**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

109 ***2023:PHHC:158787-DB***

CWP-19211-2023
Date of Decision: **12.12.2023**

State of Punjab .....Appellant(s)

Versus

Union of India and others ...Respondent(s)

CORAM: HON'BLE MR. JUSTICE G.S.SANDHAWALIA
HON'BLE MS. JUSTICE LAPITA BANERJI

Present: Mr. Sandeep Goyal, Advocate,
and Mr. Rishab Singla, Advocate,
for the petitioner.

Mr. Sourabh Goel, Sr. Standing Counsel,
and Ms. Geetika Sharma, Advocate,
for the respondents.

G.S.SANDHAWALIA, J. (Oral)

1. Challenge herein in the present writ petition filed under Articles 226 and 227 of the Constitution of India is to the order dated 31.10.2022 (Annexure P-9) whereby, the authorities have imposed service tax of Rs.4,82,14,665/- alongwith interest against the Department of Health and Family Welfare, Government of Punjab while invoking the provisions of the extended period under Section 75 of the Finance Act, 1994 read with Section 174(2) of the Central Goods Service Tax Act, 2017 (in short 'the CGST Act'). The demand of service tax for amount of Rs.68,77,616/- was vacated in view of the discussion taken in Para No.4.14 on account of tax benefits. Penalty has also been imposed of the similar amount plus an additional amount of penalty of Rs.10,000/- under Section 77 of the Finance Act read with Section 174(2) of the CGST Act. The said order was passed in pursuance of the

notice dated 21.09.2020 (Annexure P-7).

2. The issue in question was of the running of two hospitals on the land given by the petitioner to MAX Super Speciality Hospital at Mohali and at Bathinda. The notice was based on the ground that 5% of the revenue was being received under the fixed cost of the hospitals on account of the concessionaire agreements which are stated to be dated 05.08.2009 (Annexures P-1 and P-2). In pursuance of the show cause notice, the petitioners had filed detailed reply dated 24.12.2020 (Annexure P-8) which was duly considered by the Authorities while passing the order. The authorities came to the conclusion that 5% of the gross revenue was being received as concessionaire fees for running the operations of the hospital and only the revenue generated from the hospital was being shared by the authorities and no losses/expenses/liabilities were being shared by the parties. All the revenue generated by the hospital was being deposited promptly in the Escrow Account on daily basis during the operations period upto the end of concession agreement and was being transferred to the Government. In such circumstances, the finding has been recorded by respondent No.4 that it was an arrangement of a lease of land apart from the symbolic Rs.1 per year which was being received as per the agreement and thus, it would amount to renting of immovable property to M/s. Hometrail Buildtech Pvt. Ltd. and M/s. Max Healthcare Institute Ltd. Resultantly, it was held that it was a declared service under Section 66(E)(a) and the liability for service tax at the hands of the Government was assessed rejecting the stand taken by the petitioner.

3. Mr. Sandeep Goyal, counsel appearing for the petitioner has vehemently argued that there was no question as such of concealment, fraud

or misrepresentation and the demand raised is beyond limitation since the amount claimed is prior to 30.06.2017. The plea taken by the respondents in their reply that there is an alternate remedy provided under Section 86 of the Finance Act would not be tenable and this Court should go into the merits of the case.

4. As noticed, as per reply having been filed, apparently due opportunity was given and, therefore, there was no violation of principles of natural justice. The vires of the Statute or any Legislation is not a subject matter of challenge or any breach of fundamental rights. The only issue is of jurisdiction which the petitioners allege against the respondents. The Apex Court in ***M/s. Radhe Krishan Industries vs. State of Himachal Pradesh, 2021 AIR SC 2114*** laid down the principles as under:-

> *"27. The principles of law which emerge are that :*
>
> *(i) The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well;*
>
> *(ii) The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person;*
>
> *(iii) Exceptions to the rule of alternate remedy arise where (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of*

the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged;

(iv) An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law;

(v) When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion; and

(vi) In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with."

5. Section 86 of the Finance Act reads thus:-

SECTION 86.Appeals to Appellate Tribunal. *—*

(1) Save as otherwise provided herein an assessee aggrieved by an order passed by a Principal Commissioner of Central Excise or Commissioner of Central Excise under section 73 or section 83A by a

Commissioner of Central Excise (Appeals) under section 85, may appeal to the Appellate Tribunal against such order within three months of the date of receipt of the order.

