# IN THE HIGH COURT OF JUDICATURE AT PATNA

**Civil Writ Jurisdiction Case No.17216 of 2015**

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Padam Gas Distributors, proprietorship concern having its office at Forbesganj, P.O. + P.S.- Forbesganj, District- Araria through its proprietor, Padam Kumar Badalia, son of Sri Rikhab Chand Badalia, resident of Forbesganj, P.O. + P.S.- Forbesganj, District- Araria

.... .... Petitioner/s

Versus

1. The State of Bihar throrugh Commissioner of Commercial Taxes, Bihar having its office at Vikas Bhawan, Patna
2. Deputy Commissioner of Commercial Taxes (In-charge) Forbesganj Circle, Forbesganj

.... .... Respondent/s

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**Appearance :**

For the Petitioner/s : Mr. D.V.Pathy
Mrs. Manju Jha
Mr. Ram Naresh Jha

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

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

ORAL JUDGMENT

**(Per: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA)**

**Date: 20-04-2016**

Heard learned counsel for the petitioner and learned counsel for the State.

The petitioner seeks quashing of the order dated 09.07.2015 passed by the Deputy Commissioner of Commercial Taxes (In-charge), Forbesganj Circle, Farbesganj for the period 2009-10.

Learned counsel for the petitioner, at the outset, submits that the challenge to the impugned order dated 09.07.2015 in the present matter is confined only to the imposition of penalty thrice the amount payable on the ground of short payment of entry tax.

It is further submitted that another issue, which arises from this order pertains to levy of entry tax at a rate higher than the VAT leviable on the same goods, which are under challenge in a large number of writ petitions, which have been admitted by this Court and with respect to which the petitioner had also filed writ petition for the period 2008-09 and, accordingly, learned counsel seeks liberty to challenge the order dated 09.07.2015 on the said ground of vires of the said provision by way of a separate writ petition. With the aforesaid liberty granted, the present writ application shall be confined only to the part of the order passed under Section 31 (2) of the Bihar Value Added Tax Act, 2005 levying penalty of three times of the tax leviable in the matter.

The petitioner, being a proprietorship firm, is engaged in the business of sale of L.P.G. and other allied accessories and during the period in question, i.e., 2009-10 he had filed his return showing a gross turn over of Rs. 3,52,20,982.96 and had paid VAT at the rate of 1% of the taxable sales at Rs.3,31,844.23. The petitioner had further imported LPG from outside the State of the value of Rs.1,20,02,670/- and he paid entry tax at the rate of 4% of Rs.42,55,102/- till 22.06.2008. Thereafter from 23.06.2008, the petitioner had paid entry tax at the rate of 1% on the remaining import value of Rs.77,47,568/-. The petitioner while calculating the tax payable under the Bihar VAT Act deducted the whole of entry tax of Rs.2,46,680/- from his tax liability under the said Act.

Thereafter, the returns filed by the petitioner were deemed to have been accepted under Section 26 of the Act, as no action has been taken by the concerned officer of the Commercial Taxes Department upon the returns filed under Section 25 of the Act. Subsequently, the CAG raised two audit objections with regard to the said period. The first objection related to the petitioner having claimed excess adjustment of entry tax to the extent of Rs.1.83 Lacs, as it was noticed on examination of annual return/tax audit report/E.T.-V and other relevant papers placed on the record that the dealer had paid entry tax at the rate of 4% on the purchase of LPG worth Rs.42,55,102/- during the period 2009-10 and admitted his tax liability @ 1% under the Bihar VAT Act as per the prescribed rate but scrutiny of RT-III revealed that the dealer had taken the set off of entire entry tax paid against VAT which was irregular and the dealer was actually entitled to adjust the entry tax up to the extent of 1% only, i.e., Rs.42,551.02. Therefore, the dealer was found liable to pay excess adjusted entry tax along with interest, which was calculated on the said amount.

