

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

Reserved on: 13th December, 2012
% Date of Decision: 12th February, 2013

+ **W.P.(C) 8620/2009, C.M. APPL. 5744/2009**
+ **W.P.(C) 10287/2009**
+ **W.P.(C) 10311/2009**
+ **W.P.(C) 10312/2009**

M/S PERSYS PUNJ LLOYD JOINT VENTURE Petitioner
Through: Mr. Randhir Chawla and Ms. Renu
Sahgal, Advocates.
versus

COMMISSIONER OF VAT & ORS. Respondent
Through: Mr. Vineet Bhatia, Advocate.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

R.V. EASWAR, J.:

1. These are four writ petitions filed under article 226 of the Constitution of India by M/s. Persys Punj Lloyd Joint Venture of New Delhi, hereinafter referred to as ‘the petitioner’. They arise from orders passed under the Delhi Sales Tax on Works Contracts Act, 1999 (‘WC Act’) read with Delhi Sales Act, 1975 (‘DST Act’). Since all the petitions were heard together and three of them also involve common issues, they are disposed of by a single order for the sake of convenience.

W.P. (C) No.8620/2009

2. This writ petition has been filed in the following circumstances. The petitioner is a joint venture consisting of two companies—Persys SDN BHD, a company incorporated in Malaysia and having a local project office in Delhi and Punj Lloyd Ltd., a company incorporated in India under the Companies Act, 1956. Both these companies are registered with the sales tax department of the Government of NCT of Delhi separately under the WC Act and the DST Act. The Malaysian company and the Indian company were separately awarded contracts by the Delhi Metro Rail Corporation (DMRC) for execution of certain works. The Malaysian company was awarded the contract for reinforced and pre-stressing steel, pre-cast concrete work for the superstructure and the Indian company was to execute the work in connection with the survey, temporary barricades, pile foundations, etc. Under a memorandum of understanding executed on 10.10.2003 these two companies came together as a joint venture. Under the MOU, each member of the joint venture had to raise its own independent bill for the work executed and the payment was to be received by the joint venture from DMRC to be distributed by the joint venture between its two members in terms of their separate bills. The petitioner, which is the joint venture, was also registered as a dealer under the WC Act w. e. f. 13.01.2013.

3. On 21.03.2005, an assessment was completed upon the petitioner under Section 16 of the WC Act read with Section 23(3) of the DST Act. The assessment order is brief and it would be better to reproduce the same: -

*“FORM OF ORDER OF ASSESSMENT UNDER SECTION 16
OF THE DELHI SALES TAX ON WORK CONTRACT, 1999
READ WITH 23(3) OF THE DELHI SALES TAX ACT, 1975*

1.	Name & Address of the dealer:	M/s Persys Punj Lloyd Joint Venture
		1/4 Sunder Vihar, New Delhi-87
2.	Nature of business:	Construction
3.	Registration certificate No.	WC/62/213000534/ 1003
4.	Period of Assessment	2003-04
5.	Section & Sub-section under which assessment made	16 r/w 23(3)

ASSESSMENT ORDER

The L&V has been fixed w.e.f. 22.10.73. The dealer deals in the above business. Returns have been filed in time except for 3rd and 4th qrs hence penalty of ₹1000/- is imposed. Sale figures differ and the same is allowed.

In response to notice, Shri Rajneesh Goyal CA with POA appeared before me and filed trading account, sales summary, affidavit, audited balance sheet and details of payment. The dealer has filed 2 TDS certificate and the credit of the tax deposited is given after verification. Nothing adverse on record.

The assessment is framed as under:

GTO	293234912	Tax assd	0
Labour & Service	0	Tax/TDS paid	8697203
Sub-contract	293234912	Tax due	8507203
Taxable 4%	0	Interest	0
Taxable 8%	0	Penalty	1000

<i>Tax paid prucha</i>	<i>0</i>	<i>Total</i>	<i>8506203</i>
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The dealer may apply for refund as per rules.

Sd/- Senh Lata

	<i>AA/W-62</i>	
<i>Copy to dealer/ Audit</i>	<i>AA/W-62</i>	
<i>AA/W-62</i>		<i>6394</i>
		<i>21.3.05"</i>

4. Sections 5 and 7 of the WC Act are as follows: -

“Section 5 - Levy of tax

(1) Save as provided in sub-sections (2), (3), (4), (5) and (6), every dealer shall file return and pay tax under this Act for each year on his taxable turnover of sales or transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract, in the manner as may be prescribed at the rate of eight paise on every rupee of his net turnover of sales.

(2) Tax shall be paid at the rate of four paise on every rupee of his net turnover of sales pertaining to declared goods, if the goods have not suffered tax earlier, and no tax shall be payable on the turnover of sales pertaining to declared goods, if such goods have suffered tax earlier under the Delhi Sales Tax Act and transferred from the contractor to the contractee in the same form in which they were purchased by the contractor.

(3) No tax shall be levied on the turnover of sale on transfer of property in goods, specified in the Third Schedule to the Delhi Sales Tax Act, involved in the execution of works contract, if such goods are transferred from the contractor to the contractee in the same form in which they were purchased by the contractor.

(4) No such tax shall be leviable on the turnover of sales on transfer of property in goods, whether as goods or in some other form involved in the execution of works contract, if such transfer

from the contractor to the contractee constitutes a sales in the course of inter-State trade or commerce under section 3 or a sale outside the State under section 4 or a sale in the course of import or export under section 5 of the Central Sales Tax Act, 1956.

(5) No tax shall be payable under this section on the turnover of sales relating to the amount paid to a sub-contractor as consideration for the execution of works contract whether wholly or partly subject to the production of proof, as may be prescribed, that such sub-contractor is a registered dealer liable to tax under the Act and that the turnover of such amount is included in the return of turnover filed by such sub-contractor and tax thereupon has been paid.

