



HC-KAR

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 9<sup>TH</sup> DAY OF MARCH, 2026

BEFORE

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

WRIT PETITION NO. 21130 OF 2022 (T-RES)

R

**BETWEEN:**

M/S HIVELOOP TECHNOLOGY PRIVATE LIMITED  
A COMPANY INCORPORATED UNDER  
THE PROVISIONS OF THE COMPANIES ACT 2013  
NO.1090 G, 18<sup>TH</sup> CROSS, 14<sup>TH</sup> MAIN,  
SECTOR 3, HSR LAYOUT,  
BENGALURU – 560 102.  
THROUGH ITS AUTHORISED  
REPRESENTATIVE,  
MR LALIT RAMAN C V.

...PETITIONER

(BY SRI. TARUN GULATI, SENIOR COUNSEL FOR  
SRI. PRADEEP NAYAK, ADVOCATE)

**AND:**

1. THE ADDITIONAL DIRECTOR  
DIRECTORATE GENERAL OF GST INTELLIGENCE,  
BENGALURU ZONAL UNIT,  
DIRECTORATE GENERAL OF GST INTELLIGENCE,  
BENGALURU ZONAL UNIT,  
OFFICE OF THE PRINCIPAL  
ADDITIONAL DIRECTOR GENERAL  
NO.112, S P ENCLAVE,  
ADJACENT TO KARNATAKA BANK  
K H ROAD,  
BENGALURU-560 027.
2. JOINT/ADDITIONAL COMMISSIONER OF CENTRAL TAX  
CHENNAI SOUTH CENTRAL TAX  
COMMISSIONERATE 692,  
M H U COMPLEX ANNA SALAI,  
NANDANAM, CHENNAI-600 035.





3. DEPUTY /ASSISTANT COMMISSIONER OF  
CENTRAL TAX SD 5 DIVISION  
BENGALURU SOUTH CENTRAL TAXES  
COMMISSIONERATE,  
BENGALURU-560 027.
4. THE COMMERCIAL TAX OFFICER  
DGSTO-4, AUDIT 4.8,  
KARNATAKA COMMERCIAL  
TAXES DEPARTMENT,  
BANGALORE – 560 095.
5. THE ASSISTANT COMMISSIONER  
OF COMMERCIAL TAXES  
LGSTO-017, VTK-2,  
KORAMANGALA, SECOND STAGE,  
RAJENDRA NAGAR,  
BENGALURU – 560 047.

...RESPONDENTS

(BY SRI. JEEVAN.J.NEERALGI, ADVOCATE FOR R-1 TO R-3  
SMT. JYOTI.M.MARADI, HCGP FOR R-4 & R-5)

THIS W.P IS FILED UNDER ARITCLE 226 OF THE CONSTITUITON  
OF INDIA PRAYING TO QUASHING THE IMPUGNED SHOW CAUSE  
NOTICE DATED 19.09.2022 BEARING DIN NO.202209DSS0000000B050  
AND REF NO.VA/75/2019 DGGI BZU/5749/2022(ANNEXURE-A) PASSED BY  
THE R1.

THIS PETITION IS BEING HEARD AND RESERVED ON 10.12.2025  
COMING ON FOR PRONOUNCEMENT OF ORDERS THIS DAY, THE  
COURT MADE THE FOLLOWING:-



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

**CAV ORDER**

In this petition, petitioner seeks quashing of the impugned show cause notice at Annexure-A dated 19.09.2022 issued by the respondents under Section 74(1) of the CGST / KGST Act and for other reliefs.

2. Briefly stated the facts giving rise to the present petition are as under:-

The petitioner, i.e., M/s.Hiveloop Technology Private Limited (HTPL) is a private limited company incorporated on 03.06.2016 and registered with the Karnataka GST authorities, which owns and operates an electronic commerce portal (e-commerce portal) under the name and style 'www.udaan.com', wherein the users registered on the said portal undertake business to business (B2B) transactions of sale and purchase of goods by accessing the portal. It is contended that during the relevant period, which is the subject matter of the impugned show cause notice (SCN), apart from granting access to the online portal, petitioner had not undertaken any other activity such as collection of payment,



logistics, credit facility etc., and for such services, the online portal empanelled various service providers for rendering these optional services such as logistics and payment services and credit services etc., which may be availed by the users by entering into the direct contracts with the said service providers and alternatively, the users could also arrange for such services on their own by engaging service provider at their end and the users of the online platform can either procure these services from the said empanelled service providers or procure such services on their own from other non-empanelled service providers and in either of the cases neither is there any agreement nor is the petitioner responsible for the logistics, payment or credit services received by the users.

2.1 On 27.09.2017, one more private limited company under the name and style M/s.Hiveloop Logistics Private Limited (HLPL) was also incorporated as a company under the Companies Act, 2013 for providing logistics, warehousing and payment services to its customers. While the petitioner – HTPL is a separate, independent, juristic and legal entity, the said HLPL is also a separate, independent, juristic and legal entity, which was



separately registered with the Karnataka State GST Authorities. On 01.09.2018, petitioner-HTPL entered into a licence agreement with the said HLPL, whereby the logistics and supply chain technology with respect to logistics and supply chain platform and payments management technology was licenced to HLPL against payment of monthly licence fees. So also, on the very same day, i.e., on 01.09.2018, petitioner-HTPL entered into a non-exclusive services agreement with HLPL empanelling it as a service provider for providing logistics and payment services directly to other entities on the online platform and from that day onwards, petitioner was only granting access to the online platform to the users and was not collecting consideration with respect to supplies made through online portal and users were free to use either HLPL or other service providers for payment collection.

2.2 Petitioner also contends that during the period 24.09.2019 to 30.09.2020, investigation was conducted by the respondents who thereafter issued intimation – pre-show cause notice dated 24.08.2022 under Section 74(5) of the CGST / KGST Act to the petitioner alleging that the petitioner had violated and contravened Sections 52 and 72(2) of the CGST / KGST Act as



well as Sections 13 and 17 of the said Acts. The petitioner submitted a reply dated 14.09.2022 and took up various contentions including raising preliminary jurisdictional objections and disputed and denied the various allegations and claims made by the respondents and accordingly, petitioner requested the respondents to drop the proceedings by passing appropriate orders on the preliminary objections pertaining to jurisdiction. It is the grievance of the petitioner that despite the aforesaid facts and circumstances, the respondents have proceeded to issue the impugned show cause notice and as such, petitioner is before this Court by way of the present petition.

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

4. In addition to reiterating the various contentions urged in the petition as well as rejoinder / reply filed by the petitioner and referring to the material on record, learned Senior counsel for the petitioner submits that the present petition is restricted to the demand made by the respondents in the impugned show cause notice in relation to Sections 52 and 17(2) of the CGST / KGST



Act. It is submitted that the transactions in question are not supplies of the petitioner and Section 74 has no application and the impugned notice purporting to invoke Section 74(1) of the CGST / KGST Act deserves to be quashed. It was submitted that there was no provision in the CGST / KGST Act, which enables the respondents to treat the petitioner as an assessee in default, since the petitioner was not a person who has collected the tax and was consequently not liable to pay such tax which was the primary liability of the supplier of goods or services.

