

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No. 9239 of 2024

Reserved on: 05.05.2025

Date of decision: 08.05.2025

M/s Himalaya Wellness Company

...Petitioner

Versus

Union of India & Ors.

...Respondents

Coram

The Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.

The Hon'ble Mr. Justice Sushil Kukreja, Judge.

Whether approved for reporting? Yes.

For the Petitioner:

Mr. G. Shivadass, Sr. Advocate with Ms. Shradha Rajgiri, Mr. Vipul Sharda and Mr. Raditya Katoch, Advocates.

For the Respondents:

Mr. Janak Raj Central Govt. Standing Counsel, for respondent No. 1.

Name of respondent No. 2 deleted vide order dated 04.09.2024.

Mr. Vijay Kumar Arora, Sr. Advocate with Ms. Godawari, Ms. Lalita Sharma, Ms. Aastha Kohli, Mr. Hitansh Raj and Mr. Gaurav Kumar, Advocates, for respondent No. 3.

Mr. Rajiv Kumar Assistant Commissioner, CGST, Audit committee, Chandigarh in person.

Tarlok Singh Chauhan, Judge

The instant petition has been filed for grant of the following substantive reliefs:-

“(A) That this Hon’ble Court may be pleased to issue a writ in the nature of certiorari, or any other writ quashing the show cause notice dated bearing DIM No. 20240550ZG00000039B 31.05.2024 (Annexure P-1) passed by the Respondent No. 3 whereby the demand of Rs. 4,37,17,830/- along with interest and penalty was created.

(B) That this Hon’ble Court may be pleased to issue writ in the nature of mandamus or any other writ holding that the petitioner is rightly eligible for the input tax credit availed for the period from 2017-18 to 2021-22

(C) That this Hon’ble Court may be pleased to issue of writ in the nature of certiorari holding that the amendment to explanation to section 16(2)(b) is to be applied retrospectively.

(D) That this Hon’ble Court may be pleased to issue of writ of mandamus holding that the proceedings under Section 74 of the proceedings under Section 74 of the CGST Act, 2017 does not survive in the absence of willful suppression.”

2. The respondents have raised preliminary objections regarding the maintainability of the instant petition on the ground of availability of alternate statutory remedy as per the scheme of the Central Goods and Service Tax Act, 2017 (for short the ‘**CGST Act**’). It is submitted that the petition is premature at this stage as the petitioner has approached this Court against a show cause notice which is yet to be adjudicated. Even after the adjudication of the show cause notice, which always is done completely by observing principles of natural

justice, there is a statutory alternate remedy available to the petitioner before appropriate forum, hence, the present petition deserves to be dismissed as not maintainable.

3. Thus, this Court is required to go into the question of maintainability of the instant writ petition on the ground of availability of alternate remedy and for this purpose certain minimal facts need to be noticed.

4. The petitioner is a partnership firm incorporated under the Indian Partnership Act, 1932 *inter alia*, engaged in the supply of personal care and pharmaceuticals such as Medicaments, Beauty or Make-up Preparations, Preparations for use on the Hair Shampoos, Preparation for Oral or Dental Hygiene, Soap.

5. The petitioner is registered vide GSTIN 02AADFT3025B1Z1 under the Goods and Services Tax regime for the purpose of carrying out its business in the State of Himachal Pradesh. The petitioner has filed their monthly returns and discharged applicable tax liabilities.

6. The petitioner entered into an arrangement with the Goods Transportation Agencies (hereinafter referred to as '**GTA**') for the transportation of goods into and out of the State of Himachal Pradesh.

7. The GTA services are taxable either under forward charge or reverse charge in terms of Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017 and Notification No. 03/2022-Central Tax (Rate) dated 13.07.2022. The petitioner accordingly discharged GST and availed Input Tax Credit (hereinafter referred to as '**ITC**') on the GTA services received.

8. The Books of Account of the petitioner were taken up for auditing by the Central Tax Department, pursuant to which audit enquiry notice was issued to the petitioner pointing out various discrepancies.

9. The petitioner filed a reply to the enquiry notice alongwith all the relevant supporting documents. The Deputy Commissioner, Goods and Services Tax (Audit) Circle-Baddi, Central Revenue Building, Plot No. 19,, Sector 17-C, Chandigarh-160017 issued Final Audit Report without considering the submissions made by the petitioner on the ground that the reply filed by it is untenable.

10. Thereafter, the petitioner received notice in Form DRC-01A dated 21.05.2024 directing it to discharge GST to the tune of Rs. 4,37,17,830/- alongwith interest and penalty by 31.05.2024. The petitioner filed a detailed reply on 30.05.2024 wherein it was submitted that the petitioner is not liable to discharge any outward liability.

