Vs. **Cherian Varkey Construction Company Private Limited and others,** (2010) 8 SCC 24, while comparing Section 73(1) of the Arbitration and Conciliation Act, 1996 and Section 89(1) of the Code of Civil Procedure, 1908, the Hon'ble Apex Court, while interpreting the phrase "**where it appears**", held that the reference to Alternative Dispute Resolution (ADR) process is mandatory when the Trial Court forms an opinion that the said case is fit for Alternative Dispute Resolution (ADR) process. Relevant passage is extracted below:-

> "***Whether the reference to ADR process is mandatory?***
> *26. Section 89 starts with the words "**where it appears**" to the court that there exist elements of a settlement". This clearly shows that cases which are not suited for ADR process should not be referred under Section 89 of the Code.* ***The court has to***

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form an opinion that a case is one that is capable of being referred to and settled through ADR process.”

527. Thus, under Section 80(1) of the Code of Civil Procedure, 1908, the Court had formed an opinion on the above case in reference to whether Alternative Dispute Resolution (ADR) is mandatory and the Hon’ble Supreme Court held that it is mandatory for one who is capable of being referred to and settled through Alternative Dispute Resolution (ADR) process.

528. The expression “**it appears**” appears at least 18 times in 15 sections of the Income Tax Act, 1961. The expression “**it appears**” has been interpreted differently in the context of the Income Tax Act, 1961 and other Enactments.

529. In **Income Tax Officer** Vs. **P.C.A. Engineers Limited,** [1984] 8 ITD 518, while interpreting the phrase “**where it appears**” in **Sub-section (7)** of **Section 80HH** of the **Income Tax Act, 1961**, the Income Tax Appellate Tribunal-Bombay Bench, relied on an earlier Judgement of this

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Court in **V.N.M. Arunachala Nadar** Vs. **CEPT** [1957] 32 ITR 222 and held that the burden of proof is on the part of the Revenue to give a finding that in the course of business the Assessee arranged its accounts to inflate its profits as per Sub-section (7) of Section 80HH of the Income Tax Act, 1961.

530. The Bombay High Court in the case of **State** Vs. **Ganpat,** AIR 1962 Bom 165, while interpreting Section 347 of the Code of Criminal Procedure, 1898 (5 of 1898), held that the word "**appears**" means "**seems**" or "**to be in one's opinion**" and further held that it does not mean "**satisfied**".

531. Similarly, the Patna High Court in **Ramautar Mistri** Vs. **Rajindra Singh**, 1961 (2) CrLJ 139, while interpreting the phrase "**appears to have been committed**" in Section 476 of the Code of Criminal Procedure (**5** of **1898**), held that the said words show that the intention of the Legislature is that there must be sufficient materials before the Court to show that an offense is likely to have been

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committed, and further cautioned that a complaint under the said Section ought not to be preferred where it is obvious that the prosecution is bound to end in a failure.

532. The Allahabad High Court in the case of **Wagar Ahmad** Vs. **State of Uttar Pradesh** (1976) Cr LJ (All), held that the word "**appears**" in Section 209 of the Code Criminal Procedure, 1973, denotes that the discretion is always with the Magistrate to find out whether the case of which he is seized of, is triable by the Court of Session or not.

533. The Court further held that the Magistrate has to scan the material placed before him and then come to his own conclusion whether the offence committed by the accused is an offence triable exclusively by the Court of Session or not and concluded that the Magistrate is not to go blindly by what the police mentions in the charge-sheet and has to apply his own mind to the facts of the case, as he is charged with the duty of performing judicial functions.

534. In **Abraham Varghese** Vs. **State of Kerala** AIR 1965 Ker 175,

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while interpreting Section 24 of the Indian Evidence Act, 1872, observed that the appropriate meaning of the word "**appears**" is "**seems**", and that it imports a lesser degree of probability than proof. The Court further observed that the standard of a prudent man is not completely displaced, but the stringent rule of proof is relaxed.

535. The Karnataka High Court in the case of **Commissioner of Income-tax** Vs. **H.P. Global Soft Ltd**, [2012] 20 taxmann.com 242 (Kar.), while interpreting the words "**it appears**" in Section 80I of the Income Tax Act, 1961 held that there must be some material for the Assessing Officer to arrive at a conclusion that the business of the assessee is so arranged resulting in inflated profits. Relevant paragraph is extracted hereunder for the sake of clarity:-

> "*25. The course of business was so arranged that the business transaction between two units of the assessee which might expected to arise in the business undertaking or the hotel. The word 'appears' cannot be taken in isolation de hors the qualifying words of 'so arranged' with the business more than the ordinary profits. While on*

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the first aspect there is not much dispute. The second requirement viz., it is a course of business is so arranged as to result in an inflated profit is not forthcoming from the order of the Assessing Officer and unfortunately for the Revenue the findings of the Appellate Authority which also go into the facts is that the profit margin as revealed by the assessee is a reasonable profit margin in comparison to other similar units. Ultimately, there being no material to indicate that the course of business had been so arranged as to inflate profits, ie, to show a. higher profit margin to the two export units of the assessee, we are unable to answer the question in favour of the Revenue, but the only answer can be that the Tribunal was justified in taking this view and therefore, the first question is answered in the affirmative and in favour of the assessee and against the the Revenue."

536. Similarly, the Kerala High Court in **Abdul Vahab P.** Vs. **Assistant Commissioner of Income-tax, Circle-2(1), Kozhikode**, [2012] 18 taxmann.com 196 (Ker.), while interpreting **Section 174** & **175** of the **Income Tax Act, 1961**, held that a Notice under **Section 174(4)** of the said Act can be issued only when the Assessing Officer is *prima facie* satisfied the intention of an individual to leave the Country and not to

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return, thus defeating the provisions of the Act. It further held that such *prima facie* satisfaction has to be recorded and a Notice issued is to be before any assessment is completed under **Section 174** against such person.

537. In **Ram Singh** Vs. **Ram Niwas** [(2009) 14 SCC 25 : (2010) 1 SCC (Cri) 1278], the Hon'ble Supreme Court was again required to examine the meaning of the word "**appear**" in Section 319 of the Code of Criminal Procedure, 1973.

538. Section 319 of the Code of Criminal Procedure, 1973, starts with the phrase "Where, in the course of any inquiry into, or trial of, an offence, it **appears** from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed."

539. The Court there held that for the fulfilment of the condition that "**it appears to the Court that a person had committed an offence**" in

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Section 319 of the Code of Criminal Procedure, 1973, the Court must satisfy itself about the existence of an exceptional circumstance enabling it to exercise an extraordinary Jurisdiction to summon a person who was not arrayed as an accused in the criminal proceeding.

540. It was concluded that, what is therefore, necessary "**for the Court is to arrive at a satisfaction"** that the evidence adduced on behalf of the prosecution, if unrebutted, may lead to conviction of the persons sought to be arrayed as an **accused** in the case.

541. The Hon'ble Supreme Court in **Hardeep Singh** Vs. **State of Punjab and others**, (2014) 3 SCC 92 in Paragraph No.93, held that the word "**appears**" means "**clear to the comprehension**", or a phrase near to, if not synonymous with "**proved**" and that it **imparts a lesser degree of probability of proof.**

542. There, the Hon'ble Supreme Court referred to several other decisions and ultimately concluded as under:-

"***106.*** *Thus, we hold that though only a prima facie case is to be*

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established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, ***it requires much stronger evidence than mere probability of his complicity.*** *The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 CrPC. In Section 319 CrPC the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence" is clear from the words "for which such person could be tried together with the accused". The words used are not "for which such person could be convicted". There is, therefore, no scope for the court acting under Section 319 CrPC to form any opinion as to the guilt of the accused.*"

543. The above tests were also followed by the Hon'ble Apex Court in **Shankar** Vs. **State of Uttar Pradesh**, 2024 SCC OnLine SC 730.

544. In **Rajendra Singh** Vs. **State of Uttar Pradesh,** (2007) 7 SCC 378, a two-Judge Bench of the Hon'ble Supreme Court, in the context of

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Section 319 of the Criminal Procedure Code, 1973, observed that the use of the word '**appears**' in Section 319 of the Code indicates an application of mind by the Court to the evidence that has come before it and then taking a decision to proceed under Section 319 of the code or not.

545. Thus, it is clear from a reading of the above decisions that when the expression "**appears**" has been used in a Statute, it only means a *prima facie* view and not a conclusive proof. It imparts a lesser degree of probability of proof.

ARCHITECTURE OF THE RESPECTIVE GST ENACTMENTS

TYPES OF ASSESSMENT

546. The provisions of the GST Enactments and the Rules made thereunder contemplates following types of Assessments namely:-

Types of Assessment	**Self-Assessment**	**Provisional Assessment**	**Assessment of Non-Filers of Returns**	**Assessment of Unregistered Persons**	**Summary Assessment in Special Cases**
	(1)	**(2)**	**(3)**	**(4)**	**(5)**
Relevant Provisions Under Chapter	Section 59	Section 60	Section 62	Section 63	Section 64

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XII of the GST Enactments					
Corresponding Provisions under Chapter VIII of the Rules	Rules 59 to 84	Rule 98	Rule 100(1)	Rule 100(2)	Rule 100(3) Rule 100(4) Rule 100(5)
Relevant Forms Under the Rules.	GSTR-1, GSTR-2, GSTR-2A, GSTR-2B, GSTR-3, GSTR-3B etc.	GST ASMT-01 to GST ASMT- 09	GST ASMT-13 + GST DRC-07	GST ASMT-14 + GST DRC-01 & GST ASMT-15 + GST DEC-07	GST ASMT-16 + GST DRC-07 & GST ASMT-17 + GST ASMT-18
Person	Registered Person	Taxable Person / Registered Person	Registered Person	Taxable Person	Taxable Person

547. Under Sections 62 & 63 of the respective GST Enactments, in the case of non-filers of returns and un-registered Person respectively, can be made directly notwithstanding anything to the contrary contained in Section 73, 74 & 74A.

548. Before the above assessments are to be made, Different types of Returns are to be filed by an Assessee / Taxpayer under the Rules. These returns will also accompany certain Auto-populated Returns to which I shall refer to in due course.

549. These Returns in various forms mentioned above, forms the basis of Self-Assessment under Section 59 of the respective GST Enactments, Provisional Assessment under Section 60 of the respective GST Enactments.

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Such Returns filed by the supplier can form the basis of Assessment in the case of a recipient who is a non-filer of Returns under Section 62 or an Assessment of unregistered persons under Section 63 or Summary Assessment under Section 64 of the respective GST Enactments in such cases as mentioned above.

550. In case, self-assessments are to be made based on the returns and other information that are available in the Returns in the Web Portal. At the time of scrutiny of Returns under Section 61 of the respective GST Enactments or under Section 60 of the respective GST Enactments where the Proper Officer concludes that it is a fit case for Provisional Assessment.

551. In the case of a Non-filer and / or an unregistered person, the information that throws up in the Web Portal either in the form of Outward Supplies in GSTR-1 of such a person, or the details of Outward Supply of the supplier reflected in GSTR-2A/2B of such person, or the information that are gathered from the E-way bills etc., of the supplier can form the basis of a Notice under Section 73 or under Section 74 of the respective GST Enactments.

552. These provisions have to be also read along with Chapter XII to XIV. The Hon'ble Supreme Court in **Armour Security case** referred to

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supra has also observed that all provisions of Act are to be read in consonance, and not in derogation of Section 59 of the respective GST Enactments.

RETURN FOR OUTWARD SUPPLY

553. A Taxable Person is required to file the "**Details of Outward Supply"** in **Form GSTR-1** under Section 37 read with Rule 59(1) of the respective GST Rules, for a "Tax Period" as defined in Section 2(106) of the respective GST Enactments. Details of such Outward Supply in Form **GSTR-1** of supplies gets auto-populated in **GSTR-2A** in the hands of the recipient.

554. Initially, a Return in **Form GSTR-1** was to be filed latest by the **10th** of the succeeding month of such Outward Supply in terms of Section 37 read with Rule 59(1) of the respective GST Rules.

555. Originally, Return in **GSTR-2** was meant for reporting details of inward supplies or purchases made by a taxpayer based on auto-populated

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details in **GSTR-2A**. However, due to technical glitches, Return in **GSTR-2** was never implemented.

556. If **GSTR-2** was in place, the taxpayers could have filed the same and their Input Tax Credit will flow into their Electronic Credit Ledger. In the absence of **GSTR-2**, Input Tax Credit is being claimed only through **GSTR-3B**. Upon reporting Input Tax Credit in **GSTR-3B**, the Input Tax Credit was being credited to the Electronic Credit Ledger.

557. **GSTR-2A** is supposed to be dynamic. It auto-generates a statement to reflect details of inward supplies based on **GSTR-1** filed by the supplier. It helps taxpayers to verify whether suppliers have uploaded invoices on the inward supply correctly. It updates continuously in real-time as the supplier uploads or amend their invoice data. It is mainly used for reconciliation of purchase records and Input Tax Credit verification.

558. The documents filed by the supplier in any Forms **GSTR-1, 5** and **6** would reflect in the next open Form **GSTR-2B** of the recipient irrespective of the Outward Supplier's date of filing.

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559. **GSTR-2B** is a static auto-generated Input Tax Credit statement introduced to simplify Input Tax Credit reconciliation.

560. As per the **Notification No.82/2020-Central Tax** dated **10.11.2020**, Form **GSTR-2B** is a statement which is generated on the basis of the information furnished by the Outward Suppliers in their respective Forms **GSTR-1, GSTR-5** and **GSTR-6**.

561. The Taxpayers were thus advised to refer to Form **GSTR-2B** for availing unutilized credit in Form **GSTR-3B**, and recourse to Form **GSTR-2A** (which is updated on near real time basis) was made available only for the purposes of cross-reference needed for additional details for availing Input Tax Credit and to ensure that there is no suppression of turnover either in **FORM GSTR-3B Monthly Return** or **FORM GSTR- 9 Annual Return**.

561. From 1st January, 2022 onwards, registered person must claim Input Tax Credit only on those invoices which appear in **FORM GSTR-2B** – vide

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Notification No.39/2021–Central Tax dated 21.12.2021.GSTR-2B. It will be made available once a month.

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562. It is to be noted that Form **GSTR-2B** will consist of all Form **GSTR-1, GSTR-5** and **GSTR-6** being filed by the Outward Suppliers, generally between the due dates of filing of two consequent **GSTR-1** or through Invoice Furnishing Facilities (IFFs), based on the filing option (monthly or quarterly) as chosen by the corresponding supplier.

563. For example, **Form GSTR-2B** for the month of February will consist of all the documents filed by the Outward Suppliers who choose to file their **Form GSTR-1** monthly from **00:00 hours on 12th February** to **23:59 hours on 11th March**.

564. **GSTR-2B** is called a "Static Statement" because once it is generated for a particular tax period. Its data does not change. It is an auto-generated Input Tax Credit (ITC) statement prepared on the basis of details uploaded by suppliers in their **GSTR-1**, **GSTR-5** and **GSTR-6** returns within a specified cut-off date.

565. Even if the supplier later amends, adds, or removes invoices after the generation of **GSTR-2B**, changes will not affect the already generated

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statement for that period. Any subsequent changes will appear only in the **GSTR-2B** of the next Tax Period.

566. Initially, when auto-populated Return in **GSTR-2B** was introduced, it was quite difficult to manually factor the Input Tax Credit based on the Credit Notes being issued by the Outward Supplier to a recipient.

567. However, after the advent of **Invoice Management System** sometime during the year **2024-2025**, the acceptance or otherwise of a Credit Note was to be reflected for the purpose of claiming Input Tax Credit and it was streamlined.

568. Similarly, the Government has introduced a mechanism, with effect from **July 2025** onwards, wherein the auto-populated liability field in the Form **GSTR-3B** are hardlocked from being edited by the Assessees. Earlier, the Assessees could edit such auto-filled fields in their **GSTR-3B** Returns leading to inaccuracy. Presently, in order to carry out any corrections, the Assessee has to make the same through **GSTR-1A** prior to filing his **GSTR-3B**.

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569. Thus, it is clear that Input Tax Credit that is reflected in Form **GSTR-2A** and Form **GSTR -2B** alone can be validly availed and utilized for discharging the Tax Liability in **Form GSTR-3B**.

MONTHLY RETURNS:

570. On every taxable Outward Supply, an outward supplier was initially required to discharge the tax liability by filing a Monthly Return electronically in **Form GSTR-3** in terms of Section 39 read with Rule 61(1) of the respective GST Rules by the 20th of the succeeding month declaring the tax liability. This requirement of filing a Return in **FORM GSTR-3** was however deleted by Section 17 of Act 31 of 2018.

571. However, as per the First *Proviso* to Section 39(1) of the respective GST Enactments, the Government may on the recommendation of the GST Council notify certain class of Registered Person who are to furnish return for every quarter or part thereof subject to such conditions and safeguards as may be specified therein.

572. **GSTR-3** was introduced as a consolidated monthly return

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combining details of the outward supplies, inward supplies, and tax liability after matching **GSTR-1, GSTR-2A** and **GSTR-2** and was intended to generate the final tax payable amount automatically.

573. If such a regular Return in Form **GSTR-3** could not be filed within such time for the Tax Period, such an Outward Supplier could file a late Return in **Form GSTR- 3B** where the time limit for furnishing **GSTR-1** and **GSTR-2** is extended by a Notification in terms of Rule 61(5) as it stood between **01.07.2017** and **31.12.2020**.

