IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2029 OF 2025

Dharma Productions Pvt. Ltd.,
a company having its office at
2nd Floor, 201, Supreme Chambers,
Off Veera Desai, Andheri West,
Mumbai – 400053 … Petitioner

Versus

1. The State of Maharashtra,
Through Government Pleader
High Court, Mumbai.

2. The Assistant Commissioner of State
Tax, (D-011), Investigation-A,
Mumbai, GST Bhavan, Mazgaon,
Mumbai – 400010

3. The Commissioner of State Tax,
8th Floor, Mumbai GST Bhawan,
Mazgaon, Maharashtra – 400010.

4. The Deputy Commissioner of State
Tax, APP-III, (MUM-APP-E-1201),
D-Wing, D-11, Sakinaka Division,
8th Floor, GST Bhavan, Mazgaon,
Maharashtra – 400010 …. Respondents

WITH
WRIT PETITION NO.2184 OF 2025

Dharmatic Entertainment Pvt. Ltd.,
a company having its office at
2nd Floor, 201, Supreme Chambers,
Off Veera Desai, Andheri West,
Mumbai – 400053 … Petitioner

Versus

1. The State of Maharashtra,
Through Government Pleader
High Court, Mumbai.

2. The Assistant Commissioner of State
Tax, (D-011), Investigation-A,
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Tax, APP-III, (MUM-APP-E-1201),
D-Wing, D-11, Sakinaka Division,
8th Floor, GST Bhavan, Mazgaon,
Maharashtra – 400010 .... Respondents

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Mr. Darius Shroff, Senior Advocate a/w Adv. Prasad Paranjape, Adv. Kevin Gogri i/b. Lumiere Law Partners, for the petitioners.

Smt. Jyoti Chavan, Addl.G.P. a/w Mr. Amar Mishra, AGP, for the respondent-State.

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CORAM : M. S. KARNIK &
SANDESH D. PATIL, JJ.

DATE : 10th SEPTEMBER 2026

JUDGMENT (PER M. S. KARNIK, J.) :

1. Since common issues are involved, we dispose of the writ petitions by a common order. For convenience we refer to the facts in Writ Petition No.2029 of 2025. The challenge in this Writ

Petition filed under Article 226 of the Constitution of India is to the Orders in Original dated 5th April 2021 and 6th April 2021 along with two Rectification Orders dated 9th August 2021 passed by respondent No.2 - the Assistant Commissioner of State Tax. Also under challenge are two Orders in Original dated 17th March 2025 and two Orders in Appeal dated 19th March 2025 passed by respondent No.4 - the Deputy Commissioner of State Tax. The impugned Orders in Appeal reject the petitioner's Appeals and uphold the demand confirmed under the impugned Orders in Original.

2. The facts of the case in brief are as under :-

The period involved in this Writ Petition, which forms the basis of the Orders in Original, is FYs 2017-2018 to 2020-2021 (i.e., the period prior to 1st October 2021, when Entry 17(i) and 17(ii) of the Rate Notification carried differential rates of 12% and 18%). The amount of tax which is under dispute is Rs.79,72,68,337/-, plus interest and penalty. The issue involved in the present Writ Petition is "whether the licensing of copyright in cinematographic films, by the petitioner as Producer and original copyright holder, is classifiable as -

(i) licensing of intellectual property rights in goods other than Information Technology Software - taxable at 12% GST (6% CGST + 6% SGST) under Entry 17(i) of Notification No.11/2017- Central Tax (Rate) dated 28th June 2017 ("Rate Notification"), OR

(ii) licensing of Information Technology Software - taxable at 18% GST (9% CGST + 9% SGST) under Entry 17(ii) of the Rate Notification."

3. The petitioner is a company incorporated under the provisions of the Companies Act, 2013 engaged in the business of producing, developing and financing cinematographic films, web series and other audio-visual content. Being the producer, the petitioner owns the Intellectual Property Rights ("IPRs", for short), including copyrights in the cinematographic films it produces and is the original owner of the copyrights. These copyrights cover the script, dialogues, musical works, sound recordings and the overall film as a whole. These copyrights, being intangible movable property and of incorporeal property, are recognised as 'goods' under the CGST Act and are capable of being transferred, assigned or licensed.

4. The petitioner enters into a Rights License Agreement with distributors for licensing of IPR in respect of cinematographic films for commercial exploitation to distribute, exhibit or exploit the theatrical rights. The IPR in respect of cinematographic films includes a bundle of rights such as theatrical rights, sound rights, satellite rights, digital rights etc. The licensee of the IPR is entitled to exploit the rights licensed by the petitioner as per the specific terms and conditions of the Rights License Agreement.

5. Upon execution of the license agreements with various distributors, the petitioner, in most cases, transfers the cinematographic films (i.e. the movie content constituting copyrightable intellectual property) by loading the content onto a hard disk, which is then physically delivered to the offices of the respective distributors. The delivery is effected through physical handover and at no point is any software transferred or transmitted electronically, whether by email or through an online file transfer mechanism, while delivering the content physically. The petitioner relied upon the trailing email correspondence between the petitioner and the distributors, wherein the distributors have expressly acknowledged receipt of the hard disk

containing the cinematographic films (movie content). In a few cases, the petitioner transferred the cinematographic films electronically. It is the case of the petitioner that no software is supplied to the distributor in the course of such transfer.

6. As per Entry No.5(c) of Schedule II to the CGST Act, the temporary transfer or permitting the use or enjoyment of any IPR is treated as a supply of service. The petitioner, being the original owner of copyrights in cinematographic films, licenses such films to various third parties, including broadcasters and other distributors, for limited durations and specific territories. These licensing agreements involve only a temporary transfer of rights and are in the nature of permitting the use of IPRs. Accordingly, the said supply is classified by the petitioner under Service Accounting Code (SAC) 997332, namely, “Licensing services for the right to broadcast and show original films, sound recordings, radio and television programmes and the like.” The petitioner has consistently adopted this classification in respect of its licensing transactions and accordingly discharged GST @ 12% under Heading 9973 - ‘Temporary or permanent transfer or permitting the use or enjoyment of Intellectual Property (IP) right

in respect of goods other than Information Technology Software'. Post 1st October 2021, the said Entry was amended and GST was leviable @ 18%.