(6) No tax shall be payable under this section on the amount representing the value of the goods supplied to the contractor by the contractee, provided that the ownership of such goods remains with the contractee under the terms of the contract.

(7) Where in respect of sale price referred to in clause (q) of sub-section (1) of section 2, the contractor does not maintain proper accounts or the accounts maintained by him are not found by the assessing authority to be worthy of credence and the amount actually incurred towards charges for labour and other services and profit relating to supply of labour and services are not ascertainable, such charges for labour and services and such profit may, for the purposes of deductions, be determined on the basis of such percentage of the value of the works contract as may be prescribed and different percentages may be prescribed for different types or works contract.

Section – 7 Deduction of tax at source

(1) Every person other than Individual and Hindu Undivided Family responsible for making payment to any dealer (hereinafter in this section referred to as “the contractor”) for discharge of any liability on account of valuable consideration

payable for the transfer of property in goods (whether as goods or in some other form) in pursuance of a contract, shall, at the time of credit of such sum to the account of the contractor or at the time of making such payment to the contractor, either in cash or in any other manner, deduct an amount equal to two per cent from such sum towards part or, as the case may be full satisfaction of the tax payable under this Act on account of total value of such works contract.

(2) Where, on an application being made by the contractor in this behalf, the Commissioner is satisfied that any works contract involves both transfer of property in goods and labour and service, or involves only labour and service and accordingly, justifies deduction of tax on a part of the sum in respect of the words contract or, as reasonable opportunity of being heard, grant him such certification as may be appropriate:

Provided that nothing in the said certificate shall affect the assessment of the sales tax liability of the contractor under this Act:

Provided further that where any deduction has been made by a contractor from the payments made to his sub-contractor in accordance with sub-section (3) the amounts of such payments shall be deducted from the amount on which deduction is to be made under this sub-section subject to production of a certificate as prescribed in sub-section (5) of this section.”

(3) Any contractor responsible for making any payment or discharge of any liability to any sub-contractor, in pursuance of a contract with the sub-contractor, for the transfer of property in goods (whether as goods or in some other form) involved in the execution, whether wholly or in a part, of the works contract undertaken by the contractor, shall, at the time of such payment or discharge, in cash or by cheque or draft or any other mode, deduct an amount equal to two per cent. of such payment or discharge, purporting to be part or full amount of the tax payable under this Act.

(3A) (i) A contractor with respect to the contracts other than the private contracts, may make an application to the contractee authorising him to deduct tax at the rate of four per cent. towards the tax payable under this Act instead of two per cent. as provided in sub-section (1) of this section.

(ii) Where an application is made by the contractor under clause (i) of this sub-section, and a copy thereof is forwarded to the appropriate assessing authority by the contractor, the contractor shall be deemed to have opted for composition under section 6 of this Act.

(iii) A contractor, to whom the provision of clause (i) of this sub-section applies, may be assessed in a summary manner on the basis of the annual return filed by him without being called upon to produce the books of accounts and other records relating to his business.]

(4) The amount deducted under sub-section (1) or sub-section (2) or sub-section (3) shall be deposited into the Government treasury by the person making such deduction before the expiry of fifteen days following the month in which such deduction is made in the manner as may be prescribed.

(5) The person making such deduction under sub-section (1) or sub-section (2) or sub-section (3) shall, at the time of payment or discharge, furnish to the dealer from whose bills or invoices such deduction is made a certificate as may be prescribed in respect of the amount deducted, the rate at which it has been deducted and the details of deposit into the treasury.

(6) Any deduction made in accordance with the provisions of this section and credited into the Government treasury shall be treated as payment of tax on behalf of the person from whose bills or invoices the deduction has been made, and credit shall be given to him for the amount so deducted on the production of the certificate, referred to in sub-section (5) above, in the assessment made for the relevant assessment year.

[(7) If any person, as is referred to in sub-section (1) or sub-section (2) or sub-section (3) of sub-section (3A), fails to make the deduction, or after deducting, fails to deposit the amount so deducted as required by sub-section (4), the assessing authority may, after giving to such person an opportunity of being heard, by order in writing, direct that such person shall pay, by way of penalty, a sum not exceeding twice the amount deductible under this section besides tax deductible but not so deducted and, if deducted, not so deposited into the Government treasury.]

(8) Without prejudice to the provisions of sub-section (7), if any person fails to make deduction, or, after deducting, fails to deposit the amount so deducted, he shall be liable to pay simple interest at the rate of two per cent. per month on the amount deductible under this section but not so deducted and, if deducted, not so deposited from the date on which such amount was deductible to the date on which such payment is actually deposited.

(9) Where the amount has not been, deposited after deduction, such amount together with interest and penalty referred to in sub-section (7) and sub-section (8) shall be a charge upon all the assets of the person concerned and recoverable as arrears of land revenue.

[(10) Every person responsible for making deduction of tax under this section shall apply to the Commissioner for a Tax Deduction Account Number within the prescribed time and in the prescribed form and shall also furnish an annual return in the prescribed form within the prescribed period.

Explanation.--Nothing contained in this section shall apply to works contract executed in the course of inter-State trade or commerce or outside the State, or in the course of import or export out of India.]