574. However, right from the inception it appears the Monthly Return in **FORM GSTR-3**, as was contemplated under Section 39 of the respective GST Enactments read with Rule 61 and to be filed by 20th of the succeeding month of the supply, was never implemented fully. This is evident from a reading of Paragraph 1.3 of Central Board of Excise and Customs, **Circular No.26/26/2017-GST** bearing Ref.F.No.349/164/2017/-GST wherein, it was clarified as under:-

> *" 1.3 It has been further decided that the time period for filing of FORM GSTR-2 and FORM GSTR-3 for*

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the months of July 2017 to March 2018 would be worked out by a Committee of officers and communicated later.

3.2 Since, the GST Council has decided that the time period of filing FORM GSTR-2 and FORM GSTR-3 for the months of July 2017 to March 2018 would be worked out by a committee of officers, the system based reconciliation prescribed under Circular No. 7/7/2017-GST dated 1st September 2017 can only be operationalized after the relevant notification is issued. The said circular is therefore kept in abeyance till such time."

575. It appears **Form GSTR-3** that was initially contemplated under Section 39 of the respective GST Enactments, Rule 61(1) of the respective GST Rules had to be suspended due to complications in the Web Portal for uploading the above Return.

576. The requirement of filing **Monthly Return** in Form **GSTR-3** under Rule 61(1) and the belated Return in **Form GSTR-3B** under Rule 61(5) were finally done away by amending the above Rules by substituting them with a new **Monthly Return** in **Form GSTR-3B** *vide* **Notification No.82/2020-Central Tax** dated **10.11.2020** with effect from **01.01.2021.**

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577. The above amendment also amended **Rule 60** of the respective GST Rules relating to furnishing details of Inward Supplies, which until then contemplated a filing of **Declaration of Inward Supply** in **Form GSTR-2** by a recipient based on the auto-populated Input Tax Credit reflected in **Form-2A** which was auto generated based on the **GSTR-1** of the supplier(s) for the supply effected to a recipient. By the above amendment, **Form GSTR-2** was done away.

578. The amendment also introduced auto-populated Form **GSTR-2B** with effect from **01.01.2021** to reflect **GSTR-1**, **GSTR-5** and **GSTR-6** filed by the respective Outward Suppliers.

579. However, the Government suspended the filing of **GSTR-2** and **GSTR-3** due to technical and operational difficulties faced during the initial implementation of GST in 2017.

580. The suspension was done through a series of notifications issued under the CGST Act extending the due dates for **GSTR-1**, **GSTR-2** and **GSTR-3**.

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581. During **2017-2018** and **2018-2019**, several Notifications were issued extending the "due date" for filing Outward Supply in **GSTR-1**, declaration of Inward Supply of goods or service in **GSTR-2** under Rule 60(1) and Monthly Return in **GSTR-3** under Rule 61 of CGST Rules, 2017.

582. Subsequently, instead of these returns, **GSTR-3B** was introduced as a simplified summary return for tax payment *vide* **Notification No.21/2017-Central Tax** dated **08.08.2017** read with **Notification No.10/2017-Central Tax** dated **28.06.2017**.

583. By **Notification No.49/2019-Central Tax** dated **09.10.2019**, Rule 61(5) was specified under Section 39 of the respective GST Enactments. Later, Rule 61 of CGST Rules, 2017 was fully substituted *vide* **Notification No.82/2020-Central Tax** dated **10.11.2020** with effect from **01.01.2021**.

584. With the amendment in Rule 61 of CGST Rules, 2017, **FORM GSTR-3B** has been notified as the monthly and quarterly return and **FORM GSTR-3** has been done away with.

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585. The amendment also introduced auto-populated Form **GSTR-2B** with effect from **01.01.2021** to reflect **GSTR-1**, **GSTR-5** and **GSTR-6** filed by the respective Outward Suppliers.

586. **GSTR-3B** is a self-declared summary return filed monthly by taxpayers to declare GST liability and pay taxes. **GSTR-3B** can be filed only after the full payment of tax liability, interest, late fees, or any other amount payable under GST has been made. The return cannot be successfully filed without discharging the complete liability declared in the return.

587. It includes details of outward taxable supplies, inward supplies liable to reverse charge, eligible Input Tax Credit, and tax payment. It serves as the primary return for payment of GST and is mandatory even if there are no transactions during the period (NIL return).

588. Upon filing of **GSTR-3B**, the eligible Input Tax Credit claimed by the taxpayer is credited to the Electronic Credit Ledger maintained on the GST Portal, which can subsequently be utilized for payment of output tax liability.

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589. Suffice to state that different kinds of returns are contemplated to be filed by an Assessee, taxpayer and a "Registered Person" under the respective GST Enactments and the Rules made thereunder and the onus is on such person and Registered Person to make a correct self-assessment and if there is any deviation, invocation of machinery under Section 73, Section 74 and under Chapter XIX which includes a Civil Penalty under Section 122 and General Penalty under Section 125 and penal proceedings under Section 132 of the respective GST Enactments would avail them.

590. If proper declarations are not made by such a person or taxable person under the provisions of the respective GST Enactments and under the Rules made thereunder, there is scope for invoking the machinery either under Section 73 or Section 74 of the respective GST Enactments.

591. Under the provisions of the respective GST Enactments and the Rules made thereunder, once the above mentioned returns under the Chapter IX read with Chapter VIII of the Rules are filed / generated, the returns filed have to be scrutinized under Sections 59 to 64 in Chapter XII of the respective GST Enactments.

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592. Under GST law, there is no restriction on declaring one's tax liability in full in GSTR-1, but paying only part of the said liability based on the availability of amounts in Electronic Credit Ledger and Electronic Cash Register. However, the Web Portal is not designed to accept incomplete returns without payment of tax. Though, the unpaid tax liability can be directly recovered by the Department, without resorting to Section 73 / Section 74 under Section 75(12) of the respective GST Enactments because of inherent weakness in the GST Web Portal, **GSTR-3B** cannot be filed unless the entire tax liability declared therein is fully paid.

593. As a result, persons having financial difficulties cannot file their **GSTR-3B** returns in time. When they file it belatedly, the Department demands interest for the entire Tax Liability. If had the GST Web Portal allowed such taxpayers to file the **GSTR-3B** return without full discharge of tax, they could avail Input Tax Credit and pay the tax to the extent of Input Tax Credit was available. Thus, because of the faulty design in the GST Web Portal, it is not possible to pay part of the tax.

594. This was discussed in the aforesaid GST Council Meetings and thus

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Section 50 of the respective GST Enactments was retrospectively amended to the effect that when **GSTR-3B** return is filed belatedly, interest will be computed only on that portion of tax which was paid in cash.

SELF-ASSESSMENT

595. Section 59 of the respective GST Enactments reads as under:-

Section 59. Self- assessment-

> "Every registered person shall self-assess the taxes payable under this Act and furnish a return for each tax period as specified under section 39."

596. Section 59 of the respective GST Enactments in Chapter-XII contemplates "self-assessment" by a tax payer/assessee. The heart and soul of the GST Enactment is self-assessment. The Department relies on the details that are declared in the Returns filed by an Assessee for the aforesaid purpose.

597. This is the foundational pillar under which the GST Enactments operates with a minimum interface with the Department prior to Scrutiny of such Return. The GST regime encourages honesty and transparency in the business. Thus, an Assessee is required to make proper declarations in various returns that are contemplated under the Rules and pay correct tax without

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evasion within the stipulated time.

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598. The Department also has several datum of transactions in its Web Portal which enhances detection of evasion of tax. It is for this purpose, the Proper Officers have also been empowered to initiate proceedings not only under Section 73 or Section 74, but also under chapter XIX of the respective GST Enactments where it appears that the tax has not been paid.

PROVISIONAL ASSESSMENT:

599. Section 60 of the respective GST Enactments deal with Provisional Assessment, where the "Taxable Person" is unable to determine his tax liability under Section 59. On a request being made by such Taxable Person, the Proper Officer shall Provisionally Assess the tax liability.

ASSESSMENT OF NON-FILER OF RETURNS:

600. As per Section 62, when a Registered Person fails to file a Return under Section 39 or Section 45, as the case may be, his tax liability is determined by the Proper Officer to the best of his Judgement taking into account all the relevant material which is available or which the Proper Officer has gathered.

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601. This provision is an exception to invocation of machinery under Section 73, 74 and 74A, if the Registered Person fails to respond to Section 46 Notice issued to a person who is a return defaulter under Sections 39, 44 and 45.

602. As per Section 62(2), if a valid return is filed within sixty days of the service of the Assessment Order under Sub-section (1), the said Assessment Order shall be deemed to have been withdrawn but the liability for payment of interest under Sub-section (1) of Section 50 or for payment of Late Fee under Section 47 shall continue.

ASSESSMENT OF UNREGISTERED PERSONS:

603. Assessment of unregistered persons gets triggered under Section 63, when a "Taxable Person" either fails to register when he is bound to do so, or whose registration has been cancelled under Sub-section (2) of Section 29 and is liable to pay tax. In such circumstances, the Proper Officer can proceed to assess the tax liability to the best of his Judgement.

604. This is notwithstanding anything to the contrary contained in the

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machinery under Section 73, 74 & 74A of the respective GST Enactments.

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SUMMARY ASSESSMENT:

605. Under Section 64, the Proper Officer may, with the prior permission of Additional Commissioner or Joint Commissioner, proceed to summarily assess the tax liability of a Taxable Person, on any evidence showing the tax liability of such person, if the Proper Officer has sufficient grounds to believe that any delay in doing so may adversely affect the interest of Revenue.

SELF-ASSESSMENT PROCEEDINGS UNDER SECTION 59 READ WITH RULES 59 to 84 OF THE RESPECTIVE GST RULES:

606. As mentioned above, Section 59 of the respective GST Enactments contemplates "**Self Assessment**" by every Registered Person. An elaborate procedure has been prescribed under the Rules for Scrutiny of the Return.

607. Once returns have been filed by a Registered Person by making a self-assessment under **Section 59** of the respective GST Enactments, they are to be scrutinised by the Proper Officer under **Section 61** of the respective GST Enactments. During the course of Scrutiny of the self-assessment returns filed

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under Section 59 of the respective GST Enactments, the Proper Officer has options specified therein.

608. In case, the Returns filed are found to have discrepancy, the Proper Officer is required to point out the same to the assessee in **FORM GST ASMT-10** during the course of scrutiny of such returns for the taxpayer to take corrective measures. If no such corrective measures are taken by such taxpayer, the Proper Officer can initiate appropriate proceedings / action under **Section 65** or under **Section 66** or under **Section 67** or directly proceedings under **Section 73 and / or 74, Section 122** and **Section 125 and Section 132 etc.,** of the respective GST Enactments as detailed below:-

Section 65	**Section 66**	**Section 67**	**Section 73 and / or 74**	**Section 122, Section 125 and Section 132 etc.,**
Audit	**Special Audit**	**Inspection, Search and Seizures**	**Determination of Tax**	**Penalty, General Penalty, Prosecution and Punishment etc.,**

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609. Thus, any of the above-mentioned measures can be taken by a Proper Officer under Section 61(3) of the respective GST Enactments in case no satisfactory explanation is furnished by an Assessee during the course of "Scrutiny of Return" under **Section 61** of the respective GST Enactments.

610. The Registered Person also has an option to either accept the discrepancy and pay the tax or furnish his explanation in **Form GST ASMT-11**.

611. In case the Reply of the Registered Person is accepted or if the Registered Person accepts the discrepancy pointed out in **Form GST ASMT-10**, the Proper Officer shall bring a closure in terms of Section 61(2) read with Rule 99 (3) in **Form GST ASMT-12**.

612. If the Reply in **Form GST ASMT-11** is not accepted, the Proper Officer has to proceed to invoke the machinery under Section 73 or Section 74 of the respective GST Enactments read with Rule 142 of the respective GST Rules, and proceed to determine the Tax, Penalty and Interest under the Scheme of the respective GST Enactments and the Rules.

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AUDIT UNDER SECTION 65 OF THE RESPECTIVE GST ENACTMENTS:

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613. Under Section 65(1) of the respective GST Enactments, the Commissioner or any Officer authorized by him, by way of a General or a Specific Order, may undertake Audit of any Registered Person for such period, at such frequency and in such a manner as may be prescribed. The Officers referred to in Sub-Section (1) may conduct an Audit at the place of business of the Registered Person or in their Office.

614. The Registered Person is required to be informed by way of a Notice not less than fifteen (15) working days prior to the conduct of Audit in such a manner as may be prescribed.

615. The Audit under Sub-Section (1) to Section 65 shall be completed within a period of three (3) months from the date of commencement of the Audit. Where such an Audit cannot be completed within three (3) months, the Commissioner or any Officer authorized by him, may for the reasons to be recorded in writing, extend the period by a further period not exceeding six (6) months.

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616. During the course of Audit, the Authorized Officer may require the Registered Person, —

> (i) to afford him the necessary facility to verify the books of account or other documents as he may require;
>
> (ii) to furnish such information as he may require and render assistance for timely completion of the Audit.

617. If the Assessee fails to cooperate, it will be treated as Suppression of Facts within the meaning of Explanation to Section 74 of the respective GST Enactments.

618. On conclusion of the Audit, the Proper Officer shall, within thirty (30) days, inform the Registered Person, whose records are audited, about the findings, his rights and obligations and the reasons for such findings.

619. Where the Audit conducted under Sub-Section (1) to Section 65 results in deduction of tax not paid or short-paid or erroneously refunded or Input Tax Credit wrongly availed or utilized, the Proper Officer may initiate action under Section 73 or Section 74 [or Section 74A] of the respective GST Enactments.

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620. Thus, if the Audit Report in Form **GST ADT-02** under Rule 101(5) is detailed, the Proper Officer may initiate action under Section 73 or Section 74 [or Section 74A] of the respective GST Enactments.

621. Thus, if it appears at this stage to the Proper Officer, no tax was paid or short-paid or tax was erroneously refunded or the Input Tax Credit was wrongly availed and / or utilized, Section 74 of the respective GST Enactments can be invoked.

SPECIAL AUDIT UNDER SECTION 66 OF THE RESPECTIVE GST ENACTMENTS:

622. Similarly, under Section 66 of the respective GST Enactments, at any stage of scrutiny under Section 61 or Inquiry, Inspection under Section 67 or any other proceedings before, an Officer not below the rank of Assistant Commissioner, having regard to the nature and complexity of the case and the interest of Revenue, is of the opinion that the value has not been correctly declared or the credit availed is not within the normal limits, he may, with the prior approval of the Commissioner, direct such Registered

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Person by a communication in writing to get his records including Books of Account examined and audited by a Chartered Accountant or a Cost Accountant as may be nominated by the Commissioner.

623. The Chartered Accountant or Cost Accountant so nominated shall submit a Report of such Audit, within a period of 90 days, duly signed and certified by him to the said Assistant Commissioner mentioning therein such other particulars as may be specified in **Form GST ADT-04** as per Section 66(2) of the respective GST Enactments.

624. Thus, under the scheme of Section 66(2) read with Rule 102 of the GST Rules, the Proper Officer has to rely on the Audit Report and issue Notice in **Form GST DRC-01** either under Section 73 or under Section 74 read with Rule 142 of the respective GST Enactments and the Rules made thereunder.

625. As per Section 66(4) of the respective GST Enactments, the Registered Person shall be given an opportunity of being heard in respect of any material gathered on the basis of Special Audit under Sub-Section (1) which is proposed to be used in any proceedings against him under this Act

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or the Rules made thereunder.

626. As per Section 66(6) of the respective GST Enactments, where the Special Audit conducted under Sub-Section (1) results in deduction of tax not paid or short-paid or erroneously refunded, or Input Tax Credit wrongly availed or utilized, the Proper Officer may initiate action under Section 73 or Section 74 [or Section 74A] of the respective GST Enactments.

INSPECTION, SEARCH AND SEIZURE UNDER SECTION 67 OF THE RESPECTIVE GST ENACTMENTS:

627. Similarly, under Section 67(1) of the respective GST Enactments, the Proper Officer, not below the rank of Joint Commissioner may authorize in writing any other Officer of central tax to inspect any places of business of the taxable person or the persons engaged in the business of transporting goods or the owner or the operator of warehouse or godown or any other place, if he has reasons to believe that —

> (a)*a taxable person has suppressed any transaction relating to supply of goods or services or both or the stock of goods in hand, or has claimed input tax credit in excess of his entitlement under this Act or has indulged in contravention of any of the provisions of this Act or the rules made thereunder to evade tax under this Act; or*
>
> *(b)any person engaged in the business of transporting goods or an owner or operator of a warehouse or a*

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godown or any other place is keeping goods which have escaped payment of tax or has kept his accounts or goods in such a manner as is likely to cause evasion of tax payable under this Act.

628. As per Section 67(2) of the respective GST Enactments, the Proper Officer, not below the rank of Joint Commissioner, either pursuant to an inspection carried out under Section 67(1) of the respective GST Enactments or otherwise, has reasons to believe that any goods liable to confiscation or any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under this Act, are secreted in any place, he may authorize in writing any other Officer of central tax to search and seize or may himself search and seize such goods, documents or books or things.

629. As per the First *Proviso* to Section 67(2) of the respective GST Enactments, where it is not practicable to seize any such goods, the Proper Officer, or any Officer authorized by him, may serve on the owner or the custodian of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such Officer.

630. As per the Second *Proviso* to Section 67(2) the documents or books

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or things so seized shall be retained by such Officer only for so long as may be necessary for their examination and for any inquiry or proceedings under this Act.

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631. As per Section 67(3) of the respective GST Enactments, documents, books or things referred to in Sub-Section (2) or any other documents, books or things produced by a taxable person or any other person, which have not been relied upon for the issue of Notice under this Act or the Rules made thereunder, shall be returned to such person within a period not exceeding thirty days of the issuance of the said Notice.

