

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

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Civil Writ Petition No.2889 of 2022 (O&M)
Date of Decision: 20.7.2023

M/s DLF Projects Limited

... Petitioner

Versus

State of Haryana and others

... Respondents

**CORAM: HON'BLE MS. JUSTICE RITU BAHRI
HON'BLE MRS. JUSTICE MANISHA BATRA**

Argued by: Mr. Akshay Bhan, Senior Advocate with
Mr. Ankit Awal, Advocate and
Mr. Shantanu Bansal, Advocate,
for the petitioner.

Ms. Mamta Singla Talwar, DAG, Haryana.

MANISHA BATRA, J.

1. By filing this writ petition, the assessee has knocked at the doors of this Court for assailing a show cause notice dated 30.12.2021 issued by respondent No.2 under Section 34 of Haryana Value Added Tax Act, 2003 (“HVAT Act”) whereby it has been asked to show cause against the proposed revision of remand assessment order dated 02.08.2017 and has also challenged the vires of Section 174 (2) (3) of Haryana Goods and Services Tax Act, 2017 (for short “HGST Act”).

2. The facts as pleaded in brief are that the petitioner-Company had been assessed for the assessment year (A.Y.) 2011-12 by order dated 25.03.2015 passed by Excise and Taxation Officer-cum-Assessing Authority, Gurugram (East) who after examining the books of account

produced by the petitioner, had created an additional demand of a sum of Rs.8,97,43,496/- under HVAT Act and Rs.16,60,926/- under the Central Sales Tax Act, 1956 (for short “CST Act”). The petitioner challenged the abovesaid order dated 25.03.2015 by filing appeal before the Joint Excise and Taxation Commissioner (Appeals), Faridabad. The said appeal was decided on 28.09.2016 (conveyed vide endorsement No.2341 dated 22.03.2017) whereby the assessment order dated 25.03.2015 was set aside and the matter was remanded to the assessing authority with direction to decide the issues raised in terms of provisions of law after providing a fair opportunity of being heard to the petitioner. The matter was then listed before the respondent No.3 assessing authority who disposed of the remand proceedings vide order dated 02.08.2017 while giving opportunity to the petitioner and determined the tax liability of the petitioner as VAT amounting to Rs.5,31,96,919/- and CST of Rs.16,60,925/-. After adjusting the tax amount already deposited, input tax credit and tax deducted at source on work contract, the liability of the petitioner was fixed @ Rs.5,69,41,965/-.

3. It was further submitted that on 30.12.2021, a show cause notice for revision of the remand assessment order was issued by the respondent No.2 under Section 34 of the HVAT Act and Section 9 (2) of the CST Act alleging as many as nine illegalities/improprieties in the assessment order dated 02.08.2017 as passed by the respondent No.3. The petitioner being aggrieved by the impugned notice dated 30.12.2021 has made prayer for quashing the same on the grounds that no case for invoking jurisdiction under Section 34 of the HVAT Act had been made out in favour

assessment order dated 02.08.2017. It is alleged that by issuing the impugned notice, the respondent No.2 is seeking to re-examine the books of account of the petitioner in violation of the provisions of Section 29 (2) (e) of the HVAT Act. It is submitted that since the assessment proceedings were for the A.Y. 2011-12 and the period of eight years stood expired on 31.03.2020 and no proceedings for revision were pending against the petitioner as on 30.12.2021 when the impugned notice was issued, therefore, the notice for revision could not be said to be maintainable being time barred. It has also been alleged that the power of revision could not be exercised by respondent No.2 against the findings of fact recorded by the assessing authority even if he did not agree with the same. While further alleging that the impugned notice had been issued by the respondent No.2 by unlawfully invoking the powers under Section 34 of the HVAT Act and that the provisions of sub-Sections (2) and (3) of Section 174 of HGST Act were ultra vires the Constitution of India, the petitioner prayed for declaring the same as such.