5. Section 5 of the WC Act provides for the levy of tax on works contract. Sub-section (2) provides for the rate of four paise on every rupee of the net

turnover of the dealer as tax. Section 2(r) of the WC Act defines “*taxable turnover*” to mean “*such turnover as is arrived at after deducting from the turnover of sales such amounts as may be prescribed*”. Section 2(t) defines “*turnover of sales*” to mean “*the aggregate of the amount of sale price received or receivable by a dealer in respect of the execution of any works contract whether executed fully or partly during any period*”. Rule 5 of the Delhi Sales tax on Works Contract Rules, 1999 provides for the computation of taxable turnover of sales. This has to be read with sub-section (5) of Section 5 of the WC Act which we have quoted above. Clause (b) of sub-rule (1) of rule 5 of the aforesaid rules provides for the deduction, from the turnover of sales of the dealer, of “*amounts paid to a sub-contractor for the execution of works contract provided such a sub-contractor is a registered dealer and that turnover is included in the return filed by him before the assessing authority concerned and the sub-contractor furnishes a declaration in Form VI*”. The combined effect of the above provisions of the WC Act and the Rules is that the petitioner is entitled to deduct, from the amounts received from DMRC for the execution of the contract, the amounts paid to its constituents (i.e., the Malaysian and Indian companies) and obtain from them the declaration in Form VI. This declaration, as mandated in sub-section (5) of Section 5 of the Act, shall be to the effect that the amounts received by the sub-contractors (the constituents of the petitioner) are included in the return of turnover filed by them and the tax thereupon has been paid. The specimen Form VI is as follows:

“THE DELHI SALES TAX ON WORKS CONTRACT RULES, 1999

Form VI

(See Rule 5(1)(b))

Certificate regarding payment of tax made by the Sub-Contractor

*I authorised representative of who is registered dealer holding Reg.No..... under the Delhi State Tax on Works Contract Act, 1999 hereby certify that I have undertaken the sub-contract work from who is a registered dealer holding Registration No..... The details of the **Sub-Contract** are as under:-*

1. Description & particulars of works contracts undertaken:

2. Total value of the works contract undertaken from to Rs.....

3. Turnover of Taxable sales in respect of period from..... to Rs.

<i>Declared Goods</i>	<i>Other than Declared Goods</i>	<i>Turnover of Taxable Sales</i>	<i>Tax paid</i>

4. Amount of sales tax paid on the turnover referred to at Sl. No.3:

5. Particulars of payment:

<i>Period</i>	<i>Challan No.</i>	<i>Date</i>	<i>Amount of tax</i>
		<i>Total</i>	

Place:

Signature

Date

Status

6. It will be seen from the assessment order that a refund of ₹85,06,203/- was determined as payable to the petitioner. DMRC paid ₹29,32,34,912/- to the petitioner in respect of the tax period 2003-04 out of which tax of ₹86,97,203/- was deducted. Since the petitioner was only a joint venture of two companies and was to act merely as a conduit for passing on the monies to the member-companies who were sub-contractors who were to actually carry out the work, the assessment order refers to the sub-contract to show that the entire amount received by the petitioner from DMRC was paid to the sub-contractors i.e. the members of the joint venture. Accordingly, a refund of ₹85,06,203/- was determined as payable to the petitioner after deduction of penalty of ₹1,000/- for delay in filing the return. There is some difference between the figure of TDS and the figure of the refund but that should not detain us because it is common ground that the refund due to petitioner is ₹85,07,203/- as per prayer (i) of the writ petition.

7. On 08.06.2006 an assessment order under Section 23(6) of the DST Act read with Section 16 of the WC Act was passed for the tax year 2003-04 (22.10.2003 to 12.01.2004). In this assessment order the taxable sale of the petitioner and the tax assessed were determined at ₹ nil. It was further noticed in the assessment order that the mobilisation advanced of ₹19,32,57,640/- received by the petitioner from DMRC was subjected to tax deducted at source. However, it was stated in the assessment order that the refund of the tax deducted at source shall be discussed in the assessment order to be passed under Section 23(3) and the refund shall be considered separately in the reassessment order to be passed under Section 24, subject to verification of Forms-VI and IX

filed by the sub-contractor and the petitioner respectively. On the same day, i.e., 08.06.2006 a reassessment order was passed for the tax period 13.01.2004 to 31.03.2004 relevant to the tax year 2003-04 under Section 24 of the DST Act read with Section 16 of the WC Act. It would be necessary to reproduce the entire reassessment order in order to appreciate the controversy in proper perspective and also in order to appreciate the rival stands. The reassessment order is reproduced below: -

*“FORM OF ORDER OF ASSESSMENT UNDER SECTION 16
OF THE DELHI SALES TAX ON WORK CONTRACT, 1999
READ WITH 24 OF THE DELHI SALES TAX ACT, 1975*

WARD-62

1.	<i>Name & Address of the dealer:</i>	<i>M/s Persys Punj Lloyd Joint Venture</i>
		<i>1/4 Sunder Vihar, New Delhi-87</i>
2.	<i>Nature of business:</i>	<i>Construction</i>
3.	<i>Registration certificate No.</i>	<i>WC/62/213000534/ 1003</i>
4.	<i>Period of Assessment</i>	<i>2003-04 (13-1- 2004 to 31-3-2004)</i>
5.	<i>Section & Sub-section under which assessment made</i>	<i>24</i>

ASSESSMENT ORDER

In response to notice ST-15 read with WCC Act, 1999 issued for 4.07.2005. Shri Rajneesh Goel, Advocate with POA appeared on 8.8.2005 and finally on 8.5.2006.

Filed sale summary, written submissions dated 13.9.2005 challenging reassessment dated 8.5.2006, affidavit dated 31.03.2006, photocopies of returns, 4 Forms VI (received from two of its sub contractors), chart reflecting amount receipt from DMRC (distributed among subcontractors) with TDS, WCT and other details), Two Form-IX 26(6) proceedings have been taken separately.

Dealer submitted No. books of accounts are maintained. Only Form IX and Form VI & returns is the basis of assessment. The receipt of payment which are further distributed among two of his associates sub contractors, who have issued Form VI for executing works contracts and has thus claimed refund of TDS – Since dealer has not executed any job work and is claimed 100% exemptions only on account of sub contract. Filed affidavit dated 31.03.2006 stating the assessee dealer named as joint venture consists of two equal constituents (1) Persys Sdn Bhd and (2) Punj Lloyd Ltd. – Both of which are separate companies registered under DST WC Act, 1999. The Joint Venture simply acts as a conduit between both the constituents and DMRC Ltd. and does not execute any work on its own. The taxable turnover in the hands of joint venture is Nil. Further DMRC had deducted ₹85,07,203/- as per Form IX issued by DMRC from the payment made to joint venture, which becomes refundable. Further submitted tax has been deducted at source by DMRC Ltd. from all payments including all types of advance payments made by it to the assessee and deposited in Govt. Revenue. The assessing authority is bound to allow credit for the same in that financial year itself. The due tax shall be deposited by the subcontractors after, claiming exemptions as provided in the Act. To safeguard govt. revenue as per Act no TDS has been deducted from sub-contractors.

