IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.7623 of 2015

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1. Shell India Markets Pvt. Ltd., a Company incorporated under the Companies Act, 1956 having its registered office at 2nd Floor, Campus 4A RMZ Millenia Business Part 143, Dr. MGR Road, Perungudi, P.O. + P.S. Kandanchavady, Chennai-600096 and Branch Office at Plot no. 314/313, Khata No. 90, Thana No. 2, Villge- Mouzipur, P.O. + P.S.- Fatwa, District-Patna through its authorized signatory Vikramaditya Biswas, son of Shri Parbir Kumr Biswas, resident of A 8/3 Srijani Park, MG Road, Joka, P.S. Haridevpur, Kolkata-700004.

.... Petitioner/s

Versus

1. State of Bihar through the Commissioner of Commercial Taxes, Bihar, Patna having its office at Vikash Bhawan, Bailey Road, Patna.
2. Asstt. Commissioner of Commercial Taxes, Patliputra Circle, Patna.

.... Respondent/s

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with

Civil Writ Jurisdiction Case No.7625 of 2015

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1. Shell India Markets Pvt. Ltd., a Company incorporated under the Companies Act, 1956 having its registered office at 2nd Floor, Campus 4A RMZ Millenia Business Part 143, Dr. MGR Road, Perungudi, P.O. + P.S. Kandanchavady, Chennai-600096 and Branch Office at Plot no. 314/313, Khata No. 90, Thana No. 2, Villge- Mouzipur, P.O. + P.S.- Fatwa, District-Patna through its authorized signatory Vikramaditya Biswas, son of Shri Parbir Kumr Biswas, resident of A 8/3 Srijani Park, MG Road, Joka, P.S. Haridevpur, Kolkata-700004.

.... Petitioner/s

Versus

1. State of Bihar through the Commissioner of Commercial Taxes, Bihar, Patna having its office at Vikash Bhawan, Bailey Road, Patna.
2. Asstt. Commissioner of Commercial Taxes, Patliputra Circle, Patna.

.... Respondent/s

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with

Civil Writ Jurisdiction Case No.7626 of 2015

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1. Shell India Markets Pvt. Ltd., a Company incorporated under the Companies Act, 1956 having its registered office at 2nd Floor, Campus 4A RMZ Millenia Business Part 143, Dr. MGR Road, Perungudi, P.O. + P.S. Kandanchavady, Chennai-600096 and Branch Office at Plot no. 314/313, Khata No. 90, Thana No. 2, Villge- Mouzipur, P.O. + P.S.- Fatwa, District-Patna through its authorized signatory Vikramaditya Biswas, son of Shri Parbir Kumr Biswas, resident of A 8/3 Srijani Park, MG Road, Joka, P.S. Haridevpur, Kolkata-700004.

.... Petitioner/s

Versus

1. State of Bihar through the Commissioner of Commercial Taxes, Bihar, Patna having its office at Vikash Bhawan, Bailey Road, Patna.
2. Asstt. Commissioner of Commercial Taxes, Patliputra Circle, Patna.

.... Respondent/s

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Appearance :

(In CWJC No.7623 of 2015)

For the Petitioner/s : Mr. D.V.Pathy
Mrs. Manju Jha
Mr. P.K. Mishra

For the Respondent/s : Mr.Vikash Kumar, A.C. to PAAG

(In CWJC No.7625 of 2015)

For the Petitioner/s : Mr. D.V.Pathy
Mrs. Manju Jha
Mr. P.K. Mishra

For the Respondent/s : Mr. Vikash Kumar, A.C. to PAAG

(In CWJC No.7626 of 2015)

For the Petitioner/s : Mr. D.V.Pathy
Mrs. Manju Jha
Mr. P.K.Mishra

For the Respondent/s : Mr. Vikash Kumar, PAAG.

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CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA
and
HONOURABLE MR. JUSTICE AMARESH KUMAR LAL

ORAL ORDER

(Per: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA)

7 31-07-2015 Heard learned counsel for the petitioners and learned counsel for the State in all the three writ applications.