632. As per Section 67(4), the Officer authorized under Sub-Section (2) shall have the power to seal or break open the door of any premises or to break open any *almirah*, electronic devices, box, receptacle in which any goods, accounts, registers or documents of the person are suspected to be concealed, where access to such premises, *almirah*, electronic devices, box or receptacle is denied.

633. As per Section 67(5) of the respective GST Enactments, the person

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from whose custody any documents are seized under Sub-Section (2) shall be entitled to make copies thereof or take extracts therefrom in the presence of an Authorised Officer at such place and time as such Officer may indicate in this behalf except where making such copies or taking such extracts may, in the opinion of the Proper Officer, prejudicially affect the investigation.

634. As per Section 67(6), the goods so seized under Sub-section (2) shall be released, on a provisional basis, upon execution of a bond and furnishing of a security, in such manner and of such quantum, respectively, as may be prescribed or on payment of applicable tax, interest and penalty payable, as the case may be.

635. As per Section 67(7), where any goods are seized under Sub-section (2) and no notice in respect thereof is given within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized.

636. As per the *Proviso* to Section 67(7), the period of six months may, on sufficient cause being shown, be extended by the Proper Officer for a further period not exceeding six months.

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637. As per Section 67(8), the Government may, having regard to the perishable or hazardous nature of any goods, depreciation in the value of the goods with the passage of time, constraints of storage space for the goods or any other relevant considerations, by Notification, specify the goods or class of goods which shall, as soon as may be after its seizure under Sub-section (2), be disposed of by the Proper Officer in such manner as may be prescribed.

638. As per Section 67(9), where any goods, being goods specified under Sub-section (8), have been seized by a Proper Officer, or any Officer authorized by him under Sub-section (2), he shall prepare an inventory of such goods in such manner as may be prescribed.

639. As per Section 67(10), the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), relating to search and seizure, shall, so far as may be, apply to search and seizure under this section subject to the modification that Sub-section (5) of Section 165 of the said Code shall have effect as if for the word "Magistrate", wherever it occurs, the word "Commissioner" were substituted.

640. As per Section 67(11), where the Proper Officer has reasons to

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believe that any person has evaded or is attempting to evade the payment of any tax, he may, for reasons to be recorded in writing, seize the accounts, registers or documents of such person produced before him and shall grant a receipt for the same, and shall retain the same for so long as may be necessary in connection with any proceedings under this Act or the Rules made thereunder for prosecution.

641. As per Section 67(12), the Commissioner or an Officer authorized by him may cause purchase of any goods or services or both by any person authorized by him from the business premises of any taxable person, to check the issue of tax invoices or bills of supply by such taxable person, and on return of goods so purchased by such officer, such taxable person or any person in charge of the business premises shall refund the amount so paid towards the goods after cancelling any tax invoice or bill of supply issued earlier.

642. As per Section 68, the Government may require the person in charge of a conveyance carrying any consignment of goods of value exceeding such amount as may be specified to carry with him such documents and such devices as may be prescribed.

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643. As per Section 68(2), the details of documents required to be carried under Sub-section (1) shall be validated in such manner as may be prescribed.

644. As per Section 68(3), where any conveyance referred to in Sub-section (1) is intercepted by the Proper Officer at any place, he may require the person in charge of the said conveyance to produce the documents prescribed under the said Sub-section and devices for verification, and the said person shall be liable to produce the documents and devices and also allow the inspection of goods.

645. As per Section 69(1), where the Commissioner has reasons to believe that a person has committed any offence specified in Clause (a) or Clause (b) or Clause (c) or Clause (d) of Sub-section (1) of Section 132 which is punishable under Clause (i) or Clause (ii) of Sub-section (1) or Sub-section (2) of the said Section, he may, by order, authorize any Officer of central tax to arrest such person.

646. As per Section 69(2), where a person is arrested under Sub-section (1) for an offence specified under Sub-section (5) of Section 132, the

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Officer authorized to arrest the person shall inform such person of the grounds of arrest and produce him before a Magistrate within twenty-four hours.

647. As per Section 69(3), subject to the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), -

> "(a) *where a person is arrested under sub-section (1) for any offence specified under sub-section (4) of section 132, he shall be admitted to bail or in default of bail, forwarded to the custody of the Magistrate;*
>
> *(b) in the case of a non-cognizable and bailable offence, the Deputy Commissioner or the Assistant Commissioner shall, for the purpose of releasing an arrested person on bail or otherwise, have the same powers and be subject to the same provisions as an officer-in-charge of a police station."*

648. As per Section 70, the Proper Officer under this Act 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 in the same manner, as provided in the case of a Civil Court under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).

649. As per Section 70(2), every such inquiry referred to in Sub-section

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(1) shall be deemed to be a "judicial proceedings" within the meaning of Section 193 and Section 228 of the Indian Penal Code (45 of 1860).

650. As per Section 71(1), any Officer under this Act, authorized by the Proper Officer not below the rank of Joint Commissioner, shall have access to any place of business of a Registered Person to inspect books of account, documents, computers, computer programs, computer software whether installed in a computer or otherwise and such other things as he may require and which may be available at such place, for the purposes of carrying out any audit, scrutiny, verification and checks as may be necessary to safeguard the interest of Revenue.

651. As per Section 71(2), every person in charge of place referred to in Sub-section (1) shall, for the scrutiny by the Officer or audit party or the Chartered Accountant or Cost Accountant within a period not exceeding fifteen working days from the day when such demand is made, or such further period as may be allowed by the said Officer or the Audit party or the Chartered Accountant or Cost Accountant, on demand, make available to the Officer authorized under Sub-section (1) or the Audit party deputed by the Proper Officer or a Cost Accountant or Chartered Accountant nominated under Section 66,-

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"(i) such records as prepared or maintained by the registered person and declared to the proper officer in such manner as may be prescribed;
(ii) trial balance or its equivalent;
(iii) statements of annual financial accounts, duly audited, wherever required;
(iv) cost audit report, if any, under section 148 of the Companies Act, 2013 (18 of 2013);
(v) the income-tax audit report, if any, under section 44AB of the Income-tax Act, 1961 (43 of 1961); and
(vi) any other relevant record,"

652. As per Section 72, all officers of Police, Railways, Customs, and those Officers engaged in the collection of land revenue, including village Officers, Officers of State Tax and Officers of Union Territory Tax shall assist the Proper Officers in the implementation of this Act.

653. As per Section 72(2), the Government may, by Notification, empower and require any other class of Officers to assist the Proper Officers in the implementation of this Act when called upon to do so by the Commissioner.

654. It is precisely for this reason the expression used in Section 73 and Section 74 of the respective GST Enactments employ the expression *"where it appears to the Proper Officer that tax has not been paid or short-paid or*

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erroneously refunded or where Input Tax Credit has been wrongly availed or utilised by reason of Fraud, or any Wilful-Mis-statement or Suppression of Facts to evade tax…"

655. The GST Enactments which were enacted in the light of 101st Amendment to the Constitution of India was to ensure that the Assessee should declare the tax liability correctly and the tax payable by them in their returns.

656. However, if the returns filed appear to have resulted in evasion of tax, the Assessing Officer can issue a Notice. All that is required for issuing a Notice under Section 73 or Section 74 of the respective GST Enactments is the expression used "where it appears to the Proper Officer".

657. If it appears to the Proper Officer that any tax has not been paid or short-paid or erroneously refunded or where the Input Tax Credit had been wrongly availed or utilized for any reason, other than the reason of Fraud or any Wilful Mis-statement or Suppression of Facts to evade tax, the Proper Officer has to serve a Notice on the person chargeable with tax which has not been so paid or which has been so short-paid or to whom refund has erroneously been made, or who has wrongly availed or utilized the Input Tax Credit, requiring

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such a person to show cause as to why he should not pay the amount specified in the Notice along with interest and penalty.

658. Thus, all that is required is that it appears to the Assessing Officer that tax has not been paid or short-paid or erroneously refunded or where Input Tax Credit has been wrongly availed or utilized for any reason other than the reason of Fraud or any Wilful Mis-statement or Suppression of Facts to evade tax under Section 73 or Section 74 of the respective GST Enactments.

659. In the case of former, a Show Cause Notice can be issued within three years from the due date for furnishing of Annual Return for the Financial Year to which the tax not paid or short-paid or Input Tax Credit wrongly availed or utilized relates to or within three years from the date of erroneous refund. Such notice has to be issued at least three months prior to the time limit specified under Sub-Section 10 for issuance of order.

660. Where such a Notice is to be issued on account of Fraud or Willful Mis-statement or Suppression of Facts, a Notice can be issued for a period of five years from the due date for furnishing of Annual Return for the Financial

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Year to which tax was not paid or short-paid or Input Tax Credit was wrongly availed or utilized relates to or within five years from the date of erroneous refund. Such a Notice has to be issued at least six months prior to the time specified for issuance of order.

661. A reading of the above provision makes it clear that a Notice can be issued to an Assessee "where it appears" to the Proper Officer that tax was not paid or short-paid or erroneously refunded or Input Tax Credit wrongly availed or utilized either for any reason other than Fraud or any Willful Mis-statement or Suppression of Facts or by reason of Fraud or any Willful Mis-statement or Suppression of Facts.

662. On the other hand, the Notice that was to be issued by the Central Excise Officer of Proper Officer or the Assessing Officer as the case may be under the other mentioned Indirect Tax Enactments which have been subsumed into the GST Enactments, had to particularize the charge before issuance of a Notice where within the normal period of limitation or within the extended period of limitation. Such Officer could not have issued such a Notice, if he had no reasons to believe that tax or duty had escaped assessment

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in the self-assessment made by the Assessee under these Enactments.

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663. The respective GST Rules particularly, Rule 142 in Chapter XVIII contemplates a procedure to give effect under Section 73, Section 74 and Section 74A of the respective GST Enactments.

664. As per Rule 142(1A) of the respective GST Rules, the Proper Officer may, before service of Notice to the person chargeable with tax, interest and penalty, under Sub-Section (1) of Section 73 or Sub-Section (1) of Section 74 or Sub-Section (1) of Section 74A of the respective GST Enactments, as the case may be, communicate the details of any tax, interest and penalty as ascertained by the said officer in Part A of Form GST DRC-01A.

665. At the time of incorporation of Sub-Rule 1A to Rule 142, Rule 142(1A) of the respective GST Rules read as under:-

Rule 142(1A) of GST Rules (Before Amendment)	**Rule 142(1A) of GST Rules (After Amendment)**
142. Notice and order for demand of amounts payable under the Act	**142. Notice and order for demand of amounts payable under the Act**

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(1A) The proper officer **shall**, before service of notice to the person chargeable with tax, interest and penalty, under Sub-Section (1) of Section 73 or Sub-Section (1) of Section 74, as the case may be, **shall** communicate the details of any tax, interest and penalty as ascertained by the said officer, in Part A of Form GST DRC-01A.	(1A) The proper officer **may**, before service of notice to the person chargeable with tax, interest and penalty, under Sub-Section (1) of Section 73 or Sub-Section (1) of Section 74, as the case may be, communicate the details of any tax, interest and penalty as ascertained by the said officer, in Part A of Form GST DRC-01A.

PROCEDURE CONTEMPLATED FOR ISSUING NOTICE UNDER SECTION 73 AND 74 OF THE RESPECTIVE GST ENACTMENTS

666. Rule 142 in Chapter XVIII of the respective GST Rules has been amended from time to time to facilitate the taxpayer or Registered Person to pay tax at each stage of proceeding in consonance with Section 73 and Section 74 of the respective GST Enactments. For the sake of clarity, a snapshot of the aforesaid Rule which contemplates issuance of an Intimation in **FORM GST DRC-01A** and ending with **FORM GST DRC-08** is reproduced below in the following table:-

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Chapter-XVIII		
Demands and Recovery		
Notice and Order for amounts payable under the Act		
1	The proper Officer shall serve, along with the-	
(a)	Notice under sub section (1) of Section 73 or sub section (1) of Section 74 or sub section (2) of Section 76, a summary thereof electronically in **FORM GST DRC-01**,	Between 1.1.2017 and 31.3.2019
	Notice issued under section 52 or section 73 or section 74 or section 76 or section 122 or section 123 or section 124 or section 125 or section 127 or section 129 or section 130, a summary thereof electronically in **FORM GST DRC-01**,	Inserted vide Notification No. 16/2019 - Central Tax, dated 29.03.2019 with effect from 01.04.2019.
(b)	Statement under sub section (3) of section 73 or sub section (3) of Section 74, a summary thereof electronically in FORM GST DRC-02, specifying therein the details of the amount payable.	Between 1.1.2017 and 31.3.2019
(1A)	The **proper officer shall**,	Inserted vide

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	before service of notice to the person chargeable with tax, interest and penalty, under sub-section (1) of Section 73 or sub-section (1) of Section 74, as the case may be, **shall communicate** the details of any tax, interest and penalty as ascertained by the said officer, in **Part A** of **FORM GST DRC-01A**.”;	**Notification No. 49/2019-C.T., dated 9-10-2019** The expression “**proper officer shall**” was substituted with “**proper officer may**” and the expression “**shall communicate” was substituted with the** word **“communicate”** vide **Notification No.79/2020- Central Tax dated 15.10.2020 with effect from 15.10.2020**.
(2)	Where, before the service of notice or statement, the person chargeable with tax makes payment of the tax and interest in accordance with the provisions of sub-section (5) of section 73 or, as the case may be, tax, interest and penalty in accordance with the provisions of sub-section (5) of section 74, **or where any person makes payment of tax, interest, penalty or any other amount due in accordance with the provisions of the Act whether on his own ascertainment or, as communicated by the proper officer under sub-**	The bold portion inserted vide **Notification No. 16/2019 - Central Tax, dated 29.03.2019 with effect from 01.04.2019**. Underlined portion inserted by **Notification No. 49/2019-Central Tax dated 9.10.2019 with effect from 9.10.2019**

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	rule (1A)," he shall inform the proper officer of such payment in **FORM GST DRC-03** and the proper officer shall issue an acknowledgement, accepting the payment made by the said person in **FORM GST DRC-04.**	
(2A)	Where the person referred to in sub-rule (1A) has made partial payment of the amount communicated to him or desires to file any submissions against the proposed liability, he may make such submission in **Part B** of **FORM GST DRC-01A**.".	Inserted vide **Notification No. 49/2019-C.T., dated 9-10-2019.**
(3)	Where the person chargeable with tax makes payment of tax and interest under sub-section (8) of section 73 or, as the case may be, tax, interest and penalty under sub-section (8) of section 74 within thirty days of the service of a notice under sub-rule (1), **or where the person concerned makes payment of the amount referred to in sub-section (1) of section 129 within fourteen days of detention or seizure of the goods and conveyance,** he	-do- The underlined words were substituted with "Seven days of the notice issued under sub- section (3) of Section 129 but before the issuance of order under the said sub-section 3" vide **Notification No. 40/2021-CT dated 29.12.2021with effect**

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	shall intimate the proper officer of such payment in **FORM GST DRC-03** and the proper officer shall issue an order in **FORM GST DRC-05** concluding the proceedings in respect of the said notice.	**from 01.01.2022**.
(4)	The representation referred to in sub-section (9) of section 73 or sub-section (9) of section 74 or sub-section (3) of section 76 **or the reply to any notice issued under any section whose summary has been uploaded electronically in FORM GST DRC-01 under sub-rule (1)** shall be **furnished** in FORM GST DRC-06.	-do-
(5)	A summary of the order issued under sub section (9) of Section 73 or sub section (9) of Section 74 or sub section (3) of Section 76 shall be uploaded electronically in **FORM GST DRC-07**, specifying therein the amount of tax, interest and penalty payable by the person chargeable with tax.	A summary of the order issued under section 52 or section 62 or section 63 or section 64 or section 73 or section 74 or section 75 or section 76 or section 122 or section 123 or section 124 or section 125 or section 127 or section 129 or section 130 shall be uploaded electronically in **FORM GST DRC-07**, specifying therein the amount of **tax, interest**

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		and penalty payable by the person chargeable with tax*.
(6)	The order referred to in sub-rule (5) shall be treated as the notice for recovery.	
(7)	Any rectification of the order, in accordance with the provisions of section 161, shall be made by the proper officer in **FORM GST DRC-08**.".	Where a rectification of the order has been passed in accordance with the provisions of section 161 or where an order uploaded on the system has been withdrawn, a summary of the rectification order or of the withdrawal order shall be uploaded electronically by the proper officer in **FORM GST DRC-08**.".

** The underlined words were substituted with "tax, interest and penalty, as the case maybe, payable by the person concerned" vide Notification No. 40/2021-CT dated 29.12.2021with effect from 01.01.2022.*

667. This is intended to give an opportunity to the Assessee to pay tax before issuance of a Notice under Section 73 or Section 74 (Section 73(5) / Section 74(5)) of the respective GST Enactments. In the former case, only tax

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has to be paid by an Assessee. In the latter case, tax along with interest and penalty equivalent to 50% of such tax has to be paid and informed in writing of such payment in GST DRC-03 as contemplated under Rule 142(2) of the respective GST Rules.

668. Rule 142(1A) of the respective GST Rules was inserted into the Rules by **Notification No.49/2019-Central Tax** dated **09.10.2019** with effect from 09.10.2019. By an amendment to Rule 142(1A) of the respective GST Rules by **Notification No.79/2020-Central Tax** dated **15.10.2020** with effect from **15.10.2020**, the discretion has been vested with the Proper Officer to issue a Notice or Intimation in **GST DRC-01A**.

669. Since the dispute centres around interpretation of the expressions **"where it appears"**, and **"by reason of", "Fraud", "Wilful Mis-statement"** and **"Suppression of facts to evade tax"** in Section 74, it will be therefore useful to refer to manner in which it was engrafted in the respective GST Enactments.