7. The petitioner entered into a Rights License Agreement with distributors for licensing of Intellectual Property Rights ("IPR") in cinematographic films for commercial exploitation. Search and inspection were initiated on 5th October 2020 under Section 67 of the Maharashtra Goods and Services Tax Act, 2017 ("MGST Act", for short). The petitioner deposited Rs.3,00,00,000/- (FY 2018-2019) and Rs.2,00,00,000/- (FY 2019-2020) on 10th October 2020, aggregating to Rs.5,00,00,000/-, through the electronic credit ledger by filing Form DRC-03, under protest.

8. Four Form GST DRC-01A were issued on 5th November 2020, proposing the differential tax, interest, and penalty for FYs 2017-2018 to 2020-2021, on licensing of movie content/cinematographic films. The petitioner submitted its replies on 11th December 2020 in Part B of Form DRC-01A. Four manual show cause notices in Form GST DRC-01 under Section 74 of the Central Goods and Services Tax Act, 2017 ("CGST Act", for short)

were issued on 14th December 2020. The petitioner submitted its reply dated 7th January 2021 to the manual show cause notices, denying the allegation. Another four show cause notices in Form DRC -01 were uploaded on the GST portal on 21st January 2021 under Section 74 of the CGST Act.

9. The petitioner filed a detailed reply dated 23rd February 2021 to the show cause notices, denying the allegations. The petitioner was given a personal hearing before the respondent No.2 on 24th February 2021. A written submission dated 24th February 2021 was submitted during the hearing. On 22nd March 2021, the petitioner filed additional submissions.

10. Four show cause notices dated 1st April 2021 and 5th April 2021 were issued under Section 73 of the CGST Act. Four impugned Orders in Original dated 5th April 2021 and 6th April 2021 were passed by the respondent No.2 confirming the demand. Rectification Orders dated 9th August 2021 were passed revising the demand.

11. Four Appeals were filed in APL-01 before the respondent No.4. The petitioner filed additional written submissions dated 17th February 2025. Four Orders in Appeals dated 17th March 2025 and

19th March 2025 were passed by the respondent No.4 rejecting the petitioner's Appeals.

12. We have heard learned Senior Advocate Mr. Darius Shroff for the petitioner at length. Elaborating on the grounds raised in the memo of the petition, learned Senior Advocate for the petitioner submitted that the Orders in Appeal are erroneous and call for interference. We shall deal with the decisions relied upon by the learned Senior Advocate in support at a later stage of this Judgment.

13. On the other hand, learned Additional Government Pleader raised a preliminary objection to the maintainability of this Writ Petition in view of the availability of an alternative statutory remedy. It is submitted that the petitioner has an efficacious alternative remedy under Section 112 of the CGST Act read with Section 112 of the MGST Act before the Goods and Services Tax Appellate Tribunal ("Tribunal", for short). Reliance is placed on the decision in Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and Others[1] to support the proposition that the present case does not satisfy any of the parameters laid down therein to

1 (1998) 8 SCC 1

entertain this petition.

14. It is further submitted that classification disputes cannot be adjudicated in writ jurisdiction as the core issue in the present case is the classification of the service - whether it falls under SAC 998340 (Information Technology Software) attracting 18% GST, or SAC 9973 (Leasing of goods other than IT Software) attracting 12% GST. This is a quintessential adjudicatory function involving appreciation of evidence and interpretation of contracts. Reliance is placed on the decision of Magadh Sugar and Energy Limited vs. State of Bihar[2] to clarify the position regarding pure questions of law versus disputed questions of fact in writ jurisdiction. It is submitted that the present case involves disputed questions of fact. In any case, it is submitted that the classification of the service involves interpreting the relevant notifications in light of the specific facts of the transaction, which is a mixed question of law and fact. It is then submitted that the question of classification is a function best performed by the adjudicating and the appellate authority, and subsequently by the GSTAT upon its constitution. This Court, in the exercise of its writ jurisdiction,

2 (2022) 16 SCC 428

should not undertake the task of classification which requires detailed examination of evidence and contractual documents.

15. It is submitted that the contention of the petitioner of “fundamental error” is untenable as the alleged errors, if any, are errors of appreciation of evidence and interpretation of facts, which cannot be termed as “fundamental errors” warranting interference.

16. It is the contention of the learned Additional Government Pleader that the petitioner had misclassified its supply of service relating to the licensing or transfer of IPRs in cinematographic films. It is submitted that such services were incorrectly classified by the petitioner under Heading 9973, which attracts a GST rate of 12%. According to the respondents, the said service is liable to GST at the rate of 18%. A statement was also recorded from the Post Production Head of the petitioner, which the respondent placed heavy reliance on at the time of issuance of the show cause notice.

17. Thus, learned Additional Government Pleader submitted that :-

(A) Entry 5(c) of Schedule II of the CGST Act creates an express legal fiction mandating that "temporary transfer or permitting the use or enjoyment of any intellectual property right" shall be treated as a supply of service. This provision is unambiguous and admits of no exception.

(B) The Rights License Agreements executed by the petitioner grant limited, time-bound rights for specific territorial exploitation. The petitioner retains ultimate ownership of the underlying copyright. This constitutes a "temporary transfer" within the meaning of Entry 5(c) of Schedule II.

(C) The High Court of Madras in AGS Entertainment Private Limited vs. Union of India[3] has categorically held that the temporary transfer of copyright in cinematographic films is a service and not a sale of goods. This binding precedent squarely applies to the facts of the present case.

(D) The petitioner's reliance on the decision of the Hon'ble Supreme Court in Tata Consultancy Services vs. State of A.P.[4] is wholly misplaced. In that case, the Supreme Court was dealing

3 2019 (6) TMI 110 (Madras HC) : 2013 SCC OnLine Mad 1823
4 (2005) 1 SCC 308

with canned/off-the-shelf software sold on physical media (CDs, floppy discs), not with digital delivery of cinematographic content via software links. The petitioner does not deliver physical media. The entire transaction is executed through information technology infrastructure. The TCS judgment therefore has no application in the present case.

(E) The petitioner's reliance on the erstwhile VAT regime is wholly misplaced. The treatment of IPR as "goods" under the Maharashtra Value Added Tax Act was by virtue of a specific legal fiction created through Schedule Entry 39 of the Act. No such fiction exists under the GST law and the GST regime must be interpreted on its own terms.

(F) The supply by the petitioner is correctly classifiable under SAC 998340 (Information Technology Software services) attracting GST at 18% and not under SAC 9973 attracting 12%.

