

# EY Tax Alert

SC holds availability of alternative remedy not an absolute bar to maintainability of writ petition

Tax Alerts cover significant tax news, developments and changes in legislation that affect Indian businesses. They act as technical summaries to keep you on top of the latest tax issues. For more information, please contact your EY advisor.

## Executive summary

This Tax Alert summarizes a recent ruling<sup>1</sup> of the Supreme Court (SC) pertaining to maintainability of a writ petition where an alternative remedy is available in the law.

Assessee, in the present case, had approached Punjab & Haryana High Court (HC) challenging the jurisdiction of Revisional Authority to reopen proceedings under Section 34 of the Haryana Value Added Tax Act, 2003 (VAT Act). HC declined to interfere on the ground of availability of an alternative remedy of appeal.

SC observed that “entertainability” and “maintainability” of a writ petition are distinct concepts. Availability of an alternative remedy does not operate as an absolute bar to the “maintainability” of a writ petition. The rule which requires a party to pursue the alternative remedy provided by a statute is a rule of policy, convenience and discretion rather than a rule of law.

A writ court would be justified in entertaining a writ petition despite the party not having availed the alternative remedy provided by the statute in the following cases:

- ▶ where the writ petition seeks enforcement of any of the fundamental rights,
- ▶ where there is a violation of principles of natural justice,
- ▶ where the order or the proceedings are wholly without jurisdiction; or
- ▶ where the vires of an Act is challenged.

Where the controversy is a purely legal one involving only questions of law, then it should be decided by the HC. In the present case, since a jurisdictional issue was raised by the assessee, being a pure question of law, the same deserved consideration.

Accordingly, the impugned order of the HC was set aside.

<sup>1</sup> 2023-TIOL-11-SC-VAT

## Background

- ▶ Assessee is engaged in manufacturing, marketing and sales of household insecticide products in various forms, viz., mosquito coils, mats, refills, aerosols, baits and chinks.
- ▶ Returns were filed by assessee for the assessment years 2003-04 and 2004-05 declaring its gross turnover from sale of above products taxable @ 4%. The Assessing Authority passed orders accepting the classification and rate of tax as stated by assessee.
- ▶ Subsequently, show-cause notices (SCNs) were issued by Revisional Authority, seeking to revise the above assessments basis the allegations that such turnover is taxable @ 10% instead of 4%.
- ▶ Consequently, assessee filed a writ petition before the High Court of Punjab and Haryana (HC), challenging the jurisdiction of Revisional Authority to reopen proceedings, in exercising of *suo moto* revisional power conferred by Section 34 of the Haryana Value Added Tax Act, 2003 (VAT Act).
- ▶ HC declined to interfere on the ground of availability of an alternative remedy of appeal to the assessee under Section 33 of the VAT Act, which it had not pursued.
- ▶ Aggrieved by the same, assessee preferred an appeal before the Supreme Court (SC).

## SC ruling

- ▶ Power to issue prerogative writs under Article 226 of the Constitution of India is plenary in nature. Any limitation on the exercise of such power must be traceable in the Constitution itself.

Article 226 does not impose any limitation or restraint on the exercise of power to issue writs.

- ▶ One of the self-imposed restrictions on exercise of power under Article 226 that has evolved through judicial precedents is that the HCs should normally not entertain a writ petition, where an effective and efficacious alternative remedy is available.
- ▶ At the same time, it must be remembered that mere availability of an alternative remedy of appeal or revision would not oust the jurisdiction of the HC and render a writ petition "not maintainable".
- ▶ "Entertainability" and "maintainability" of a writ petition are distinct concepts. The distinction between the two ought not to be lost sight of.
- ▶ A writ petition, despite being maintainable may not be entertained by a HC for many reasons or relief could even be refused, despite setting up a sound legal point if grant of the claimed relief would not further public interest.
- ▶ Earlier, SC in the case of Mohd Nooh<sup>2</sup> made clear that availability of an alternative remedy does not operate as an absolute bar to the "maintainability" of a writ petition. The rule, which requires a party to pursue the

alternative remedy provided by a statute, is a rule of policy, convenience and discretion rather than a rule of law.

- ▶ In case of Whirlpool Corporation<sup>3</sup>, SC carved out the exceptions whereof a writ court would be justified in entertaining a writ petition despite the party not having availed the alternative remedy provided by the statute. The same are as follows:
  - ▶ where the writ petition seeks enforcement of any of the fundamental rights;
  - ▶ where there is violation of principles of natural justice;
  - ▶ where the order or the proceedings are wholly without jurisdiction; or
  - ▶ where the vires of an Act is challenged.

The same principle was reiterated in the case of Commercial Steel Limited<sup>4</sup>.

- ▶ Where the controversy is a purely legal one and it does not involve disputed questions of fact but only questions of law, then it should be decided by the HC instead of dismissing the writ petition on the ground of an alternative remedy being available.<sup>5</sup>
- ▶ In the present case, since a jurisdictional issue was raised by the assessee, questioning the very competence of the Revisional Authority to exercise *suo moto* power, being a pure question of law, the plea raised in the writ petition did deserve a consideration on merits and the same ought not to have been thrown out at the threshold.
- ▶ The HC, by dismissing the writ petition committed an error of law for which the order under challenge is unsustainable. Accordingly, the same was set aside.

## Comments

- a. The distinction between maintainability and entertainability of writ petition brought out by the SC is likely to provide clarity to businesses seeking writ interference on various issues.
- b. Presently, the Government is yet to set up Goods and Services Tax Appellate Tribunal (GSTAT). This results in an inordinate delay in conclusion of various proceedings. The Apex court judgement may help in filing and disposal of writ petition for issues involving question of law.

<sup>2</sup> 1958 SCR 595  
<sup>3</sup> (1998) 8 SCC 1

<sup>4</sup> 2021 SCC Online SC 884  
<sup>5</sup> (1977) 2 SCC 724, (2000) 10 SCC 482

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