

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CIVIL APPLICATION NO. 515 of 2023
[On note for speaking to minutes of order dated 16/02/2023 in
R/SCA/515/2023]**

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TORRENT POWER LTD.

**Versus
UNION OF INDIA**

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Appearance:

UCHIT N SHETH(7336) for the Petitioner(s) No. 1

MS HETVI H SANCHETI(5618) for the Respondent(s) No. 1,2,3,4

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**CORAM: HONOURABLE THE CHIEF JUSTICE MS. JUSTICE
SONIA GOKANI
and
HONOURABLE MR. JUSTICE SANDEEP N. BHATT**

Date : 24/02/2023

**ORAL ORDER
(PER : HONOURABLE THE CHIEF JUSTICE MS. JUSTICE SONIA
GOKANI)**

A note for speaking to minutes is moved by the petitioner indicating typographical error in the order dated 16.2.2023 passed in the captioned matter.

Considering the note for speaking to minutes, the same is allowed. The words `Malladi Drugs and Pharma Limited' appearing in paragraphs 10 and 16 in the order dated 16.2.2023 passed in the captioned petition may be replaced and read as `M/s Godrej Sara Lee Ltd.". Rest of the order holds the field.

(SONIA GOKANI,CJ)

(SANDEEP N. BHATT,J)

SRILATHA

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

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TORRENT POWER LTD.

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UNION OF INDIA

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Appearance:

MR SN SOPARKAR, SR.ADV. with UCHIT N SHETH(7336) for the
Petitioner(s) No. 1
MS HETVI H SANCHETI(5618) for the Respondent(s) No. 1,2,3,4

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CORAM: HONOURABLE THE CHIEF JUSTICE MS. JUSTICE
SONIA GOKANI
and
HONOURABLE MR. JUSTICE SANDEEP N. BHATT

Date : 16/02/2023

ORAL ORDER
(PER : HONOURABLE THE CHIEF JUSTICE MS. JUSTICE SONIA
GOKANI)

1. By way of this petition preferred under article 226 of the Constitution of India, the petitioner seeks the issuance of writ of mandamus for quashing and setting aside the show cause notice dated 30.11.2022 issued under section 74 of the Central/Gujarat Goods and Services Tax Act, 2017 ("the GST Act" for short) on the ground that the same is without jurisdiction, arbitrary and illegal.
2. The petitioner is engaged in the business of transmission/distribution of electricity in the State of

Gujarat, Maharashtra and Uttar Pradesh. It has been granted the electricity distribution license under the Electricity Act, 2003 in the cities of Ahmedabad, Surat and Gandhinagar, Dahej SEZ and Dholera. It has its electricity distribution franchisee in different parts of Maharashtra and State of Uttar Pradesh. It is registered under the GST Act.

3. During the course of routine maintenance and network enhancement, the petitioner digs out tranches on public roads, which are maintained by Municipal Corporations, which includes Ahmedabad Municipal Corporation ("the AMC" for short). The dug out portion of the road and pavement is then reinstated/restored by the AMC for which the AMC recovers reimbursement of road reinstatement charges from the petitioner. The said charges are fixed per meter/area based on the type of the road, which are duly paid by the petitioner and they are accounted in the the ledger account of the AMC.
4. It is averred by the petitioner that it is statutorily

entitled to open up the roads, if required, for laying or repairs or maintenance or distribution lines or work under sections 42 and 67 of the Electricity Act, which are relied on.

5. According to the petitioner, a notice from the Directorate General of GST (Intelligence) on 27.08.2021 requiring the petitioner to give the details of road opening permit charges in respect of the AMC as well as GST paid on reverse charge basis on such services received from the AMC is the reason for the petitioner to approach this Court with the following prayers:

“34. IN view of the aforesaid premises, the Petitioner humbly prays that:

RELIEFS CLAIMED

A. This Hon'ble Court may be pleased to issue a writ of mandamus or writ in the nature of mandamus or any other appropriate writ or order quashing and setting aside the impugned show cause notice dated 30.11.2022 (annexed at Annexure A) as being wholly without jurisdiction, unconstitutional and illegal;

B. Pending notice, admission and final hearing of this petition, this Hon'ble Court may be pleased to stay further proceedings pursuant to the impugned show cause notice dated 30.11.2022 (annexed at Annexure A);

C. Ex parte ad interim relief in terms of prayer B may kindly be granted;

D. Such further relief(s) as deemed fit in the facts and circumstances of the case may kindly be granted in the interest of justice for which act of kindness your Petitioner shall forever pray.”