(G) The classification is founded on direct evidence emanating from the petitioner's own establishment. The Post-Production Head of the petitioner, during the investigation, recorded a statement confirming that "the link to expedite the films in digital format is created in software format which is secured by password and which are clearly services.” This admission is binding on the petitioner and forms the basis of the classification.

(H) A cinematographic film delivered in a digital format, whether through a secure link or on a hard drive, is a “representation of data, sound or image recorded in a machine-readable form”. This squarely falls within the definition of “information technology software” as contemplated under the relevant notifications.

(I) The supply in question is, in fact, a classic example of an Online Information Database Access and Retrieval (OIDAR) service. The IGST Act defines OIDAR services as those delivered via the internet with minimal human intervention. The official GST guidance explicitly includes “online supplies of digital content (movies, television shows, music and the like)” and “accessing or downloading of films” within the scope of OIDAR services.

(J) The petitioner’s contention that the service should be classified under SAC 9973 is contrary to the established principles of service classification, which require that the most specific entry should be preferred over a general entry. The specific entry for IT software services (SAC 998340) must prevail over the generic entry for leasing services (SAC 9973).

(K) The Hon'ble Supreme Court in State of Kerala and Another vs. Asianet Satellite Communications Ltd. and Others[5] has upheld the "Aspect Theory" and recognised that modern forms of entertainment delivered via broadcasting and digital means constitute taxable services. The relevant paragraph is :

> "Both Parliament (under Entry 97 of List I via the Finance Act, 1994) and State Legislature (under Entry 62 of List II as a tax on luxuries) possess the competence to tax different aspects of the broadcasting and entertainment activity without constitutional overlap under the aspect theory and the doctrine of pith and substance."

(L) Applying the Aspect Theory, the petitioner's transaction has multiple aspects :

(a) The general "licensing of IPR" aspect;

(b) The specific and dominant "supply of IT/OIDAR service" aspect, defined by the technological mode of delivery.

(M) It is the specific IT/OIDAR aspect that determines the correct classification and tax rate. The supply is not of a physical

5 2025 SCC OnLine SC 1225

good, but of digital content accessible only through information technology.

(N) The petitioner's reliance on CBIC Circular dated 11th October 2024 and Circular dated 15th October 2024 to contend that the dispute should be regularised on an "as is where is" basis at 12% GST has no application to the present case.

(O) Reliance is placed on the decision of the Hon'ble Supreme Court in Paper Products Ltd. vs. Commissioner of Central Excises[6] which has laid down that "Circulars issued by the CBEC are binding on the Revenue Department, and the Department is precluded from challenging their correctness or acting contrary to circulars in force at the relevant time." Applying this principle, the CBIC circulars relied upon by the petitioner pertain to transactions between distributors and exhibitors (downstream), not between producers and distributors (upstream). The petitioner cannot derive benefit from circulars that govern a different set of transactions.

6 (1999) 7 SCC 84

(P) The said circulars pertain to the regularisation of GST liability on transactions between distributors and exhibitors, i.e. the downstream transaction in the film distribution chain. The present dispute concerns the upstream transaction between the producer (petitioner) and its distributors. The petitioner cannot derive benefit from circulars that govern an entirely different set of transactions involving different parties and a different stage in the value chain. Furthermore, the Office Memorandum from Prasar Bharati and the Alert Circular from the Principal Chief Commissioner of Central Tax, Bangalore Zone, are not binding on the Maharashtra State Tax authorities. An adjudicating authority is duty-bound to apply its own mind to the facts and law of the case before it. The Hon'ble Supreme Court in Commercial Taxes Officer vs. Bombay Machinery Store[7] has held that taxing statutes must be interpreted strictly based on their plain language and the actual facts of each transaction. The CBIC circulars cannot be stretched to cover transactions not expressly covered.

(Q) It is submitted that there is no violation of principles of natural justice and the petitioner has been given adequate

7 (2020) 20 SCC 714

opportunity to present its case.

18. The Order in Appeal is a detailed and reasoned Order. The Total demand confirmed against the petitioner, after adjusting the protest deposits, is as follows :-

Financial Year	**Tax Demand (₹)**	**Interest (₹)**	**Penalty (₹)**	**Total (₹)**
2017-18	2,04,26,400	38,60,900	20,42,640	2,63,29,940
2018-19	2,93,92,800	45,99,000	29,39,280	3,69,31,080
2019-20	2,93,92,800	28,10,000	29,39,280	3,51,42,080
2020-21	1,97,88,000	10,00,000	19,78,800	2,27,77,800
Grand Total	**9,99,00,000**	**1,22,69,900**	**99,99,000**	**12,11,69,900**

Consideration

19. We have heard Mr. Darius Shroff, learned Senior Advocate and Ms. Jyoti Chavan, learned Additional Government Pleader for the respondent-State at length. We have perused the memo of the petition, impugned Order and the materials on record.

20. Before we proceed to analyze the submissions, it would be appropriate to seek guidance from the decisions relied upon by learned counsel for a proper appreciation of the controversy.

21. Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and Others (supra) is relied upon in support of the proposition that “writ petition may be entertained despite the existence of an alternate remedy only when the statutory authority has acted without jurisdiction, in violation of the principles of natural justice, or whether the impugned order is a nullity. The existence of an alternative remedy is sufficient ground for the High Court to decline interference under Article 226. In paragraph Nos.14 and 15, Their Lordships observed thus:-

> “14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for “any other purpose”.
>
> 15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative a remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic

> whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.”

22. In *Paper Products Ltd. vs. Commissioner of Central Excises* (supra), in the context of issuance of circulars by the Board, their Lordships observed in paragraph No.5 thus: -

> “5. It is clear from the abovesaid pronouncements of this Court that apart from the fact that the circulars issued by the Board are binding on the Department, the Department is precluded from challenging the correctness of the said circulars even on the ground of the same being inconsistent with the statutory provision. The ratio of the judgment of this Court further precludes 9 the right of the Department to file an appeal against the correctness of the binding nature of the circulars. Therefore, it is clear that so far as the Department is concerned, whatever action it has to take, the same will have to be consistent with the circular which is in force at the relevant point of time.”