4.1 Learned Senior counsel would elaborate his submissions by pointing out that the petitioner was not collecting any payment / consideration with respect to the supplies in question which was absolutely essential for invocation of Section 52 and in the light of the CBIC Circular bearing No.194/06/2023 – GST dated 17.07.2023, Section 52 was applicable only in cases where the petitioner / e-commerce operator collected the payment / consideration and in the absence of the same, the very invocation of Section 52 was illegal and without jurisdiction or authority of law and the impugned SCN deserves to be quashed. It was also submitted that HLPL is a separate, independent, legal and juristic



entity being a logistics agent and a distinct person under Section 25(2) and services provided by the said HLPL cannot be construed or treated as services provided by the petitioner, which was completely different, separate, independent legal and juristic entity and another distinct person especially when HLPL was only an empanelled service provider on the online portal and it was optional for the users to enter into an agreement with HLPL without reference to the petitioner. It was therefore submitted that the impugned SCN purporting to invoke contravention and violation of Section 52 by the petitioner deserves to be quashed.

4.2 Learned Senior counsel would also invite my attention to the impugned show cause notice in order to contend that Section 17(2) invoked by the respondents was also erroneous and untenable since the said provision restricts exempted supplies which was not the present case and the marketing services of the petitioner were not “free supplies”, especially when the activity of the petitioner without consideration would get excluded from the purview of the CGST / KGST Act thereby indicating that the said provision contained in Section 17(2) was not applicable to the



petitioner and could not have been invoked in the impugned SCN which deserves to be quashed.

4.3 Learned Senior counsel would also submits that apart from the fact that the ingredients of Section 74 was not satisfied in the present case, the impugned SCN which seeks to tax the same transaction twice was illegal and impermissible in law and the impugned SCN being without jurisdiction or authority of law, it was open for this Court to entertain the present petition challenging the impugned SCN notwithstanding availability of an alternative remedy in favour of the petitioner. It is therefore submitted that the impugned SCN and all further proceedings pursuant thereto deserve to be quashed.

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

6. I have given my anxious consideration to the rival submissions and perused the material on record.



7. A perusal of the impugned SCN would indicate that the respondents have purported to invoke Section 74(1) of the CGST/KGST Act and alleged that the petitioner has contravened the following provisions of the Act as hereunder:-

- *Section 52 of the CGST Act, 2017 ( and similar provisions in SGST Act, 2017) in as much as they failed to collect TCS 2 1% of the net value of taxable supplies made though it by other supplier where the consideration with respect to such supplies is to be collected by the operator;*
- *Section 17(2) of CGST Act, 2017 ( and similar provisions under SGST Act, 2017) in as much they failed to restrict availment of input tax credit to so much of the input tax as is attributable to the said taxable supplies;*
- *Section 13 of the CGST Act, 2017 (and similar provisions under SGST Act, 2017) in as much as they failed to raise tax invoice to their group entities in time;*
- *Section 39 of the CGST Act, 2017 ( and similar provisions under SGST Act, 2017) in as much as they failed to furnish the prescribed returns the details of free supplies provided to their customers.”*

8. As noticed above, petitioner has restricted the present petition only in relation to Sections 52 and 17(2) of the CGST /



KGST Act and Sections 13 and 39 referred to supra are not the subject matter of the present proceedings / order.

9. The following points arise for consideration in the present petition are as under:-

(i) Whether the impugned SCN issued by the respondents alleging that the petitioner had contravened / violated Section 52 of the CGST / KGST Act, since they failed to collect TCS (Tax Collection at Source) @ 1% of the net value of the taxable supplies made through it by other suppliers where the consideration with respect to such supplies is to be collected by the operator deserves to be quashed?

(ii) Whether the impugned SCN issued by the respondents alleging that the petitioner had violated / contravened Section 17(2) of the CGST / KGST Act, since they failed to restrict availment of Input Tax Credit (ITC) to so much of the input tax as is attributable to the said taxable supplies deserves to be quashed?

(iii) Whether the respondents were entitled to invoke Section 74(1) of the CGST / KGST Act for the purpose of issuing the impugned SCN to the petitioner ?



**Re-Point No.1:-**

10. Before proceeding further, it would be apposite to extract the provisions of Section 52 of the CGST / KGST Act, which reads as under:-

***52. Collection of tax at source.-***

*(1) Notwithstanding anything to the contrary contained in this Act, every electronic commerce operator (hereafter in this section referred to as the "operator"), not being an agent, shall collect an amount calculated at such rate not exceeding one per cent., as may be notified by the Government on the recommendations of the Council, of the net value of taxable supplies made through it by other suppliers where the consideration with respect to such supplies is to be collected by the operator.*

***Explanation*** .-For the purposes of this sub-section, the expression "net value of taxable supplies" shall mean the aggregate value of taxable supplies of goods or services or both, other than services notified under sub-section (5) of section 9, made during any month by all registered persons through the operator reduced by the aggregate value of taxable supplies returned to the suppliers during the said month.

*(2) The power to collect the amount specified in sub-section (1) shall be without prejudice to any other mode of recovery from the operator.*

*(3) The amount collected under sub-section (1) shall be paid to the Government by the operator within ten days*



*after the end of the month in which such collection is made, in such manner as may be prescribed.*

*(4) Every operator who collects the amount specified in sub-section (1) shall furnish a statement, electronically, containing the details of outward supplies of goods or services or both effected through it, including the supplies of goods or services or both returned through it, and the amount collected under sub-section (1) during a month, in such form and manner as may be prescribed, within ten days after the end of such month:*

*[**Provided** that the Commissioner may, for reasons to be recorded in writing, by notification, extend the time limit for furnishing the statement for such class of registered persons as may be specified therein:*

***Provided** further that any extension of time limit notified by the Commissioner of State tax or the Commissioner of Union territory tax shall be deemed to be notified by the Commissioner.]*

*[**Explanation** : - For the purposes of this sub-section, it is hereby declared that the due date for furnishing the said statement for the months of October, November and December, 2018 shall be the <sup>3</sup>[07th February, 2019].]*

*(5) Every operator who collects the amount specified in sub-section (1) shall furnish an annual statement, electronically, containing the details of outward supplies of goods or services or both effected through it, including the supplies of goods or services or both returned through it, and the amount collected under the said sub-section during the financial year, in such form and manner as may be*



*prescribed, before the thirty first day of December following the end of such financial year*

***Provided** that the Commissioner may, on the recommendations of the Council and for reasons to be recorded in writing, by notification, extend the time limit for furnishing the annual statement for such class of registered persons as may be specified therein:*

***Provided** further that any extension of time limit notified by the Commissioner of State tax or the Commissioner of Union territory tax shall be deemed to be notified by the Commissioner.]*

*(6) If any operator after furnishing a statement under sub-section (4) discovers any omission or incorrect particulars therein, other than as a result of scrutiny, audit, inspection or enforcement activity by the tax authorities, he shall rectify such omission or incorrect particulars in the statement to be furnished for the month during which such omission or incorrect particulars are noticed, subject to payment of interest, as specified in sub-section (1) of section 50:*