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670. Thus, it is evident that a Notice under Section 73 or Section 74 of the respective GST Enactments has to follow the procedure under Rule 142 of the respective GST Rules. Along with Notice under Section 73 or Section 74 of the respective GST Enactments, intimation in **FORM GST DRC- 01A** was to be mandatorily issued for the period between 09.10.2019 and 14.10.2020 followed by Summary of Notice in **GST DRC-01**. For the period between 01.01.2017 and 31.03.2019, apart from a Notice under Section 73 or Section 74 of the respective GST Enactments, a summary in **FORM GST DRC-01** was to be issued. For the period starting from 15.10.2020, issuance of Intimation in **FORM GST DRC-01A** was made discretionary.

671. With effect from 1st April, 2019 *vide* **Notification No.16/2019-Central Tax** dated **29.03.2019**, **FORM GST DRC-01** was substituted. The Notice under Section 73 or Section 74 of the respective GST Enactments is required to specify the reason for its issuance, unless such reasons have been already communicated under Section 65, Section 66 or under Section 67 or where there is a failure to furnish the details when called upon to furnish during the course of scrutiny assessment under Section 61 of the respective GST

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672. Intimation in **FORM GST DRC-01A** was a precursor to a Notice along with summary in **FORM GST DRC-01** for the purpose of the above provisions of the respective GST Enactments.

673. Issuance of **FORM GST DRC-01A** was made discretionary in terms of the amendment *vide* **Notification No.79/2020-Central Tax** dated **15.10.2020** with effect from **15.10.2020**. **FORM GST DRC-01A** is an Intimation and **FORM GST DRC-01** is a Notice along with summary under the provisions mentioned above.

674. Thus, the Scheme under the respective GST Enactments and the Rules made thereunder place a heavy reliance on the declarations made by a Registered Person in the returns. Any incorrect declarations made thereunder will attract any of the measures contemplated under the Act. If it appears to a Proper Officer that any tax has not been paid or short-paid or erroneously refunded or where Input Tax Credit has been wrongly availed or utilised by reason of Fraud or Willful Mis-statement or Suppression of Facts to evade tax, machinery under Section 74 of the respective GST Enactments can be preserved

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against such an Assessee.

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675. It is thus evident that the provisions of the respective GST Enactments, the Rules and the Notifications issued thereunder form a complete code and protects the tax payer against any oppressive action by a Proper Officer. Any violation of the Act or Rules or Notice will attract appropriate proceedings including a determination and recovery proceeding under Chapter XV of the respective GST Enactments under Section 73 and Section 74 and other provisions.

676. The respective GST Rules particularly, Rule 142 in Chapter XVIII contemplates a procedure to give effect under Section 73, Section 74 and Section 74A of the respective GST Enactments.

677. As per Rule 142(1A) of the respective GST Rules, the Proper Officer may, before service of Notice to the person chargeable with tax, interest and penalty, under Sub-Section (1) of Section 73 or Sub-Section (1) of Section 74 or Sub-Section (1) of Section 74A of the respective GST Enactments, as the case may be, communicate the details of any tax, interest and penalty as ascertained by the said officer in Part A of Form **GST**

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DRC-01A.

678. This is intended to give an opportunity to the Assessee to pay tax before issuance of a Notice under Section 73 or Section 74 (Section 73(5) / Section 74(5)) of the respective GST Enactments. In the former case, only tax has to be paid by an Assessee. In the latter case, tax along with interest and penalty equivalent to 15% of such tax has to be paid and informed in writing of such payment in **GST DRC-03** is contemplated under Rule 142(2) of the respective GST Rules.

679. Mandatory issuance of a Notice or Intimation in **GST DRC-01A** has been now dispensed with by an amendment to Rule 142(1A) of the respective GST Rules by **Notification No.79/2020-Central Tax** dated **15.10.2020** with effect from **15.10.2020**. The discretion has been vested with the Proper Officer to issue a Notice or Intimation in **GST DRC-01A**.

680. Thus, the Notice in **Form GST ASMT-10** issued under Section 61(1) of the respective GST Enactments read with Rule 99(1) of the respective GST Rules forms the substratum of the proceedings under Section 73 or Section 74 read with Rule 142 of the above-mentioned Enactments and the Rules.

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681. Whichever mode is adopted, the bottom line is limitation prescribed under the respective provisions have to be kept in mind. For initiation of proceedings under Section 73 and Section 74 of the respective GST Enactments are concerned, an elaborate procedure has been prescribed under Chapter XVIII of the respective GST Rules starting from Rules 142-161.

682. If the Notice in **Form GST ASMT-10** is issued under Section 61(1) of the respective GST Enactments read with Rule 99(1) is detailed, the Show Cause Notice under Section 73 or Section 74 read with Rule 142 of the above-mentioned Enactments and the Rules need not be detailed as the Officer already has material to invoke the machinery under Section 73 or Section 74 read with Rule 142 of the above-mentioned Enactments and the Rules which has already been communicated and the Assessee was called upon to the Reply in **Form GST ASMT-11**.

683. Therefore, it is not open for the Petitioners to argue that if the Notice in **Form GST DRC-01** is bereft of the details of the grounds for invoking the machinery under Section 74 of the respective GST Enactments, the proceeding is vitiated.

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684. On the other hand, if the Notice in **Form GST ASMT-10** issued under Section 61(1) of the respective GST Enactments read with Rule 99(1) is bereft of details regarding Fraud, Wilful-Misstatement or Suppression of Facts, and where the Show Cause Notice and summary thereof in **Form GST DRC-01** is also bereft of such details to justify the invocation of machinery under Section 74 of the respective GST Enactments, it can be held that no jurisdictional facts were available to undertake the above exercise either under Section 74 read with Rule 142 of the above-mentioned Enactments and the Rules.

685. Therefore, if the demand is confirmed based on such Notice and Order(s) are passed and a summary is issued in **Form GST DRC-07**, it can be set aside and the case has to be referred back for *de novo* adjudication by treating the Assessment Order as an addendum to the Show Cause Notice and summary thereof in **Form GST DRC-01**.

686. However, even if the Notice in **Form GST ASMT-10** issued under

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Section 61(1) of the respective GST Enactments read with Rule 99(1) is bereft of details regarding Fraud, Wilful Misstatement or Suppression of Facts to evade tax, but the Show Cause Notice and summary thereof in **Form GST DRC-01** is detailed, the proceedings cannot be interfered as the reasons required for invocation of the extended period of limitation under Section 74 of the respective GST Enactments stands complied and communicated.

687. If during the course of scrutiny under Section 61 read with Rule 99, a Registered Person refuses to furnish the details called for, it would amount to "suppression" for the purposes of Section 74 in terms of Explanation 2 to Section 74, which stood deleted *vide* the Finance (No.2) Act, 2024, (15 of 2024) dated 16.08.2024. The said Explanation read as under:-

> "***Explanation 2*** *: For the purposes of this Act, the expression "suppression" shall mean non-declaration of facts or information of which a taxable person is required to declare in the statement, report or any other document furnished under this Act or the rules made thereunder or failure to furnish any information on being asked for, in writing, by the proper officer."*

688. As per Section 61(3) of the respective GST Enactments,

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i. *in case no satisfactory explanation is furnished within a period of thirty days of being informed by the proper officer or such further period as may be permitted by him; or*

ii. *where the registered person, after accepting the discrepancies, fails to take the corrective measure in his return for the month in which the discrepancy is accepted,*

689. As mentioned above, the Proper Officer may initiate appropriate action including those under Section 65 or Section 66 or Section 67, or proceed to determine the tax and other dues under Section 73 or Section 74 or presently under Section 74A of the respective GST Enactments during the course of scrutiny of the self-assessment filed under Section 59 of the respective GST Enactments.

690. Thus, even if scrutiny of the self-assessment returns filed under Section 59 is not undertaken, there are other avenues which may justify issuance of Notices under Section 73 or Section 74 of the respective GST Enactments in **Form GST DRC-01**. For instance, after the Reply in **Form GST ASMT-11** is found to be not satisfactory, the case can be referred for **Audit** under **Section 65**, or **Special Audit** under **Section 66** or for **Inspection**, **Search** and **Seizure**

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under **Section 67** of the respective GST Enactments in terms of Section 61(3) of the respective GST Enactments.

691. Therefore, it is clear that if **Form GST ASMT-10** has necessary foundational facts to justify invocation of extended period of limitation under Section 74 of the respective GST Enactments, a Notice issued in **Form GST DRC-01** need not be detailed if the Reply of the Assessee in **Form GST ASMT-11** is found to be not satisfactory.

692. In a recent Judgment of this Court in **Mandarina Apartment Owners Welfare Association** Vs. **Commercial Tax Officer**, 2024 (88) G.S.T.L. 190 (Mad.) / (2024) 21 Centax 35 (Mad.), it was held that after Scrutiny under Section 61 of the respective GST Enactments if discrepancy is found and **GST FORM ASMT 10** is issued then Section 73 and section 74 of the respective GST Enactments can be invoked relying on the Scrutiny under Section 61 of the respective GST Enactments.

693. Relevant portion of the said Judgement reads as under:-

> *"14. Therefore, the consequence of not issuing the ASMT-10 notice, in spite of noticing discrepancies after selecting and scrutinizing returns, would be that it vitiates the scrutiny*

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process, including the discrepancies noticed thereby and the quantification, if any, done in course thereof. As regards adjudication, the limited impact would be that the scrutiny under Section 61 cannot be relied upon for adjudication."

DISCUSSION ON SECTION 73 & 74 OF THE RESPECTIVE GST ENACTMENTS

694. **Section 73** of the respective GST Enactments deals with issuance of a Notice to an Assessee **for any reason**, **other than the reason** of:-

(i) F**raud** or
(ii) **any Wilful-Mis-statement** or
(iii) **Suppression of Facts** to **evade tax**

695. If **"it appears to the Proper Officer"**, that an Assessee has not paid tax or short-paid or has been erroneously refunded of tax or Input Tax Credit was wrongly availed and / or utilised by an Assessee, *simpliciter* the Proper Officer can issue Notice under section 73 of the Act.

696. On the other hand, **Section 74** of the respective GST Enactments, applies to a situation where it appears that tax has been short-paid or not paid by an Assessee or where Input Tax Credit (ITC) has been wrongly availed and / or utilised by an Assessee by reasons of

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(i) **Fraud** or
(ii) **any Wilful-Mis-statement** or
(iii) **Suppression of Facts** to **evade tax**

697. Therefore, the Proper Officer can initiate proceedings for its determination and recovery under the three specified circumstances. The expression used is **"where it appears to the Proper Officer"** therefore, if it "appears to the Proper Officer" that by reasons of **Fraud or any Wilful Mis-statement or Suppression of Facts to evade tax**, tax was short-paid or not paid by a person chargeable with tax or where Input Tax Credit (ITC) has been wrongly availed and / or utilised by such a person, a Notice under Section 74 can be issued.

698. The limitation for issuance of Notice and for passing order under Section 73 and 74 of the respective GST Enactments are as under:-

Time limit specified for	**Section 73 of the respective GST Enactments**	**Section 74 of the respective GST Enactments**
Issuance of Show Cause Notice	At least **three months prior to the time limit** specified in sub-section (10) for issuance of order	At least **six months** prior to the time limit specified in sub-section (10) for issuance of order

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Issuance of Order under sub-section (10)	**Within three years from**	**Within a period of five years from**
	the **due date for furnishing of annual return** for the financial year, where tax was not paid or short paid or where there was wrong availing or utilization of input tax credit; or erroneous refund of tax.	
Circumstances, Under which a notice can be issued.	**for any reason, other than the reason**	**by reason**
	of fraud, or any wilful-misstatement or suppression of facts to evade tax	

699. For the sake of convenience and clarity, both Section 73 and Section 74 of the Central Goods and Services Tax, 2017 (hereinafter referred to as the 'CGST Act') [which is *pari materia* with Sections 73 and 74 of the Tamil Nadu Goods and Services Tax Act (hereinafter referred to as the 'TNGST Act')] is extracted hereunder:-

Section 73 of the CGST Act	Section 74 of the CGST Act
(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised ***for any reason, other than the reason of fraud or any wilful-misstatement or suppression of facts to evade tax,***	*(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised* ***by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax,*** *he shall serve*

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he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty leviable under the provisions of this Act or the rules made thereunder.	*notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.*
*(2) The proper officer shall issue the notice under sub-section (1) at least **three months** prior to the time limit specified in sub-section (10) for issuance of order.*	*(2) The proper officer shall issue the notice under sub-section (1) at least **six months** prior to the time limit specified in sub-section (10) for issuance of order.*
(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.	
(4) The service of such statement shall be deemed to be service of notice on such person under sub-section (1), subject to the condition that the grounds relied upon for such tax periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.	*(4) The service of statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful-misstatement or suppression of facts to evade tax, for periods other than those covered under*

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	subsection (1) are the same as are mentioned in the earlier notice.
(5) The person chargeable with tax may, before service of notice under subsection (1) or, as the case may be, the statement under sub-section (3), pay the amount of tax along with interest payable thereon under section 50 on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.	*(5) The person chargeable with tax may, before service of notice under sub-section (1), pay the amount of tax along with interest payable under section 50 and a penalty equivalent to fifteen per cent. of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.*
(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1) or, as the case may be, the statement under sub-section (3), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.	*(6) The proper Officer on receipt of such information, shall not serve any notice under sub-section (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder;*
(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.	
(8) Where any person chargeable with tax under sub-section (1) or sub-section (3) pays the said tax along with interest payable under section 50 within thirty days of	*(8) Where any person chargeable with tax under sub-section (1) pays the said tax along with interest payable under section 50 and a penalty*

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issue of show cause notice, no penalty shall be payable and all proceedings in respect of the said notice shall be deemed to be concluded.	*equivalent to twenty-five per cent. of such tax within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded.*
(9) The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and a penalty equivalent to ten per cent. of tax or ten thousand rupees, whichever is higher, due from such person and issue an order.	*(9) The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order.*
*(10) The proper officer shall issue the order under sub-section (9) within **three years** from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within **three years** from the date of erroneous refund.*	*(10) The proper officer shall issue the order under sub-section (9) within a period of **five years** from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within **five years** from the date of erroneous refund.*
(11) Notwithstanding anything contained in sub-section (6) or sub-section (8), penalty under sub-section (9) shall be payable where any amount of self-assessed tax or any amount collected as tax has not been paid within a period of thirty days from the due date of payment of such tax.	*(11) Where any person served with an order issued under sub-section (9) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent. of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to*

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	be concluded.
*The **Explanation 1.— For the purposes of section 73 and this section,—*** *(i) the expression —all proceedings in respect of the said notice‖ shall not include proceedings under section 132;* *(ii) where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under section 73 or section 74, the proceedings against all the persons liable to pay penalty under sections 122, 125, 129 and 130 are deemed to be concluded.* ***Explanation 2.**—For the purposes of this Act, the expression —suppression shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer.*	

700. These provisions deal with issuance of Notice, where tax and duty has not been paid as prescribed. The language in Section 74 is also 73 of the respective GST Enactments makes it clear for invoking the power either under Section 73 or Section 74 of the respective GST Enactments, it has to **"appear"** to the **"proper officer"** that tax has not been (i) paid or (ii) short-paid or (iii) erroneously refunded or (iv) Input Tax Credit has been wrongly availed and / or utilised as the expression used in both Section 73 and Section 74 of the respective GST Enactments is **"Where it appears"** to the **"Proper Officer".**

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701. For the sake of convenience, the dichotomy between Section 73 & 74 of the respective GST Enactments are tabulated below:-

<table>
<tr><th>TO WHOM IT SHOULD APPEAR</th><th colspan="4">WHAT SHOULD APPEAR</th></tr>
<tr><td rowspan="5">The Proper Officer</td><td colspan="2">SECTION 73</td><td colspan="2">SECTION 74</td></tr>
<tr><td colspan="4">that any tax has not been</td></tr>
<tr><td>(i)</td><td>(ii)</td><td>(iii)</td><td>(iv)</td></tr>
<tr><td>Paid; or</td><td>Short paid; or</td><td>Erroneously refunded; or</td><td>where input tax credit has been wrongly availed or utilised</td></tr>
<tr><td colspan="2">For any reason, other than the reason of</td><td colspan="2">By reasons of</td></tr>
<tr><td colspan="4">(i) fraud, or
(ii) any wilful-misstatement or
(iii)suppression of facts to evade tax</td></tr>
</table>

SIMILARITY BETWEEN SECTION 73 & 74 OF THE GST ENACTMENTS AND SECTION 28 OF THE CUSTOM ACT, 1962, SECTION 11A OF THE CENTRAL EXCISE ACT, 1944 AND SECTION 73 OF THE FINANCE ACT, 1994

702. Both Section 73 and Section 74 of the respective GST Enactments are inspired from the above three Central Indirect Tax Enactments *viz.,*

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Section 11A(4) of the **Central Excise Act, 1944**, **Section 28(4)** of the **Customs Act, 1962** and ***Proviso*** to **Section 73** of the **Finance Act, 1994.**

703. Only the names of the Officers under **Section 11A** of the **Central Excise Act, 1944** and **Section 73** of the **Finance Act, 1994** were replaced and substituted with that of the Proper Officer as in **Section 28** of the **Customs Act, 1962** in Section 73 and Section 74 of the respective GST Enactments**.**

704. The name of the Officers in these Indirect Tax Enactments and Section 73 and Section 74 of the respective GST Enactments are as under:-

Proper Officer	Central Excise Officer
Section 28 of Customs Act, 1962	Section 11A of the Central Excise Act, 1944
Section 73 & 74 of the respective GST Enactments	Section 73 of the Finance Act, 1994

705. Thus, there is no doubt that Section 73 & 74 are heavily inspired from these provisions and are the amalgam of these provisions with certain modifications.