23. The Calcutta High Court in M/s. Harsh Polyfabric Pvt. Ltd. Vs. Union of India & Ors. WPO 588 of 2019 decided on 10th January, 2023, was considering a case where the petitioner sought adjudication under Article 226 of the Constitution of India on the issue as to which chapter and which classification of the Customs and Central Excise Tariff Act its product will fall and declaration to that effect. The petitioner therein had challenged the findings of the appellate authority where it has been held that the petitioner’s claim on PPSB bed sheet are produced in a finished stage by

processing the non woven fabrics manufactured by the petitioner. In that context, His Lordship made an observation that this Court in the exercise of writ jurisdiction under Article 226 of the Constitution of India should not act as an expert to scrutinise the composition and mode of manufacture of product like of this nature and do the job of classifying the products under which classification list of the Customs Tariff Act such product falls. Since it requires scientific and technical analysis to be conducted by the expertise in such scientific and technical field.

24. In *AGS Entertainment Private Limited vs. Union of India* (supra), the Madras High Court in paragraph Nos.14, 16, 18, 21 and 23 which are relevant, held thus:-

> “14. An alternate submission was made that even if there is an element of service, the dominant intention of the parties/transaction is to be looked into and if the same is done, it is transfer of "goods" and such transaction cannot be construed as service. In any event, there is no power vested with the Parliament to dissect the transaction unlike works contract, catering service or hire-purchase transactions, which have been enumerated in clause (29A) of article 366 of the Constitution.
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> 16. We have also heard the submissions of Mr. Kanmani Annamalai, learned Government Advocate (T) appearing for the State of Tamil Nadu and Mr. R. Ananda Kumar, learned counsel appearing for the fourth respondent in W. P. No. 482 of 2011 and the fifth respondent in W. P. No. 483 of 2011 and 231 of 2012.
>
> 18. Before, we proceed further on the submissions made

on either side, it would be essential to first have an overall view of the concept of service tax.

21. The Finance Act, 1998, was also to the same effect as that of the 1994 Act and in the 1998 Act, the list of notified services were increased to include advertising agencies, travel agencies, architects, entrepreneurs, clearing and forwarding agencies, credit rating agencies, customs house agents, practising charted accountants, cost accountants, real estate agents, security agencies, etc. The Finance Act has been amended year after year in order to bring more services into the tax net, as well as to insert certain new provision found necessary.

23. Licensing or exploitation of other intellectual rights like trademarks, designs, patterns or any other similar intangible properties are within the ambit of service tax since 2004. However, copyright was excluded till July 1, 2010. With effect from July 1, 2010, sub-clause (zzzzt) of clause (105) of section 65 defines "taxable service" as under:

> "Taxable service" means any service provided or to be provided to any person, by any other person, for-
>
> (a) transferring temporarily; or
>
> (b) permitting the use or enjoyment of,
>
> any copyright defined in the Copyright Act, 1957, except the rights covered under sub-clause (a) of clause (1) of Section 13 of the said act."

Thus, the first category of copyright i.e., original literary, dramatic, musical and artistic works are out of the Service Tax."

25. This Court in *Oberoi Constructions Ltd. Vs. Union of India & Ors.* (supra) held that the practice of instituting petitions by-passing statutory remedies only to avoid pre-deposits cannot be encouraged.

26. It is the submission of learned Senior Advocate for the petitioner that the show cause notices, the Orders in Original and the Orders in Appeals all proceed on fundamental erroneous premise that the licensing of copy right in cinematographic films amounts to licensing “Information Technology Software”. For the reasons we have stated hereinafter, we are satisfied that this is not a disputed question of fact but an error of law going to root of the jurisdiction. The authority that assumes the power to tax a transaction by misconstruing the governing statutory entry and definition, acts without jurisdiction. If the authority acts without jurisdiction, the resultant show cause notices and orders are void ab initio. The vitiating character of such jurisdictional error and its consequence for the sustainability of the entire proceeding is illustrated by the Hon’ble Supreme Court in M/s. Godrej Sara Lee Ltd. Vs. The Excise and Taxation Officer-Cum-Assessing Authority & Ors.[8], where an authority proceeding on a legally unsustainable premise was held to have exceeded its jurisdiction, an interference was warranted despite the existence of an alternate remedy. The observations made by their Lordships is extremely significant in the context of this Court exercising jurisdiction under Article 226

8 [2023 (2) TMI 64 (SC)]

of the Constitution of India despite the existence of the remedy of an appeal against the Order in appeals before the Tribunal. The relevant paragraphs are,

> "3. It appears on a perusal of the order under challenge in this appeal that the appellant had questioned the jurisdiction of the Deputy Excise and Taxation Commissioner (ST)-cum-Revisional Authority, Kurukshetra (hereafter 'the Revisional Authority', for short) to reopen proceedings, in exercise of suo motu revisional power conferred by section 34 of the VAT Act, and to pass final orders holding that the two assessment orders, both dated 28th February, 2007 passed by the ETO-cum-Assessing Authority, Kurukshetra (hereafter 'the Assessing Authority', for short) for the assessment years 2003-04 and 2004-05 suffered from illegality and impropriety as delineated therein, viz. that the Assessing Authority erred in levying tax on mosquito repellant (a product manufactured by the appellant) @ 4% instead of 10%. Keeping in view the objection raised by counsel for the respondents that without exhausting the remedy of appeal provided by section 33 of the VAT Act "it would not be permissible to entertain this petition" and upon consideration of the decision of this Court reported in (1975) 2 SCC 436 (Titagarh Paper Mills vs. Orissa State Electricity Board & Anr.) based on which it was contended on their behalf that where any right or liberty arises under a particular Act then the remedy available under that Act has to be availed, the High Court was of the opinion that there can be no presumption that the appellate authority would not be able to grant relief sought in the writ petition; hence, the writ petition was dismissed and the appellants were relegated to the appellate remedy.
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> 4. Before answering the questions, we feel the urge to say a few words on the exercise of writ powers conferred by Article 226 of the Constitution having come across certain orders passed by the high courts holding writ petitions as "not maintainable" merely because the alternative remedy provided by the relevant statutes has not been pursued by the parties desirous of invocation of the writ jurisdiction. The power to issue prerogative writs under Article 226 is plenary in nature. Any limitation on the exercise of such