6. First notice had been responded to by the petitioner.

Thereafter, another notice of 13.12.2021 has alleged that the petitioner was liable to pay tax on reverse charge basis, since road restoration work by the AMC was not a part of its sovereign function. This also was responded to by the petitioner and eventually the second respondent issued the notice in the form of GST DRC-01A asking the petitioner to pay tax on reverse charge basis on payment made to the AMC. The petitioner objected to such proposed demands by upholding Part B of Form GST DRC-01 and submissions made earlier were reiterated.

6.1. As averred, ignoring the submissions, the respondent proceeded to issue the show cause notice of 30.11.2022 under section 74 of the GST Act proposing to demand the tax with interest and penalty on the payments made to the AMC by referring to various provisions as also the definition of “ goods and services

tax” under Article 366(12A) of the Constitution of India. It is urged that the AMC does not supply any goods and services to the petitioner and the petitioner does not request the AMC for restoration of the road. It restores the road in view of its obligation under Article 243W of the Constitution of India and claims reimbursement of the charges from the petitioner. There is absolutely no element of supply involved in this transaction. The petitioner never requisitioned any service of the AMC.

7. On issuance of notice, Ms. Hetvi Sancheti, learned Standing Counsel appears for all the respondents. Affidavit-in-reply is filed by respondent No.2-Assistant Director of Directorate General of Goods and Services Intelligence, Ahmedabad Zonal Unit, Ahmedabad.

- 7.1. According to him, to maintain the underground power cable network, the petitioner digs up and opens up and excavates tranches on the public road under the jurisdiction of the AMC. These tranches are then restored, reinstated and then the AMC collects the

road restoration charges from the petitioner in lieu of such restoration activity.

8. An inquiry was initiated by the officers of the Directorate General of Goods and Services Tax Intelligence, Zonal Unit, Ahmedabad revealing that the petitioner was not paying the GST on the road restoration charges paid to the AMC. According to the submission of the petitioner the restoration of the road is a function entrusted to the AMC under Article 243W of the Constitution of India and hence, it is exempted from the tax under Entry 4 of Notification No.12/2017 of the Central Tax (Rate) dated 28.06.2017. They had also shared other relevant Notification and requested the petitioner to pay applicable GST on the road restoration services. It is further the say of the respondent that there are many business entities such as telephone, gas etc. and each time each one of them digs up the road, there is restoration work required to be done. This would not result in performing of sovereign function, which has been already once

performed by the AMC by constructing the road or undertaking the maintenance work. The function in relation to the construction of road would not entitle the Municipal Authority to collect any charges from any one for performing the function. However, the AMC has collected the road restoration charges for restoring the trenches. It is also emphatically urged that the petitioner is a recipient of services and, therefore, the show cause notice has been issued.

9. Another emphasis on the part of the respondent is that the department has completed the investigation and show cause notice has been issued, which is pending for adjudication before the competent adjudicating authority and the petitioner should exhaust alternative legal remedy and it seeks to rely on various decisions for the said purpose.
10. We have heard Mr. S.N.Soparkar, learned Senior Advocate appearing with Mr. Uchit Sheth, learned advocate for the petitioner. He has pressed into service the decision of the Apex Court in the case of *Malladi*

***Drugs and Pharma Limited vs. The Excise and
Taxation Officer-cum-Assessing Authority and others***

passed in Civil Appeal No.5393 of 2010, where the Apex Court was engaged in deciding two questions. One of them was whether the High Court was justified in declining interference on the ground of availability of alternative remedy of appeal to the appellant under section 33 of the VAT Act, which it had not pursued and second was whether to remit the writ petition to the High Court for hearing on merits and examine the correctness. As the first question has been answered in the negative, it was the case where the appellant had questioned the jurisdiction of Deputy Excise and Taxation Commissioner-cum-Revisional Authority, Kurukshetra to reopen the proceedings in exercise of *suo motu* revisional power conferred by section 34 of the VAT Act and to pass final order holding that the two assessment orders passed by the said authority suffered from the illegality and impropriety. The Apex Court on the exercise of writ powers conferred by

Article 226 of the Constitution has held and observed that certain orders passed by the High Courts holding the writ petitions as not maintainable, merely because alternative remedy provided by the relevant statutes has not been pursued by the parties desirous of invocation of writ jurisdiction, which is a matter of concern. It has made a reference of Article 329 ordainment of other similarly worded articles in the Constitution. It held that while it is true that the writ powers, despite availability of remedy under the very statute, which has been invoked, ought not to be in a routine manner, yet the mere fact that the petitioner before the High Court in a given case, has not pursued the alternative remedy available to him. It cannot mechanically be construed as a ground of its dismissal. “ It is axiomatic that the High Courts (bearing in mind the facts of each particular case) have a discretion whether to entertain a writ petition or not. One of the self-imposed restrictions on the exercise of power under Article 226 that has evolved through

judicial precedents is that the high courts 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, which the party invoking the jurisdiction of the High Court under Article 226 has not pursued, would not oust the jurisdiction of the High Court and render a writ petition “not maintainable”. In a long line of decisions, this Court has made it clear that availability of an alternative remedy does not operate as an absolute bar to the “maintainability” of a writ petition and that 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. Relevant portion of the paragraph is reproduced as under:

“4....Though elementary, it needs to be restated that “entertainability” and “maintainability” of a writ petition are distinct concepts. The fine but real distinction between the two ought not to be lost sight of. The objection as to “maintainability” goes to the root of the matter and if such objection were found to be of substance, the courts would be rendered incapable of even receiving the lis for adjudication.

On the other hand, the question of “entertainability” is entirely within the realm of discretion of the high courts, writ remedy being discretionary. A writ petition despite being maintainable may not be entertained by a high court for very many reasons or relief could even be refused to the petitioner, despite setting up a sound legal point, if grant of the claimed relief would not further public interest. Hence, dismissal of a writ petition by a high court on the ground that the petitioner has not availed the alternative remedy without, however, examining whether an exceptional case has been made out for such entertainment would not be proper.”

11. On this issue, following authorities are sought to be pressed into service by Ms. Hetvi Sancheti, learned Standing Counsel for the respondents:

- a) In the matter before this Court in the case of ***M/s. Cera Sanitaryware Limited vs. State of Gujarat and 1 other*** passed in Special Civil Application No. 8050 of 2020 dated 14.07.2020.
- b) ***Commissioner of Central Excise, Haldia vs. Krishna Wax Private Limited***, (2020) 12 SCC 572.
- c) ***Malladi Drugs and Pharma Limited vs. Union of India and another***, (2020) 12 SCC 808.

12. In the case of ***M/s. Cera Sanitaryware Limited*** (supra) this Court had not entertained, the writ application challenging the notice of intimation in the Form GST

DRC-O1A issued under section 74(5). It was held that the same being merely an intimation, it is upto the applicant whether the pay attention to such intimation or not and if he deems fit to ignore the same bearing in mind the consequence of further show cause notice, in any view of the matter, any such notice, when is issued, an opportunity of hearing is to be given to the writ application.

12.1. This is a decision of this Court, which has been placed into service for the purpose of pressing the point that the issuance of show cause notice may not be the ground for the Court to entertain the petition.

13. The case of **Krishna Wax Private Limited** (supra) rendered by the Apex Court is also emphasized upon by the learned counsel. She has also urged that section 11A of the Central Excise Act is *pari materia* similar to what is presently being pressed into service by the petitioner in the present petition. She has, therefore, urged that the show cause notice when issued since becomes a reckoning gate for various

issues including the issue of limitation, any entertainment of this would create imbalance of working of various provisions of the Act including the period of limitation.

13.1. Relevant paragraphs of the decision are reproduced as under:

“10. The issuance of show cause notice under [Section 11A](#) also has some significance in the eyes of law. The day the show cause notice is issued, becomes the reckoning date for various issues including the issue of limitation. If we accept the submission of the respondent that a prima facie view entertained by the department whether the matter requires to be Civil Appeal 8609/2019 [Diary No. 17005 of 2018] [Commissioner of Central Excise, Haldia vs. M/s. Krishna Wax \(P\) Ltd.](#)

proceeded with or not is to be taken as a decision or determination, it will create an imbalance in the working of various provisions of [Section 11A](#) of the Act including periods of limitation. It will be difficult to reckon as to from which date the limitation has to be counted.

11. In the present case, the respondent had not registered itself and was not paying any excise duty on the products that it was manufacturing. The search conducted by the Department at the registered office and the factory premises of the respondent led to the recovery of certain material on the basis of which the Department was considering the matter. At that stage, a writ petition was filed in which an order was passed by the High Court on 28.11.2005 directing the appellant to decide whether the Department had jurisdiction to proceed in the matter before deciding any other issues on merits. As stated above, the provisions of the Act do not contemplate any such prima facie determination to be arrived at and requiring that a copy of such determination to be submitted to the concerned person and only thereafter to proceed in the matter. Nonetheless, since a direction was issued by the High Court, the Department in deference to such direction did consider the matter and by an Internal Order dated 15.03.2006 prima facie recorded an

opinion that the authorities under the Act had jurisdiction to proceed in the matter. Since the provisions of the Act do not contemplate Civil Appeal 8609/2019 [Diary No. 17005 of 2018] [Commissioner of Central Excise, Haldia vs. M/s. Krishna Wax \(P\) Ltd.](#)

any prima facie determination which must be communicated to the concerned person, the Department was justified in not communicating the Internal Order on its own. The matter was correctly assessed by the High Court on the next occasion when in spite of having directed that a copy of the Internal Order be supplied, it acknowledged that the remedy of the respondent lied in submitting reply to the show cause notice, in which reply it would be open to the respondent to take objections to the jurisdiction of the appellant to proceed against the respondent under the provisions of the Act.