4. The respondents have filed joint written statement raising preliminary objections to the effect that the writ petition was not maintainable as no fundamental right of the petitioner had been infringed, that no ground had been made out to seek quashing of provisions of sub Sections (2) and (3) of Section 174 of HGST Act and further that the notice issued against the petitioner was perfectly valid. On merits, it was submitted that the impugned notice dated 30.12.2021 had been issued by the respondent No.2 to look into the legalities and proprieties of the remand assessment order dated 02.08.2017, that the same was constitutionally valid

and issuance of the same was within the jurisdiction of respondent No.2 and

within the exercise of powers of revision. While controverting the remaining pleas, the dismissal of the writ petition had been prayed for.

5. The petitioner filed rejoinder controverting the pleas as taken in the written statement filed by the respondents and re-asserting those of the writ petition.

6. It would not be out of place to mention here that the learned counsel for the writ petitioner restricted his argument to the extent of challenge as to the impugned show cause notice dated 30.12.2021 and has not pressed the ground challenging the vires of Section 174 (2) and (3) of HGST Act, 2017. He strenuously argued that the impugned show cause notice was liable to be quashed as it was issued in violation of principles of natural justice and was without jurisdiction. He submitted that by issuing the impugned notice, the respondent No.2 was seeking to re-examine the books of account of the petitioner pertaining to the A.Y. 2011-12 which he was not competent to ask for as under Section 29 (2) (e) of the HVAT Act. The petitioner was responsible for preserving its account books only for a period of eight years after the close of the year to which the books related and as the period of eight years stood expired as on 31.03.2020, therefore, the petitioner could not be compelled to produce the books of account which it was not statutorily required to maintain after 31.03.2020. He further argued that no illegality or impropriety in the remand assessment order dated 02.08.2017 was either made out or pointed out in the impugned notice and, therefore, the respondent No.2 could not invoke jurisdiction under Section 34 of VAT Act to revise the remand assessment order. While stressing that the petitioner was within its right to file this petition under the

same was maintainable even though alternative remedy had not been availed by the petitioner and, therefore, urged that the impugned show cause notice was liable to be quashed and the writ petition deserved to be allowed. To fortify his arguments, learned counsel for the petitioner placed reliance upon authorities cited as **M/s Godrej Sara Lee Ltd. v. The Excise and Taxation Officer-cum-Assessing Authority and others**, AIR 2023 SC 781; **Rafat Ali v. Sugni Bai and others**, (1999) 1 SCC 133; **Hindustan Petroleum Corporation Ltd. v. Dilbahar Singh**, AIR 2014 SC 3708; **BSL Limited v. Commissioner, Commercial Taxes and others**, 2015 SCC OnLine Raj 3928; **V.K. Uchal v. Commissioner of Commercial Taxes, Mysore**, (1967) 20 STC 67 & **Haryana Agro Industries Corporation Limited v. State of Haryana and others**, (2001) ILR 2 Punjab and Haryana, 603.

7. Per contra, it was argued by Ms. Mamta Singla Talwar, learned Deputy Advocate General, Haryana that the writ petition as filed against a show cause notice was premature and not maintainable at all. She submitted that the remedy by way of filing reply to respondent No.2 and getting the notice adjudicated first was very much available with the petitioner. The petitioner had failed to make out any case of lack of jurisdiction on the part of respondent No.2 to issue the impugned notice or any instance of violation of principle of natural justice. Under the proviso to Section 34 (1) of the HVAT Act, the revisional authority was entitled to revise any order passed by the assessing authority within a period of six years from the date of supply of copy of such order to the assessee and the impugned notice which was served upon the petitioner on 30.12.2021 was within limitation. She

all attracted in the matter as the assessment proceedings in this case were closed on 02.08.2017 by the assessing authority when the remand assessment order had been passed and since as per Section 29 (2) (e) of the HVAT Act, the account books were also required to be preserved till the completion of proceedings pending under the HVAT Act and not only within a period of eight years from the close of the assessment year. She further submitted that even otherwise the respondents in their reply/additional affidavit had made it clear that no books of accounts were asked for by the respondent No.2 nor the same were required for the purpose of revising of the remand assessment order. With these broad arguments, it was submitted that the writ petition was not maintainable and was liable to be dismissed. To fortify her argument, learned Deputy Advocate General placed reliance upon authorities cited as **Commissioner of Central Excise, Haldia v. M/s Krishna Wax (P) Ltd.**, 2020 (12) SCC 572; **Bhubaneswar Development Authority v. Commissioner of Central Excise, Customs and Service Tax and others**, 2015 (39) STR 355 & **C.C.T. Orissa and others v. Indian Explosives Ltd.**, AIR 2008 SC 1631.