All the three cases raise common issue and have been disposed of by two orders both dated 23.02.2015 for the period 2008-09 and the common order for the periods 2009-10 and 2010-11, by which the Commissioner of Commercial Taxes, Bihar has disposed of the three revision applications filed by the petitioner but upheld the orders so far as the assessment regarding imposition of tax liability under the Bihar Tax on Entry of Goods into Local Areas (for Consumption Use or Sale Therein) Act,1993 is concerned. They have, accordingly, been heard together and are being disposed of by this common order.

The petitioner is a company engaged in the business of petroleum product and a registered dealer under the Bihar Value Added Tax Act, 2005 and had accordingly filed its returns under the said Act for the periods 2008-09, 2009-10 and 2010-11 respectively. The petitioner is although liable for payment of Entry Tax also under the provisions of the Bihar Entry Tax Act but it did not register itself as a dealer under the said Act nor any returns were filed nor any tax paid under the said Act. It is the stand of the petitioner that under a bona fide notion that since the amount of Entry Tax was to be adjusted against the liability under the Bihar VAT Act, under which Act the liability was higher than that under the Entry Tax Act, it would not be required to pay Entry Tax having paid the entire amount of tax under the Bihar VAT Act. On an audit objection made by the Accountant General, Bihar with regard to non-payment of Entry Tax by the petitioners, proceedings were initiated under Section 33 of the Bihar Value Added Tax Act and by order dated 8.7.2014, the Assistant Commissioner of Commercial Taxes imposed Entry Tax as also interest for the period 2008-09 and also penalty under Section 31

(2) of the Act being three times the amount of Entry Tax. Aggrieved by the same, the petitioner filed three revision applications before the Commissioner of Commercial Taxes which have been disposed of by the two orders dated 23.2.2015, by which he has upheld the liability of Entry Tax but set aside the interest levied and with regard to the penalty under Section 31 (2) of the Act for the period 2008-09, the same was set aside and the matter remanded to the court below to proceed afresh after issuing proper notice in the matter. Aggrieved by the adverse part of the order, the petitioner has filed the present writ applications.

The basic argument of learned counsel for the petitioner is that this is not a matter where the petitioner had any intention to avoid the payment of Entry Tax, as a full and true disclosure of the entire transaction of the petitioner has been made in the returns under the Bihar VAT Act and the entire amount of tax leviable thereon has also been paid and the Entry Tax amount payable on the import of scheduled goods into local areas for consumption, use or sale therein would be less than the amount paid under the VAT Act and such amount would be adjustable against the amount payable under the VAT Act. Thus effectively, there has been no loss of tax to the State Exchequer nor any evasion of tax by the petitioner but only a failure on the part of the petitioner to get a registration as a dealer and file returns under the Entry Tax Act also. It is submitted that the two returns are to be filed practically at the same time under which the amount of tax has already been paid under the VAT Act.

In support of his aforesaid stand, learned counsel for the petitioner relies upon the decision of a Division Bench of this Court in the case of United Breweries Ltd. vs. State of Bihar and others: (2006) 143 STC 106, in paragraph Nos. 7 and 8 of which it has been held as follows:-

> "7. In this case the matter is vice versa. Admittedly the entire sales tax as per assessment has been paid and nothing is due and only entry tax is due under the Act. Under the provisions of the Act read with Rules the amount of tax under the Act with regard to Scheduled goods has to be deposited by the petitioner and thereafter he will claim reduction of the liability under the Finance Act to the extent of the tax paid under the Act. Admitted fact is that he has paid the amount of sales tax under the Finance Act and the rate

of sales tax is more than the rate of tax under the Act. In case the direction is issued to pay tax under the Act then the amount already deposited under the Finance Act will have to be refunded. It appears from the counter-affidavit that earlier practice was that if the amount of tax has already been paid under the Finance Act then the amount of tax which the petitioner was liable to pay under the Act was used to be adjusted. Now that practice has been given a go-by after 1996.