No books of accounts are maintained by dealer only Form IX & Form VI & returns is basis of assessment and refund books of accounts are maintained as submitted by dealer only Form IX and TDS deducted by DMRC and deposited in Govt. revenue on behalf of joint venture. Detailed letter to DMRC dated 31.3.2006 for verification issued with copy of the dealer and credit shall be allowed thereafter accordingly. The verification letter is part of assessment.

Dealer further submitted that no benefit of TDS advances has been availed by its sub-contractor while adjusting advances in the bills raised for execution of works contract. Tax on total turnover has been calculated tax has been deposited on turnover after claiming exemptions.

As per Act dealer has not collected TDS from its sub-contractors in this regard, filed written submission date 31.03.2006. Difference in 1st, 2nd & 4th quarter returns submitted were defected at the time of finalization of account whereas dealer has not maintained, separate books of accounts for joint venture. For late and wrong filing of returns and TDS not deducted from sub-contractor the submission of dealer are not accepted and a penalty of ₹10,000/- is imposed.

<i>GTO</i>	<i>29,32,34,912</i>
<i>Sub Contract</i>	<i>29,32,34,912</i>
<i>Tax assessed</i>	<i>Nil</i>
<i>Tax deposited</i>	<i>Subject of verification</i>
<i>Penalty</i>	<i>10,000</i>

The dealer is directed to deposit ₹10,000/- as per demand notice enclosed.

Assessing Authority W-62"

8. This order does not bear any date but it was clarified in the course of the hearing that it was passed on 08.06.2006. The reassessment order refers to the

fact that DMRC had deducted ₹85,07,203/- as per Form IX issued by it to the petitioner from the payment made it and that the amount became refundable to the petitioner. There is further reference to the fact that the taxable turnover in the hands of the joint venture is nil. The reassessment order further refers to a detailed letter dated 31.03.2006 sent to DMRC for verification and that the said letter was part of the assessment. In addition, the reassessment order notes the fact that the petitioner did not deduct tax when the amounts were paid to the sub-contractors i.e. the two member-companies and accordingly was liable to pay a penalty of ₹10,000/-. Ultimately no tax demand was raised against the petitioner in the reassessment because the amount of ₹29,32,34,912/- received from the DMRC was paid to the sub-contractors fully. Thus except for reiterating the petitioner's claim for refund and stating that it would be granted after verification and imposing a penalty of ₹10,000/- for not deducting tax on the amounts paid by the petitioner to the member-companies, no taxable turnover has been determined to have escaped assessment. In other words, in the reassessment order also there was no tax demand.

9. In respect of the tax year 2004-05, an order of assessment was passed on 31.03.2006 under Section 23(3) of the DST Act read with Section 16 of the WC Act. This assessment order is substantially in the same language and tenor as the reassessment order by the assessing authority on 08.06.2006 for the assessment year 2003-04. The only difference is that in the assessment year 2004-05, DMRC had paid ₹12,54,17,546/- to the petitioner which was fully transferred (by the petitioner) to the member-companies. DMRC had deducted tax of ₹2,20,60,306/- as per Form-IX issued by it. Accordingly in the assessment order dated 31.03.2006, a refund of the entire amount of tax

deducted by DMRC was determined as payable to the petitioner subject to verification. For this year too a letter dated 31.03.2006 appears to have been written to the DMRC for verification of the tax deposit. As in the assessment year 2003-04, a penalty of ₹10,000/- was imposed on the petitioner for late and wrong filing of return and for not deducting tax from the payments made to the member-companies.

10. There is another development to which we must refer to at this stage. On 11.05.2009, three re-assessment orders were passed by the assessing authority: two orders for different tax periods relating to the same assessment year i.e. 2003-04 and one order relating to assessment year 2004-05. These orders of reassessment were made under Section 24 of the DST Act read with Section 16 of the WC Act. In these orders, the assessing authority made demands of tax, interest and penalty. These orders are the subject matter of separate challenge by the petitioner in the other three writ petitions, the ground of challenge being that those orders were passed without jurisdiction as there was no escapement of turnover and only with a view to nullify the refunds determined in the earlier orders passed by the assessing authority. We will deal with those writ petitions separately without mixing them up with the present writ petition at this stage, though there is some overlapping of the contentions between this writ petition and those three writ petitions in the sense that one of the contentions in the present writ petition is that the refunds determined have been wrongly sought to be nullified by reassessment orders passed on 11.05.2009.

11. Coming to the present writ petition, after the orders determining the refunds were passed by the assessing authority for both the assessment years, the petitioner applied for the refunds by separate applications dated 23.06.2006.

These applications sought rectification of the mistake allegedly committed by the assessing authority while passing the orders determining the refund and mentioning that the letters have been issued to DMRC for verification of the tax deducted at source by them from the payments made to the petitioner. The letters have been filed as Annexure P-III to the writ petition. We consider it necessary to reproduce one of these letters: -

*“Rajnish Goyal & Associates
ADVOCATES & ATTORNEYS*

E-mail:

*Resi.:22371556, 22376332
Mob.: 9811078700
I-1/16, Shanti Mohan House
(Behind Shiv Mandir)
Ansari Road, Darya Ganj
New Delhi – 110002.*

*The D.V.A.T.O.
Ward No.62
New Delhi*

Dated: 23.06.2006

Sub: M/S PERSYS PUNJLLOYD JOINT VENTURE ¼, Sunder Vihar, Paschim Vihar, New Delhi – Rectification of Mistake in Re-Assessment under Delhi Sales Tax on Works Contract Act for Asst. Year 2003-04 & Issuance of Refund regarding.

