IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.1761 of 2015

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M/s N.M.Food Product 48 G Block, Shri Ganganagar, Rajasthan through its authorized signatory Surjeet Singh S/o Ashok Kumar resident of village - Gajaraula Jay Singh, Tehsil - Thakurdwara, District - Moradabad (U.P.)

.... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary Cum Commissioner Department of Commercial Taxes, New Secretariat Bailey Road, Patna
2. The Principal Secretary Cum Commissioner, Department of Commercial Taxes, New Secretariat Bailey Road, Patna
3. The Principal Secretary Cum Commissioner, Department of Mines & Geology, Govt. of Bihar, Patna
4. The District Magistrate Cum Collector, Munger
5. The Deputy Commissioner of Commercial Taxes, Munger Commercial Taxes Circle, Munger
6. The Mines Development officer, Munger

.... Respondent/s

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with

Civil Writ Jurisdiction Case No.4867 of 2015

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M/s Mahadev Enclave Pvt. Ltd. a registered company having its registered office at B- 37, Ayodhya Marg, Hanuman Nagar, Jaipur, Rajasthan through its authorized representative Bhupinder Singh, S/o Shri Ratan Singh, R/O- H- No. 762 Santnagar, Tehsil- Rania, District- Sirsa (Haryana).

.... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary Cum Commissioner Department of Commercial Taxes, New Secretariat Baily Road, Patna.
2. The Principal Secretary Cum Commissioner Department of Commercial Taxes, New Secretariat Baily Road, Patna.
3. The Principal Secretary Cum Commissioner, Department of Mines & Geology, Govt. of Bihar, Patna.
4. The District Magistrate Cum Collector, Bhagalpur.
5. The Deputy Commissioner of Commercial Taxes, Bhagalpur Commercial Taxes Circle, Bhagalpur.
6. The Mines Inspector, Banka.

.... Respondent/s

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Appearance :

(In CWJC No.1761 of 2015)

For the Petitioner	:	Mr. Gautam Kumar Kejriwal
For Respondent Nos.1,2&5	:	Mr. Vikash Kumar, A.C. to PAAG
For Respondent Nos.3,4&6	:	Mr. Devenra Kumar Sinha, Sr. Advocate
		Mr. Rajendra Prasad, Spl P.P., Mines

(In CWJC No.4867 of 2015)

For the Petitioner	:	Mr. Gautam Kumar Kejriwal
For Respondent Nos.1,2&5	:	Mr. Vikash Kumar, A.C. to PAAG
For Respondent Nos.3,4&6	:	Mr. Devenra Kumar Sinha, Sr. Advocate
		Mr. Rajendra Prasad, Spl P.P., Mines

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CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA
and
HONOURABLE MR. JUSTICE SUDHIR SINGH

ORAL ORDER

(Per: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA)

15 11-01-2016 Heard learned counsels for the parties.

The petitioner seeks quashing of the order dated 06.02.2014 passed by the Commissioner of Commercial Taxes-cum-Principal Secretary, Government of Bihar, Patna, by which he has directed the concerned authorities to collect advance tax under Section 3 (7) of the Bihar Value Added Tax Act, 2005 at twice the amount of settlement at the rate of 5% since the price at which the minerals are sold is more than the price payable under the Mines and Minerals (Development and Regulation) Act, 1957 with regard to sand mining and for the consequential reliefs.

The petitioner, M/s. N.M. Foods Product, had participated successfully in tender invited for settlement of sand ghat in the State of Bihar with regard to Group-1, Munger. The facts of the second case (C.W.J.C. No.4867/2015) are not being narrated, as in both the matters the challenge is to the same order of the Commissioner of Commercial Taxes with regard to collection of advance tax at a turnover twice the amount of settlement. The only difference is that in the second case the Deputy Commissioner of Commercial Taxes, as a matter of fact, did not insist upon the payment of advance tax at twice the amount of settlement in view of the pendency of the present writ application. With regard to the petitioner of the first writ petition, the Deputy Commissioner of Commercial Taxes Department, Munger insisted upon deposit of advance tax at the rate of 10% instead of prescribed rate of 5%. In the other writ petition, the demand was not made, it is submitted, on account of the pendency of the writ petitions before this Court and subsequently this Court also by interim order dated 16.10.2015 had directed to stay that part of the order, which is under challenge in the writ petitions.