8. Be that as it may, this Court cannot ignore the fact that the amount of sales tax under the Finance Act has already been deposited and that will cover the tax required to be paid under the Act also. In such a situation the proper course for the authority is to adjust the amount of tax demanded under the Act from the tax paid under the Finance Act. Technicality should not stand in the way of doing justice. After adjustment nothing more is required to be paid by the petitioner

so far the entry tax for the relevant years is concerned…..”

So far as the payment of the entire amount of tax is concerned, there is a stand taken on the basis of the order passed by the Assessing Officer that the entire amount of tax has not been paid, but on the petitioner’s counsel subsequently producing the challans for the same which were handed over to learned counsel for the State, they were verified and it is admitted that the entire amount of tax as per the disclosure in the VAT return has been paid by the petitioner. On the basis of the said fact, learned counsel also assails the order of remand so far as the levy of penalty under Section 31 (2) of the Act is concerned.

With regard to the entire goods that had been brought into the State, a return was filed under the Bihar VAT Act before the very same authority of the Commercial Taxes Department who is also the Assessing Authority under the Entry Tax Act, and it is therefore urged that it cannot be considered a fit case for levy of any penalty under sub-section (2) of Section 31 of the Act. It is submitted by learned counsel that any such penalty has to be imposed only if there is concealment, omission or failure to disclose full and correct particular by the dealer and except for the technical plea that there has been non-disclosure on account of non-registration and non-filing of return under the Entry Tax Act, it cannot be said that with regard to the goods and transaction in question before the same authority, there has been any such concealment, omission or failure to disclose full and correct particulars.

In the said circumstances, according to learned counsel for the petitioner, the penalty cannot be attracted under Section 31 (2) of the Act.

In support of the same, learned counsel for the petitioner relies upon a decision of the Supreme Court in the case of Union of India vs. Rajasthan Spinning and Weaving Mills : (2009) 13 SCC 448, in paragraph No.29 of which it has been laid down as follows:-

> "29. From the aforesaid discussion it is clear that penalty under Section 11-AC as the word suggests, is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section."

Learned counsel for the State, on the other hand, submits that the very failure to register as a dealer and not to file returns under the Entry Tax would attract the provisions of sub-section (2) of Section 31 of the Act and since there was an audit objection the respondents were bound to proceed under Section 33 of the Act. On the basis of the same, it is contended that the petitioner having failed to apply for registration and having not filed return under the Entry Tax Act the same cannot be said to be a bona fide act of the petitioner and thus the petitioner would be liable for payment of tax, penalty, etc. in view of the Division Bench decision of this Court in the case of M/s. Premier Irrigation Adriteck private Limited vs. The State of Bihar and others: 2014 (3) PLJR 81, in paragraph No.65 of which it has been held as follows:-

> "65. Hence, liability of entry tax has to be tested on the facts of each given case. For instance, if the omission to have got registered under Bihar Entry Tax Act, 1993, was bona fide, the tax, levied under Bihar Entry Tax, 1993, can be reduced to the extent of VAT paid. However, if the registration was evaded with an oblique motive to avoid payment of entry tax, the tax liability, incurred under Bihar Entry Tax Act, 1993, may not be reduced to the extent of VAT

> paid. The defaulter dealer, as such, can be asked to pay entry tax first and, then, claim refund of the entry tax paid to the extent of the VAT amount already paid."

It is urged by learned counsel for the State on the basis of the aforesaid decision that the registration has been, in the present matter also, evaded with an oblique motive to avoid payment of entry tax and, therefore, the petitioner can be asked to pay entry tax first and only thereafter claim refund of entry tax to the extent of VAT already paid.