***Provided** that where an order, relating to a service which is exported, has been passed under section 85 and the matter relates to grant of rebate of service tax on input services, or rebate of duty paid on inputs, used in providing such service, such order shall be dealt with in accordance with the provisions of section 35EE of the Central Excise Act, 1944 (1 of 1944):*

***Provided** further that all appeals filed before the Appellate Tribunal in respect of matters covered under the first proviso, after the coming into force of the Finance Act, 2012 (23 of 2012), and pending before it up to the date on which the Finance Bill, 2015 receives the assent of the President, shall be transferred and dealt with in accordance with the provisions of section 35EE of the Central Excise Act, 1944 (1 of 1944)."*

(1A) (i) The Board may, by order, constitute such Committees as may be necessary for the purposes of this Chapter.

(ii) Every Committee constituted under clause (i) shall consist of two Principal Chief Commissioners of Central Excise and Chief Commissioners of Central Excise or two Principal Commissioners of Central Excise or Commissioners of Central Excise] as the case may be.

(2) The Committee of Principal Chief Commissioners of Central Excise or Chief Commissioners of Central Excise] may, if it objects to any order passed by the Principal Commissioner of Central Excise or Commissioner of Central Excise under section 73 or section 83A [***],direct the

[Principal Commissioner of Central Excise or Commissioner of Central Excise] to appeal to the Appellate Tribunal against the order :

***Provided** that where the Committee of Principal Chief Commissioners of Central Excise and Chief Commissioners of Central Excise differs in its opinion against the order of the Principal Commissioner of Central Excise or Commissioner of Central Excise], it shall state the point or points on which it differs and make a reference to the Board which shall, after considering the facts of the order, if is of the opinion that the order passed by the Principal Commissioner of Central Excise or Commissioner of Central Excise is not legal or proper, direct the Principal Commissioner of Central Excise or Commissioner of Central Excise]to appeal to the Appellate Tribunal against the order.*

(2A) The Committee of Commissioners may, if it objects to any order passed by the Commissioner of Central Excise (Appeals) under section 85, direct any Central Excise Officer to appeal on its behalf to the Appellate Tribunal against the order :

***Provided** that where the Committee of Commissioners differs in its opinion against the order of the Commissioner of Central Excise (Appeals), it shall state the point or points on which it differs and make a reference to the jurisdictional [Principal Chief Commissioners of Central Excise or Chief Commissioner] who shall, after considering the facts of the order, if is of the opinion that the order passed by the Commissioner of Central Excise (Appeals) is not legal or proper, direct any Central Excise Officer to appeal to the Appellate Tribunal against the order.*

***Explanation.** — For the purposes of this sub-section, "jurisdictional Principal Chief Commissioners* *or Chief Commissioner" means the Principal Chief Commissioners or Chief Commissioner having jurisdiction over the concerned adjudicating authority in the matter.*

(3) Every appeal under sub-section (2) or sub-section (2A) shall be filed within four months from the date on which the order sought to be appealed against is received by the Committee of Principal Chief Commissioners or Chief Commissioners or, as the case may be, the Committee of Commissioners.

(4) The Principal Commissioner of Central Excise or Commissioner of Central Excise or any Central Excise Officer subordinate to him or the assessee, as the case may be, on receipt of a notice that an appeal against the order of the Principal Commissioner of Central Excise or Commissioner of Central Excise or the Commissioner of Central Excise (Appeals) has been preferred under sub-section (1) or sub-section (2) or sub-section (2A)] by the other party may, notwithstanding that he may not have appealed against such order or any part thereof, within forty-five days of the receipt of the notice, file a memorandum of cross-objections, verified in the prescribed manner, against any part of the order of the Principal Commissioner of Central Excise or Commissioner of Central Excise or the Commissioner of Central Excise (Appeals), and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in sub-section (3).

(5) The Appellate Tribunal may admit an appeal or permit the filing of a memorandum of cross-objections after the expiry of the relevant period referred to in sub-section (1) or sub- section (3) or sub-section (4) if it is satisfied that there was sufficient cause

for not presenting it within that period.