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706. There the threshold under Section 11A of the Central Excise Act, 1985, Section 28 of the Customs Act, 1962 and Section 73 of the Finance Act, 1994 for issuance of Notice was much higher as compared to Section 74 [Section 67 of the Second Draft GST Model Law] as also Section 73 of the respective GST Enactments.

707. There, the concerned Officer could invoke the machinery for recovery and determination of tax / duty only if there was a definite information regarding such tax / duty as having not paid or short-paid or erroneously refunded.

708. It is for this purpose, the Notice issued to a manufacturer, or an importer / exporter or, the Registered Person under these enactments, had to specify the details of such tax and reasons in such Notice.

709. Though, the provisions for recovery of tax both in the First and Second Model GST Law were inspired from these provisions from the above mentioned Indirect Tax Legislations, they were drastically diluted in the **8th GST Council Meeting** held on **03.01.2017** and on **04.01.2017** under a mistaken notion that the draft of Section 67 did not provide for "**due process**". Thus, both Section 73 and 74 of the respective GST Enactments

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reads the way they read now.

710. The phrase "**Where it appears**" in both Section 73 and Section 74 of the respective GST Enactments implies a lower threshold for issuance of a Notice as compared to **Section 28** of the **Customs Act, 1962**, **Section 11A** of the **Central Excise Act, 1944** and **Section 73** of the **Finance Act, 1994**, as the Central Excise Officer or Proper Officer as the case may be should have a definite information of any tax or duty not paid, short-paid, not levied, short-levied, or erroneously refunded.

711. A conjoint reading of the phrase "**where it appears**" along with the phrase "**by reason of**" employed in Section 74 of the respective GST Enactments and the phrase "**where it appears**" with the phrase "**for any reason other than the reason of"** in Section 73 of the respective GST Enactments, before the words **"Fraud, Wilful-Mis-statement, Suppression of Facts to evade tax"** would indicate that only recording a *prima facie* view before issuing a Notice is sufficient while exercising the power under Section 73(1) and Section 74(1) of the respective GST Enactments.

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712. The threshold in both Section 73 and Section 74 of the respective GST Enactments was drastically lowered as compared to the threshold in **Section 11A(4)** of the **Central Excise Act, 1944**, **Section 28(4)** of the **Customs Act, 1962** and ***Proviso*** to **Section 73** of the **Finance Act, 1994** with the addition of the expression "**Where it appears**" in the beginning of both Section 73 and 74 of the respective GST Enactments, pursuant to the deliberation in the 8th GST Council Meeting referred to *supra.*

713. Under the provisions of the respective GST Enactments, the "Proper Officer" should have a *prima facie* information which would entail the Proper Officers to entertain a view that tax has been short-paid, not paid or erroneously refunded or where Input Tax Credit has been wrongly availed or utilized by a person. Whether indeed the tax was not paid or not paid or erroneously refunded back has to be determined. The Proper Officer has to however convey the same in the Show Cause Notice.

714. Thus, for invoking the machinery under Section 73 & Section 74 of the respective GST Enactments, existence of the Jurisdictional Fact / Foundational Fact is a must. Existence of Jurisdictional Fact / Foundational

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Fact should be discernable from the records for it to appear to the Proper Officer that tax has not been paid or short paid or erroneously refunded or where Input Tax Credit has been wrongly availed or utilized.

715. The requirement of existence of Foundational Fact is satisfied "**Where it appears**" if the above circumstances are there before him. Since the expression "**Where it appears**" has been used, it implies existence of information (ocular presence of such information from the records) and exercise of mental faculty implying rationality. If the above criteria is satisfied it can be said the *sine qua non* for issuance of Notice under the respective provisions are there.

716. Thus, if it appears to the Proper Officer, that such non-payment of tax or short-payment of tax or erroneous refund of tax or wrong availment and / or utilization of Input Tax Credit was by reason of Fraud or Wilful Mis-Statement or Suppression of Facts to evade tax, extended period of limitation under Section 74 is available.

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717. On the other hand, if it appears to the Proper Officer, that such non-payment of tax, or short-payment of tax, or erroneous refund of tax or wrong availment and / or utilization of Input Tax Credit was for any reason, other than Fraud or Wilful Mis-statement or suppression of fact, Notice has to be issued only under Section 73 of the respective GST Enactments. Such instances cannot be disguised as a Notice under Section 74 of the respective GST Enactments.

718. For the sake of clarity, the relevant portion of the above Indirect Tax Enactments are reproduced below:-

Section 11A of the **Central Excise Act, 1944**	**Section 28** of the **Customs Act, 1962**	**Section 73** of the **Finance Act, 1994**
11-A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded:- (1) ….. (2) ….. (3) ….. (4) Where any duty of excise has not	**28. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously-** (4) Where any duty has not been levied or not paid or has been short-levied or short-paid or	**Provided that where any service tax has not been levied or paid or has been short-levied or short paid or erroneously refunded by the reason of-** (a) Fraud; or (b) Collusion; or (c) Wilful misstatement; or

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been levied or paid or has been short-levied or short-paid or erroneously refunded, by the reason of- (a) Fraud; or (b) Collusion; or (c) Any wilful misstatement; or (d) Suppression of facts; or (e) Contravention of any of the provisions of this Act or of the Rules made thereunder with intent to evade payment of duty, By any person chargeable with the duty, the Central Excise Officer shall, within five years from the relevant date, serve notice on such person requiring him to show cause why he should not pay the amount specified in the	erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of- (a) Collusion; or (b) Any wilful misstatement; or (c) Suppression of facts, By the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or not paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.	(d) Suppression of facts; or (e) Contravention of any of the provisions of this Chapter or of the Rules made thereunder with the 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.

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notice along with interest payable thereon under Section 11-AA and penalty equivalent to the duty specified in the notice.		

719. There is a marked difference in the language employed in the above-mentioned Indirect Tax Legislations and Section 73 and Section 74 of the respective GST Enactments.

720. The phrase "**Where it appears**" which appears both in the beginning of Section 73 and Section 74 of the respective GST Enactments, is conspicuously absent under **Section 28** of the **Custom Act, 1962**, **Section 11A** of the **Central Excise Act, 1944** and **Section 73** of the **Finance Act, 1994**.

721. If the ratio of the Hon'ble Supreme Court rendered particularly in the context of **Section 11A** of the **Central Excise Act, 1944**, **Section 28** of the **Customs Act, 1962** & **Section 73** of the **Finance Act, 1994** are to be

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applied, such reason has to be also communicated to the Assessee.

722. However, as mentioned above, in view of the departure in both Section 73 and Section 74 of the respective GST Enactments and the Rules made thereunder, the threshold was lowered.

723. That apart, under the respective GST Rules, the flow of information particularly in the case of a Registered Person during the course of a scrutiny under Section 61, Audit under Section 65, Special Audit under Section 66, Inspection, Search & Seizure under Section 67, ensures communication of reason for invoking the machinery under Section 73 & 74 of the respective GST Enactments.

724. Therefore, even though the expression "**Where it appears"** have been used in Section 74 of the respective GST enactments and the threshold for issuance of the Notice was lowered, it is noticed that the communication of reasons during the course of the above proceedings to a Registered Person or a taxpayer as the case may be, ensures the compliance of the "due process

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of law", which was discussed in the aforesaid GST Council Meeting.

725. Thus, the drafters of the aforesaid Rules, have ensured that the proceedings are initiated not on a mere *ipse dixit* of an Officer. Rather the proceedings can be initiated only based on the definite information that would throw up in any one of the stages of proceedings referred to *supra.*

726. Therefore, a mere suspicion or a conjecture or a surmise is not sufficient to clothe the Proper Officer with the power to invoke the machinery either under Section 73 or Section 74 of the respective GST Enactments, as the phrase used in both Section 73 and 74 is "**Where it appears**".

727. It implies the availability of information in the hands of the Proper Officer and a subjective satisfaction that tax was not paid, short-paid, erroneously refunded or Input Tax Credit was wrongly availed / utilized, based on such information. Such appearance can be discerned by the Proper Officer from the records before the Proper Officer, implying a rational

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decision based on such information and a *prima facie* view that tax was not paid, short-paid *etc.*

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728. Therefore, a mere non-communication of the reasons in the Notice issued under Section 74 *ipso facto* for invoking the extended period of limitation by itself will not be fatal to the proceedings, if such informations are discernible in the course of the above proceedings and were earlier communicated to the taxpayer / Registered Person, *etc.*.

729. As long as the Notice is issued under Section 74 of the respective GST Enactments alludes to one or more of the Form GST ASMT-10, Form GST INS-02, Form GST ADT-02, Form GST ADT-04 *etc.,* issued earlier and was communicated, the proceedings initiated under Section 74 of the respective GST Enactments cannot be said to be arbitrary.

730. A Notice under Section 73 as also Section 74 of the respective GST Enactments need not reiterate the reasons once again, if such reasons, have been already communicated earlier in Form GST ASMT-10, Form GST

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INS-02, Form GST ADT-02, Form GST ADT-04 *etc.*

731. This would satisfy the test of reasonableness and the expression "**Where it appears**" in these two provisions of the respective GST Enactments, particularly in the light of the requirements of Rule 142 of the respective GST Rules.

732. Further, the legal principles authoritatively applied under the above-mentioned Indirect Tax regimes are not similar to the 'Categorical Imperatives' (in the Kantian sense) having universal application devoid of the language. As mentioned elsewhere, the ratio laid therein only serve as a guide.

733. Therefore, application of principles *ex proprio vigore* under the respective GST Enactments, regardless of the change in law would be similar to the Plato's allegory of the Cave cited in his oft-read book 'The Republic', where the shadows on the wall obstructs one from looking at the reality present outside the cave.

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734. That apart, in taxing statutes, the Court is concerned only with the language used in the provision and what is not intended, as held by the King's Bench in **Cape Brandy Syndicate** Vs. **Inland Revenue Commissioners,** [1921] 1KB 64.

735. Though there are a few decisions of this Court and the other High Courts which have interfered following the decision of the Hon'ble Supreme Court in **H.M.M Ltd** referred to *supra,* none have examined Section 73 or Section 74 of the respective GST Enactments independently with the Scheme under the Rules. Therefore, they have no precedential value.

736. Suffice to state that, to initiate proceedings under Section 74 of the respective GST Enactments, it has to **appear** to a Proper Officer that tax has not been paid or short-paid or erroneously refunded or Input Tax Credit was wrongly availed or utilized **by reason of Fraud or any Wilful-Mis-statement or Suppression of Facts to evade tax.**

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737. Thus, on a cumulative reading of both Section 73 and 74 of the respective GST Enactments, it is clear that a Notice can be issued to an Assessee or a taxpayer only "**Where it appears**" to the Proper Officer that tax was not paid or short-paid or erroneously refunded or Input Tax Credit wrongly availed or utilized either "**for any reason other than Fraud** or any **Willful Mis-statement** or **Suppression of Facts"** or **"by reason of Fraud or any Willful Mis-statement** or **Suppression of Facts to evade tax"**.

738. Though, a Notice under Section 73 or Section 74 of the respective GST Enactments can be issued by a Proper Officer based on a *prima facie* view that tax was not paid or short-paid or erroneously refunded or erroneously refunded or where Input Tax Credit was wrongly availed and / or utilized by the taxpayer, it is sufficient if a *prima facie* view for records before the Proper Officer which could reveal of non-payment, short-payment of tax or where an erroneous refund of tax was made to such taxpayer or where Input Tax Credit was wrongly availed and / or utilized by such taxpayer.

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739. As mentioned above, such eventuality will normally arise in the course of scrutiny of the self-assessed returns filed under Section 59, under Section 61 of the respective GST Enactments or where no returns were filed by such registered taxpayer. Such conclusion can be also arrived at, where the taxpayer has failed to obtain registration and to pay tax on the supplies made or where such tax is to be paid under Reverse Charge Mechanism (RCM) by such person.

740. There could be many other situations under which such a *prima facie* view can be entertained by a Proper Officer based on the records and / information available before such Officer.

741. The threshold to issue a Notice is satisfied "Where it appears" to the Proper Officer of such evasion and the Proper Officer is satisfied from the records of non-payment, short-payment of tax, erroneous refund of tax or where the Input Tax Credit is availed erroneously or utilized.

742. Once such a *prima facie* view is available, the Proper Officer has

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no option except to issue a Notice within the timeline stipulated in Section 73(2) or Section 74(2) of the respective GST Enactments, such order has to be passed under Section 73(9) and Section 74(9) within the limit under Section 73(10) and Section 74(10) of the respective GST Enactments. If non-payment of tax was on account of Fraud, Wilful-Misstatement or suppression of fact to evade tax, a Notice under Section 74(1) of the respective GST Enactments, will also call upon the person to pay 100% penalty.

743. It has to be also kept in mind that under Section 73 and 74 of the respective GST Enactments, the Proper Officer plays a passive role in contrast to the active role to be played by an Assessee in the era of self-assessment. Thus, "**Where it appears**" means, if it appears to a Proper Officer that an Assessee has orchestrated, or manipulated the records to evade tax, the Proper Officer can invoke the machinery under Section 74 within the period of limitation prescribed under Section 74.

RECORDING OF REASONS

744. Both Section 73 and 74 of the respective GST Enactments, do not expressly mandate "**recording of reasons"** before issuance of Notice, as

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compared to Section 148(2) of the Income Tax Act, 1961 as it stood up to **01.04.2021**, or thereafter, under Section 148A(b) / 148A(2) of the Income Tax Act, 1961 with effect from 01.04.2021.

745. Section 147 and Section 148 of the Income Tax Act, 1961, as they stood between April, 1989 and April, 2021 mandated that a Notice under Section 148(1) of the said Act could be issued for the purpose of assessment, reassessment or recomputation under Section 147 of the Act only after recording of reasons under Section 148(2) of the said Act.

746. Both Section 147 and Section 148 of the Act as they stood between **April, 1989** and **April, 2021** also did not contemplate communication of the reasons recorded under Section 148(2) of the said Act to an Assessee before the issuance of Notice under Section 148(1) of the Act.

747. All that was required was that the Assessing Officer before issuing Notice under Section 148(1) of the said Act for the purpose of assessment, reassessment or recomputation under Section 147 of the Act was

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required to "**record his reasons for doing so**" under Section 148(2) of the said Act.

748. However, the Hon'ble Supreme Court in **G.K.N.Driveshafts India Limited case** (referred to *supra*) held that the "**reasons recorded**" under Section 148(2) of the said Act are to be communicated to an Assessee, if such an Assessee so desires, after a Return of Income is / are filed pursuant to the aforesaid Notice under Section 148(1) of the Act.

749. Thus, the taxpayer was held to be entitled for the reasons recorded under Section 148(2) of the said Act after the returns are filed in terms of Section 148(1) of the Income Tax Act, 1961. This has also been now codified under Section 148A(b) of the Income Tax Act, 1961 with effect from **01.04.2021**.

750. Similarly, communication of reasons for invoking extended periods of limitation is / was not explicit under **Section 28** of the **Customs**

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Act, 1962, **Section 11A** of the **Central Excise Act, 1944** and **Section 73** of the **Finance Act, 1994**.

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751. However, communication of reasons for invoking extended periods of limitation is / was implicit under these provisions by the Proper Officer / or the Central Excise Officer, under these three Indirect Tax Enactments.

752. The communication of reasons for invoking extended periods of limitation is *sine qua non,* and has also been judicially recognised by the Hon'ble Supreme Court in several decisions rendered in the context of these Indirect Tax Enactments.

753. At the same time, it should be kept in mind that the bulk of the ratios of the Courts were rendered in the context of the assessments under **Section 11A** of the **Central Excise Act, 1944** when approval of "**Classification List**" under **Rule 173B** and approval of "**Price List**" under

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Rule 173C of the Central Excise Rules, 1944 were in vogue for the period prior to 1995 and 1994 respectively.

754. Similarly, most of the decisions referred to under the **Customs Act, 1962** followed the ratio of the Hon'ble Supreme Court rendered in the context of Central Excise Act, 1944, when the assessment was to be made by the Proper Officer under the provisions of the **Customs Act, 1962,** as it stood prior to 2011, based on the decisions rendered under **Section 11A** of the **Central Excise Act, 1944** when approval of "**Classification List**" under **Rule 173B** and approval of "**Price List**" under **Rule 173C** of the Central Excise Rules, 1944 were in vogue for the period prior to 1994 and 1995 respectively.

755. Thus, the ratios of the Hon'ble Supreme Court referred to *supra* rendered in the context of these Indirect Tax Enactments cannot be straight away applied to Section 74 of the respective GST Enactments.

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756. The ratios of the Hon'ble Supreme Court rendered in the context of *Proviso* to both **Section 11A** of the **Central Excise, 1944** & **Section 28** of the **Customs Act, 1962** as they stood earlier and later Sub-section 4 of these provisions and/or under *Proviso* to **Section 73** of the **Finance Act, 1994,** will still apply in the context of Section 74 of the respective GST Enactments, only under limited circumstances when an Assessee entertains a *bona fide* doubt that tax was not payable, either based on the decisions of the Tribunals, High Courts or Supreme Court or on account of any Clarifications / Circulars issued of the Central Board of Indirect Taxes. However, there also Reply has to be given to the Notice issued under Section 74 of the respective GST Enactments.

757. Without a Reply, a taxpayer or an Assessee cannot challenge the proceedings in a Writ Court. Under those circumstances, Writ Proceedings cannot be used as a tool to scuttle the proceedings initiated under Section 74 of the respective GST Enactments, particularly when several disputed questions of fact will arise for consideration.