power must be traceable in the Constitution itself. Profitable reference in this regard may be made to Article 329 ordainments of other similarly worded articles in the Constitution. Article 226 does not, in terms, impose any limitation or restraint on the exercise of power to issue writs. While it is true that exercise of writ powers despite availability of a remedy under the very statute which has been invoked and has given rise to the action impugned in the writ petition ought not to be made in a routine manner, yet, the mere fact that the petitioner before the high court, in a given case, has not pursued the alternative remedy available to him/it cannot mechanically be construed as a ground for its dismissal. It is axiomatic that the high courts (bearing in mind the facts of each particular case) have a discretion whether to entertain a writ petition or not. One of the self-imposed restrictions on the exercise of power under Article 226 that has evolved through judicial precedents is that the high courts should normally not entertain a writ petition, where an effective and efficacious alternative remedy is available. At the same time, it must be remembered that mere availability of an alternative remedy of appeal or revision, which the party invoking the jurisdiction of the high court under Article 226 has not pursued, would not oust the jurisdiction of the high court and render a writ petition "not maintainable". In a long line of decisions, this Court has made it clear that availability of an alternative remedy does not operate as an absolute bar to the "maintainability" of a writ petition and that the rule, which requires a party to pursue the alternative remedy provided by a statute, is a rule of policy, convenience and discretion rather than a rule of law. Though elementary, it needs to be restated that "entertainability" and "maintainability" of a writ petition are distinct concepts. The fine but real distinction between the two ought not to be lost sight of. The objection as to "maintainability" goes to the root of the matter and if such objection were found to be of substance, the courts would be rendered incapable of even receiving the lis for adjudication. On the other hand, the question of "entertainability" is entirely within the realm of discretion of the high courts, writ remedy being discretionary. A writ petition despite being maintainable may not be entertained by a high court for very many reasons or relief could even be refused to the petitioner, despite setting up a sound legal point, if grant of the claimed relief would not further public interest. Hence, dismissal of a writ petition by a high court on the ground that the petitioner has not availed the alternative remedy without, however, examining whether an exceptional case has been made out for such entertainment would not be proper.

5. A little after the dawn of the Constitution, a Constitution Bench of this Court in its decision reported in 1958 SCR 595 (State of Uttar Pradesh Vs. Mohd. Noor) had the occasion to observe as follows:

> "10. In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute, (Halsbury's Laws of England, 3rd Edn., Vol. 11, p. 130 and the cases cited there). The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies. ***"

6. At the end of the last century, this Court in paragraph 15 of the its decision reported in (1998) 8 SCC 1 (Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and Others) carved out the exceptions on the existence whereof a Writ Court would be justified in entertaining a writ petition despite the party approaching it not having availed the alternative remedy provided by the statute. The same read as under:

> (i) where the writ petition seeks enforcement of any of the fundamental rights;
>
> (ii) where there is violation of principles of natural justice;

> (iii) where the order or the proceedings are wholly without jurisdiction; or
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> (iv) where the vires of an Act is challenged.
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> 7. Not too long ago, this Court in its decision reported in 2021 SCC OnLine SC 884 (Assistant Commissioner of State Tax vs. M/s. Commercial Steel Limited) has reiterated the same principles in paragraph 11.
>
> 8. That apart, we may also usefully refer to the decisions of this Court reported in (1977) 2 SCC 724 (State of Uttar Pradesh & ors. vs. Indian Hume Pipe Co. Ltd.) and (2000) 10 SCC 482 (Union of India vs. State of Haryana). What appears on a plain reading of the former decision is that whether a certain item falls within an entry in a sales tax statute, raises a pure question of law and if investigation into facts is unnecessary, the high court could entertain a writ petition in its discretion even though the alternative remedy was not availed of; and, unless exercise of discretion is shown to be unreasonable or perverse, this Court would not interfere. In the latter decision, this Court found the issue raised by the appellant to be pristinely legal requiring determination by the high court without putting the appellant through the mill of statutory appeals in the hierarchy. What follows from the said decisions is that where the controversy is a purely legal one and it does not involve disputed questions of fact but only questions of law, then it should be decided by the high court instead of dismissing the writ petition on the ground of an alternative remedy being available."

27. It is necessary to mention that at the relevant time when the petition was filed on 21st May, 2025, the Tribunal was not functioning. As on the date when the petition was heard, the Tribunal has become functional. We would still have relegated the petitioner to the remedy of appeal before the Tribunal as submitted by the learned AGP, but for the fact that there are no disputed questions of fact involved in the present petition but an

error of law going to the root of the jurisdiction. Let us elaborate.

28. The relevant extract of SAC heading and rate of GST prior to amendment before 1st October 2021 needs to be noted. So far as the rate of GST on intra-State supply of specific services with Service Code Tariff (SAC) is concerned, in exercise of the powers conferred in sub-section (1) of Section 9, sub-section (1) of section 11, sub-section (5) of section 15 and sub-section (1) of section 16 of the Central Goods and Services Act, 2017, issued a notification dated 28th June, 2017, on the intra-State supply of services of description as specified in column (3) of the Table in the notification, falling under Chapter, Section or Heading of scheme of classification of services as specified in column (2), shall be levied at the rate as specified in the corresponding entry in column (4), subject to the conditions as specified in the corresponding entry in column (5) of the said Table. The relevant portion viz. Serial No.17 of the Heading No. 9973 reads thus:-

01.07.2017 to 30.09.2021

SI. No.	**Chapter, Section or Heading**	**Description of Service**	**Rate (per cent)**	**Condition**
(1)	(2)	(3)	(4)	(5)
17.	**Heading 9973** (Leasing or	(i) Temporary or permanent transfer or	6	

	rental services, with or without operator)	permitting the use or enjoyment of Intellectual Property (IP) right in resepct of goods other than Information Technology software.		
		(ii) Temporary or permanent transfer or permitting the use or enjoyment of Intellectual Property (IP) right in respect of Information Technology software. [Please refer to Explanation no. (v)]	9	

<u>Amendment – Post 01.10.2021</u>

Chapter, Section or Heading	Description of Service	Rate (percent)
Heading 9973 (Lease or Rental services, with or without operator	-	-
	ii) Temporary or permanent transfer or permitting the use or enjoyment of Intellectual Property (IP) right	18

29. For the purpose of the notification clause 4(v) provides for explanation of the term "information technology software". Clause 4(v) reads thus:-

> "(v) "information technology software" means any representation of instructions, data, sound or image, including source code and object code, recorded in a machine readable form, and capable of being manipulated or providing interactivity to a user, by means of a computer or an automatic data processing machine or any other device or equipment."