(6) An appeal to the Appellate Tribunal shall be in the prescribed form and shall be verified in the prescribed manner and shall, irrespective of the date of demand of service tax and interest or of levy of penalty in relation to which the appeal is made, be accompanied by a fee of,—

(a) where the amount of service tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is five lakh rupees or less, one thousand rupees;

(b) where the amount of service tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is more than five lakh rupees but not exceeding fifty lakh rupees, five thousand rupees;

(c) where the amount of service tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is more than fifty lakh rupees, ten thousand rupees :

***Provided** that no fee shall be payable in the case of an appeal referred to in sub-section (2) or sub-section (2A) or a memorandum of cross-objections referred to in sub-section (4).*

(6A) Every application made before the Appellate Tribunal,—

*(a) in an appeal **** for rectification of mistake or for any other purpose; or*

(b) for restoration of an appeal or an application, shall be accompanied by a fee of five hundred rupees :

***Provided** that no such fee shall be payable in the case of an application filed by the Principal Commissioner of Central Excise or Commissioner of Central Excise or Assistant Commissioner of Central*

Excise or Deputy Commissioner of Central Excise, as the case may be under this sub-section.

(7) Subject to the provisions of this Chapter, in hearing the appeals and making orders under this section, the Appellate Tribunal shall exercise the same powers and follow the same procedure as it exercises and follows in hearing the appeals and making orders under the [Central Excise Act, 1944] (1 of 1944).”

6. We are of the considered opinion that in view of a three-Judge Bench judgment in ***The Assistant Commissioner of State Tax and others vs. Commercial Steels Ltd., 2021 (9) TMI 480-SC*** which was also arising out of the proceedings of a similar Statute, the Apex Court had come to the conclusion that the order of detention and notice as such which was issued was not liable to be challenged by the petitioner under Article 226 of the Constitution of India and the order of the High Court had been set aside. In similar circumstances, in ***The State of Punjab vs. M/s. Shiv Enterprises and others, 2023 (96) GST 120,*** similar view has been taken wherein the Division Bench of this Court had interfered in a show cause notice issued and had passed detention order. The Apex Court set aside the order of the Division Bench by holding that once there is a statutory remedy provided under the Act, the High Courts are not supposed to interfere. We are also of the considered opinion that no such hardship will be caused to the State of Punjab if an appeal is to be filed under Section 86 of the Finance Act.

7. Keeping in view the above, we are of the considered opinion that it is a matter of how the agreement is to be construed as such and whether the State was contributing in any manner in the running of the hospital. This is a matter of fact which has to be analyzed by the statutory authorities in appeal and to be summerized. The right of the petitioner thereafter to challenge

the order in case the same is decided against it would always be available. The issue of extended period of limitation whether it has been rightly invoked or not, is a matter which the Appellate Authority can go into and since the impugned order records the fact that the consideration was being received at 5% of the gross revenue and as per the provisions of the concessionaire agreement. Apparently from the show cause notice, it would be clear that it was only when the revenue had started investigation against Max Super Speciality Hospital, Mohali regarding non-payment of service tax, it had come to their notice about the arrangement which has been made with the petitioner and thereafter the proceedings had been initiated and, therefore, the issue of jurisdiction is also based on a factual matrix.

8. In such circumstances, it would also be a matter of fact which would be within the jurisdiction of the Appellate Authority as to whether the notices as such issued were within the prescribed period and whether the action of the Revenue in extending the period of limitation is justified or not in the facts and circumstances. Therefore, we feel that it is not a fit case for exercise of our extra ordinary writ jurisdiction. The judgment rendered by the Apex Court in ***Godrej Sara Lee Ltd. vs. Excise and Taxation Officer-cum-Assessing Authority and others, 2023 SCC Online 95,*** upon which reliance has been placed by counsel for the petitioner, would be of no help since it was a case of exercise of revisional jurisdiction by the authorities. Similarly in ***Union of India and another vs. State of Haryana and another, (2000) 10 SCC 482,*** a finding was recorded by the Apex Court that the issue raised was prestinely legal which required determination as to whether provision of telephone connections and instruments amounted to sale and

even if so was the Union of India exempted from payment of sales tax under the respective Statutes. No such issue as such arises in the present case and, therefore, we do not feel that the said judgment is applicable in the facts and circumstances of the present case.

9. Accordingly, the writ petition is disposed of and the petitioners are relegated to the remedy of appeal. Needless to say that since the petitioners had approached this Court on 29.08.2023, if the appeal is filed within a period of 4 weeks from today, the Tribunal shall proceed to decide the same on merits.

(G.S. SANDHAWALIA)
JUDGE

12.12.2023
shivani

(LAPITA BANERJI)
JUDGE

Whether reasoned/speaking Yes
Whether reportable Yes