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758. Strictly, if the ratios of the Courts rendered under **Section 147** and **Section 148** of the **Income Tax Act, 1961** and the ratio of the Courts rendered in the context of **Section 28** of the **Customs Act, 1962** and **Section 11A** of the **Central Excise Act, 1944** and **Section 73** of the **Finance Act, 1994** are applied to Section 73 and Section 74 of the respective GST Enactments, Notices issued therein should also spell out the reasons as to why they are being issued *i.e.*:-

i. "**for any reason, other than the reason of Fraud, Wilful-Mis-statement, Suppression of Facts to evade tax**" under Section 73 of the respective GST Enactments; or

ii. "**by reason of Fraud, Wilful-Mis-statement, Suppression of Facts to evade tax**" under Section 74 of the respective GST Enactments.

759. Use of the phrase "**by reason" of** or "**for any reason other than the reason of"** in conjunction with the phrase "**Where it appears**" both in Section 73 and Section 74 of the respective GST Enactments would imply communication of such reasons.

760. The communication of such reason is now made mandatory and has now been judicially recognized by the Hon'ble Supreme Court in

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M/s.Armour Security (India) Limited Vs. **Commissioner, CGST,** 2025 SCC OnLine SC 1993, in the context of issuance of Notice under the respective GST Enactments. The observations in the said decisions was made without specific reference to the Scheme under Section 73 and Section 74 read with Rule 142 of the respective GST Rules. However, in view of the architecture of the respective GST Enactments and the Rules made thereunder which has been discussed elaborately, communication of such reasons in Section 74 Notice may not be mandatory requirement if it has been already communicated before, either in **ASMT-10** under Section 61 read with Rule 99 or **DRC-01A** or in **ADT-02** under Section 65 read with Rule 101 or **ADT-04** under Section 66 read with Rule 102 or in **INS-02** under Section 67 read with Rule 139.

761. If the records before the Proper Officer reveal tax has not been paid, short-paid, erroneously refunded etc., by reasons of **Fraud**, **Wilful Mis-statement** or **Suppression of Facts to evade tax**, Notice can be issued straight away. If the records reveal that a deliberate attempt has been made to suppress tax, a Notice can be issued as otherwise the purpose of Section 73 / 74 of the respective GST Enactments will stand frustrated.

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762. The Notice has to specify the reasons for invoking the extended period of limitation albeit **Fraud**, **Wilful Mis-statement** or **Suppression of Facts to evade tax**, based on the materials that are available, if it has not been already communicated either in **ASMT-10** under Section 61 read with Rule 99, or **DRC-01A**, or in the **ADT-02** under Section 65 read with Rule 101, or **ADT-04** under Section 66 read with Rule 102, or in **INS-02** under Section 67 read with Rule 139.

ASSESSMENTS IN THE CASE OF NON-FILERS, UNREGISTERED PERSON AND SUMMARY ASSESSMENT

763. However, where no returns are filed or where no registration has been obtained by such taxpayer or person, Orders have to be passed to the best of the judgement by the Proper Officer under Sections 62 and 63 of the respective GST Enactments respectively. The machinery under Section 62 and Section 63 are a departure from the procedure under the previous Indirect Tax Regime.

764. The machinery under Section 62 in the case of non-filer of Returns is akin to the machinery under Section 74 of the respective GST

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Enactments, save that, the Notice need not specify the reason of **Fraud**, **Wilful Mis-statement**, or **Suppression of Facts** to evade tax. Almost a similar mechanism exists even in the case of an un-registered person under Section 63.

765. Similarly, under Section 64 of the respective GST Enactments, a summary assessment can be made by the Proper Officer under special circumstances with the previous approval of the Additional Commissioner / Joint Commissioner to protect the interest of Revenue, if the Officer has sufficient grounds to believe that the delay in doing so will adversely affect the interest of the Revenue.

766. As per Section 64(2), such orders can be withdrawn by the Proper Officer by himself, or either on application of the Taxable Person or the Additional Commissioner / Joint Commissioner, if the order passed under Sub-section (1) is considered to be erroneous, in which case the Proper Officer can follow the procedure under Section 73, 74 & 74A of the respective GST Enactments.

IN-BUILT AMNESTY SECTION 73, 74 & 74A OF THE RESPECTIVE GST ENACTMENTS.

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767. If during the course of scrutiny of the returns under Section 61 or before such scrutiny, a taxpayer realizes that tax was not paid tax or short-paid or erroneously refunded to the taxpayer or where Input Tax Credit was wrongly availed and / or utilized by such taxpayer, such taxpayer can make amends by making a payment together with interest thereon and penalty at lesser rate.

768. Both these provisions have an inbuilt amnesty in them insofar as payment of penalties are concerned which would otherwise be attracted if orders are passed pursuant to a Notice issued under Section 73(1) or under Section 74(1) of the respective GST Enactments as the case may be.

769. Under Section 73(5) of the Act, a person chargeable with tax may before service of Notice under Sub-section (1) or a statement under Sub-section (3) pay amount of tax without interest under Section 50 of the Act on the basis of its own ascertainment or tax as ascertained by the Proper Officer and inform the same to the Proper Officer in writing of such payment.

770. If the same is acceptable to the Proper Officer, no further Notice

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shall be issued by the Proper Officer. However, where the Proper Officer is of the opinion that the amounts paid under Sub-section (5) to Section 73 of the respective GST Enactments falls short of the amount actually payable by a taxpayer, he shall proceed to issue a Notice under Sub-section (1) in respect of such amount which fall short of the amount actually payable.

771. Similarly, under Section 74(5) of the Act, under similar circumstances, where there is an element of **Fraud, Wilful Mis-statement or Suppression of Facts to evade tax**, over and above the tax and interest payable, the Assessee has to pay 15% of such tax towards penalty and if the amount paid is acceptable, no further proceedings shall be initiated.

772. However, if the Proper Officer is of the opinion that the amount paid under Sub-section (5) to Section 74 of the Act falls short of the amount actually payable, he shall proceed to issue a Notice under Sub-section (1) in respect of such amount which fall short of the amount actually payable.

773. Under Sub-section (8) to Section 73 and Section 74 of the Act,

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within 30 days of such Notice, the person chargeable to tax, may pay the tax together with interest. In the case of Sub-section (8) to Section 74 of the respective GST Enactments, the taxpayer has to additionally pay 25% of the amount of the tax towards penalty.

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774. In case such taxpayer fails to pay the amount, tax has to be determined within the limitation prescribed under Sub-section (10) of the respective Sections.

775. In the case of circumstances specified under Section 73(11) of the Act, higher of the penalty at 10% of the tax or Rs.10,000/- has to be. However, under Section 74(11) of the Act, the amount to be paid is 50% of the tax amount. Thus, an inbuilt amnesty is provided both under Section 73 and Section 74 of the respective GST Enactments.

776. For the sake of clarity, the amnesty as far as payment of penalty is concerned is reproduced below:-

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<table>
<tr><th colspan="2">SECTION 73</th><th colspan="2">SECTION 74</th></tr>
<tr><td colspan="4">VOLUNTARY PAYMENT OF TAX BEFORE ISSUANCE OF NOTICE UNDER SUB-SECTION (1)</td></tr>
<tr><td colspan="4">Sub-section (5)</td></tr>
<tr><td colspan="2">i. Tax
ii. Interest u/s. 50
iii. No penalty</td><td colspan="2">i. Tax
ii. Interest u/s. 50
iii. Penalty @ 15%</td></tr>
<tr><td>(6)</td><td>(7)</td><td>(6)</td><td>(7)</td></tr>
<tr><td>If payment made under (5) is accepted, no Show Cause Notice shall be issued.</td><td>If payment made under (5) falls short, Show Cause Notice is issued.</td><td>If payment made under (5) is accepted, no Show Cause Notice shall be issued.</td><td>If payment made under (5) falls short, Show Cause Notice is issued.</td></tr>
<tr><td colspan="4">VOLUNTARY PAYMENT OF TAX/INTEREST/PENALTY AFTER SHOW CAUSE NOTICE UNDER SUB-SECTION (1) WITHIN 30 DAYS OF ITS ISSUANCE.</td></tr>
<tr><td colspan="4">Sub-section (8)</td></tr>
<tr><td colspan="2">i. Tax
ii. Interest
iii. No penalty is payable
iv. Proceedings Conclude</td><td colspan="2">i. Tax
ii. Interest
iii. Penalty @ 25%
iv. Proceedings Conclude.</td></tr>
<tr><td colspan="4">ORDER OF DETERMINATION UNDER SUB-SECTION (9)</td></tr>
<tr><td colspan="2">i. Tax
ii. Interest
iii. Penalty @ 10 % or Rs.10,000/-</td><td colspan="2">i. Tax
ii. Interest
iii. Penalty @ 100%</td></tr>
<tr><td colspan="2">VOLUNTARY PAYMENT NOT MADE WITHIN 30 DAYS</td><td colspan="2">VOLUNTARY PAYMENT MADE WITHIN 30 DAYS</td></tr>
<tr><td colspan="4">Sub-section (11)</td></tr>
</table>

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i.Notwithstanding anything in (6) & (8) ii. Tax iii. Interest iv. **Penalty @ 10%**	i. Tax ii. Interest iii. **Penalty @ 50%** iv. Proceedings Conclude

777. Apart from the above, a special amnesty was provided under Section 128A *vide* Finance (No.2) Act, 2024 (15 of 2024), dated 16.08.2024 with effect from 01.11.2024 *vide* SO 4253(E), dated 27.09.2024, contents of which have already been discussed.

778. At this stage, it would also be apposite to address the contentions raised by the learned counsel **Mr.G.Shiva Kumar** in **W.P.Nos.11713 and 11793 of 2025** (since disposed of) that a Notice issued under Section 74 of the respective GST Enactments cannot be converted into a Notice under Section 73 in exercise of the powers under Section 75(2), when the Notice issued is, bereft of mental elements *viz.,* **Fraud**, **Willful Mis-statement**, or **Suppression of Facts to evade tax**.

779. As stated elsewhere, the difference between the Notices issued under Section 73 and Section 74 of the respective GST Enactments, is the

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presence of and absence of, the elements of **Fraud**, or **Wilful Mis-statement** or **Suppression of Facts** to evade tax.

780. In Section 73 of the respective GST Enactments, the presence of the mental elements *viz.,* **Fraud**, **Wilful Mis-statement**, or **Suppression of facts to evade tax** is irrelevant. On the other hand, in Section 74, the presence of such elements is *sine qua non.* However, a proceeding under Section 74 can be directed to be converted into a proceeding under Section 73 of the respective GST Enactments, if the Appellate Authority or Appellate Tribunal or Court, conclude that the mental elements are not established. This is the scheme under the respective GST Enactments. In the absence of a challenge to the *vires* of Section 74 when read in the context of Section 75(2) of the respective GST Enactments, such an argument cannot be countenanced.

781. That apart, as mentioned elsewhere, a notice under section 74 of the respective GST Enactments can be issued based on a *prima facie* view as the expression used is "**Where it appears**". It implies not only a lower threshold but also a discretion to the Proper Officer to drop the proceedings

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and pass Order under Section 73.

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782. If by any chance, the Proper Officer, in a given case, fails to use the discretion properly and confirms the demand and penalty under Section 74 of the respective GST Enactments, in an appeal before the Appellate Authority, Tribunal or the Court, a direction can be given to the Proper Officer to pass a proper Order under Section 73 of the respective GST Enactments.

783. This would not mean the proceedings initiated were arbitrary or without Jurisdiction lacking Foundational Facts *viz.,* **Fraud**, **Wilful Mis-statement**, or **Suppression of Facts to evade tax**.

784. The purpose of endowing the discretion on the Appellate Authority or Appellate Tribunal or Court under Section 75(2) of the respective GST Enactments is not only to protect the interest of the Parties *i.e.,* both the Revenue and the Taxpayer, the mechanism under Section 75(2) has been

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incorporated as a boon to an Assessee / Taxpayer so that they are not mulcted with higher tax and penalty.

785. In a way, the decisions of the Hon'ble Supreme Court in **Dharmandera Textiles** referred to *supra* as clarified by **Rajasthan Spinning Mills** referred to *supra* has been diluted to ensure there is no levy of either unjust tax or penalty.

786. The argument of the learned counsel for the Petitioner **Mrs.R.Hemalatha** in **W.P.Nos.172 & 382 of 2025**, that the phrase "**Where it appears**" is used along with the word "**determination**" in contradistinction to the word "**assessment**" and this necessarily means that the Proper Officer must confine his attention only to material on records and should determine the tax liability, is to be rejected.

787. The determination of tax will be based on the records collected in any of the stages *viz.,* Scrutiny, Audit, Special Audit, Inspection, Search and Seizure, in order to arrive at a *prima facie* view sufficient for invoking

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Section 74 and thereafter to determine the tax liability of the taxpayer.

788. In this connection, it is apposite to refer to the Judgement of the Hon'ble Supreme Court in **Commissioner of Income Tax** Vs. **Sun Engineering Works Private Limited,** (1992)4 SCC 363. There, although in the context of Section 147 of the Income Tax Act, 1961, the Hon'ble Supreme Court observed that the said Section deals with the machinery of assessment and in interpreting a provision of that kind, the Rule is that construction should be preferred which makes the machinery workable. Relevant portion of the said decision is extracted hereunder:-

> ***40.*** *Although, Section 147 is part of a taxing statute, it imposes no charge on the subject but deals merely with the machinery of assessment and in interpreting a provision of that kind, the rule is that construction should be preferred which makes the machinery workable. Since the proceedings under Section 147 of the Act are for the benefit of the Revenue and not an assessee and are aimed at gathering the 'escaped income' of an assessee, the same cannot be allowed to be converted as 'revisional' or 'review' proceedings at the instance of the assessee, thereby making the machinery unworkable.*

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CONCLUSION:

789. Under the Scheme of the respective GST Enactments, the Proper Officer has a passive role during the self-assessment under Section 59 of the respective GST Enactments unless the eventuality prescribed under Section 64 of the respective GST Enactments arise.

790. Proceedings under Section 74 of the respective GST Enactments are in a sense akin to the proceedings under Section 147 of the Income Tax Act, 1961 and therefore, the proceedings initiated in time cannot be frustrated or scuttled, as they are intended for the benefit of the revenue as held by the Hon'ble Supreme Court in **Commissioner of Income Tax** Vs. **Sun Engineering Works Private Limited,** (1992) 4 SCC 363.

791. For issuance of a Notice both under Section 73(1) or under Section 74(1) of the of the respective GST Enactments, it has to "**appear**" to the Proper Officer that tax was either not paid or short-paid or where the tax was erroneously refunded where the Input Tax Credit was wrongly availed or

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utilized by a taxpayer or the Registered Person.

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792. The requirement of satisfying Jurisdictional / Foundational Facts either under Section 73(1) & 74(1) are met, if it **appears** to the Proper Officer from the records / information available before such Officer, that tax has not been paid or has been short-paid, or has been erroneously refunded, or that Input Tax Credit has been wrongly availed and / or utilized either "**for any reason other than the reason of"** or "**by reason of" Fraud**, **Willful Mis-statement**, or **Suppression of Facts** with an intent to evade tax.

793. The threshold for the issuance of a Notice under both Section 73 and 74 of the respective GST Enactments is much lesser compared to the threshold for the issuance of a Notice Section 11A of the Central Excise Act, 1944, Section 28 of the Customs Act, 1962, and Section 73 of the Finance Act, 1994, as the expression used is "**Where it appears**".

794. The tests laid down under **Section 11A** of the **Central Excise Act, 1944**, **Section 28** of the **Customs Act, 1962**, and **Section 73** of the **Finance Act, 1994**, rendered in the era of the approval of price lists, classification lists under **Rule 173B** and **173C** of the **Central Excise Rules, 1944**, are not

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strictly applicable in the self-assessment era under the respective GST Laws.

795. The threshold for issuance of a Notice for extended period of limitation under **Section 11A** of the **Central Excise Act, 1944**, **Section 28** of the **Customs Act, 1962**, and **Section 73** of the **Finance Act, 1994** is / was much higher, as such Notice could be issued only based on the definite information of non-payment of tax or duty as the case may be.

796. Initiation of proceedings under Section 74 of the respective GST Enactments, 2017, particularly in the era of self-assessment under Section 59 of the respective GST Enactments, can hardly be tested in the light of the decisions of the Courts under other Indirect Tax Regimes.

797. The Jurisdiction under Section 73 of the respective GST Enactments can be invoked by a Proper Officer within the limitation prescribed therein, "**Where it appears"** to the Proper Officer that tax was either not paid or short-paid or erroneously refunded or where the Input Tax

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Credit was wrongly availed and / or utilized by a taxpayer or the Registered Person, "**for any reasons other than Fraud or any Willful Mis-statement or Suppression of Fact to evade tax**".

798. On the other hand, the Jurisdiction under Section 74 of the respective GST Enactments can be invoked by a Proper Officer within the limitation prescribed therein, "**Where it appears**" to the Proper Officer that tax was either not paid or short-paid or erroneously refunded or where the Input Tax Credit was wrongly availed or utilized by a taxpayer or the Registered Person, **by reasons of Fraud or any Willful Mis-statement or Suppression of Fact to evade tax.**

799. Ordinarily, Notices issued under Sections 74 of the respective GST Enactments must not only invoke the machinery under Section 74, but also state the reasons for doing so in the Notice itself. However, such reasons need not be so stated if they have already been communicated in **Form GST ASMT-10**, an Audit Report in **Form GST ADT-02**, or a Special Audit report in **Form GST ADT-04**, or an Inspection report in **Form GST INS-02**, under Section 61, Section 65, Section 66 and Section 67 of the respective GST Enactments.