Dear Sir,

This is with reference to the reassessment for the Asst. Year 2003-04 completed in the case of the captioned assessee by your learned predecessor under the Delhi Sales Tax on Works Contract Act, 1999 (hereinafter referred to as the ‘Act’). While completing the assessment, it has been mentioned in the Reassessment Order, that as per the Form IX issued by the Delhi Metro Rail Corporation Ltd. (DMRC) a total amount of ₹85,07,203.00 has been deducted at source and also deposited by them in the Govt. Treasury on behalf of the assessee. Since the

tax payable as per the reassessment order is Nil, the entire amount of ₹85,07,203.00 is Refundable in the hands of the assessee. The Assessing Officer has not given credit for the taxes paid by the DMRC Ltd., despite Form IX having been issued by it in favour of the assessee and also copies of all the Challans in respect of the payments made in the Govt. Treasury being submitted at the time of completion of assessment and already there on record. The Department had issued letter to DMRC Ltd. regarding verification of the payments made by them. However, the DMRC Ltd., after verifying from their advisors, has informed us that there was no need for any separate certificate and the TDS Certificate in Form No.IX alongwith the copies of the challans already issued in respect of the deposit of taxes made were sufficient evidence for the allowability of credit to the assessee.

In view of the aforesaid, you honour is requested to pass requisite Orders for the Rectification of mistake, allowing of credit of taxes deducted/ paid & the Issuance of Refund of ₹88,07,203.00 along with upto date interest on the same.

Thanking you,

Yours faithfully,

*(RAJNISH GOYAL)
ADVOCATE
Counsel for the assessee”*

12. The above application for rectification did not evoke any response from the respondents, compelling the petitioner to remind them by a series of letters/ reminders dated 16.10.2006, 22.01.2007, 16-17.07.2007 and 23.08.2007. Eventually on 20.09.2007 the second respondent (VATO) wrote letters to the petitioners stating that there was no mistake apparent from the record which

required rectification under Section 48 of the DST Act in relation to the issuance of refunds for the assessment years 2003-04 and 2004-05. Even after receipt of the aforesaid letters, the petitioner kept writing to the respondents in the matter of issuing the refunds. It was repeated that the refunds had already been determined in the assessment orders subject to verification with DMRC, that these orders were passed in the year 2006, that the TDS certificate in Form-IX issued by DMRC and the payment which was duly certified by the DMRC were also submitted by the petitioner and were part of the record and that the verification part should not take such a long and unreasonable time and in these circumstances it was prayed that the refunds may be issued as early as possible. Formal applications for refund in the prescribed form (Form ST-21 prescribed by Rule 29) were also submitted on 13.01.2008 seeking refund of ₹85,07,203/- for the assessment year 2003-04 and ₹2,20,60,306/- for the assessment year 2004-05. Despite these applications and reminders, the assessing authority did not refund the amounts. Instead of refunding the amounts, the assessing authority in fact started reassessment proceedings which culminated in reassessment orders being passed under Section 24 of the DST Act on 11.05.2009 raising demands of tax, interest and penalty which virtually nullified the refunds.

13. The contention of the petitioner, predictably, is that the refunds have been determined by the assessing authority under orders validly passed and there being no dispute regarding the authenticity/ genuineness of the certificate of TDS issued by DMRC in Form-IX and there being no further liability upon the petitioner to pay any tax under the WC Act in respect of the contracts with DMRC which were to be executed only by the member-companies of the

petitioner and there being no dispute that the petitioner was merely acting as a conduit for passing on the monies from DMRC to the Malaysian and Indian company which actually carry out the works, and there being no statutory impediment in issuing the refunds, the action of the respondents in withholding the refunds for an unreasonably long period of time without any justification whatsoever is arbitrary, illegal and cannot be countenanced at all. It was even suggested in the course of the arguments on behalf of the petitioner that the action of the respondents was *mala fide* in as much as they proceeded to pass reassessment orders on 11.05.2009 raising huge demands of tax, interest and penalty merely to withhold refunds allegedly determined.

WP(C) Nos.10311/2009, 10312/2009 and 10287/2009

14. The relevant facts in connection with these three writ petitions may now be stated. After the completion of the earlier assessments/re-assessments in respect of the Assessment Years 2003-04 and 2004-05, a show cause notice was issued to the petitioner on 17th April, 2009. The show cause notice was issued in terms of Section 7(7) of the WC Act, which provides as under:-

“(7) If any person as is referred to in sub-section (1) of sub-section (2) or sub-section (3) fails to make the deduction or, after deducting fails to deposit the amount so deducted as required by sub-section (4), the assessing authority may, after giving to such person an opportunity of being heard, by order in writing, direct that such person shall pay, by way of penalty, a sum not exceeding twice the amount deductible under this section besides tax deductible but not so deducted and, if deducted, not so deposited into the Government treasury.”

15. The show cause notice issued on 17.04.2009 was for the alleged failure of the petitioner to comply with the provisions of Section 7(3) of the WC Act; the petitioner was asked to show cause as to why the penalty for such failure cannot be imposed under Section 7(7).

16. It would appear that the petitioner submitted a detailed reply dated 29.04.2009 to the assessing authority, pointing out that even as per the earlier assessment/re-assessment orders, the petitioner had submitted Form No. VI issued by the sub-contractors and that in those forms, the sub-contractors i.e. the member-companies of the joint venture have certified that they have undertaken the work from the petitioner and that the sales tax on the turnover in executing the contract was paid by them. It was pointed out that all the particulars relating to the total value of the works contract undertaken by the sub-contractors, the turnover of sales, and the details of payments of tax such as challan number, date, relevant period etc. were furnished in those forms which were part of the record. It was thus pointed out, *inter alia*, that there was no such failure on the part of the petitioner as would attract the penalty provisions of Section 7(7) and a prayer was accordingly made that the proceedings may be dropped. It is not known as to what happened to those proceedings.