***Provided** that no such rectification of any omission or incorrect particulars shall be allowed after the <sup>5</sup>[thirtieth day of November] following the end of the financial year or the actual date of furnishing of the relevant annual statement, whichever is earlier.*

*(7) The supplier who has supplied the goods or services or both through the operator shall claim credit, in his electronic cash ledger, of the amount collected and*



*reflected in the statement of the operator furnished under sub-section (4), in such manner as may be prescribed.*

*(8) The details of supplies furnished by every operator under sub-section (4) shall be matched with the corresponding details of outward supplies furnished by the concerned supplier registered under this Act in such manner and within such time as may be prescribed.*

*(9) Where the details of outward supplies furnished by the operator under sub-section (4) do not match with the corresponding details furnished by the supplier under <sup>6</sup>[section 37 or section 39], the discrepancy shall be communicated to both persons in such manner and within such time as may be prescribed.*

*(10) The amount in respect of which any discrepancy is communicated under sub-section (9) and which is not rectified by the supplier in his valid return or the operator in his statement for the month in which discrepancy is communicated, shall be added to the output tax liability of the said supplier, where the value of outward supplies furnished by the operator is more than the value of outward supplies furnished by the supplier, in his return for the month succeeding the month in which the discrepancy is communicated in such manner as may be prescribed.*

*(11) The concerned supplier, in whose output tax liability any amount has been added under sub-section (10), shall pay the tax payable in respect of such supply along with interest, at the rate specified under sub-section (1) of section 50 on the amount so added from the date such tax was due till the date of its payment.*



*(12) Any authority not below the rank of Deputy Commissioner may serve a notice, either before or during the course of any proceedings under this Act, requiring the operator to furnish such details relating to-*

*(a) supplies of goods or services or both effected through such operator during any period; or*

*(b) stock of goods held by the suppliers making supplies through such operator in the godowns or warehouses, by whatever name called, managed by such operator and declared as additional places of business by such suppliers,*

*as may be specified in the notice.*

*(13) Every operator on whom a notice has been served under sub-section (12) shall furnish the required information within fifteen working days of the date of service of such notice.*

*(14) Any person who fails to furnish the information required by the notice served under sub-section (12) shall, without prejudice to any action that may be taken under section 122, be liable to a penalty which may extend to twenty-five thousand rupees.*

**Explanation.** *-For the purposes of this section, the expression "concerned supplier" shall mean the supplier of goods or services or both making supplies through the operator.*

*[(15) The operator shall not be allowed to furnish a statement under sub-section (4) after the expiry of a period of three years from the due date of furnishing the said statement:*



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**Provided** that the Government may, on the recommendations of the Council, by notification, subject to such conditions and restrictions as may be specified therein, allow an operator or a class of operators to furnish a statement under sub-section (4), even after the expiry of the said period of three years from the due date of furnishing the said statement]

*Explanation, -For the purposes of this Section, the expression “ concerned supplier” shall mean the supplier of goods or services or both making supplies through the operator.”*

10.1 The Central of Indirect Taxes and Customs, issued a Circular No.194/06/2023-GST dated 17.07.2023 clarifying TCS liability under Section 52 of the CGST / KGST Act in case of multiple e-commerce operators in one transaction. The said Circular reads as under:-

***Circular No. 194/06/2023-GST***

***File No. CBIC-20001/5/2023-GST  
Government of India  
Ministry of Finance  
Department of Revenue  
Central Board of Indirect Taxes and Customs  
GST Policy Wing***

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*New Delhi, Dated the 17th July, 2023*

To,

*The Principal Chief Commissioners/Chief  
Commissioners/Principal Commissioners/*



*Commissioners of Central Tax (All)  
The Principal Directors General/ Directors General (All)*

*Madam/Sir,*

***Subject: Clarification on TCS liability under Sec 52 of the CGST Act, 2017 in case of multiple E-commerce Operators in one transaction.***

*Reference has been received seeking clarification regarding TCS liability under section 52 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as "CGST Act"), in case of multiple E-commerce Operators (ECOs) in one transaction, in the context of Open Network for Digital Commerce (ONDC).*

*2.1 In the current platform-centric model of e-commerce, the buyer interface and seller interface are operated by the same ECO. This ECO collects the consideration from the buyer, deducts the TCS under Sec 52 of the CGST Act, credits the deducted TCS amount to the GST cash ledger of the seller and passes on the balance of the consideration to the seller after deducting their service charges.*

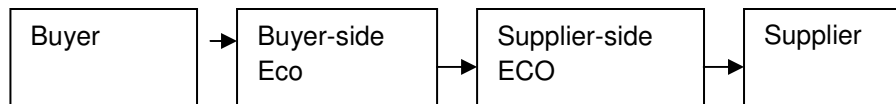
*2.2 In the case of the ONDC Network or similar other arrangements, there can be multiple ECOs in a single transaction - one providing an interface to the buyer and the other providing an interface to the seller. In this setup, buyer-side ECO could collect consideration, deduct their commission and pass on the consideration to the seller-side ECO. In this context, clarity has been sought as to which ECO should deduct TCS and make other compliances under section 52 of CGST Act in such situations, as in such models*



*having multiple ECOs in a single transaction, both the Buyer-side ECO and the Seller-side ECO qualify as ECOs as per Section 2(45) of the CGST Act.*

*3. In order to clarify the issue and to ensure uniformity in the implementation of the provisions of law across the field formations, the Board, in exercise of its powers conferred by section 168 (1) of the CGST Act, hereby clarifies the issues as under:*

***Issue 1: In a situation where multiple ECOs are involved in a single transaction of supply of goods or services or both through ECO platform and where the supplier-side ECO himself is not the supplier in the said supply, who is liable for compliances under Section 52 including collection of TCS?***



***Clarification:*** *In such a situation where multiple ECOs are involved in a single transaction of supply of goods or services or both through ECO platform and where the supplier-side ECO himself is not the supplier of the said goods or services, the compliances under section 52 of CGST Act, including collection of TCS, is to be done by the supplier-side ECO who finally releases the payment to the supplier for a particular supply made by the said supplier through him.*

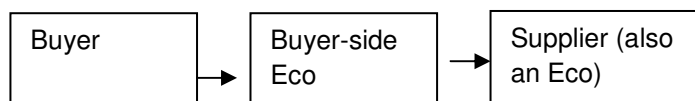
*e.g.: Buyer-side ECO collects payment from the buyer, deducts its fees/commissions and remits the balance to*



*Seller-side ECO. Here, the Seller-side ECO will release the payment to the supplier after deduction of his fees/commissions and therefore will also be required to collect TCS, as applicable and pay the same to the Government in accordance with section 52 of CGST Act and also make other compliances under section 52 of CGST Act.*

*In this case, the Buyer-side ECO will neither be required to collect TCS nor will be required to make other compliances in accordance with section 52 of CGST Act with respect to this particular supply.*