8. We have heard learned counsel for both the parties at considerable length and have given due deliberations to the contentions as raised by both the sides.

9. The petitioner has challenged validity of impugned show cause notice dated 30.12.2021 as issued by respondent No.2 whereby the latter has sought revision of order passed by assessing officer on 02.08.2017 qua assessment for the A.Y. 2011-12. Admittedly, the petitioner has challenged the validity of the impugned show cause notice without availing the

effective and alternative remedy of filing reply to the said show cause notice

and getting the same adjudicated upon and also without availing the opportunity to file appeal against the order passed by the revisional authority before the appropriate forum. The claim of the petitioner is that it was still entitled to invoke the jurisdiction of this Writ Court and the petition filed by it was very much maintainable as the impugned notice was issued in violation of principles of nature justice and without jurisdiction whereas according to the respondents, the petition was not maintainable as the petitioner had efficacious alternative remedy. The well settled proposition of law with regard to exercise of jurisdiction under Article 226 of the Constitution and the cases in which writs under this Article are maintainable as laid down by Hon'ble Apex Court by way of several pronouncements may be briefly discussed before proceeding further. It is well established that while exercising its jurisdiction under Article 226 of the Constitution, the Court is duty bound to consider whether:-

- a) adjudication of the writ petition involves any complex or disputed questions of fact and whether they can be satisfactorily resolved;
- b) the petition reveals all material facts;
- c) the petitioner has any alternative or effective remedy for the resolution of the dispute;
- d) petitioner invoking the jurisdiction is guilty of unexplained delay and laches;
- e) ex facie barred by any law of limitation;
- f) grant of relief is against public policy or barred by any valid law, and host of other factors.

SCC 260, wherein the Hon'ble Apex Court had expressed a view that Article 226 was not meant to short circuit or circumvent statutory procedure. It was only where statutory remedies were entirely ill suited to meet the demand of extraordinary situations, as for instance where the very vires of the statute was in question or where private or public wrongs were so inextricably mixed up and the prevention of public injury and the vindication of public justice required it, that recourse may be had to Article 226 of the Constitution. It was held that even then the Court must have good and sufficient reason to bypass the alternative remedy provided by the statute and that the matters involving the revenue where statutory remedies were available were not such matters.

11. Reference can further be made to **Raj Kumar Shivhare v. Directorate of Enforcement**, (2010) 4 SCC 772, wherein the Hon'ble Apex Court while dealing with the issue whether the alternative statutory remedy available under the Foreign Exchange Management Act, 1999 could be bypassed and jurisdiction under Article 226 of the Constitution could be invoked, observed as follows:-

“When a statutory forum is created by law for redressal of grievance and that too in a fiscal statute, a writ petition should not be entertained ignoring the statutory dispensation. In this case, the High Court is a statutory forum of appeal on a question of law. That should not be abdicated and given a go-by by a litigant for invoking the form of judicial review of High Court under writ jurisdiction.

12. In two recent judgments cited as **The State of Maharashtra and others v. Greatship (India) Limited**, AIR 2022 SC 4408 and **The**

State of Madhya Pradesh and another v. M/s Commercial Engineers and Body Building Company Limited, 2022 (14) Scale 920, the Hon'ble Supreme Court was dealing with cases wherein the assessment orders had been challenged by the assessee directly by filing writ petitions before High Courts. It was held that the statute provided for the right of appeal against the assessment order passed by the assessing officer and against the order passed by the appellate authority, a right to file appeal/revision before the Tribunal. It was held that in view of that matter, the High Court ought not to have entertained the writ petition under Article 226 challenging the assessment order in view of availability of statutory remedy under the Act. Consequently, the assessee was relegated to avail the statutory remedy of appeal and other remedies available under the MVAT Act, CST Act and the appeal filed by the revenue had been allowed.