17. However, on 27.04.2009 i.e. two days prior to the date on which the petitioner submitted its detailed reply to the show cause notice, the assessing authority issued notices under Section 24 of the DST Act read with Section 16 of the WC Act in Form ST-15 seeking to re-open the assessments for the Assessment Years 2003-04 and 2004-05. At the end of the notices, the assessing authority recorded the reason for re-opening the assessments. For

instance, in the notice of re-opening issued for the period 13.01.2004 to 31.03.2004, the following reason was mentioned:-

“Reason: the dealer was required to deduct TDS @ 2% from the payment made to sub-contractor but the dealer failed to do so. According to ST-15 issued for re-assessment of case for the year 2003-04 (13.01.2004 – 31.03.2004)”

18. Similar reasons were recorded in the other two re-opening notices, the only difference being the tax period. In the notice which is the subject matter of challenge in WP(C) No.10312/2009, the tax period mentioned in the reason is 22.10.2003 to 12.01.2004 and in the notice of re-opening which is the subject matter of challenge in WP(C) No.10287/2009, the tax period mentioned is 13.01.2004 to 31.03.2004 relating to the Assessment Year 2004-05. Except for these differences, the notices are the same.

19. On receiving the notices, the petitioner sought time of 15 days on the ground that the officer concerned who was looking after the sales tax matters was out of station. Apparently, this request did not find favour with the respondents who passed *ex parte* re-assessment orders, referring to the petitioner's reply dated 29.04.2009 in response to the show cause notice issued under Section 7(7) of the WC Act.

20. All the re-assessment orders were passed on the same day i.e. 11th May, 2009. We may reproduce as specimen, the re-assessment order in respect of the Assessment Year 2003-04 (13.01.2004-31.03.2004):-

“Form of order of assessment under Section 24 of DST Act 1975 read with Section 16/7(7) and Section 7(8) of DST on work Contract Act, 1999.

Name of the dealer: M/s Persys Punj Lloyd J.V.
Address of the dealer: ¼ Sunder Vihar, Paschim
Vihar, New Delhi-63
Nature of Business: Construction
Registration Certificate: WC/62/213000534/1003
Assessment Period: 2003-04 (13.01.2004 to
31.03.2004)

Re-Assessment Order

The above named dealer is regd. Under WCT Act 1999 w.e.f. 13.01.2003 and he was liable to deduct TDS from the payment made to M/s Persys SDM BHD and M/s Punj Lloyd Ltd. as per section 7(3) of DST on work contract Act, 1999. But he failed to deduct the TDS @2% on payment of ₹ 242553806/- made to above sub-contractors. The dealer was asked to explain the reason for sales tax on Contract Act, 1999 vide notice no. 13425-13426 dated 17.04.2009. In this connection the reply received from the dealer on 29.04.2009 is not found satisfactory. Thereafter ST 15 was issued to dealer on 27.04.2009 for 11.05.2009 but no body has appeared on behalf of the dealer. Therefore, the Re-assessment Order is framed as under:-

<i>GTO/Receipts</i>	:	242553806.00
<i>Tax/TDS @ 2%</i>	:	4851076.00
<i>Penalty</i>	:	9702152.00
<i>Interest</i>	:	5821291.00
<i>Total Tax Due</i>	:	20374519.00

The dealer is directed to deposit tax ₹20374519/-.

Sd/-
AA WARD

Copy to the dealer”

21. The following chart sets out the relevant details with regard to all the three writ petitions, including the figures of tax, interest and penalty demanded in the re-assessment orders:-

Writ Petition (C) No.	Tax period/ Assessment Year	Date of re- assessment order	Amount demanded		
(1)	(2)	(3)			
10311/09	2003-04 [13.01.2004 to 31.03.2004]	11.05.2009	Tax (₹)	Interest (₹)	Penalty (₹)
			48,51,076	58,21,291	97,02,152
10312/09	2003-04 [22.10.2003 to 12.01.2004]	11.05.2009	Tax (₹)	Interest (₹)	Penalty (₹)
			14,53,743	17,44,492	29,07,485
10287/09	2004-05 [13.01.2004 to 31.03.2004]	11.05.2009	Tax (₹)	Interest (₹)	Penalty (₹)
			2,30,82,150	2,40,78,864	5,01,64,300

22. The prayer in all the three writ petitions is for quashing the re-assessment notices dated 27th April, 2009 as well as the re-assessment orders passed on 11th May, 2009. The contention of the petitioner in these writ petitions is mainly that there was no turnover that escaped assessment, which alone can confer jurisdiction upon the assessing authority to re-open the assessment. It is submitted that it would be apparent from the reassessment orders that no turnover had escaped assessment and that the only purpose of the re-assessment proceedings was to impose a demand of tax allegedly deductible at source u/s. 7(3) of the WC Act in respect of the payments made by the petitioner to the member-companies, interest thereon and also penalty under Section 7(7) of the Act. It is further submitted that these demands have been

raised solely with the view to scuttling the claim of the petitioner to the refunds which is the subject matter of WP (C) No.8620/2009.

23. On behalf of the respondents, a preliminary objection was taken to the effect that the orders of re-assessment which are challenged in WP(C) Nos. 10311/2009, 10312/2009 and 10287/2009 can be appealed against under the relevant provisions of DST Act read with Section 16 of the WC Act and since that alternative remedy was available to the petitioner, the writ petitions should be dismissed as not maintainable. So far as WP(C) No.8620/2009 is concerned, the contention of the respondents is that no refunds can be granted since there were huge demands raised against the petitioner under the re-assessment orders for the same period.