***Issue 2: In a situation where multiple ECOs are involved in a single transaction of supply of goods or services or both through ECO platform and the Supplier-side ECO is himself the supplier of the said supply, who is liable for compliances under section 52 including collection of TCS?***



***Clarification:*** *In such a situation, TCS is to be collected by the Buyer-side ECO while making payment to the supplier for the particular supply being made through it.*

*e.g. Buyer-side ECO collects payment from the buyer, deducts its fees and remits the balance to the supplier (who is itself an ECO as per the definition in Sec 2(45) of the CGST Act). In this scenario, the Buyer-side ECO will also be required to collect TCS, as applicable, pay the same to the Government in accordance with section 52 of CGST Act and also make other compliances under section 52 of CGST Act.*



*4. It is requested that suitable trade notices may be issued to publicize the contents of this Circular.*

*5. Difficulty, if any, in implementation of this Circular may please be brought to the notice of the Board. Hindi version would follow.*

*(Sanjay Mangal)  
Principal Commissioner  
(GST)*

10.2 A perusal of the material on record will indicate that in the impugned SCN proceeds on the basis that the petitioner being an e-commerce operator was liable to collect TCS on the consideration with respect to the supplies undertaken on its online portal, [www.udaan.com](http://www.udaan.com) in terms of Section 52 and it is on this basis that the SCN purports to invoke Section 74(1) to demand tax from the petitioner on such supplies undertaken through the online portal. In this context, the impugned SCN overlooks the fact that Section 52 which provides for the e-commerce operator to collect TCS would not apply unless payment / consideration is collected / received by the petitioner; section 52 is applicable only to cases where the e-commerce operator is collecting consideration with respect of supplies undertaken through the online portal and the petitioner herein who does not collect consideration, therefore cannot be covered within Section 52 of the CGST / KGST Act.



10.3 The SCN also fails to consider and appreciate that the transactions in question are not supplies of the petitioner and Section 74 has no application since the jurisdictional requirement for issuing the impugned SCN under Section 74(1) is that “any tax has not been paid or short paid by reasons of fraud, or willful misstatement or suppression of facts to evade tax” and has to be issued to “the person chargeable with tax”; in the instant case, Section 74 could not have been invoked for any non-compliance of Section 52 as the transactions on which demand is sought to be raised are not the supplies of the petitioner and it is the sellers / service providers who undertook such supplies that are required to discharge GST; the petitioner only operates a platform on which two independent parties chose to transact and the sellers using the online platform having been registered under the CGST / KGST Act and having paid the tax due on their respective supplies, in the absence of any provision under the CGST / KGST Act to treat the petitioner as a supplier of such supplies, Section 74 could not have been invoked at all and the impugned SCN deserves to be quashed.



10.4 The impugned SCN also fails to consider and appreciate that there is no provision in the CGST / KGST Act to treat the petitioner as an assessee in default, under which, the person responsible for collecting tax becomes liable to pay tax which is a liability of the supplier of goods or services; in this context, it is relevant to state that in other tax / physical statutes for eg., Section 201 of the Income Tax Act, 1961 which provides for a legal fiction under which a person responsible for deducting tax “an assessee in default” and is liable to pay tax not deducted; however, in the CGST / KGST Act, there is no provision to issue a notice to the person who has not collected the tax to pay such tax which is the primary liability of the supplier of the goods or services and the impugned SCN deserves to be quashed on this ground also.

10.5 As stated supra, in the instant case, the petitioner does not collect payment for the supply and Section 52 has no application; in this context, it is significant to note that a plain reading of Section 52 discloses that unless payment is collected by the petitioner which is an e-commerce operator, the provisions pertaining to TCS would not apply and in the light of the undisputed fact that no payment is collected by the petitioner as required under



Section 52, the impugned SCN which purports to travel beyond the provisions of Section 52 is clearly without jurisdiction. Further, there is no allegation in the entire impugned SCN that consideration / payment is collected by the petitioner with respect to the supplies, which is yet another circumstance which would vitiate the impugned SCN issued by the respondents; so also, Section 74 would apply only against persons chargeable with tax and the petitioner not being a “person chargeable with tax”, it is impermissible in law to invoke Section 74 as against the petitioner as sought to be purported to be done by way of the impugned SCN by the respondents; significantly, a perusal of the provisions contained in Section 74 which contemplates issuance of notice only if tax has not been paid / short paid / erroneously refunded / ITC wrongly availed / utilised by reason of fraud / willful misstatement or suppression of facts to evade tax would not be attracted upon failure by a person to deduct TCS or non-compliance of Section 52; to put it differently, violation / breach of Section 52 would not entail invocation of Section 74 which would not apply on account of non-compliance of Section 52 and the impugned SCN deserves to be quashed on this ground also.



10.6 It is also relevant to state that there is no provision in the CGST / KGST Act, much less, Section 52 which permits the respondents to consider a payment collected by a separate entity to be a payment collected “on behalf of” petitioner and Section 52 would be applicable only to cases where the e-commerce operator is also collecting consideration with respect of supplies undertaken through its online portal. In this regard, a perusal of the CBIC Circular dated 17.07.2023, will indicate that it is specifically stated that Section 52 is applicable only in cases where e-commerce operators such as the petitioner collects the payment. As stated supra, the petitioner herein does not collect consideration or payment and the various persons registered in the petitioner’s platform had engaged their own service providers and were settling payments directly among themselves, thereby establishing that the petitioner would neither be covered nor come within the scope and ambit of Section 52 of the CGST / KGST Act and the impugned SCN issued by the respondents illegally invoking Section 52 deserves to be quashed on this ground also.

10.7 A perusal of the impugned SCN will indicate that the respondents have proceeded on an erroneous assumption that the



services provided by HLPL of logistics and payment collection services are in fact, services of the petitioner – HTPL and therefore, petitioner is covered under Section 52 of the CGST / KGST Act. However, such an assumption is wholly erroneous and contrary to the material on record, in as much as HLPL is a different, separate, distinct, juristic and legal entity which is carrying on business on its own account and is also separately registered with the GST authorities, while the petitioner – HTPL is also a different, separate, distinct, juristic and legal entity which is carrying on business on its own account and is also separately registered with the GST authorities as required under Section 25 of the CGST / KGST Act; it follows therefrom that in terms of the principles contained in the company laws in India and Section 25 of the CGST / KGST Act, HLPL is a distinct entity which is separate and independent from the petitioner – HTPL, especially when the said HLPL is one of the empanelled service providers on the online portal of the petitioner and it is completely optional for the users to enter into a Bipartite agreement with HLPL or anyone else and the petitioner being neither responsible nor collects the consideration on behalf of the users, the provisions of Section 52 are not



applicable to the petitioner and viewed from this angle also, the impugned SCN deserves to be quashed.

10.8 The aforesaid discussion is sufficient to come to the conclusion that the impugned SCN issued by the respondents alleging that the petitioner had contravened / violated Section 52 of the CGST / KGST Act, since they failed to collect TCS (Tax Collection at Source) @ 1% of the net value of the taxable supplies made through it by other suppliers where the consideration with respect to such supplies is to be collected by the operator is clearly illegal, arbitrary and without jurisdiction or authority of law and contrary to the provisions of the CGST / KGST Act and the same deserves to be quashed.