13. With regard to the question of maintainability of writ petitions issued challenging show cause notices, reference can be made to **Malladi Drugs and Pharma Limited v. Union of India**, 2004 (166) E.L.T. 153 (SC), wherein the Hon'ble Supreme Court had affirmed the view taken by the High Court that the appellant should first raise all the objections before the authorities who had issued the show cause notice and in case, any adverse order is passed against the appellant, then liberty can be granted to approach the High Court. Reference can further be made to **Mahanagar Telephone Nigam Limited v. Chairman, Central Board Direct Taxes and another**, 2004 Supp. (2) SCR 593, wherein the same principle was expounded by Hon'ble Apex Court by holding that a litigation against a show cause notice should not be encouraged. Further reference can be made

to **Commissioner of Central Excise, Haldias's case** (Supra), wherein the

Hon'ble Supreme Court observed that a writ petition should normally not be entertained against mere issuance of show cause notice. The appellant should firstly raise all the objections before the authority who had issued the show cause notice and in case, any adverse order is passed against the appellant, then liberty can be granted to the petitioner to approach the High Court and also to **Indian Explosives Ltd.'s** case (Supra), wherein the Hon'ble Supreme Court observed that the writ Court should not entertain a writ petition where ordinary remedy is available and judicial discipline ought to be adhered to or the department ought to be allowed to reach its conclusion since any decision of the High Court at such juncture would prejudice the interest of statutory authorities.

14. It will also be relevant to refer to **M/s Godrej Sara Lee Ltd.'s** case (Supra), which is a very recent pronouncement of Hon'ble Supreme Court and has been heavily relied upon by the learned counsel for the petitioner to buttress his argument that a writ petition was maintainable even without availing the alternative remedy. In the above cited case, the assessee had challenged the assessment order passed by the revisional authority in exercise of suo motu revisional power by filing writ petition before this High Court. The writ petition had been dismissed as this High Court had declined interference on the ground of availability of an alternative remedy of appeal to the appellant under Section 33 of the HVAT Act. The Hon'ble Supreme Court held that since a jurisdictional issue was raised by the assessee in the writ petition questioning the very competence of the revisional authority to exercise suo motu power, the same being a pure question of law, the writ petition ought not to have been thrown out at

the threshold.

15. In view of the proposition of law as laid down by the Hon'ble Apex Court in the above cited authorities, it is very much explicit that the High Court can entertain a writ petition even though the alternative remedy has not been availed if there is pure question of law and the matter can be decided without going into disputed questions of fact, if the proceedings initiated by the assessing authority/any other revenue authority are without jurisdiction or, if there is violation of principles of natural justice or if the writ petitioner seeks enforcement of any fundamental right. The main thrust of argument raised by the petitioner for assailing the impugned show cause notice is that it was illegal and without jurisdiction and was liable to be quashed as it was issued in violation of Section 29 (2) (e) of the HVAT Act by respondent No.2 who would require it to produce documents and books of accounts pertaining to the A.Y. 2011-12 while conducting proceedings on this notice though the petitioner was not required to maintain and preserve such documents and books of account beyond a period of eight years from close of relevant assessment year. The argument so raised by the petitioner appears to be attractive but on a careful perusal of the record, we are of the considered opinion that the same lacks any merit. No doubt, under Section 29 (2) (e) of the HVAT Act, a registered dealer is required to preserve his account books for a period of eight years after the close of the year to which such books relate and not beyond that but as per this very provision, such dealer is also required to preserve his account of books till the completion of proceedings which are pending under the provisions of HVAT Act. The petitioner has tried to make out a case that to adjudicate upon the impugned show cause notice, the respondent No.2 would be requiring it to produce books of account for the A.Y. 2011-12 which it was