12. The communication of the Internal Order dated 15.03.2006 was only in deference to the order passed by the High Court. At the cost of repetition, it must be stated that neither the Act contemplates any such prima facie determination which must be communicated only whereafter the proceedings could be initiated nor was such course undertaken by the Department on its own. Therefore, merely because the Internal Order was communicated to the respondent, it would not afford the respondent a cause of action to file an appeal against said Internal Order. The communication of said Internal Order was only in obedience of the directions issued by the High Court. It was not a decision or determination which was arrived at in terms of sub-section 10 of Section 11A. The Civil Appeal 8609/2019 [Diary No. 17005 of 2018] [Commissioner of Central Excise, Haldia vs. M/s. Krishna Wax \(P\) Ltd.](#)

respondent therefore could not have preferred any appeal against said Internal Order dated 15.03.2006. The Appellate Authority as well as the Tribunal, in our view, completely failed to appreciate this basic distinction.

13. It must be noted that while issuing a show cause notice under [Section 11A](#) of the Act, what is entertained by the Department is only a prima facie view, on the basis of which the show cause notice is issued. The determination comes only after a response or representation is preferred by the person to whom the show cause notice is addressed. As a part of his response, the concerned person may present his view point on all possible issues and only thereafter the determination or decision is arrived at. In the present case even before the response could be made by the respondent and the determination could be arrived at, the matter was carried in appeal against said Internal Order. The appellant was

therefore, justified in submitting that the appeal itself was premature.

14. It has been laid down by this Court that the excise law is a complete code in itself and it would normally not be appropriate for a Writ Court to entertain a petition under [Article 226](#) of the Constitution and that the concerned person must first raise all the objections before the authority who had issued a show cause notice and the redressal in terms of the Civil Appeal 8609/2019 [Diary No. 17005 of 2018] [Commissioner of Central Excise, Haldia vs. M/s. Krishna Wax \(P\) Ltd.](#)

existing provisions of the law could be taken resort to if an adverse order was passed against such person. For example in [Union of India and another vs. Guwahati Carbon Limited](#)⁵, it was concluded; “The Excise Law is a complete code in order to seek redress in excise matters and hence may not be appropriate for the writ court to entertain a petition under [Article 226](#) of the Constitution”, while in [Malladi Drugs and Pharma Ltd. vs. Union of India](#)⁶, it was observed:-

“...The High Court, has, by the impugned judgment held that the Appellant should first raise all the objections before the Authority who have issued the show cause notice and in case any adverse order is passed against the Appellant, then liberty has been granted to approach the High Court... ...in our view, the High Court was absolutely right in dismissing the writ petition against a mere show cause notice.”

14. In the case of *Malladi Drugs and Pharma Limited* (supra), the Apex Court has found that the appellant was a bulk drug manufacturer and used platinum catalyst. A show cause notice was issued as to why not to pay the duty. The reply was filed to the said show cause notice and then the writ petition was preferred. On the ground that the High Court's order was passed way back in the year 1997, neither party knew

whether the department had proceeded further and whether any order had been passed pursuant to the show cause notice. The Court held that the High Court was right in dismissing the writ petition against a mere show cause notice.

15. Considering the submissions of both the sides and also noticing the issue raised before this Court, we are of the opinion that mere ground of alternative remedy being available will not be the reason for this Court to not entertain this petition.
16. Issue raised will also require consideration and the decision of *Malladi Drugs and Pharma Limited* (supra) makes it quite clear that the aspect of non-maintainability is on account of self-imposed limitations and the restraints on exercise of powers to issue a writ. The entertainability and maintainability of the writ being a distinct aspect, this Court issues the Rule.
17. The petitioner has pressed for interim relief of the nature that both the proceedings pursuant to the

impugned show cause notice dated 30.11.2022 be stayed. In wake of the fact that to the final show cause notice, no reply has been given and as Ms. Hetvi Sancheti, learned Standing Counsel has pointed out that investigating wing is different than the one which has presently issued the notice, we do not deem it appropriate to grant any kind of stay at this stage. At the same time, if there is any adjudication, which may affect the right of the petitioner, it may always approach this Court for this purpose.

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(SONIA GOKANI,CJ)

THE HIGH COURT
OF GUJARAT

(SANDEEP N. BHATT,J)

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