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800. Therefore, a Notice need not specify ingredients of **Fraud, Wilful mis-statement** or **Suppression of facts to evade tax**, if the records reveal that the tax has not been paid for the aforesaid reasons and the reason was communicated in the course of Scrutiny, Audit, Special Audit or Inspection, Search and Seizure. It is sufficient if the Notice(s) under Section 73 or 74 respective GST Enactments, allude to the same, as these proceedings are interconnected.

801. If during the scrutiny, the self-assessment made by a taxpayer under Section 59 of the respective GST Enactments reveals evasion of tax by wrongfully availing ineligible Input Tax Credit [**For Example**:- exempted supplies and / or against blocked credit under Section 17(5)], the intention to evade tax under Section 74 will be revealed and thus it can be said to appear to the Proper Officer that the Input Tax Credit was wrongly availed and / or utilized.

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802. Therefore, a Notice can be issued by invoking the extended period of limitation by spelling out the above details of the Tax evaded in the Notice. However, the Notice need not once again spell out or state such details once again for invoking the extended period of limitation under Section 74 of the respective GST Enactments, if it was communicated earlier during a Scrutiny or an Audit or a Special Audit or during the course of Inspection, Search & Seizure.

803. Thus, it is only under limited circumstances, a Notice issued under Section 74 has to specify the ingredients of **Fraud, Wilful Mis-statement or Suppression of facts to evade tax** as held by the Hon'ble Supreme Court in **Armour Security (India) Limited** Vs. **Commissioner, CGST, Delhi, dated 14.08.2025** that the Show Cause Notice must specifically state the mental elements *viz.* **Fraud**, **Wilful Mis-statement** or **Suppression of facts to evade tax**, for an Assessee to file a proper reply.

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804. It would be keeping up with the mandate of Principles of Natural Justice incorporated in Section 73 or Section 74 of the respective GST Enactments and the Rules made thereunder.

805. Where, however, excess Input Tax Credit availed was contrary to what is reflected in **GSTR-2A/2B** and utilised, a notice can be issued to recover the tax as it would appear to the Proper Officer would reveal that Input Tax Credit was wrongly availed and/or utilized by playing fraud or on account of wilful-misstatement by claiming the same in **GSTR-3B** resulting in suppression of facts to evade tax.

806. Thus, the notice need not specifically state the same once again if such reasons stands communicated earlier in any one of the stages mentioned above.

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807. Even if such information comes to the knowledge of the Proper Officer, within the normal period of limitation or beyond the normal period of limitation, machinery under Section 74 can be invoked.

808. Where, however, the benefit of exemption is wrongly claimed under a notification issued under the provisions of the respective GST enactments, the ingredients under Section 74 *viz.* fraud, wilful-misstatement or suppression of facts to evade tax, may be required to be specified unless such reasons stand communicated earlier in one of the stages as mentioned above. The onus is on the assessee or the tax payer to establish his/her true *bona fides.*

809. Similarly, if the records before the Proper Officer reveal that the Assessee was involved in circular trading and was passing ineligible Input Tax Credit illegally to another tax payer, a notice under under Section 122 can be issued based on information available, to impose penalty under Section 122 on such person and to recover the tax from the tax payer who

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has availed and/or utilized such Input Tax Credit under Section 74 of the respective GST Enactments. The notice has to clearly specify the same.

810. The conclusion regarding the presence of mental elements *viz.* Fraud, Wilful-misstatement, or Suppression of facts to evade tax in the case of a Tax Payer filing Returns, will normally be reached during the course of a Scrutiny of Returns, Audit, Special Audit, or Inspection, Search under Seizure under Section 65, 66 and 67 of the respective GST enactments, and conveyed in **ASMT-10**, **ADT-02**, **ADT-04** & **INS-02**.

811. During the course of Scrutiny of the Returns under Section 61 of the respective GST Enactments, a notice in **ASMT-10** can be issued which has to be replied by a Tax Payer in **ASMT-11**.

812. Where either no reply to **ASMT-10** notice is filed in **ASMT-11** or where such a reply in **ASMT-11** is not satisfactory, a Show Cause Notice can be issued either under Section 73 or 74 of the respective GST Enactments together with a summary thereof in **DRC-01** under Rule 142 of

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the respective GST enactments before a final order is passed.

813. Between 2019 to 2020, under **Rule 142 (1A),** an intimation in **DRC-01A** could also be issued detailing the shortcomings and the reasons for issuance of such intimation prior to issuance of a Show Cause Notice and a summary thereof in **DRC-01**, which has now been discretionary.

814. With effect from, 15.10.2020, it is not mandatory for issuance of an intimation in **DRC-01A** prior to issuance of Show Cause Notice and **DRC-01** as mentioned above under **Rule 142 (1A)** of the respective Rules.

815. An intimation in **ASMT-10** & **DRC-01A** may particularize as to whether the proceedings initiated are heading for invocation of machinery under Section 73 and Section 74 of the respective GST Enactments. This is sufficient for satisfying the requirements of invocation of the machinery

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under either of the provisions under the circumstances specified therein.

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816. The requirement of Foundational / Jurisdictional Fact is also satisfied when it appears to the Proper Officer that tax was not paid, or short-paid or erroneously refunded or where the Input Tax Credit was availed or utilized wrongly, and the same is communicated in the Show Cause Notice under Section 73 or Section 74 as the case may be or in **ASMT-10, ADT-02, ADT-04** or an **INS-02.**

817. Since the expression, "**Where it appears**" has been employed in both Section 73(1) and under Section 74(1) of the respective GST Enactments, a *prima facie* view is sufficient to set the law in motion under these provisions. Therefore, the only remedy available to a noticee, is to reply by taking advantage of the machinery provided under the respective GST Enactments.

818. Since, the phrase "**Where it appears**" have been employed both in Sections 73 and 74 of the respective GST Enactments, the threshold for

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issuing a notice is satisfied, if the Proper Officer comes to a rational and a *prima facie* conclusion based on the available records that tax was not paid or short-paid or erroneously refunded or Input Tax Credit was wrongly availed and / or utilized, either on account of **Fraud** or by reasons of **Willful Mis-statement** or **Suppression of Facts** with an intent to evade tax.

819. A Notice issued under Section 74(1) of the respective GST Enactments within the period of limitation prescribed under Section 74(2) read with Section 74(10) of the respective GST Enactments, can be directed to be converted into a proceeding under Section 73 in accordance with Section 75(2) of the respective GST Enactments, by an Appellate Authority or by an Appellate Tribunal or by the Court.

820. A Notice under Section 74 can be issued even before the expiry of limitation under Section 73(2) read with Section 73(10) of the respective GST Enactments, "**Where it appears**" to the Proper Officer that tax was not paid or short-paid or erroneously refunded or Input Tax Credit was wrongly availed / utilized by reason of **Fraud** or **Willful Mis-statement** or **Suppression of Facts to evade tax**.

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821. Where no **Fraud** or **Willful Mis-statement** or **Suppression of Facts to evade tax** is noticed by a Proper Officer from the records, a Notice under Section 74(1) cannot be issued. Such a Notice would be arbitrary and whimsical and contrary to law warranting an interference.

822. A separate mechanism has been provided in the case of "**Non-filers of Returns**" and "**Unregistered Persons**". The machinery for such provisions is under Section 62 and Section 63 of the respective GST Enactments. They start with a non-obstante clause "notwithstanding anything to the contrary contained in Section 73 or Section 74 or Section 74A". This is a departure from the Scheme under the Central Indirect Tax Regimes, namely, Central Excise Act, 1944 and Finance Act, 1994, which have been subsumed in the respective GST Enactments.

823. If such details are available in these Intimations /Notices, they need not be reiterated or repeated once again in the Show Cause Notice and

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summary thereof in GST DRC-01 issued under Section 74 of the respective GST Enactments.

824. Where there is a failure to respond to either of the Intimations in **ASMT-10** or **DRC-01A** or failure to furnish necessary information during the course of Audit, Special Audit, Inspection, Search & Seizure under Sections 65, 66 and 67 respectively of the respective GST Enactments, a Notice issued under Section 74 of the respective GST Enactments can be issued, as such failure would tantamount to "Suppression of Fact" within the meaning of Explanation 2 to Section 74 of the respective GST Enactments as it stood in Section 74 prior to its deletion *vide* Finance (No.2) Act, 2024 (15 of 2024) dated 16.08.2024 with effect from 01.11.2024 *vide* Notification No.39/2021-Central Tax dated 21.12.2021.

825. A Scrutiny under Section 61 of respective GST Enactments can also result in issuance of a Notice under Section 73 or Section 74 by

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following the due procedure prescribed under Rule 142 of the respective GST Rules.

826. The Proper Officer can also proceed directly with the issuance of a Notice under Section 74 of the respective GST Enactments, in terms of the mechanism described under Rule 142 of the respective GST Enactments, as held in **Mandarina Apartment Owners Welfare** Vs. **Commercial Tax Officer**, 2024 (88) G.S.T.L. 190 (Mad.) = (2024) 21 Centax 35 (Mad.).

827. A Scrutiny of Returns under Section 61 of the respective GST Enactments can transition into an Audit Report under Section 65 or a Special Audit Report under Section 66 or an Inspection, Search and Seizure under Section 67 as the case may be, of the respective GST Enactments and thereafter further into a proceeding under Section 73 or Section 74 of the respective GST Enactments, as the case may be read with Rule 142 of the respective GST Rules.

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828. In case, it is the case of the Petitioner that the Assessee is entitled to an exemption, and that the proceedings are therefore without Jurisdiction, it has to be demonstrated only before the Authority by filing a proper reply. Such a reply shall be considered and disposed of as a preliminary issue, as a Civil Court will normally do when questions of Jurisdiction arise.

829. Mechanical challenges to the Notices issued under Section 73 or 74, as the case may be, on hypertechnical grounds of Violation of Principles of Natural Justice cannot be countenanced when the reasons are traceable from supplementary Reports / Notices *viz.,* **ASMT-10, ADT-02, ADT-4, INS-02, DRC-01A,** as there is no real prejudice caused to the taxpayer.

DISCUSSION:

830. After having discussed at length to the law under Section 74 of the respective GST Enactments, I now proceed to pass orders in the following cases:-

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Sl. No.	W.P.No.	Name of the Petitioner	Subject
1.	35967, 35970, 35974 and 35976 of 2024	M/s.Fastenex Private Limited	Challenge to the Show Cause Notices issued by the State Authority
2.	2142 of 2026	M/s.Turbo Energy Private Limited	Challenge to the Show Cause Notice issued by the Central Authority
3.	14487, 14492 and 14500 of 2025	Ispahani Estates Private Limited	Challenge to the Assessment Orders passed by the State Authority

M/s.Fastenex Private Limited

W.P.Nos.	Name of the Petitioner
35967, 35970, 35974 and 35976 of 2024	M/s.Fastenex Private Limited

831. In these Writ Petitions, the Petitioner has challenged the Impugned Show Cause Notices issued by the Respondent under Section 74 of the respective GST Enactments as detailed below:-

Sl.No.	Writ Petition No.	Period of Tax	Date of DRC-01A	Date of DRC-01	Amount of Tax
1.	35967 of 2024	2021-2022	18.09.2024	15.10.2024	7,20,60,059
2.	35970 of 2024	2022-2023	18.09.2024	15.10.2024	6,13,36,175
3.	35974 of 2024	2023-2024	18.09.2024	15.10.2024	3,79,65,391
4.	35976 of 2024	2024-2025	18.09.2024	15.10.2024	1,30,04,904

832. These Show Cause Notices have been issued to the Petitioner in the background of an inspection conducted by the Intelligence Wing on

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13.09.2024 under Section 67 of the respective GST Enactments and in response to the Reply of the Petitioner to the Intimations in GST DRC-01A under Rule 142(1A) of the respective GST Rules issued to the Petitioner as mentioned above.

833. The Petitioner was called upon to pay the amount specified therein, in view of the defects noticed during the inspection conducted on 13.09.2024. In response to the above Intimations in GST DRC-01A, the Petitioner had also replied on 03.10.2024.

834. For the respective Tax Periods, following defects were noticed:-

Sl.No.	Writ Petition No.	Period of Tax	Date of DRC-01A	Defects in DRC-01A
1.	35967 of 2024	2021-2022	18.09.2024	1) The petitioner had not displayed the Registration Certificate in a prominent place. 2) At the time of inspection, the petitioner's staff had not co-operated and they have not maintained and kept books of accounts and also refused to submit user name and passwords. Nor did they submit the Original Purchase Invoices for the relevant period. 3) The petitioner had adopted and paid tax at the rate of 18% as seen from the 13 Sales Invoices produced by
2.	35970 of 2024	2022-2023	18.09.2024	
3.	35974 of 2024	2023-2024	18.09.2024	
4.	35976 of 2024	2024-2025	18.09.2024	

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				them without treating their goods as automotive parts taxable as 28%. 4) The petitioner has not submitted separate balance sheet and P & L account for Plant 2.

835. Not being satisfied with the Reply of the Petitioner in response to the Intimations in GST DRC-01A issued under **Rule 142(1A)** of the respective GST Enactments, the Impugned Show Cause Notices in GST DRC-01 have been issued to the Petitioner.

836. The challenge to the respective Show Cause Notices is on the ground that there is a pre-determination of issue and therefore the impugned Show Cause Notices are liable to be quashed and cannot be countenanced.

837. The other ground is that the issue is also covered by the decisions of the Hon'ble Supreme Court, Calcutta High Court and that of this Court referred to above.

838. As far as the merits are concerned, it is for the Petitioner to place the facts before the Respondent by way of a Reply and convince the said Officer that the issue is covered in favour of the Petitioner.

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839. As far as the challenge to the Impugned Show Cause Notices are concerned, based on the decision of the Hon'ble Supreme Court in **Oryx Fisheries Private Limited** (referred to *supra*), it has to be held that the decision was rendered in the context of the Marine Products Export Development Authority (MPEDA) Rules, 1972. Similarly, the challenge to the Impugned Show Cause Notices based on the decision of the Hon'ble Supreme Court **Siemens Limited** Vs. **State of Maharashtra and others**, 2007 (207) ELT 168 (SC) / (2006) 12 SCC 33 is concerned, they deal with pre-determination leaving no scope for the said Company to Reply. There, the order was disguised as Notice whereas in the present case, Notices have been issued in accordance with requirement of the respective GST Act and the Rules made thereunder.

840. The decision of this Court in **SL Lumax Limited, Represented by its Chief Financial Officer** Vs. **Deputy Commissioner of State Taxes-II, Nandanam, Chennai**, (2024) SCC Online Mad 420 is to be distinguished as it has not considered the Scheme of the respective GST Enactments as discussed above.

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841. For the same reason, I am unable to follow the view taken by the Calcutta High Court in **Joyous Blocks & Panels Private Limited** Vs. **Assistant Commissioner**, 2022 SCC Online Cal 4306.

842. As mentioned in the discussion part of this order, the Scheme under the respective GST Enactments along with the Rules made thereunder are different. They contemplate communication of reason at any one stage of the proceeding either under Section 61 or under Section 65 or under Section 66 or under Section 67 of the respective GST Enactments or in the Intimation under Rule 142(1A) or directly under a Notice under Section 73(1) or under Section 74(1) of the respective GST Enactments.

843. It cannot be held that there was pre-meditation in view of the Scheme under the respective GST Enactments and the Rules made thereunder. Under the new Regime under the respective GST Enactments, a Show Cause Notice can be issued **"if it appears"** to the Proper Officer that tax has been evaded (including short-paid/short-levied) or where tax was erroneously or Input Tax Credit was wrongly availed and / or utilzed, either by reason or for any reason, other than Fraud, Willful Mis-statement or Suppression of tax with an intent to evade tax.

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844. Merely because the impugned Notice is detailed, *ipso facto* would not lead to an inference that there is pre-determination of the issue. The impugned Show Cause Notices merely contain proposal. Therefore, it cannot be said that the Respondent has made up its mind.

845. In fact, as mentioned during the course of discussion, the Hon'ble Supreme Court in **Armour Security (India) Limited** Vs. **Commissioner, CGST, Delhi East Commissionerate and another**, 2025 SCC OnLine SC 1700 / [2025] 177 taxmann.com 478 (SC) has also held that the Show Cause Notice should contain detailed allegations for an Assessee to reply.

846. Therefore, the challenge to the impugned Show Cause Notice based on the decision of the Honble Supreme Court in **Oryx Fisheries Private Limited case** (referred to *supra*) and the decision of the Hon'ble Supreme Court in **Siemens Limited Vs. State of Maharashtra and others**, 2007 (207) ELT 168 (SC) / (2006) 12 SCC 33 cannot be countenanced and other decision cited.

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847. Therefore, the challenge to the Impugned Show Cause Notices cannot be countenanced based on the above-mentioned decisions and are liable to be dismissed.

848. Accordingly, these Writ Petitions are dismissed. The Respondent is directed to pass order on merits and in accordance with law, within a period of three months from the date of receipt of a copy of this order after considering the Reply if any filed by the Petitioner.

M/s.Turbo Energy Private Limited

W.P.No.	Name of the Petitioner
2142 of 2026	M/s.Turbo Energy Private Limited

849. In this Writ Petition, the Petitioner has challenged the Impugned Show Cause Notice No.305/2025-AUDIT I dated 26.09.2025 and the Summary of the Show Cause Notice in GST DRC-01 dated 06.01.2026 issued for the Tax Period 2020-2021 to 2022-2023 under Section 74 of the respective GST Enactments by the Central Authority.