24. The preliminary objection of the respondents that writ petitions against the re-assessment orders passed on 11th May, 2009 are not maintainable since those orders were appealable need not detain us since it is well settled that where the action of an executive authority acting without jurisdiction is likely to subject a person to dilatory proceedings and undue harassment, the High Courts will issue appropriate writs to prevent such consequences. The following observations of the Supreme Court in the case of ***Calcutta Discount Co. Ltd. vs. Income Tax Officer and Anr.*** reported in (1961) 41 ITR 191 are relevant: -

“Mr. Sastri next pointed out that at the stage when the Income Tax Officer issued the notices he was not acting judicially or quasi-judicially and so a writ of certiorari or prohibition cannot issue. It is well settled howsoever that though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting

without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts, it is well settled, will issue appropriate orders or directions to prevent such consequences.

Mr. Sastri mentioned more than once the fact that the company would have sufficient opportunity to raise this question, viz. whether the Income Tax Officer had reason to believe that under assessment had resulted from non-disclosure of material facts, before the Income Tax Officer himself in the assessment proceedings and, if unsuccessful there, before the Appellate Officer or the Appellate Tribunal or in the High Court under Section 66(2) of the Indian Income Tax Act. The existence of such alternative remedy is not however always a sufficient reason for refusing a party quick relief by a writ or order prohibiting an authority acting without jurisdiction from continuing such action.

In the present case the company contends that the conditions precedent for the assumption of jurisdiction under section 34 were not satisfied and came to the court at the earliest opportunity. There is nothing in its conduct which would justify the refusal of proper relief under Article 226. When the Constitution confers on the High Courts the power to give relief it becomes the duty of the courts to give such relief in fit cases and the courts would be failing to perform their duty if relief is refused without adequate reasons. In the present case we can find no reason for which relief should be refused.”

25. In ***State of Himachal Pradesh & Ors. v. Gujarat Ambuja Cement Ltd.***, (2005) 6 SCC 499, the following principles were recognised: -

- (a) *The issue of existence of alternative remedy is a rule of self-imposed limitation; it is essentially a rule of policy, convenience and discretion, but never a rule of law.*
- (b) *The High Court should ensure that the petitioner has made out a strong case to invoke the extraordinary jurisdiction despite the existence of alternative remedies.*

- (c) *Where there has been a serious breach of the principles of natural justice or procedure, where the order or the proceedings are wholly without jurisdiction, where the vires of a statute is challenged or where there has been an abuse of the process of law, the High Court may exercise its discretion to permit the petitioner to invoke article 226.*

In ***Ram and Shyam Company v. State of Haryana, (1985) 3 SCC 267***, it was opined that if the alternative remedy is an appeal from “Caesar to Caesar’s wife” the existence of such a remedy would be a mirage and an exercise in futility.

In ***Godrej Sara Lee Limited vs. Asst. Commissioner and Anr. (2009) 14 SCC 338*** the Supreme Court observed as under: -

“.....the question as to whether the said Notification could have a retrospective effect or retro-active operation being a jurisdictional fact, should have been determined by the High Court in exercise of its writ jurisdiction under Article 226 of the Constitution of India as it is well known that when an order of a statutory authority is questioned on the ground that the same suffers from lack of jurisdiction, alternative remedy may not be a bar. (See: Whirlpool Corporation v. Registrar Trade Marks and Mumtaz Post Graduate Degree College vs. Vice Chancellor).”

In the light of the above observations of the Supreme Court, we overrule the preliminary objection of the respondents. In the case on hand, apart from being appeals from “Caesar to Caesar”, the petitioner would be likely to be asked to make pre-deposit of the disputed tax, interest and penalty u/s. 43(5) of the DST Act. This is likely to affect the finances of the petitioner prejudicially, particularly when the grievance is that the orders complained of lack

jurisdiction, ex-facie. In such a scenario, the appeal remedy cannot be said to be an efficacious one.

26. The contentions of the petitioner in WP(C) No.8620/2009 on the one hand and the other three writ petitions on the other, necessarily telescope into each other because though refunds were determined by the respondents, they did not bother to get the response from the DMRC for the letter of verification sent by them and furthermore, proceeded to pass re-assessment orders raising huge demands against the petitioner which neutralised the refund claims. The validity of the action of the respondents both in not issuing the refund orders within a reasonable time after the passing of the orders determining the refund and in framing re-assessment orders to nullify the refund are to be viewed together and in an integrated manner. They cannot be divorced from each other. We would therefore prefer to first examine the validity of the re-assessment proceedings initiated under Section 24 of the DST Act.

27. By virtue of Section 16 of the WC Act, several provisions of the DST Act are incorporated by reference into the WC Act. The provisions of the DST Act relating to the assessment, re-assessment, refund, and appeals are some of them. Re-assessment proceedings are dealt with under Section 24 of the DST Act which runs as under:-

*“24. **Turnover escaping assessment** – 1. Where after a dealer has been assessed under Section 23 for any year or part thereof, the Commissioner has reason to believe that the whole or any part of the turnover of a dealer in respect of any period has escaped assessment to tax or has been under-assessed or has been assessed at a rate lower than the rate at which it is assessable, or any deduction has been wrongly made therefrom, the Commissioner may –*

- (a) within six years from the date of final order of assessment, in a case where the dealer has concealed, omitted or failed to disclose fully the particulars of such turnover; and*
- (b) within four years from the date of final order of assessment, in any other case, serve a notice on the dealer and after giving the dealer an opportunity of being heard and making such inquiry as he considers necessary, proceed to determine to the best judgment, the amount of tax due from the dealer in respect of such turnover, and the provisions of this Act shall, so far as may be, apply accordingly.”*

28. In order that proceedings can be taken under Section 24, the first condition is that the Commissioner should have reason to believe that the whole or any part of the turnover of the dealer has escaped assessment to tax or has been under-assessed or has been assessed at a rate lower than the appropriate rate or any deduction was wrongly made from the turnover.