not liable to preserve. It is not his case that the relevant books of account or documents relating to the assessment year are no more with him. More so, the contention as raised that the respondent No.2 would require such account books and documents appears to be based on conjectures and surmises. In the impugned notice, there is no mention that the relevant account books and documents would be required by respondent No.2. Not even this in their written statement, the respondents have categorically submitted that the illegalities and improprieties which have been pointed out in the impugned notice are on the basis of the assessment record, which was available before the assessing authority and now no fresh evidence or material is required. It will not be out of place to mention here that the respondents even filed an additional short reply on 16.03.2023 submitting therein that no new document would be required by the respondents for the purpose of revising the remand assessment order and it would be done on the basis of documents available on record during the time of original assessment. In such circumstance when the respondent No.2 in the impugned notice has not sought production of the account books for the relevant assessment year and when the respondents have rather clarified that they would not be needing production of the same at the stage of determining the impugned show cause notice, in our considered opinion, the impugned notice could not be stated to be illegal or without jurisdiction merely because it was issued after expiry of period of eight years from the closing of A.Y. 2011-12.

16. It may also be relevant to mention here that the remand assessment order was passed in this case as on 02.08.2017. Under proviso to

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order is six years from the date of supply of copy of such order to the assessee. Therefore, the respondent No.2 was well within time to issue impugned show cause notice seeking revision of the remand assessment order which is dated 02.08.2017 and this notice cannot be stated to be time barred. The proceedings under the VAT Act could not be stated to have been completed till at least six years from the date of passing of the revision order and, therefore, even otherwise the petitioner was duty bound to preserve its account books as required under Section 29 (2) (e) of the HVAT Act till then. As such, no illegality can be stated to have been committed by respondent No.2 by issuing the impugned show cause notice on 30.12.2021 and the said notice cannot be stated to be not maintainable on this ground.

17. The further challenge to the impugned show cause notice has been made by the petitioner on the ground that there is illegality and impropriety in the assessment order dated 02.08.2017 as passed by respondent No.3 and the respondent No.2 as such could not exercise the power of revision merely because he did not agree with the findings of fact as recorded by the assessing authority. In this regard, learned counsel for the petitioner has placed reliance upon **Rafat Ali's** case (Supra) and **Hindustan Petroleum Corporation Ltd.'s** case (Supra) wherein the Hon'ble Apex Court while dealing with appeals filed against orders passed by the High Courts (as revisional authorities) in eviction cases had observed that the scope of revision was limited one and it was not open to High Court to substitute the findings of the Lower Courts with its own findings while exercising the limited supervisory jurisdiction and as a revisional jurisdiction could not be equated with appeal powers in all its parameters.

He has also relied upon **Haryana Agro Industries Corporation Ltd.'s**

case (Supra) wherein a Coordinate Bench of this Court had held that the revisional authority must confine himself to the record which is called for by him and it was before the lower authority. He cannot take into consideration any fresh material which is neither pending nor disposed of by the taxing authority and has further referred to **Mahaboob Ali Mohammed Yakub & Sons v. State of Karnataka**, (1993) 90 STC 276 (Kar.), wherein High Court of Karnataka had observed that the revisional authority was empowered to call for and examine the record of any order passed or proceedings recorded by a Subordinate Officer only for the purpose of satisfying himself as to the legality or propriety of such order or as to the regularity of proceedings and it was for the revisional authority to show that the order sought to be revised was illegal and improper or the proceedings of the Subordinate Officer were irregular which was prejudicial to the interest of the revenue.