**Point No.1** is accordingly answered in favour of the petitioner.

**Re-Point No.2:**

11. A perusal of the impugned SCN will indicate that the respondents have alleged that the petitioner had violated Section 17(2) of the CGST / KGST Act, since it had failed to restrict availment of ITC to so much of the input tax as is attributable only to the taxable supplies and the petitioner who was required to



reverse ITC in terms of Section 17(2) r/w Rules 42 and 43 of the CGST / KGST Rules has failed to do so, thereby violating the said provision resulting in demand made by the respondents in the impugned SCN issued by them. It is alleged that there has been irregular availment of ITC by the petitioner with respect to free supplies resulting in the petitioner being liable to answer the demand made in the impugned SCN issued by the respondents. In this context, it is necessary to extract Section 17 which reads as under:-

**Section 17. Apportionment of credit and blocked credits**

*(1) Where the goods or services or both are used by the registered person partly for the purpose of any business and partly for other purposes, the amount of credit shall be restricted to so much of the input tax as is attributable to the purposes of his business.*

*(2) Where the goods or services or both are used by the registered person partly for effecting taxable supplies including zero rated supplies under this Act or under the Integrated Goods and Services Act and partly for effecting exempt supplies under the said Acts, the amount of credit shall be restricted to so much of the input tax as is attributable to the said taxable supplies including zero rated supplies.*

*(3) xxxxxxxxxxxxxxxxxxxxxxxxx*



11.1 It is also relevant to extract Section 7(1)(a) of the CGST / KGST Act, which defines 'supply' as under:-

***Scope of supply.***

***7.(1)*** For the purpose of this Act, the expression "supply" includes –

***(a)*** all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;

11.2 Section 2(78) defines 'non-taxable services' as under:-

***2 (78)*** "non-taxable supply" means a supply of goods or services or both which is not leviable to tax under this Act or under the Integrated Goods and Services Tax Act;”

11.3 Section 2(47) defines 'exempt supply' as under:-

***2(47)*** "exempt supply" means supply of any goods or services or both which attracts nil rate of tax or which may be wholly exempt from tax under [section 11](#), or under [section 6](#) of the Integrated Goods and Services Tax Act, and includes nontaxable supply;”

11.4 A perusal of the material on record will indicate that in order to promote the online market place services and in order to penetrate B2B e-commerce market, the petitioner was actively



promoting the entire platform along with the services which are provided therein; the impugned SCN erroneously assumes that these services are free supplies and hence, not taxable / exempt and accordingly, ought to have reversed ITC by following Section 17(2) which imposes restriction on suppliers undertaking both taxable as well as exempt supplies; however, the impugned SCN which raises a demand in this regard clearly travels well beyond the scope and ambit of Section 17(2) which is not applicable to the petitioner and the impugned SCN deserves to be quashed for more than one reason;

(a) Firstly, the promotion of one's own platform along with all the services provided therein is an activity which benefits the petitioner himself primarily and also benefits all the other service providers and ultimately, the petitioner would be able to expand his business by attracting more persons on the website if he were to show that the said website could attract more and more players; therefore, the fundamental fallacy in the impugned SCN is on jurisdictional facts which assumes that the said section is attracted even where someone uses the input tax credit for his own self and that also benefits others; in this context, it is relevant to state that in



the case of ***Philips India Ltd vs CCE – 1997(91) ELT 540(SC)***, when the revenue/department purported to add discount representing advertising expenses to the assessable value under central excise when such expenditure benefited both the manufacturer and the distributor and such an addition was negated by the Apex Court by holding as under wherein it was held that :

*“ 4. It is not in dispute that the agreements between the appellant and their dealers are genuine agreements entered into an arms length, that they are as between principal and principal and that the payments contemplated therein are made. The relevant clauses of the agreement are:*

*(6) All Company's products to be supplied under this Agreement shall be paid for in cash upon delivery. All taxes (Central or State), levies, imposition, octroi and duties which may be assessed on the Company in respect of the sale of the Company's products or levied on the said sales shall be borne by the Dealer and the Dealer shall indemnify and keep indemnified the Company against any claim, demands, proceedings, costs, charges and expenses in respect of such imposition, taxes and duties.*

*(16) The Dealer will be informed from time to time of the Company's products which are available and of their current list prices together with the terms of supply and prices applicable to the dealer. The Company shall be at liberty to intimate to the dealer the maximum prices at which the dealer shall sell the products. The dealer shall, however, be free to charge prices lower than those.*

*(18) The Dealer undertakes strictly to comply with the terms of guarantee of free service for the company's products laid down by the Company from time to time regardless of where the purchase has been made and further undertakes that it shall not charge the customer for*



*any repairs to any Philips receivers during the prescribed guaranteed service period.*

*(19) The Dealer undertakes to maintain an efficient service station duly equipped in every respect to the satisfaction of the Company at all times and will assume full responsibility for the servicing or repairs in respect of the sets and the Company's products. The Dealer shall comply in this respect with whatever instructions may be given from time to time by the Company.*

*(24) The Company reserves the right to exercise control and supervision at any time over all repairs of Philips receivers and in case repairs are considered by the Company to be of an unsatisfactory nature, the Company will be free to correct such repairs at the cost and expense of the Dealer.*

*(26) The dealers shall carry out at their own expense advertisement campaign to promote sales of the Company's products.*

*(34) Nothing in this Agreement shall constitute or be deemed to constitute the Dealer as agent of the Company for any purpose whatsoever and the relationship between the parties hereto is that of vendor and purchaser.*

*5. It seems to us clear that the advertisement which the dealer was required to make at its own cost benefited in equal degree the appellant and the dealer and that for this reason the cost of such advertisement was borne half and half by the appellant and the dealer. Making a deduction out of the trade discount on this account was, therefore, uncalled for.*

*6. As to the after sales service that the dealer was required under the agreement to provide, it did of course enhance in the eyes of intending purchasers the value of the appellant's product, but such enhancement of value enured not only for the benefit of the appellant; it also enured for the benefit of the dealer for, by reason thereof, the dealer got to sell more and earn a larger profit. The guarantee attached to*



*the appellant's products specified that they could be repaired during the guarantee period by the appellant's dealers anywhere in the country. Thus, though one dealer might have to repair goods sold by another dealer and incur costs in that regard, he also had the benefit of having the goods he sold reparable throughout the country. The provision as to after sales service, therefore, benefited not only the appellant; it was a provision of mutual benefit to the appellant and the dealer.*

*7. We think that in adjudicating matters such as this, the Excise authorities would do well to keep in mind legitimate business considerations. ”*

(b) Secondly, in the case on hand, there are no services, much less free services, being provided by the petitioner who operates the said web site and promotes its usage and under Section 17(2), the onus is on the respondents to show how the input services are being used in exempt and taxable services and this data is clearly not forthcoming from the show cause notice and the same being conspicuously absent, the impugned SCN deserves to be quashed.

