1.The issue of writ as an alternative quick fix remedy and new s 148A has risen afresh with the SC ruling on **RED CHILLI INTERNATIONAL SALES** decided on 3rd January 2023.

2.The decision:

RED CHILLI INTERNATIONAL SALES *versus* INCOME TAX OFFICER & ANR. 2023 LiveLaw (SC) 16

Special Leave to Appeal (C) No(s). 86/2023; 03-01-2023

SANJIV KHANNA; J., M.M. SUNDRESH; J. **RED**

Income Tax Act, 1961; Sections 148 and 148A - **Writ petition** can be entertained to examine if conditions for issuance of notice under Section 148 have been satisfied.

(Arising out of impugned final judgment and order dated 02-06-2022 in CWP No. 10073/2022 passed by the High Court of Punjab & Haryana at Chandigarh)

O R D E R

Delay condoned.

We with the petitioner that the impugned judgment rejecting the writ petition on the ground of alternative remedy does not take into consideration several judgments of this Court, on the jurisdiction of High Court, as writ petitions have been entertained to be examined whether the jurisdiction preconditions for issue of notice under Section 148 of the Income Tax Act, 1961 is satisfied. The provisions of reopening under the Income Tax Act, 1961 have undergone an amendment by the Finance Act, 2021, and consequently the matter would require a deeper and in-depth consideration keeping in view the earlier case law. Accordingly, we set aside the observations made by the High Court in the impugned judgment observing that the writ petition would not be maintainable in view of the alternative remedy, clarify that this issue would be examined in depth by the High Court if and when it arise for consideration. We do deem it open to examine this issue in the present case after having examined the notice under Section 148A (b) including the annexure thereto, the reply filed by the petitioner and the order under Section 148A (d) of the Income Tax Act, 1961.

Recording the aforesaid, the special leave petition is disposed of. We clarify that

the dismissal of the special leave petition would not be construed as a findings or observations on the merits on case.
Pending application(s), if any, shall stand disposed of.

3.Other cases:

Just prior,in case of **Kulwant Singh ,reported in CWP -18032-2022** the P & H high court has admitted writ against Instruction number 1 of CBDT dated 11.5.2022.

One can be further enthused by rulings like **Shri Ganesh Jute Mills Ltd reported in 109 ITR 562(Cal)** for the proposition of raising new pleas at the appellate stage.

4.WP as a decisive remedy? :

The advocates of a WP remedy in IT matters would do well to remember the decision in ASHISH AGARWAL **444 ITR 1(SC).**Writ challenges while IT proceedings are at an intermediate stage rarely result in adjudications.They result in set asides,prolonging the agony and expense of the taxpayer.In tax matters it is the irregularity rule which prevails over the illegality rule.Courts,rarely ,in Writ jurisdiction ,quash with no recourse to revenue.Hence , a regular appellate channel pursuance is of much greater practical utility.

4.1The advocates of writ route should draw lessons from line of argument shown in **M/s MIL India Ltd VS Commissioner of Central Excise, NOIDA** Appeal (civil) 6988 of 2005 DATE OF JUDGMENT: **01/03/2007.**

Let us see the key part:

''Further one needs to understand the concept of assessment. An order of assessment under the taxing law does not become final before the adjudicating authority in every matter. It is subject to before the Commissioner (A). The Commissioner (A) can even add or subtract certain items from the order of assessment made by the adjudicating

authority and that order of the Commissioner(A) could also be treated as an order of assessment. In complicated cases where costing in involved the adjudicating authority can also refer the matter to an expert. The Act also makes provision for special audit. However, when the principle of law is evolved an appeal lies to the appellate Tribunal under the said Act. In fact, the power of remand by the Commissioner (A) has been taken away by amending Section 35A with effect from 11.5.2001 under the Finance Bill, 2001. Under the Notes to clause 122 of the said Bill it is stated that clause 122 seeks to amend Section 35A so as to withdraw the powers of the Commissioner (A) to remand matters back to the adjudicating authority for fresh consideration. Therefore, the Commissioner (A) continues to exercise the powers of the adjudicating authority in the matters of assessment. Under Section 35B any person aggrieved by the order of the Commissioner as an adjudicating authority is entitled to move the Tribunal in appeal. Section 35B indicates that the decision of order passed by the Commissioner (A) shall be treated as an order of an adjudicating authority. In the circumstances the High Court had erred in holding that the assessee was not entitled to agitate the question of dutiability in appeal before the Tribunal.

[NOTE:IDENTICAL AMENDMENT IN INCOME TAX ACT TOO IN 2001]

We do not wish to remand the matter. This matter has undertaken a chequered history. In the present case vide order dated 9.4.2003 the Commissioner (A) held that the assessee had failed to produce evidence regarding its entitlement for the MODVAT credit. However the fact remains that even if the bought out items were dutiable, the department was still required to give the benefit of MODVAT credit …….. ***Accordingly, appeal is partly allowed, the impugned judgment of the High Court in Central Excise Appeal no. 28 of 2004 dated 05.11.2004 is set aside with no order as to costs."***

4.1.1 This was a civil appeal.Unless a similar approach is possible in pursuing writ that it is not a curable irregularity but a fatal illegality that has occurred and second innings to revenue would be a travesty of justice the writ route is futile.The argument which needs to succeed is that a re adjudication would lead to creation of an irresponsible and arbitrary

executive action which would be comfortable in the belief that at worst ,we will manage a set aside.

4.2 The best illustration in income tax is provided in KSS Petron Private Ltd. v/s.ACIT INCOME TAX APPEAL NO. 224 OF 2014 [M.S.SANKLECHA, & S.C.GUPTE, JJ.] DATE : 3rd OCTOBER, 2016.

"8 We note that once the impugned order finds the Assessment Order is without jurisdiction as the law laid down by the Apex Court in GKN Driveshafts (supra) has not been followed, then there is no reason to restore the issue to the Assessing Officer to pass a further/fresh order. If this is permitted, it would give a licence to the Assessing Officer to pass orders on reopening notice, without jurisdiction (without compliance of the law in accordance with the procedure), yet the only consequence, would be that in appeal, it would be restor ed to the Assessing Officer for fresh adjudication after following the due procedure. This would lead to unnecessary harassment of the Assessee by reviving stale/ old matters."

5.Conclusion:

My prescription deriving from my humble experience and reading is simple.Tax matters are not a lis between a citizen and the State.Hence Courts do not interfere in WP in the manner of concluding the issue as they would,in a non tax civil or criminal suit involving fundamental rights or irreversible injuries.There is no State adversariality in that sense.A writ is to be rarely invoked in tax matters and under exceptional circumstances.The regular appellate channel is the way to go about handling tax litigation. Watch the verdict of HC in Red Chilli!

Anadi Varma

10th January 2023