Learned counsel for the petitioner submits that in terms of Section 3 (7) and (8) of the Bihar VAT Act, 2007 read with Rule 7 of the Bihar VAT Rules, 2005, the advance tax can be collected upon an estimation of the same being made and further the prescribed authority may require the dealer to furnish an advance estimate of his taxable turnover for that year so as to provisionally determine the amount of tax payable by the dealer and call upon the dealer to pay the advance tax. It is further submitted that no such steps were taken by the prescribed authority. It is the Commissioner, who has acted on his own and directed the concerned authorities to collect advance tax at twice the amount of settlement, as the price charged for the selling of sand is alleged to be much higher than the settlement amount. It is also submitted by learned counsel for the petitioner that the effect of the said order of the Commissioner is to literally direct payment of advance tax at twice rate of tax as nothing has been brought on the record that sand would be sold at the higher price than the settlement amount. It is stated that it is evident from the NIT itself that the formula for fixation of price is given therein and it is not open to the dealer charge any amount than what has been fixed as per the NIT. Thus, there is no question of collecting the tax on twice the settlement amount. It is submitted by learned counsel for the petitioner that in terms of the said formula given in the NIT, the Collector has notified the sale price. Hence, the order of the Commissioner of Commercial Taxes is without any legal or rational basis.

Learned counsel for the State has sought to argue the matter on the basis of the counter affidavit filed on behalf of respondents stating that the settlement of sand as minor mineral has been done by public auction by the Collector to the highest bidder on annual basis and what has been transferred, as in the present matters, is a right to mine the sand on payment of a lump sum amount of Rupees One 1,32,00,000/- irrespective of the quantity of sand lifted and irrespective of the sale value of the extracted sand and thus the estimated taxable turnover towards sale of extracted sand has been determined at twice of the lump sum amount deposited under Mines and Minerals (Development and Regulation) Act, 1957 and advance tax has been realized, accordingly, in terms of the order for six months. It is also the stand that if in the assessment of tax any refund is found due, the same would be refunded to the petitioner. The stand taken in the counter affidavit is not at all supported by any factual figures as per the terms and conditions as laid down in the NIT itself.

As a matter of fact, it is the stand of the petitioner that if any sand is lifted beyond the quantity that has been auctioned then for that separate transit permit would be required, which is given after collecting the royalty and the VAT at the rate of 5% at the said amount and thus no sand would be lifted without paying VAT at the prescribed rate even before lifting of the sand.

The counter affidavit filed on behalf of the State does not meet the stand of the petitioner in any manner. Learned counsel for the State is unable to satisfy us as to how VAT can be effectively charged at the rate of 10% as advance tax when the rate fixed for the tax on sand is only at 5%. To say that the Department will collect advance tax at twice the settlement amount and then refund the same is wholly unjustifiable collection of tax and the same amounts to illegal action exaction.

In the aforesaid view of the matter, the impugned order dated 06.02.2014 of the Commissioner of Commercial Taxes Department, in so far as it directs the collection of advance tax under the Bihar VAT Act at twice the settlement amount is found to be wholly illegal and is to that extent quashed.

It is submitted by learned counsel for the State that today the State has filed a supplementary counter affidavit bringing on record the impugned order of assessment passed under Section 25 of the Bihar VAT Act

In our view, the same has no relevance to the decision in the present matters. It is for the petitioner who may, if aggrieved by the same, challenge it before the appropriate forum.

Both the writ applications are, accordingly, allowed.

V.P.Sinha/-

(Ramesh Kumar Datta, J)

(Sudhir Singh, J)

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