(c) Thirdly, the material on record also discloses that the petitioner does collect licensing fees from the other operators on which there is no allegation regarding non-payment of GST and



therefore, if at all, the ITC being availed of and taken by the petitioner is used for providing taxable services on which GST is being discharged, the usage of such services to promote one's own website along with the other participants cannot lead to a conclusion that the petitioner is providing services free of charge to others; marketing services of the petitioners are not free supplies and the same are undertaken for the business and has been erroneously assumed to be free supply, since it was only to enhance the footfall on the online portal and charging. of consideration really does not arise where such promotional activities go to benefit oneself along with others. in fact, there were no free supplies made by the petitioner and mere non-charging of consideration to enhance footfall on the online portal of the petitioner cannot be considered / construed / treated as free or non-taxable or exempt supplies so as to attract Section 17(2) which is clearly non-applicable to the petitioner and the impugned SCN deserves to be quashed.

11.5 It is pertinent to note that a perusal of Section 17(2) clearly indicates that it restricts exempt supplies which would cover only services attracting nil rate of tax or are wholly exempt from tax



and includes a non taxable supply; in the instant case, the impugned SCN has not set out these ingredients nor analysed the same as to show what are the exempt supplies at all except stating that since promotional activities were done by the petitioner for others without consideration, it would amount to exempt supplies which is contrary to the material on record which clearly establishes that doing promotional activities which benefit the petitioner and other suppliers cannot be construed or treated as exempt supplies and consequently, in the absence of any specific exemption or the services being levied with “nil” rate of tax, the same cannot qualify as exempt supply leading to the sole conclusion that Section 17(2) would not be applicable to the facts of the instant case and it was impermissible in law for the respondents to invoke Section 17(2) for the purpose of the impugned SCN which deserves to be quashed on this ground also.

11.6 It is significant to note that any activity without consideration gets excluded from the purview of the CGST / KGST Act; in this context, it is relevant to state that the restrictions under Section 17(2) would apply only when there is a “supply” undertaken and in order to fall under the scope of supply, there has to be “a



consideration” involved against the activity undertaken and only the activities specified in Schedule – I are considered as supply without charging any consideration; the activities undertaken by the petitioner includes activities which undisputedly do not fall in Schedule – I and since the services provided by the petitioner are without any consideration, the same do not qualify as supply as per Section 7 of the CGST / KGST Act. It follows there from that if a transaction does not qualify a supply at all, it is not correct or permissible in law to characterize or construe or treating as a “free supply” for the purpose of invocation of the provisions of Section 74 thereby making it clear that the provisions of the CGST / KGST Act including the restrictions under Section 17(2) are not applicable to the transactions in question and the attempt made by the respondents in the impugned SCN seeking to restrict the ITC of the petitioner by invoking Section 17(2) is nothing but an attempt to include a transaction within the purview of the CGST / KGST Act which is otherwise excluded from its applicability and as such, the impugned SCN deserves to be quashed on this score also.

11.7 A plain reading of Section 17(2) of the CGST / KGST Act will indicate that the said provision would be applicable only to



a registered person using goods or services or both partly for effecting taxable supplies including zero rated supplies and partly for effecting exempt supplies; undisputedly, petitioner is not effecting zero rated supplies and in the case on hand, in the absence of any material placed by the respondents or any allegation made in the impugned SCN that the petitioner is partly effecting taxable supplies and partly effecting exempt supplies as required under Section 17(2), it cannot be said in the facts and circumstances of the instant case that the petitioner has violated Section 17(2) as alleged by the respondents and the said provision not being applicable to the petitioner or its transactions, the impugned SCN deserves to be quashed on this ground also.

11.8 Under these circumstances, I am of the considered opinion that the impugned SCN issued by the respondents alleging that the petitioner had violated / contravened Section 17(2) of the CGST / KGST Act, since they failed to restrict avilment of Input Tax Credit (ITC) to so much of the input tax as is attributable to the said taxable supplies is clearly illegal, arbitrary and without jurisdiction or authority of law and contrary to the provisions of the CGST / KGST Act and the same deserves to be quashed.



**Point No.2** is also accordingly answered in favour of the petitioner.

**Re-Point No.3:**

12. A perusal of the impugned SCN will indicate that the mandatory requirements / ingredients of Section 74 are not satisfied and the same are conspicuously absent in the impugned SCN; there is no gainsaying the fact that Section 74 would be applicable only in circumstances involving fraud, willful misstatement or suppression of facts with intent to evade tax; in the instant case, as per the impugned SCN, the only ground for invocation of the extended period of limitation as provided in Section 74 is that the petitioner was not collecting TCS and had not reflected non-taxable supply in its GST return which could not have been made the basis nor contain necessary ingredients for invocation of Section 74 of the CGST / KGST Act; it is well settled that where a show cause notice does not contain any allegation that the petitioner had not paid taxes or wrongly availed or utilised ITC due to any fraud or willful misstatement or suppression of facts to evade tax, the impugned SCN which lacked the basic ingredients would be wholly without jurisdiction or authority of law



and contrary to the said provisions. In the case of ***M/s.NCN Pearson Inc. vs. Union of India & others – W.P.No.7635/2024 dated 16.07.2025***, this Court held as under:-

17. *As stated supra, it is the specific contention of the petitioner that the impugned SCN dated 12.02.2024 issued under Section 74 of the CGST Act, by the 2<sup>nd</sup> respondent on the ground of 'wilful suppression' is illegal and arbitrary being manifestly violative of the law for want of satisfaction of the jurisdictional fact of Section 74 of the CGST Act and that the impugned show cause notice is wholly without jurisdiction or authority of law as the foundational jurisdictional facts to trigger / invoke Section 74 of the CGST Act i.e., existence of wilful suppression to evade / avoid payment of GST in relation to Type – III tests has not been satisfied by the respondents who seek the invoke the benefit of the extended period of limitation under Section 74 of the CGST Act. In this context, it is relevant to state that the question of limitation involves a question of jurisdiction and that a finding of fact on the question of jurisdiction would be a jurisdictional fact and issues concerning limitation go to the very root of the matter and an authority cannot clothe itself with jurisdiction by deciding the jurisdictional fact incorrectly or by assuming the jurisdictional fact wrongly.*

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



**Jurisdictional fact**

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

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

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

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

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

**Jurisdictional fact and adjudicatory fact**

29. *But there is distinction between “jurisdictional fact” and “adjudicatory fact” which cannot be ignored. An “adjudicatory fact” is a “fact in issue” and can be determined by a court, tribunal or authority on*



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

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

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

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

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

(emphasis supplied)

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

**33.** In *Chaube Jagdish Prasad v. Ganga Prasad Chaturvedi* [AIR 1959 SC 492 : 1959 Supp (1) SCR 733], the question was whether the landlord was entitled to enhancement of rent. Under the Act, he was not entitled to such rent unless a “new construction” had been made after 30-



6-1946. It was held by this Court that the question whether construction was new or not was a "jurisdictional fact" and if the court wrongly decided the said fact and thereby conferred jurisdiction not vested in it, the High Court could interfere with the order. The Court stated (at AIR p. 498, para 21) that "once it had the power it could determine whether the question of the date of construction was rightly or wrongly decided". (See also Arun Kumar v. Union of India [(2007) 1 SCC 732] .)