18. Learned counsel for the petitioner has submitted that the respondent No.2 could exercise revisional power under Section 34 of the HVAT Act only for the purpose of satisfying himself as to the legality and propriety of the proceedings conducted while passing remand assessment order dated 02.08.2017 and not for dealing with the question that the allowances were rightly given by the assessing officer or not, but as the respondent No.2 proposed to embark upon such questions, therefore, had no jurisdiction to issue the impugned notice. In this regard, learned counsel has relied upon **V.K. Uchal's** case (Supra) wherein the High Court of Karnataka had observed that impropriety could be said to arise only where a decision was not based on evidence or was devoid of any support in such evidence or

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any sense related to the material on which it purported to proceed. There can be no dispute about the fact that the power of the revisional authority to call for and examine the record of proceedings under the HVAT Act, in the event of infirmity in any order passed by a competent authority empowered to impose tax, is not an absolute power exercisable at the whims and fancies of the revisional authority and such power is circumscribed by the legislature by prescribing certain conditions, viz., if the order is erroneous or prejudicial to the interest of the State revenue. The emphasis is on two terms:- namely, erroneous order or if it is prejudicial to the interest of the State revenue. The expression “legality” or “propriety” would take within its folds all types of illegalities and improprieties which might have crept in the proceedings pending before the assessing authority or which might have affected the final adjudication. Section 34 of HVAT Act which empowers the Commissioner to exercise revisional powers does not contemplate any prima facie determination which just have been communicated to the petitioner. In this case, the respondent No.2 has proposed to revise remand assessment order by pointing as many as nine illegalities in the same. The petitioner has not explained all of them in the instant petition filed by him. By issuing the impugned show cause notice, in our opinion, what was entertained by the revenue was only prima facie view, on the basis of which such notice is issued. The determination to the notice would obviously come after response or revision is preferred by the petitioner to whom this notice is addressed. The petitioner may certainly present his view point or issues and it will only be thereafter that the determination or decision on the show cause notice would be arrived at. The petitioner, however, filed this writ petition even before filing any reply to respondent No.2. It has failed to

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show that there was any lack of jurisdiction on the part of respondent No.2 while issuing this notice. Though it has been submitted that the principles of natural justice had been violated, however, it could not be pointed out as to what principle of natural justice had been violated while issuing the impugned notice and how? The respondent No.2 was competent to issue the impugned notice within six years from the date of supply of copy of the remand assessment order dated 02.08.2017 to the assessee and as such this notice had been issued within time and, therefore, bar of limitation or jurisdiction does not arise. As discussed in **Malladi Drugs and Pharma Limited's** case (Supra), the petitioner can very well raise all the objections before the respondent No.2 who had issued the impugned show cause notice and in any case, if any adverse order is passed against it, then liberty can be granted to it to approach this Court. In **M/s Godrej Sara Lee Ltd.'s** case (Supra) which has been relied upon by learned counsel for the petitioner, the Hon'ble Apex Court had held that the writ petition under Article 226 could be entertained even if an alternative remedy was available only in cases where the controversy was a purely legal one and did not involve disputed questions of fact but only questions of law and jurisdictional issue had been raised. The proposition as laid down in this case cannot be stated to be applicable to the peculiar facts and circumstances of this case as neither pure and legal question of law has been raised by the petitioner nor the impugned show cause notice involves only question of law rather the same involves questions of fact pointing out illegality and impropriety in the remand assessment order on the basis of facts available on record of the said order. The matter has not gone beyond the show cause notice. In the present set of circumstances, any finding by this Court at this stage is likely to be

prejudicial to the interest of either of the parties to this petition. The issues raised in the show cause notice are required to be determined by the respondent No.2 at the first instance. The matter has to be determined in the light of the submissions that may be advanced by the petitioner as well as the revenue in course of such determination. The question as to whether the assessment order is liable to be revised is yet to be determined by the revisional authority. In such circumstances, the writ petition does not deserve to be allowed. Consequently, without expressing any opinion on the merit of the issues raised in the course of the arguments, we dismiss this petition but allow the petitioner, a further period of 30 days from today to file reply to the impugned show cause notice and to participate in the proceedings. The petitioner will, however, be at liberty to raise all such contentions and the Commissioner shall deal with the matter strictly in accordance with law without being influenced in any manner by any observation made hereinabove and reach in an independent conclusion both on facts and legal issues raised.

19. All miscellaneous application(s), if any, also stand disposed of.

(RITU BAHRI)
JUDGE

(MANISHA BATRA)
JUDGE

20.7.2023
manju

Whether speaking/reasoned Yes/No

Whether reportable Yes/No