30. The annexure to the notification provides for scheme of classification of services. Relevant in the context of the present case is Group 99733, Serial Nos.250, 251 and 252 which is as under:-

S. No.	**Chapter, Section, Heading or Group**	**Service Code (Tariff)**	**Service Description**
(1)	(2)	(3)	(4)
250	Group 99733		**Licensing services for the right to use intellectual property and similar products**
251		997331	Licensing services for the right to use computer software and databases
252		997332	Licensing services for the right to broadcast and show original films, sound recording, radio and television programme and the like.

31. It is then necessary to refer to the Explanatory Notes to the Scheme of Classification of Services. So far as Group 99733 viz. Licensing services for the right to use intellectual property and similar products is concerned, the same reads thus:-

> "**99733** Licensing services for the right to use intellectual property and similar products
>
> This group includes permitting, grating or otherwise authorizing the use of intelletual property products and similar products
>
> Note: This covers rights to exploit these products, such as licensing to third parties; reproducing and publishing software, books, etc; using patented designs in production processes to produce new goods and so on. Limited end user licences, which

are sold as part of a product (e.g., packaged software, books) are not included here.

This group does not include:

- licence fees as integral part of consumer goods (e.g., end-user licenses for books, records, software)

- preparation, drafting and certification services concerning patents, trademarks, copyrights and other intellectual property rights, cf. 998213

- legal services related to drawing up or certification of patents, trademarks, copyrights and other intellectual property rights, cf.998213

- management services for copyrights and their revenues (except from motion pictures), cf. 998599

- management services for rights to industrial property (e.g., patents, licences, trademarks, franchises etc.), cf.998599

- management services for motion picture rights, cf 999614

- management services for artistic rights, cf. 999629"

32. The Service Code Tariff 997331 as regards licensing services for the right to use computer software and databases reads thus:-

" This service code includes:

- licensing services for the right to reproduce, distribute or incorporate computer programs, program descriptions and supporting materials for both systems and applications software. This applies to various levels of licensing rights such as rights to reproduce and distribute the software, rights to use software components for the creation of and inclusion in other software products

> - licensing services for the right to reproduce, distribute or incorporate databases (i.e. compilations of facts/information) in other databases or applications. This applies to various levels of licensing rights such as rights to reproduce and distribute the database, rights to use database components for the creation of and inclusion in other databases and applications.
>
> This service code does not include:
>
> - packaged (non-customized) software/ database,
> - limited end-user licence as part of packaged software,
> - licensing services for the right to use database software, cf. 997331."

33. So far as the Service Code Tariff 997332 for licensing services for the right to broadcast and show original films, sound recordings, radio and television programme etc., it is provided thus :

> " This service code includes:
>
> - licensing services for the right to reproduce, distribute or incorporate entertainment, musical such as broadcasting and showing of original films, sound recordings, radio and television programmes, prerecorded tapes and videos"

34. The Circular dated 11th October, 2024 was issued based on the recommendations of the GST Council in its 54th meeting held on 9th September, 2024, at New Delhi, in exercise of the

powers conferred under section 168 (1) of the Central Goods and Services Tax Act, 2017, whereby clarifications are issued through this Circular. Relevant in the present context being clause 10, reads thus :

> "**10. Regularizing payment of GST on services of film distributors or sub-distributors who act on a principal basis to acquire and distribute films**:
>
> 10.1 Representations have been received to clarify regarding the GST liability for the period from 1-7-2017 to 1-10-2021 on transaction between distributors and exhibitors wherein the distributors grant the theatrical rights to the exhibition centers. Field formations have viewed that such transaction are classifiable under SAC 9996 and attracts GST at the rate of 18%
>
> 10.2 Prior to 1st October 2021, GST at the rate of 18% was leviable on "Motion Picture, videotape and television programme distribution services" under Heading 9996 whereas 12% rate of GST was leviable on "temporary or permanent transfer or permitting the use or enjoyment of intellectual property right in respect of goods other than IT technology software" under Heading 9973. It was observed that both entries apparently covered services by way of licensing of rights to broadcast or show films. This issue was discussed in the 45th GST Council meeting held on 17-9-2021 wherein, the Council recommended to keep a uniform rate of 18% on both these entries with effect from 1-10-2021.
>
> 10.3 The GST Council in its 54th meeting held on 9th September 2024 has recommended to regularize the payment of GST on transaction between distributors and exhibitors wherein the distributors grant the theatrical rights to the exhibition centers on 'as is where is' basis from 1-7-2017 to 30-9-2021"

35. Circular No. 236/30/2024-GST dated 11th October, 2024 issued by the Board provides the meaning of "as is where is". Clauses 4 and 5 provide thus:

"4. The phrase 'as is where is' is generally used in the context of transfer of property and means that the property is being transferred in its current condition, whatever this condition happens to be and the transferee of property has accepted it with all its faults and defects, whether or not immediately apparent. In the context of GST, the phrase 'regularized on as is where is' basis means that the payment made at lower rate or exemption claimed by the taxpayer shall be accepted and no refund shall be made if tax has been paid at the higher rate. The intention of the Council is to regularize payment at a lower rate including nil rate due to the tax position taken by taxable person, as full discharge of tax liability. The tax position of a taxable person is reflected in the returns filed by the person where the applicable rate of tax (or relevant exemption entry) on a transaction/supply is declared.

5. Thus, in cases where the matters have been regularized on "as is" or " as is, where is basis", in case of two competing rates and the GST is paid at lower of the two rates, or at nil rate where one of the competing rates was nil under notification entry, by some suppliers while other suppliers have paid at higher rate, payment at lower rate shall be treated as tax fully paid for the period that is regularized."

36. The Prasar Bharati (India's Public Service Broadcaster) issued an Office Memorandum dated 14th January, 2019 stating thus:-

"OFFICE MEMORANDUM

Subject: Applicable GST rate and SAC applicable on 'Royalty' payment of films.

It has been brought to the notice that various Kendras are making payment to the right holders inclusive of GST for royalty of the film under different SAC codes and different rates of tax. In this connection, it is clarified that the payments to be made to the right holders towards royalty for film screening or broadcasting comes under SAC-997332- "Licensing services for the right to broadcast and show original films, sound recording, radio and television programmes etc." and/or "Licensing service for right to use other inteflectual property products and other resources not elsewhere classified" which is covered under SAC-

997339. The GST chargeable on both is same i.e. @ 12%. The same may be complied with accordingly.

All the Kendras are requested to ensure that GST on royalty payment for the films is paid @12% under SAC-997332 or 997339. Also, input tax credit of the GST so paid should be availed timely by the Kendras as per the extant procedure."