11. The respondent No. 3 issued show cause notice bearing DIN No. 20240550ZG000000D39B, dated 31.05.2024 in FORM GST DRC-01 under Section 74(1) of the CGST Act proposing to demand and recover the alleged inadmissible input tax credit (hereinafter referred to as '**ITC**') or Rs. 4,36,75,439/-, alleged short paid GST to the tune of Rs. 27,446/-, interest on non-payment of GST of Rs. 14,945/- and interest and penalty in terms of CGST Act on the demands proposed above. The show cause notice also proposed to appropriate the GST paid amounting to Rs.6,85,440/- towards the demand proposed in the show cause notice.

12. The petitioner being aggrieved by the aforesaid show cause notice has filed the present writ petition.

13. It is vehemently argued by Shri G. Shivadass, learned Senior Advocate, assisted by Ms. Shradha Rajgiri, Advocate, **for the petitioner, that the present writ petition is maintainable despite the availability of alternate remedy to the petitioner as the present show cause notice has been issued with a pre-conceived mind and in violation of natural justice.**

14. On the other hand, it has been strongly urged by Shri Vijay K. Arora, learned Senior Advocate assisted by Ms. Godawari, Advocate, that the instant writ petition is not maintainable that too against the mere show cause notice, which

would be adjudicated upon completely by observing the principles of natural justice, as undertaken in the reply. Merely because the show cause notice has been issued by the respondents does not mean that the same has been issued with a pre-conceived mind.

15. We have heard learned counsel for the parties and have gone through the material placed on record.

16. At the outset, it needs to be observed that the high Court has the discretion not to entertain the writ petition and one of the restriction placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person.

17. The exception 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.*

18. However, an alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate course though ordinarily, a writ

petition should not be entertained when an efficacious alternate remedy is provided by law.

19. 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. (**Ref.:- Radha Krishan Industries vs. State of H.P. 2021 (6) SCC 771**).

20. No exceptional situation exists in the instant case and moreover the petitioner otherwise has a right created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability.

21. In coming to such conclusion, we are duly supported by a judgment of Three-Judge Bench of the Hon'ble Supreme Court in **Assistant Commissioner of Sales Tax vs. M/s Commercial Steel Ltd. decided on 03.09.2021, 2022 (16) SCC 447**.

21(i) **The facts** therein were that the High Court in exercise of its writ jurisdiction under Article 226 of the Constitution, set aside the action of the appellants therein in collecting an amount of Rs.4,16,447/- from the respondents towards tax and penalty under CGST and the State Goods and Service Tax Act

(hereinafter referred to as the '**SGST Act**') and directed a refund together with interest @ 6% per annum from 13.12.2019. A further direction was given to the State of Telangana to consider initiating disciplinary proceedings against the Assistant Commissioner and costs of Rs. 25,000/- was also imposed on the first appellant, who was the first respondent before the High Court.

21(ii) The respondent therein was a proprietary concern engaged in the business of iron and steel and was registered under CGST. The respondent purchased certain goods from a dealer JSW Steel Limited, Vidyanagar, Karnataka under a tax invoice dated 11.12.2019. The consignment of goods was being carried in a truck bearing registration No. KA 35C 0141. While it was proceeding from the State of Karnataka, it was intercepted on 12.12.2019 at 5:30 pm at Jeedimetala. The tax invoice indicated that the goods were earmarked for delivery at Balanagar, Telangana. The case of the appellant was that Balanagar is situated between the State of Karnataka and Jeedimetala and that no reasonable person would cross Balanagar and then turn around to go back to the place of destination. The purchase value of the goods appeared to be in the amount of Rs.11,14,579/- from the tax invoices.

21(iii) The case of the revenue was that in the guise of an inter-State sale, the respondent was attempting to sell the goods in the local market by evading both SGST as well as CGST. An order of detention was issued in Form GST MOV-06 on 12.12.2019 and a notice was served on the person in charge of the conveyance. The respondent paid the tax and penalty, following which the goods and the conveyance were released on 13.12.2019.

21(iv) The respondent instituted writ proceedings under Article 226 of the Constitution before the High Court challenging the order of detention dated 12.12.2019 and the notice which was issued under Section 20 of the IGST Act 2017. A refund of tax was also sought. A counter affidavit was filed on behalf of the appellants before the High Court. The High Court entertained the writ petition and ordered the refund of the amount collected towards tax.

21(v). As observed above, High Court not only entertained the writ petition but allowed it in the aforesaid terms.

21(vi). Aggrieved by the judgment passed by the High Court, the appellant therein filed an appeal before the Hon'ble Supreme Court wherein it was argued that the High Court was in error in entertaining the writ petition under Article 226 of the

Constitution having regard to the statutory alternate remedy which was available under Section 107 of the GST Act.