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

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

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

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



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

**3.** *Aggrieved by that order the appellant went up in appeal to the Appellate Assistant Commissioner. The Appellate Assistant Commissioner rejected the appeal on the ground that the same was not maintainable. He took the view that an appeal lay only under Section 30(1-A). But, before such an appeal can be entertained the appellant must satisfy two conditions, namely, (1) he had deducted the tax due from the non-resident in accordance with the provisions of sub-section (3-B); and (2) that he had paid the sum deducted to the Government. The appellant having not complied with those two conditions, the Appellate Assistant Commissioner held that the appeal was incompetent. The order of the Appellate Assistant Commissioner was confirmed by the Tribunal. Thereafter, the appellant moved the High Court under Article 226 of the Constitution. That application came up before a Single Judge. The Single Judge after going into the matter in dated came to the conclusion that Messrs Nathirmal and Sons is not a non-resident firm and that being so the appellant was not required to act under Section 18(3-B). He accordingly set aside the order impugned. The revenue went up in appeal against the order of the learned Single Judge to the Appellate Bench. That Bench allowed the appeal with the observations, "in the present case the question before the Income Tax Officer, Rampur, was whether the firm Nathirmal and Sons was non-resident or not. There was material before him on this question. He had jurisdiction to decide the question either way. It cannot be said that the officer assumed jurisdiction by a wrong decision on this question of residence". The Appellate Bench appears to have been under the impression that the Income Tax Officer was the sole Judge of the fact whether the firm in question was resident or non-resident. This conclusion in, our opinion, is wholly wrong. No authority, much less a quasi-judicial authority, can confer jurisdiction on itself by deciding a jurisdictional fact wrongly. The question whether the Jurisdictional fact has been rightly decided or not is a question that is open for examination by the High Court in an application for a writ of certiorari. If the High Court comes to the conclusion, as the learned Single*



*Judge has done in this case, that the Income Tax Officer had clutched at the Jurisdiction by deciding a jurisdictional fact erroneously, then the assessee was entitled for the writ of certiorari prayed for by him. It is incomprehensible to think that a quasi-judicial authority like the Income Tax Officer can erroneously decide a jurisdictional fact and thereafter proceed to impose a levy on a citizen. In our opinion, the Appellate Bench is wholly wrong in opining that the Income Tax Officer can “decide either way”.*

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

***Limitation***

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

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

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

*“On the contrary, all the processes were carried out openly and they themselves had come up for detailed consideration and eventually the decision was taken under the Assistant Collector’s order dated 14-7-1983 after due application of mind and it would, therefore, be incredible to*



*allege as is sought to be done that the Department was not in a position to get first-hand knowledge of the various processes adopted.”*

*The appellant had further contended:*

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

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

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

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

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



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

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

*21. In the instant case, a perusal of the material on record will indicate that the 2<sup>nd</sup> respondent has decided the jurisdictional facts in relation to the alleged wilful suppression by the petitioner erroneously/incorrectly by attempting to vest itself with the jurisdiction under Section 74 of the CGST Act and saddle a GST liability upon the petitioner for the period under dispute, which is impermissible in law and consequently, the very issuance of the impugned SCN dated 12.02.2024 under Section 74 of the CGST Act is illegal and violative of Article 265 of the Constitution inasmuch as the impugned SCN seeks to realize monies from the petitioner under the guise of tax without the authority of the law and the impugned SCN deserves to be quashed.*

*22. The impugned SCN also fails to consider and appreciate that the issue of classification of Type-III Tests had not attained finality on account of W.P.No.3555/2021*



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*preferred by the petitioner against the order of the AAAR pending adjudication before the Division Bench of this Court, in which there is an interim order in favour of the petitioner as stated supra; despite the sub-judice nature of the issue of classification and taxability of Type-III Tests pending before this Court, and interim orders having been granted in favour of the petitioner, the 2<sup>nd</sup> respondent has issued the impugned SCN relating to Type-III Tests, even though this very issue/question relating to classification and taxability of such supply of service was pending consideration of this Court and the impugned SCN deserves to be quashed on this score also.*

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



*impugned SCN, which deserves to be quashed on this ground also.*

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

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

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

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



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

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

26. In *Tata Iron & Steel Co. Ltd. v. Union of India* [(1988) 3 SCC 403 : 1988 SCC (L&S) 381 : (1988) 35 ELT 605] this Court held that when the classification list continued to have been approved regularly by the Department, it could not be said that the manufacturer was guilty of "suppression of facts". As noted herein earlier, we have also concluded that the classification lists supplied by the appellant were duly approved from time to time regularly by the Excise Authorities and only in the year 1995, the Department found that there was "suppression of facts" in the matter of post-forming manufacturing process of the products in question. Furthermore, in view of our discussion made herein earlier, that the Department has had the opportunities to inspect the products of the appellant from time to time and, in fact, had inspected the products of the appellant. Classification lists supplied by the appellant were duly approved and in view of the admitted fact that the flow-chart of manufacturing process submitted to the Superintendent of Central Excise on 17-5-1990 clearly mentioned the fact of post-forming process on the rubber, the finding on "suppression of facts" of CEGAT cannot be approved by us. This Court in the case of *Pushpam Pharmaceuticals Co. v. CCE* [1995 Supp (3) SCC 462] while dealing with the meaning of the expression "suppression of facts" in the proviso to Section 11-A of the Act held that the term must be construed strictly, it does not



*mean any omission and the act must be deliberate and wilful to evade payment of duty. The Court further held: (SCC pp. 463-64, para 4)*  
*“In taxation, it [‘suppression of facts’] can have only one meaning that the correct information was not disclosed deliberately to escape payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression.”*

*(emphasis supplied)*

*27. Relying on the aforesaid observations of this Court in the case of Pushpam Pharmaceuticals Co. v. CCE [1995 Supp (3) SCC 462] we find that “suppression of facts” can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty. When facts were known to both the parties, the omission by one to do what he might have done and not that he must have done, would not render it suppression. It is settled law that mere failure to declare does not amount to wilful suppression. There must be some positive act from the side of the assessee to find wilful suppression. Therefore, in view of our findings made hereinabove that there was no deliberate intention on the part of the appellant not to disclose the correct information or to evade payment of duty, it was not open to the Central Excise Officer to proceed to recover duties in the manner indicated in the proviso to Section 11-A of the Act. We are, therefore, of the firm opinion that where facts were known to both the parties, as in the instant case, it was not open to CEGAT to come to a conclusion that the appellant was guilty of “suppression of facts”. In Densons Pultretaknik v. CCE [(2003) 11 SCC 390] this Court held that mere classification under a different sub-heading by the manufacturer cannot be said to be wilful misstatement or “suppression of facts”. This view was also reiterated by this Court in CCE v. L.M.P. Precision Engg. Co. Ltd. [(2004) 9 SCC 703]*