We heard learned counsels for the parties and considered the orders of the authorities below. It is not in dispute that so far as the Department is concerned, there has been no loss caused to it on account of any action of the petitioner. So far as over all collection of tax under the provisions of the Bihar Entry Tax and the Bihar VAT Act taken together are concerned, we also agree with the contention of learned counsel for the petitioner that if the petitioner had complied with the letter of the two enactments, then it would have been required to obtain registration under the Bihar Entry Tax, 1993 and file returns under both the Acts practically at the same time showing the payments of the amounts that have been made firstly, as an entry tax and thereafter after claiming set off of the amount so paid in terms of the provisions of sub-section (2) of Section 3 of the Bihar Entry Tax Act, only the remaining amount would have been required to be paid under the Bihar VAT Act. Thus, it is certainly not a case of any attempt to deliberately avoid payment of tax under either of the Acts and the petitioner has, as a matter of fact, paid the entire amount it would have been required to pay under the two Acts collectively. That having been done, the case of the petitioner appears to be squarely covered by the decision in the case of United Breweries Ltd. (supra). Even, if the petitioner is required to pay the amount under the Entry Tax Act, it would be entitled to set off the said amount with respect to liability under the Bihar Value Added Tax Act and the said amount, which would now be required to be deposited under the Entry Tax Act, would have to be refunded under the Bihar VAT Act.

We are thus of the view that in such a situation the Department ought not to have been taken the technical view as it has taken in the present case merely on the ground that there was an audit objection and the proper course for the authorities of the Commercial Taxes Department would have been to adjust the tax demanded under the Entry Tax Act from the tax paid under the

VAT Act.

So far as the reliance placed by learned counsel for the State upon the observations made in the case of M/s. Premier Irrigation Adritek Pvt. Ltd. (supra) is concerned, the same does not appear to be of any assistance as this is not a case where the omission to have got registered under Bihar Entry Tax Act was not bona fide or the registration was evaded with an oblique motive for payment of entry tax since no benefit has been derived by the petitioner by any such non-payment in the facts and circumstances of the present case.

We, however, may refer to the last part of the observation made in paragraph No.65 of the said decision where it is observed that the defaulter can be asked to pay Entry Tax first and then claim refund of the Entry Tax paid to the extent of the VAT amount already paid. According to us, the correct legal position is as stated in the earlier decision in the case of United Breweries Ltd. (supra), that if the amount of tax has already been paid under the Bihar Finance Act (now, the Bihar VAT Act), then under the second proviso of sub-section (2) of Section 3 of the Bihar Entry Tax Act, the said amount has to be adjusted against the liability under the Bihar VAT Act and, therefore, the claim for refund of the similar amount has to be made under the Bihar VAT

Act. We are, however, of the view that the same is not required to be done in the present matter.

So far as the question of liability under Section 31 (2) of the Act is concerned, the respondents have not produced any material before us to show that the petitioner has concealed, omitted or failed to disclose full and correct particulars of sale or purchase before the authorities of the Commercial Taxes Department, as all the facts were already available to them on the basis of the return filed by the petitioner under the VAT Act. That being the position, on the basis of some technicality, it is not open to the respondents to invoke the provisions of sub-section (2) of Section 31 of the VAT Act for levy of penalty. As has been clearly held by the Apex Court in the case of Rajasthan Spinnig and Weaving Mills (supra), the penalty under such provision is punishment for an Act of deliberate deception by the assessee with the intent to evade tax by adopting any of the means mentioned in the corresponding section. Such is not the case in the present matter.

In the result, the writ applications are allowed. So far as the assessment under the Bihar Entry Tax is concerned, we do not see any reason to interfere with the same, except to state that the tax liability created thereby shall be adjusted against the amounts already paid under the VAT Act by treating the same to have already been paid under the Bihar Entry Tax Act, 1993. In view of what has been held by us above, the impugned order dated 23.2.2015 in so far as it directs remand of the proceedings under Section 31 (2) of the Bihar VAT Act is also quashed.

(Ramesh Kumar Datta, J)

V.P.Sinha/-

(Amaresh Kumar Lal, J)

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