37. We make it clear that the Office Memorandum issued by the Prasar Bharati is relied upon by the learned Senior Advocate for the petitioner only for its persuasive value and has fairly submitted that the same cannot be said to have a binding force.

38. We may now refer to Agenda for 54th GST Council Meeting dated 9th September, 2024. Recommendations were made by the Fitment Committee for making changes in GST rates or for issuing clarifications in relation to services. Annexure VI provides as under:-

SI. No.	**Proposal**	**Details of request**	**Discussions in Fitment Committee and its recommendations**
1	To clarify that for the period prior to 01.10.2021, the tax rate applicable is 12% where the film distributor or sub-distributor acts on a principal basis to acquire distribute films.	• Feature films distribution is undertaken based on arrangement entered into between producers of such feature films and distributors and also by way of	• There are two entries pertaining to distribution share received from theatres namely, motion picture distribution services under heading 9996 and services by way of licensing of rights

		an agreement entered into between producers/ distributors and with the exhibition centres. Hence, in the flow of services, there are two separate agreements. • In some agreements, the distributor acquires the exclusive theatrical rights of distribution, exhibition and exploitation of the feature film on a commission basis for the designated territories for a fixed period from the date of release of the feature film. • Further, the distributor in turn enters into an agreement with exhibition centers the for granting the exhibition rights of feature films. As per this agreement entered into between the distributor and the exhibitor, the	to broadcast or show films under heading 9973. • Prior to 1st October 2021, "Motion Picture, videotape and television programme distribution services" under Heading 9996 attracted GST rate of 18% and "temporary or permanent transfer or permitting the use or enjoyment of intellectual property right in respect of goods other than IT technology software" under Heading 9973 which covered services by way of licensing of rights to broadcast or show films attracted 12%. • Explanatory Notes to SAC 999614 and 997332 are reproduced below: **SAC 999614-Motion Picture, videotape and television programme distribution services include:**

		distributor grants the exhibition rights to the exhibitor. • The department has taken a view that only the transaction entered into by the producers can only be covered under SAC code 9973 eligible for 12% GST rate and therefore, the transaction between distributors and exhibitors wherein the distributors grant the theatrical rights to the exhibition centers attract GST rate @ 18% under SAC 9996.	• (i) distribution of audiovisual works, including granting permission to exhibit, broadcast and rent audiovisual works that are implicitly or explicitly protected by a copyright owned or controlled by licensor, usually intended for theatres, television, home video market etc., such as live action or animated films, videos, digital media etc. (ii) management services for motion picture rights. Note: This product is transacted between the distributor and the exhibitor, television network, television station, video rental store etc. This service code does not include licensing services (by the copyright holder) for the right to reproduce, distribute or incorporate

			audiovisual originals, cf. 997332. • **SAC 997332- Licensing services for right to broadcast and show original films, sound recordings, radio and tv programmes etc. includes:** • Licensing services for the right to reproduce, distribute or incorporate entertainment, musical such as broadcasting and showing of original films, sound recordings, radio and tv programmes, prerecorded tapes and videos. • The GST rates on these services were discussed in the 45th GST Council meeting held on 17.09.2021 wherein, the Council recommended to rationalize the GST rate and keep uniform rate of 18% on both entries. It was also mentioned that there is an overlap between explanatory notes

			to services codes 999614 and 997332. • It was noted that while "granting permission to exhibit, broadcast and rent audiovisual works protected by copyrights" is covered by Service code 999614 and "licensing services for the right to broadcast and show original films" is covered by service code 997332, there is no difference between "granting permission" and "licensing". • **After deliberations, Fitment Committee recommended to regularize the GST liability for the past period prior to 01.10.2021 on 'as is where is' basis, where the film distributor or sub-distributor acts on a principal basis to acquire and distribute films.**

39. Thus, in the minutes of 54th meeting held on 9th September, 2024, a decision was taken that the Council approved the recommendation of the Fitment Committee to regularize the

payment of GST on transaction between distributors and exhibitors where the distributors grant the theatrical rights to the exhibition centers on ‘as is where is’ basis from 1st July 2017 to 30th September 2021.

40. Reading of the aforesaid entries would reveal that Heading 9973 of the rate notification consciously creates two separate and distinct taxable entries under Entry No.17. Entry No.17 (i) provides for transfer or permitting the use or enjoyment of Intellectual Property (IP) right in respect of goods other than Information Technology software (12%); and Entry No.17 (ii) provides that in respect of Information Technology software (18%). The explanation 4(v) of the rate notification defines, “Information technology software” means any representation of instructions, data, sound or image, including source code and object code, recorded in a machine readable form, and capable of being manipulated or providing interactivity to a user, by means of a computer or an automatic data processing machine or any other device or equipment.

41. The respondents proceeded to pass the impugned orders on the grounds of alleged misclassification of service. The key

findings recorded in the impugned orders are as follows :-

(a) That under VAT laws, IPR was considered as intangible goods by means of a legal fiction, but no such fiction exists under the GST regime, and thus, cinematographic content cannot be treated as goods merely because it was considered as intangible goods under the VAT regime. Under the GST, there is no concept of intangible goods.

(b) That the licensing of IPR in respect of cinematographic films is liable to GST at the rate of 18%, and not at 12% as adopted by the petitioner.

(c) That as per the statement of the Post-production Head, the link to expedite the films in digital format is created in software format.

42. The impugned orders do not deal with the definition of "Information Technology Service" at all. There is no finding, much less a finding, as to how a cinematographic film, a passive audio visual work, incapable of execution, manipulation or inter-activity could ever satisfy the statutory definition "information technology software". The scheme of Classification of Services confirms the distinction. Group 99733 ("Licensing services for the right to use intellectual property and similar products") separately lists SAC

997331 ("Licensing services for the right to use computer software and databases") and SAC 997332 ("Licensing services for the right to broadcast and show original films, sound recordings, radio and television programme etc"). The existence of a separate, specific SAC for cinematographic films demolishes the respondents' assumption that such licensing can be subsumed within "software". The impugned orders neither analyse these two distinct entries nor explain why they are being collapsed into one – they merely reproduce the show cause notices without independent reasoning. We agree with the submissions of the learned Senior Advocate for the petitioner that the confirmation of demand without identifying or applying the correct SAC and without explaining the collapse of two admittedly distinct SACs into one, is a manifest and unreasoned error of law.