*27. So also, in **Continental Foundation Joint Venture vs. Commissioner of Central Excise, Chandigarh** -(2007) 216 ELT 177 (SC), it was held by the*



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*Apex Court that mere omission to give correct information is not suppression of facts, unless it was deliberate to stop the payment of duty and that when the facts are known to both the parties, omission by one party to do what he might have done would not render it to be suppression as hereunder:*

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

*28. As stated earlier, though the respondents allege in the impugned SCN that the petitioner failed to mention the value of services correctly in the GSTR - 5A returns and apply the correct GST rate on the consideration received, the mere omission to mention the value of services correctly in the returns and/or apply the correct GST rate would not be tantamount to wilful suppression, in light of the principles laid down in the aforesaid judgments, particularly when the respondents-Revenue had in their knowledge the complete gamut of transactions of supply of Type-III tests by the petitioner, thereby leading to the sole conclusion that an intention to evade payment of tax could in no manner be*



*imputed or attributable to the petitioner and the impugned SCN deserves to be quashed.*

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

**14.** In *Pushpam Pharmaceuticals Co. v. CCE* [*Pushpam Pharmaceuticals Co. v. CCE, 1995 Supp (3) SCC 462*], this Court, while dealing with a similar fact circumstance wherein the extended period of limitation under the abovementioned proviso had been invoked, held that since the expression "suppression of facts" is used in the company of terms such as fraud, collusion and wilful misstatement, it cannot therefore refer to an act of mere omission, and must be interpreted as referring to a deliberate act of non-disclosure aimed at evading duty, that is to say, an element of intentional action must be present.

**15.** Similarly, in *CCE v. Chemphar Drugs & Liniments* [*CCE v. Chemphar Drugs & Liniments, (1989) 2 SCC 127 : 1989 SCC (Tax) 245*], this Court, while dealing with a similar situation of invocation of extended period of limitation under Section 11-A of the Act, this Court held as under : (SCC p. 131, para 9)

"9. ... In order to make the demand for duty sustainable beyond a period of six months and up to a period of 5 years in view of the proviso to sub-section (1) of Section 11-A of the Act, it has to be established that the duty of excise has not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, before (sic beyond) the period of six months. Whether in a particular set of facts and circumstances there was any fraud or collusion or wilful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case. The Tribunal came to the conclusion that the facts referred to hereinbefore do not warrant any inference of fraud. The assessee declared the goods on the basis of their belief of the interpretation of the provisions of the law that the exempted goods were not required to be included and these did not include the value of the exempted goods which they manufactured at the relevant time. The Tribunal found that



*the explanation was plausible, and also noted that the Department had full knowledge of the facts about manufacture of all the goods manufactured by the respondent when the declaration was filed by the respondent. The respondent did not include the value of the products other than those falling under Tariff Item 14E manufactured by the respondent and this was in the knowledge, according to the Tribunal, of the authorities. These findings of the Tribunal have not been challenged before us or before the Tribunal itself as being based on no evidence."*

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

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



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

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

*30. In the instant case, as stated supra, in the light of pendency of W.P.No.3555/2021 preferred by the petitioner before this Court assailing the order of the AAAR, the very issue/question relating to classification of Type-III tests supplied by the petitioner as OIDAR services, remains in a significant state of flux inasmuch as at the very initial stage of the litigation, the AAR vide its order dated 22.05.2020 held that Type-III tests were outside the purview of OIDAR services which was reversed by the AAAR, thereby indicating that the very classification of Type-3 tests as OIDAR services was uncertain and in a constantly fluid state and thus an interpretative issue which has not attained finality and the classification and taxability of Type-III Tests continues to be in a state of flux, even as of the present*



*day; it follows there from that when there is a scope for doubt concerning the interpretation of legal provisions and the entire facts have been placed before the Revenue Authorities, the assessee cannot be attributed with any suppression or misstatement of facts with intent to evade duty and hence, cannot be saddled with demand by invoking the extended period of limitation and impugned SCN deserves to be quashed.*

31. *The respondents placed reliance upon the decision of the Gujarat High Court in **Commissioner of Central Excise vs. Neminath Fabrics Pvt. Ltd., -2010 (256) ELT 369 (Guj.)** to justify the invocation of the extended period of limitation under Section 74 of the CGST Act by submitting that the concept of knowledge cannot be an appropriate defence; in this context, it is relevant to state that the said judgment is circumscribed and applicable only to cases wherein 'suppression' is established or admitted as can be seen from the relevant portion of the judgment as hereunder:*

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

32. *The aforesaid judgment in **Neminath's case supra** was considered by the CESTAT in **Amway India Enterprises Pvt. Ltd. vs. Commissioner of Central***



***Excise, New Delhi - 2017 (3) GSTL 69 (Tri.-Del), wherein it was held as under:***

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

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

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



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

*34. The aforesaid discussion clearly establishes that the impugned Show Cause Notice dated 12.02.2024 issued under Section 74 of the CGST Act, by the 2<sup>nd</sup> respondent is illegal and arbitrary being manifestly violative of the law for want of satisfaction of the jurisdictional facts contemplated in Section 74 of the CGST Act and that the impugned show cause notice is wholly without jurisdiction or authority of law as the foundational jurisdictional facts to trigger / invoke Section 74 of the CGST Act i.e., existence of wilful suppression to evade / avoid payment of GST in relation to Type – III tests has not been satisfied by the respondents and the impugned show cause notice deserves to be quashed.*

12.1 As stated supra, the vague, bald, omnibus and general allegations made in paragraphs – 9.1 and 9.2 of the impugned



SCN do not satisfy or fulfill the mandatory requirements and parameters for invocation of Section 74 (1) of the CGST / KGST Act and consequently, the impugned SCN deserves to be quashed on this ground also.

**Point No.3** is accordingly answered in favour of the petitioner.

13. Insofar as the contention urged by the respondents that the present petition challenging the impugned show cause notice is premature and is not maintainable / entertainable due to availability of an alternative remedy in favour of the petitioner, having regard to the findings recorded hereinbefore that the impugned SCN is illegal, arbitrary and without jurisdiction or authority of law and contrary to the statutory provisions referred to supra and the well settled principles of law as held by the Apex Court and this Court in various judgments including the judgments of the Apex Court in the cases of **(i) Calcutta Discount Co., vs. ITO – (1961) 2 SCR 241**, **(ii) State of U.P. vs. Mohammed Nooh – AIR 1958 SC 86** and **(iii) DCCE vs. Susheel & Co., - (2016) 13 SCC 233**, thereby leading to the sole inference / conclusion that the present petition is



both maintainable and entertainable and as such, even this contention urged by the respondents cannot be accepted.

14. In the result, I pass the following:-

**ORDER**

(i) Petition is hereby allowed.

(ii) The impugned show cause notice at Annexure-A dated 19.09.2022 issued by the 1<sup>st</sup> respondent and all further proceedings pursuant thereto are hereby quashed.

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

Srl.