21(vii). Allowing the appeal, the Hon'ble Supreme Court after quoting Section 107 of the CGST Act observed as under:-

"11. The respondent had a statutory remedy under Section 107. Instead of availing of the remedy, the respondent instituted a petition under Article 226. The existence of an alternate remedy is not an absolute bar to the maintainability of a writ petition under [Article 226](#) of the Constitution. But a writ petition can be entertained in exceptional circumstances where there is:

- (i) a breach of fundamental rights;*
- (ii) a violation of the principles of natural justice;*
- (iii) an excess of jurisdiction; or*
- (iv) a challenge to the vires of the statute or delegated legislation.*

12. In the present case, none of the above exceptions was established. There was, in fact, no violation of the principles of natural justice since a notice was served on the person in charge of the conveyance. In this backdrop, it was not appropriate for the High Court to entertain a writ petition. The assessment of facts would have to be carried out by the appellate authority. As a matter of fact, the High Court has while doing this exercise proceeded on the basis of surmises. However, since we are inclined to relegate the respondent to the pursuit of the alternate statutory remedy under [Section 107](#), this Court makes no observation on the merits of the case of the respondent.

13. For the above reasons, we allow the appeal and set aside the impugned order of the High Court. The writ petition filed by the respondent shall stand dismissed.

However, this shall not preclude the respondent from taking recourse to appropriate remedies which are available in terms of [Section 107](#) of the CGST Act to pursue the grievance in regard to the action which has been adopted by the state in the present case.”

22. Adverting to the facts of the instant case, as already noticed above, none of the exception, as carved out by the Hon'ble Supreme Court in **Radha Krishan's case (supra)** has been established before this Court. Merely because the petitioner has been served with the show cause notice would not mean that the same has been issued with the pre-conceived mind and in violation of natural justice. The proceedings are still at the stage of show cause notice, which has been assailed in the instant case. Therefore, the petitioner cannot raise this claim, that too, at this stage. Even otherwise, it would be premature on the part of the High Court to quash a show cause notice by invoking Article 226 of the Constitution of India. It is premature for the High Court to opine anything whether there was any evasion of tax or not, the same is required to be considered in an appropriate proceedings for which show cause notice has already been issued to the petitioner.

23. In coming to such conclusion, we are duly supported by the judgment of the Hon'ble Supreme Court in **Civil Appeal No. 359 of 20203 (Arising out of SLP (C) No. 19295/2022)**,

titled as The State of Punjab vs. M/s Shiv Enterprises & Ors., decided on 16.01.2023.

23(i) The facts there were that the respondents therein issued a show cause notice dated 14.09.2021, as to why the goods in question and conveyance used in transport of such goods should not be confiscated under Section 130 of the Punjab GST Act, 2017, IGST Act, 2017 and CGST Act, 2017 and why the tax, penalty and other charges payable in respect of such goods and the conveyance should not be payable.

23(ii) In the show cause notice, there was a specific allegation with respect to evasion of duty which was yet to be considered by the appropriate authority. The question arose as to whether the High Court should have entertained the petition, when the petitioner approached the High Court against mere show cause notice. The High Court while entertaining the petition observed in para-29 as under:-

“29. From the pleadings on record, it is clear that there is no allegation that the petitioner has contravened any provision of the Act or the rules framed thereunder much less with an intent to evade payment of tax. It is also not the case of the State that the petitioner did not account for any goods on which he is liable to pay tax under the Act or that he supplied any goods liable to tax under the Act without having applied for registration or that he supplied or received any goods in contravention of any of the provisions of the Act. From the perusal of show cause notice issued to the petitioner under Section 130, the

case alleged against the petitioner is that of wrongful claim of input tax credit. The petitioner or for that matter any registered person shall be entitled to tax credit of input tax on any supply of goods or services, only when he shall be able to show that the tax in respect of such supply has been paid to the Government either in cash or through utilization of input tax credit admissible in respect of the said supply. Needless to reiterate any person can claim input tax credit under the provisions of the 2017 Act only if the same has been actually paid to the Government. Thus, the action of the respondents in initiating proceedings under Section 130 on the basis of show cause notice dated 14.09.2021 cannot be sustained."

23(iii). Setting aside the judgment passed by the High Court, the Hon'ble Supreme Court observed as under:-

"Apart from the fact that the aforesaid is factually incorrect, even otherwise, it was premature for the High Court to opine anything on whether there was any evasion of the tax or not. The same was to be considered in an appropriate proceeding for which the notice under Section 130 of the Act was issued. Therefore, we are of the opinion that the High Court has materially erred in entertaining the writ petition against the show cause notice and quashing and setting aside the same. However, at the same time, the order passed by the High Court releasing the goods in question is not to be interfered with as it is reported that the goods have been released by the appropriate authority."

24. Reverting back to the facts of the instant case, it would be noticed that the respondents have served upon the

petitioner a detailed show cause notice running into 15 pages, containing extensive details how it has arrived at a conclusion, sufficient enough to issue a show cause notice to the petitioner. Therefore, entertaining the petition would be annihilating a still born proceeding by going into the merits of the show cause notice

25. In view of the above and for the reasons stated above and without expressing anything on merits in favour of either of the parties, more particularly, against the petitioner herein, we find this petition to be not maintainable. Consequently, the same is dismissed.

26. All the contentions/defences which may be available to the petitioner are kept open to be considered by the appropriate authority in accordance with law and on its own merits.

(Tarlok Singh Chauhan)
Judge

(Sushil Kukreja)
Judge

8th May, 2025
(sanjeev)