43. The explanatory notes reinforce the distinction. SAC 997331 is confined to computer programs, program descriptions and supporting materials and databases; SAC 997332 covers licensing of the right to reproduce, distribute or incorporate "entertainment, musical such as broadcasting and showing of original films, sound recordings, radio and television programmes,

prerecorded tapes and videos" – language that maps precisely onto the petitioner's transaction and nowhere references software.

44. The 12% differential was harmonised to a uniform 18% w.e.f. 1st October, 2021 in the 45th GST Council meeting. The present dispute is confined exclusively to the period prior to 1st October 2021, when there was a classification distinction.

45. CBIC Circulars regularise the dispute on an "as is where is" basis. The Circular dated 11th October, 2024, referred to hereinbefore at para 10 and Circular No. 236/30/2024-GST dated 11th October, 2024 clarifies the scope of "as is where is" basis regularisation generally. It acknowledges the long-standing overlap/ambiguity in classification of theatrical rights in cinematographic films prior to 1st October 2021 (SAC 9973 at 12% v SAC 9996 at 18%) and regularise payment made under SAC 9973 at 12% for 1st July 2017 to 30th September 2021 on an "as is where is" basis.

46. Respondent No.4, in the impugned Orders in Original confines the benefit of Circular 234/28/2024 to downstream distributor-exhibitor transactions alone, excluding the petitioner's upstream licensing as producer/original copyright holder. This

finds no support in the Circular's text, which turns not on the identity of the supplier but on an acknowledged ambiguity intrinsic to the nature of theatrical rights- on ambiguity permeating the entire chain of exploitation, from the producer's license to the distributor's onward grant to exhibitors. Further, the classification of theatrical rights cannot change when the distributor licenses the exhibitor. There is no difference between a license given by the license holder to the distributor, and, a license given by the distributor to the exhibitor. The distinction sought to be raised by the adjudicating authority is therefore flawed. In any event, once the classification and taxability is regularised on an "as is where is" basis, the Circular 236/30/2024-GST having confirmed the benefit, such benefit cannot be selectively withheld from one link in that chain while extended to another paying at the same rate under the same competing entries.

47. Administrative clarifications support SAC 997332 for licensing by the original copyright holder. The Alert Circular dated 13th October, 2020, issued by the Principal Chief Commissioner, Central Tax, Bengaluru Zone and the Office Memorandum dated 8th January, 2019 issued by Prasar Bharati, (obviously having a

persuasive value) confirm that royalty/licensing payments to the original rights holder/producer for the right to broadcast and show cinematographic films fall under SAC 997332 (or 997339), taxable at 12%. The Alert Circular expressly distinguishes this from "distribution of films" by a distributor to an exhibitor (classifiable under SAC 999614 / Heading 9996 at 18%). Thus, the Petitioner, as producer/original copyright holder licensing rights to a distributor, squarely falls within the former.

48. The impugned orders rely on an alleged statement of the Petitioner's Post-Production Head. Learned Additional Government Pleader was at pains to submit that the statement of the production head demolishes the petitioner's case. In our considered view, even taken at face value, the statement speaks only to the mode of transmission; no technical material, expert evidence, executable program or software architecture was produced. The adjudicating authority thus committed an error in placing too much reliance on the alleged statement of the petitioner's Post-Production Head. Moreover, the said statement was never furnished to the petitioner. No reliance could have been placed by the adjudicating authority on such statement.

49. The next aspect that we are required to consider is whether mode of delivery is irrelevant to classification. In our opinion, whether content is transmitted physically (encrypted hard disks) or electronically, the mode of delivery cannot determine classification, which must turn on the essential character of the supply. Equating "digital content" with "software", the core error underlying the impugned orders, has no statutory basis.

50. The impugned Orders in Original rely on *AGS Entertainment Pvt. Ltd. v. Union of India* (supra). In *AGS Entertainment Pvt. Ltd. v. Union of India* (supra), the issue involved was whether under the erstwhile VAT/Service Tax regime, licensing of copyright in films was a sale of goods or a service. The issue never was whether it is "software". The decision in fact holds that copyrights in cinematographic films are in the nature of intangible goods.

51. It would be material to refer to a ground taken for the first time in the Affidavit-in-Reply by the Respondents contending that the petitioner's services fall within "Online Information Database Access and Retrieval" ("OIDAR") services. Neither the show cause notice, Orders in Original nor Orders in Appeal

contains any discussion or finding on the contention that the petitioner's services fall within “OIDAR” services. Mohinder Singh Gill v. Chief Election Commissioner[9], has clearly laid down that an adjudicating/appellate order cannot be improved upon or supplemented by an affidavit before the writ court; its validity must be tested on the reasoning it actually contains.

52. The respondents’ reliance on the Aspect Theory to treat “mode of delivery” as an independent classification criterion is misconceived. The Aspect Theory operates in the field of legislative competence, permitting different legislatures to tax different aspects of the same transaction under distinct fields of legislation and has no application to classification o a single supply under a single statute. The dominant nature and essential character of the supply, not its mode of transmission, must govern classification.

53. We find that the Order-in-Originals substantially reproduce, almost verbatim, the allegations in the show cause notices, without independent analysis or findings on the petitioner's detailed submissions. The Order in Appeals do not

9 (1978) 1 SCC 405

cure this defect. Respondent No.4 has not engaged with the specific grounds raised by the petitioner viz. correct tariff entry, the statutory definition of “information technology software”, the Scheme of Classification of Services and has merely affirmed the adjudicating authority's conclusions. We are in agreement with the learned Senior Advocate for the petitioner that mere reproduction of facts, submissions or case law is not a reasoned adjudication.

54. However, instead of remitting the matter back to the adjudicating authority, since we are of the view that the impugned orders suffer from jurisdictional errors all apparent on the face of the record and not requiring adjudication of disputed questions of fact and in the absence of a functional GST Appellate Tribunal at the relevant time when this petition was filed, we proceeded to entertain the writ petition in the light of the law laid by the Hon’ble Supreme Court in *Godrej Sara Lee Ltd. v. Excise & Taxation Officer-cum-Assessing Authority* (supra).

55. The Writ Petitions are therefore allowed in terms of prayer clause (a). No order as to cost.

(SANDESH D. PATIL, J.) **(M. S. KARNIK, J.)**