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850. Paragraph No.5 of the Impugned Show Cause Notice reads as under:-

> "**5. Reasons for invocation of provisions of Section 74**:
>
> 5.1. The taxpayer is operating under the era of self-assessment as per Section 59 of CGST Act, 2017 the onus is on the taxpayer to ascertain and assess his tax liability and discharge the same as per Section 9 of CGST Act, 2017 and also submit a return for each taxable period under Section 39 of CGST Act, 2017. Further, as per Section 59 of CGST Act, 2017 read with Section 155 of CGST Act, 2017, the burden of proof regarding eligibility of ITC shall lie on the person availing such ITC. **In the instant case, it appears that the taxpayer had availed excess ITC in their GSTR-3B in respect of invoices which were not reflected in GSTR-2A/2B, invoice in which the supplier has not paid tax and filed GSTR-3B and by availing ITC twice in respect of certain invoices. It also appears that the taxpayer had failed to reverse appropriate ITC in full in respect of the credit notes issued by the suppliers resulting in excess availment of ITC**. It further appears that the taxpayer has availed ITC under wrong head resulting in excess availment of ITC under IGST/CGST/SGST. This availment of ineligible/excess ITC by the taxpayer clearly establishes the intention of the taxpayer to enjoy undue pecuniary benefit, which is not entitled to, due to such irregular/improper availment of ITC. As per Explanation 2 to Section 74, 'suppression' shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under GST Act and the rules made under. The

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taxpayer had failed to exercise the burden of proof regarding the eligibility cast on him as per Section 155 of CGST Act, 2017 with regard to availment of ITC with an intention to enjoy undue benefit of such ITC by suppression of fact with a mala fide intent to evade payment of tax. By such suppression of facts with mala fide intent to evade payment of tax, it appears that the taxpayer had rendered himself liable for invocation of the provisions of Section 74 of CGST Act, 2017. This non-payment of tax and wrong availment of ITC would not have been noticed/unearthed but for the audit undertaken by the officers of the department."

851. The challenge to the Impugned Show Cause Notice is primarily on the ground that there is no scope for invoking extended period of limitation under Section 74 of CGST Act for the Tax Period 2020-2021 to 2022-2023 on account of the alleged mismatch between GSTR-2A, GSTR-2B and GSTR-3B filed by the Petitioner for the said tax period.

852. It is submitted by the learned counsel for the Petitioner that the Petitioner cannot be found fault with, if the supplier had not paid tax if the Petitioner has all the documents to substantiate that the Petitioner had indeed received the goods and service and had paid the amount due to the supplier and therefore, the Impugned Show Cause Notice is without Jurisdiction.

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853. Reliance was placed on the decision of this Court in **Neeyamo Enterprise Solutions Private Limited, Represented by its Manager-Finance (Statutory & Compliance)** Vs. **The Commercial Tax Officer, Office of the Joint Commissioner (State Tax) (Intelligence), Madurai**, 2025 (103) GSTL 352 (Mad.) in W.P(MD) Nos.30453 to 30458 of 2024 *vide* order dated 11.11.2025. Reference was made to Paragraph No.15 of the order wherein it has been observed as under:-

> ***"15. I am again not persuaded by this submission. When an order passed by the authority is bad in law, it has to be quashed. The order may be set aside either for non-adherence to procedural formalities or on account of the absence of the jurisdictional facts. Executive orders are often set aside on the ground of violation of principles of natural justice. The statute would provide for issuance of notice. But without issuing such notice, an adverse order would be passed. When such orders are set aside, the writ court has to remand the matter. The authority has to be given liberty to proceed afresh. But when jurisdictional facts are absent, the order has to be set aside and the court will have to stop at that. The presence of the jurisdictional fact alone confers power on the authority to initiate action and proceed in the matter. Their absence would completely undermine the very foundation itself. In such cases, the question of making a remand does not arise at all. An order of remand cannot be made mechanically. When the issue goes to the root of the matter touching***

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on the jurisdictional aspect and the issue is answered in favour of the assessee, the writ court will not be justified in remanding the matter."

854. The submission of the learned counsel for the Petitioner that there are no Jurisdictional Facts available for invoking extended period of limitation is liable to be rejected as the Show Cause Notice is defiled. Paragraph No.5 of the Impugned Summary of Show Cause Notice dated 06.01.2026 issued for the Tax Period 2020-2021 to 2022-2023, has captured the reasons clearly. Therefore, it cannot be said that Jurisdictional or Foundational facts are not available for the Respondents therein to issue the Impugned Show Cause Notice to the Petitioner.

855. The decision of this Court in **Neeyamo Enterprise Solutions Private Limited case** (referred to *supra*) cannot be applied to the facts of the present case.

856. Therefore, there is no merits in the challenge to the Impugned Show Cause Notice.

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857. In the light of the above, the challenge to the Impugned Show Cause Notice in W.P.No.2142 of 2026 is not tenable.

858. Therefore, there shall be a direction to the Petitioner to file a Detailed Reply in response to the Impugned Show Cause Notice within a period of thirty (30) days from the date of receipt of a copy of this order. The Respondents shall thereafter proceed to pass a final order on merits and in accordance with law as expeditiously as possible, preferably, within a period of three (3) months of such Reply.

859. Needless to state, before passing any such order, the Respondents shall afford an opportunity of personal hearing to the Petitioner in compliance with Section 74 of the respective GST Enactments.

Ispahani Estates Private Limited

W.P.Nos.	Name of the Petitioner
14487, 14492 and 14450 of 2025	Ispahani Estates Private Limited

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860. In these writ petitions, the Petitioner has challenged the following Orders passed by the state authority:-

Sl. No.	W.P.No.	Tax Period	Date of issuance of Show Cause Notice	Date of Assessment Order passed under Section 74 of the respective GST Enactments
1.	14487 of 2025	Apr 2022-Mar 2023	13.07.2023	04.12.2024
2.	14492 of 2025	Apr 2021-Mar 2022	13.07.2023	07.01.2025
3.	14500 of 2025	Apr 2019-Mar 2020	13.07.2023	14.11.2024

861. The Petitioner is stated to be engaged in renting of immovable properties mainly Residential Real Estate Project (RREP) Services and had claimed Input Tax Credit allegedly contrary to Notification No.3/2019-Central (Rate) dated 29.03.2019. It was therefore alleged in the Notice that the Input Tax Credit was wrongly availed and utilized by the Petitioner for discharging the tax liability for the above Tax Period.

862. In the Show Cause Notices in GST DRC-01 issued to the Petitioner on 13.07.2023 for the respective Tax Period, the Petitioner was specifically called upon to furnish the following documents:

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1) Project wise RERA approval details

2) Project wise Number of residential units and area of each units

3) Advance booking of housing units details such as name, advance amount, date of booking and cancellation of booking details

4) If it is Joint Development Project – Copy of Agreement executed

5) Project completed / not-if completed Completion Certificate Copy

6) Inward supply invoice copy and purchase ledger with payment details of the project and summary statement

7) Outward supply including Nil rated, exempted and Non GST supply details and summary statement

8) Un-billed advance details

9) Financial Statement and reports – Balance Sheet, Tax Audit Report, Annual Financial Statement, Cost Audit Report, Trial Balance, Trading Account, Profit and Loss Account etc.,

10) Reverse Charge Mechanism (RCM) ledger with supporting documents

11) Project wise Work Contract / Sub-Contract details along with TDS related transaction details

12) Scrap sales details

13) Details of all the pending creditors with relevant inward supply details.

This was followed by Reminders dated 05.08.2023

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863. The above Show Cause Notices would have been issued after scrutiny under Section 61 of the returns filed by the Petitioner under Section 59 of the respective GST Enactments.

864. The Petitioner had replied to the respective Notices on 08.08.2023 and stated as follows:-

> *"This has reference to your Show Cause Notice and demand for Financial Year 2019-2020 referred above, we would bring to your kind notice that renting of immovable properties and maintenance of such properties are our core business.* ***We have not done any construction activities****; we have taken input credit which relates to our business only.*
>
> *We hereby plead you to kindly drop the proceedings and not insist any demand as per the Show Cause Notice issued vide Reference No: ZD330723052176J dated 13.07.2023."*

Therefore, further remainders were issued dated 31.01.2024 and 21.02.2024.

865. It is in this background, the Impugned Assessment Order has been passed wherein the demand has been confirmed. The failure to respond to the Notices and Reminders issued amounts to suppression of fact

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within the meaning of Explanation to Section 74 of the respective GST Enactments as it stood prior to its deletion *vide* **Finance (No.2) Act, 2024 (15 of 2024)**, dated **16.08.2024**, with effect from **01.11.2024** *vide* **SO 4253(E)**, dated **27.09.2024** and therefore the Department is justified in invoking Section 74 of the respective GST Enactments.

866. Details of ineligible Input Tax Credit for the respective Tax Periods reads as under:-

		2019-2020	**2021-2022**	**2022-2023**
Ineligible ITC claimed / Tax due	IGST	45,320	46,413	46,412
	CGST	19,00,511	17,66,722	26,75,506
	SGST	19,00,511	17,66,722	26,75,506
	Cess	0	0	0
Total (A)		**38,46,342**	**35,79,857**	**53,97,424**
Penalty	IGST	45,320	46,413	46,412
	CGST	19,00,511	17,66,722	26,75,506
	SGST	19,00,511	17,66,722	26,75,506
	Cess	0	0	0
Total (B)		**38,46,342**	**35,79,857**	**53,97,424**
Interest	IGST	33,837	16,195	9,590
	CGST	12,41,732	5,13,651	3,27,498
	SGST	12,41,732	5,13,651	3,27,498
	Cess	0	0	0
Total (C)		**25,17,301**	**10,44,217**	**6,64,586**
Grand Total (A+B+C)		**1,02,09,985**	**82,03,931**	**1,14,59,434**

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867. The Notification No.11/2017-Central Tax (Rate) dated 28.08.2017 as amended by Notification No.3/2019-Central Tax (Rate) dated 29.03.2019 deals with Real Estate Services including renting of immovable properties.

868. It is noticed the Show Cause Notice which preceded the Impugned Orders have not clearly particularized the basis on which, it has been concluded that the Petitioner had wrongly availed Input Tax Credit with reference to specific Serial Number to the Notification as amended by the above Notification.

869. A reading of the Impugned Order and the Show Cause Notice indicate that no particulars were given for invoking the invocation of extended period of limitation. However, in the preamble to subject to the Notice, it has been stated as under:-

> "Sub: TNGST/CGST Act, 2017 – Returns scrutinized – Ineligible **ITC claimed intentionally** against Notification No.3/2019 – ITC reversal Show Cause Notice (SCN) issued u/s 74(1)-Regarding."

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870. Scrutiny of the Returns under Section 61 of the respective GST Enactments, the Respondent also had the following options before proceeding to issue a Notice under Section 73 / Section 74 as the case may be:

i. Audit under Section 65;

ii. Special Audit under Section 66;

iii. Inspection, Search and Seizure under Section 67 of the respective GST Enactments.

However, the Notice is silent on the same. Instead, these Show Cause Notices have been directly issued to the Petitioner.

871. It is noticed that neither the Notice nor the Reply indicate the value of outward supply of taxpayer. There is no information regarding the extent of outward supply made during the respective Tax Periods. *Prima facie,* the Input Tax Credit availed for a sum of **Rs.1,28,23,623/-** [Rs.38,46,342 + Rs.35,79,857 + Rs.53,97,424] for the above Tax Periods to be highly disproportionate.

872. The limitation for issuance of Notices under Section 73 / Section 74 of the respective GST Enactments and for passing orders for the respective Tax Periods would have expired as per the Table below:-

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	W.P.No.14500 of 2025		W.P.No.14492 of 2025		W.P.No.14487 of 2025	
	2019-2020		2021-2022		2022-2023	
Last date for filing Annual Return in GSTR-9	31.12.2020		31.12.2022		31.12.2023	
Last date for issuance of Show Cause Notice in GST DRC-01 under Section 73 (2 years 9 months) and Section 74 (5 years 6 months)	Section 73	Section 74	Section 73	Section 74	Section 73	Section 74
	30.09.2023	30.06.2025	30.09.2025	30.06.2027	30.09.2026	30.06.2028
Last date for passing order under Section 73 and Section 74	31.12.2023	31.12.2025	31.12.2025	31.12.2027	31.12.2026	31.12.2028
Date of the Show Cause Notice in GST DRC-01	13.07.2023		13.07.2023		13.07.2023	
Date of impugned Assessment Order	04.11.2024		07.01.2025		04.12.2024	

873. In terms of the decision of the Court in **M/s.Tata Play Limited and others** Vs. **Union of India, Ministry of Finance, New Delhi and others** in **W.P.Nos.17184 of 2024 etc., batch** dated **12.06.2025** as modified by **05.11.2025** [2025 32 Centax 318], it cannot be also stated that the proceeding are barred by limitation. Paragraph No.3 of the Order dated **05.11.2025** is reproduced below:-

Sl. No.	Financial Year	Actual / Original due date for filing	Due date extended in exercise of power under	Period of limitation under Section	Extended time limit under Section 73(10) for	Limitation under Section 73(10) after

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		Annual Return under Section 44(1)	**Section 44 of CGST Act through Notifications**	**73(10) of CGST Act**	**issuance of order under Section 73(9) in exercise of power under Section 168A of CGST Act (upto)**	**exclusion of period 15.03.2020 to 28.02.2022 as per Order dated 10.01.2022 of the Hon'ble Supreme Court**
1.	2017-2018	31.12.2018	05.02.2020 07.02.2020 (Notification No.06/2020)	05.02.2023	31.12.2023 (Notification No.09/2023)	21.01.2025 Adding 715 days
2.	2018-2019	31.12.2019	31.12.2020 (Notification No.80/2020)	31.12.2023	30.04.2024 (Notification No.56/2023)	27.02.2025 Adding 424 days
3.	2019-2020	31.12.2020	31.03.2021 (Notification No.04/2021)	31.03.2024	31.08.2024 (Notification No.56/2023)	28.02.2025 Adding 334 days

874. Therefore, it cannot be said the proceedings are beyond the limitation under Section 73 of the respective GST Enactments. Considering the same, these cases are remitted back to the Respondent to pass a fresh order on merits under Section 73 of the respective GST Enactments on account of alleged availing wrong of Input Tax Credit by the Petitioner as an addendum to the Impugned Order. In case no scrutiny has been conducted a corrigendum to be made.

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875. The Petitioner shall furnish the details called for by the Respondent in the respective Show Cause Notices failing which it is open for the Respondent to pass appropriate orders under Section 74 of the respective GST Enactments.

876. In the result,

i. W.P.Nos.35967, 35970, 35974 and 35976 of 2024 are disposed of with the above observations.

ii. W.P.No.2142 of 2026 is disposed of with the above observations.

iii. W.P.Nos.14487, 14492 and 14500 of 2025 and W.P.No.2142 of 2026 are disposed of with the above observations.

iv. No costs. Connected Writ Miscellaneous Petitions are closed.

877. The status of the present Writ Petitions as well as the other Writ Petitions heard together in the batch but ordered separately, are tabulated below:-

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It.No.	W.P.No.	Result
1.	2142 of 2026	Disposed of
2.	14487, 14492 and 14500 of 2025	Disposed of
3.	20935, 21399 and 21403 of 2024	Dismissed
4.	21110, 21113, 21115, 21122, 21126 of 2024	Dismissed
	20374, 20390, 20394, 20406, 20410 of 2024	Disposed of
5.	23220 of 2024	Dismissed
6.	23540 of 2024	Dismissed
7.	24897 of 2024	Disposed of
8.	26246 of 2024	Disposed of
9.	35967, 35970, 35974 and 35976 of 2024	Disposed of
10.	37279 of 2024	Disposed of
11.	39089 of 2024	Partly Allowed
12.	172 of 2025	Disposed of
13.	382 of 2025	Disposed of
14.	2026, 2092, 2086, 2081, 2079, 2075 of 2025	Disposed of
15.	10854 of 2025	Partly Allowed

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16.	14847 of 2025	Dismissed
17.	18541 of 2025	Dismissed
18.	18697 of 2025	Dismissed
19.	29580 of 2025	Disposed of
20.	29744 and 29747 of 2025	Disposed of
21.	29996 of 2025	Disposed of
22.	30242 of 2025	Disposed of
23.	31815 of 2025	Dismissed
24.	33258, 33262, 33268, 33272 and 33275 of 2025	Dismissed
25.	34600 of 2025	Dismissed
26.	34604 of 2025	Dismissed
27.	34617 of 2025	Dismissed

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Neutral Citation: Yes / No

arb/raja

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To:

1.State Tax Officer (Inspection-VI),
Office of the Joint Commissioner (ST) (Intelligence),
No.1, Vallalar Nagar,
Manjakuppam, Cuddalore – 607 001.

2.The Additional Commissioner,
Office of the Commissioner of Central Tax
and Central Excise,
Audit-I Commissionerate,
No.1775, Jawarharlal Nehru Inner Ring Road,
Anna Nagar Western Extension,
Chennai – 600 101.

3.The Assistant / Deputy Commissioner,
Circle-V, GST Audit-I Commissionerate,
1775, Jawarharlal Nehru Inner Ring Road,
Anna Nagar Western Extension,
Chennai – 600 101.

4.The Superintendent,
Chennai-North,
Tamil Nadu.

5.The State Tax Officer,
Nungambakkam Assessment Circle,
No.88, Mayor Ramanathan Salai,
Chetput, Chennai – 600 031.

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C.SARAVANAN, J.

arb/raja

Pre-delivery Common Order in
W.P.Nos.35967, 35970, 35974, 35976 of 2024
and W.P.No.2142 of 2026
and W.P.Nos.14487, 14490 and 14500 of 2025

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