29. In the reason mentioned at the bottom of Form ST-15 which is the notice of re-assessment, what has been stated by the respondents is that the petitioner was required to deduct tax at the rate of 2% from the payments made to the sub-contractors, but failed to do so. The question is whether this can hold good as the reason to believe that taxable turnover had escaped assessment. It must be remembered that the petitioner does not effect any sales to its sub-contractors; all it does – and this fact has also been accepted by the respondents – is to pass on the monies received from DMRC to the sub-contractors, acting as a conduit. The question of turnover in the hands of petitioner would arise only if it indulges in sale of goods. The petitioner merely transfers the monies received from DMRC to the member-companies.

30. Section 2(t) of the WC Act defines “turnover of sale” as meaning “*the aggregate of the amount of sale price received or receivable by a dealer in respect of any transfer of property in goods involved in the execution of any works contract whether executed fully or partly during any period*”. Since the expression “turnover of sale” is defined in the WC Act, it is not permissible to look at the definition of “turnover” in Section 2(o) of the DST Act, because Section 16(1) of the WC Act does not incorporate the definition sections of the DST Act into the WC Act. It is not in dispute that the petitioner, who is a dealer registered under the WC Act has not received any amount of sale price from the sub-contractors in respect of any transfer of property in goods involved in the execution of any works contract, whether executed fully or partly during any period. On the contrary, the petitioner has transferred or paid monies to the sub-contractors. It did not deduct tax under Section 7(3) of the WC Act at the rate of 2% of the payment because the payment was not “*for the transfer of property in goods (whether as goods or in some other form) involved in the execution, whether wholly or in part*”. The payment was merely by way of passing the monies received from DMRC to the sub-contractors. Moreover, the petitioner had obtained Form VI from the sub-contractors in terms of Rule 5(1)(b) of the Delhi Sales Tax on Works Contract Rules, 1999 and these forms were submitted to the respondents when the petitioner’s assessments were made. It was in these circumstances and by virtue of the relevant statutory provisions that the petitioner did not deduct tax.

31. It is a highly debatable question whether the failure to deduct tax by the petitioner in accordance with Section 7(3) of the WC Act can amount to “turnover of sale” escaping assessment. Tax deducted at source is only a mode

of collecting the tax payable by the recipient of the money; the deductor of the tax acts as the agent of the Revenue. There is, therefore, no basis to reopen the assessment on the ground of the whole or part of the turnover having escaped assessment. The reason given for reopening the assessment does not establish any escapement of turnover. It only refers to the alleged failure on the part of the petitioner to deduct tax from the payments made to the sub-contractors. Even assuming for the sake of argument that there was such a failure, it does not amount to turnover escaping assessment in the petitioner's hands. The reassessment notices appear to us to have been issued without any application of mind and without having regard to any of the statutory provisions. This becomes more pronounced if one looks at the cryptic manner in which the reassessment orders have been framed. Moreover, even the penalty which is to be imposed, if at all, is under Section 7(7) of the WC Act and that too after providing reasonable opportunity to the petitioner of being heard as envisaged under that section, but strangely it has been imposed in the reassessment orders. No reasonable opportunity was given to the petitioner of being heard nor was a separate order imposing the penalty passed. The petitioner filed the returns for the assessment years 2003-04 and 2004-05 and had also furnished Form-VI with all the relevant particulars showing the payment of tax by the sub-contractors. It seems to us that the respondent No.2 (VATO) chose to adopt a rather unusual procedure - to say the least- by imposing penalty in the reassessment order itself without bothering to go through the procedure envisaged by Section 7(7) of the Act, assuming that penalty proceedings could be lawfully initiated against the petitioner under that section.

32. The reassessment orders passed on 11.5.2009 for both the assessment years are, therefore, without jurisdiction. The notices as well as the reassessment orders are accordingly quashed.

33. The contention of the petitioner in WP(C) No.8620/2009 merits acceptance. Refunds were determined by orders passed by the respondents under Section 23(3) and/or Section 24 of the DST Act read with Section 16 of the WC Act for both the years. In these orders, the refunds due to the petitioner were determined and quantified. The petitioner had furnished the relevant forms which enable it to claim the refund of the tax deducted by DMRC. This is not controverted. It is also a matter of record that letters dated 31.3.2006 were sent by the respondents to DMRC for verification of the claim of the petitioner. It is not known whether there was any response from DMRC. It is, however, the case of the petitioner that no such verification was required at all since the Forms-IX were submitted to the respondents in the assessment proceedings. This is not denied by the respondents. There is nothing on record to show that DMRC denied having issued the Forms No.IX to the petitioner certifying to the deduction of tax at source. The respondents have not also found any irregularities or fault with the Forms No.VI filed by the petitioner, being declarations of the sub-contractors that they have paid the tax. The refund claims had also been made in the prescribed form by the petitioner on 13.1.2008. Despite all this and without finding any fault in the certificates or pointing out any lack of compliance on the part of the petitioner, the respondents have refused to grant the refund, for the only apparent reason that verification has to be done from DMRC. That verification has been pending since March, 2006 when letters were purportedly written by the respondents to

DMRC. Such circumstances, coupled with the fact that in May, 2009 steps were taken to reopen the assessments of the petitioner to raise demands of not only tax and interest but also of penalty, and that too without affording any hearing to the petitioner, make it clear that the conduct of the respondents in withholding the refund was unwarranted and contrary to law. A writ of mandamus is accordingly issued in terms of prayer (i). The refunds have been withheld for several years without any justification. The respondents are, therefore, directed to issue the refunds forthwith, and at any rate within four weeks from today with interest as applicable under the relevant provisions of the WC Act read with DST Act.

34. In view of the foregoing discussion, all the writ petitions are allowed. The respondents to pay costs to the petitioner which we assess at ₹40,000/-

(R.V. EASWAR)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

FEBRUARY 12, 2013
hs/shaloo/Bisht