The other objection of the CAG related to the application of incorrect rate of entry tax to the extent of Rs.10,30,813.92, as it was found that the dealer had admitted his entry tax liability at the rate of 4% on Rs. 42,551.02/- and at the rate of 1% on Rs.77,47,568/-, whereas the entry tax during the period 2009-10 was at the rate of 4% which resulted in application of incorrect rate of entry tax, that makes the dealer liable to pay differential rate of entry tax along with penalty and interest under Section 31 (2) of the Bihar VAT Act.

The respondent No.2 upon receipt of the CAG objection issued notice to the petitioner and thereafter passed the impugned order dated 09.07.2015 in terms of the said audit objection.

At the outset, it is evident that out of the two objections raised by the CAG, the first related to the Bihar Value Added Tax Act, 2005 while second objection related to the Bihar Tax on Entry of Goods into Local Areas for Consumption, Use or Sale therein Act, 1993 and thus there ought to have been two separate proceedings and two separate orders, but the same has been dealt with by the same impugned order dated 09.07.2015.

Learned counsel for the petitioner does not seriously contest the order passed on the first objection with regard to adjustment of excess amount of entry tax from the entire tax liability under the Bihar VAT Act, whereas the adjustment should have been only towards the amount of Bihar VAT Act payable on the sale or purchase of goods after import, for which the entry tax @ 4% had been paid. A faint attempt was made to show that the second proviso of sub-section (2) of Section 3 of the Entry Tax Act permitted the adjustment of the entire amount of entry tax from the tax liability under the Bihar Value

Added Tax Act.

On a consideration of the said provision specially in the context of third proviso to sub-section (2) of Section 3 of the Entry Tax Act, it is evident that the deduction of tax liability under the Bihar VAT Act shall be only to the extent of tax paid on the said scheduled goods under the Entry Tax Act.

Thus, so far as the first part of the order levying tax and interest under Section 31 (1) of the Bihar VAT Act is concerned, with respect to the assessment under the VAT Act, this Court does not find any force in the submission of learned counsel for the petitioner. The said contention of the learned counsel in this regard is, accordingly, rejected.

Learned counsel for the petitioner, however, submits that the applicability of the provisions of Section 31 (2) of the Bihar VAT Act would only be in a case where the dealer has concealed, omitted or failed to disclose full and correct particulars of such sale of purchase or input tax credit and only in the said case the dealer can be saddled with penalty to pay a sum equal to three times the amount of tax which is or may be assessed on the turnover of sale or purchase which escaped assessment.

Learned counsel for the petitioner submits that it is evident from the CAG's report brought on the record in the counter affidavit that it was in course of the examination of annual return (ET-V) filed by the dealer that it was noticed that the dealer had purchased LPG worth Rs.1,20,02,670/- from outside the State during the period 2009-10. Thus, there is no finding either of the Comptroller & Auditor General or the Assessing Officer in the impugned order dated 09.07.2015 that the petitioner had concealed, omitted or failed to disclose full particulars of his sale or purchase, rather there is only a finding that for certain amount of turnover the petitioner had paid entry tax at the lower rate, i.e., 1% instead of the 4% payable. It is submitted that such payment of tax at the lower rate is to be rectified upon scrutiny of return under sub-section (1) (c ) of Section 25 of the said Act to ensure as to whether the rates of tax have been applied correctly or not by the dealer and in case it is found that they have not been so correctly applied then a notice under Section 25 (2) of the Act has to be served in the prescribed form on the concerned dealer directing him to pay within thirty days the extra amount of tax along with interest, if any, payable and furnish the chalan evidencing such payment and/or to explain within 30 days that the return or returns filed by him do not suffer from any error and all requirements specified in clause (a) to (f) of sub-section (1) have been complied with and, after affording a reasonable opportunity to adduce necessary evidence, pass such order in the matter as the Assessing Officer may deem fit. It is further submitted that under sub-section (3) of Section 25 of the Act if any tax or interest is found to be payable by a dealer, a notice in the form and manner prescribed shall be served upon the dealer requiring him to pay the tax and interest within the time as may be prescribed or the same shall be deemed to be an arrear of tax within the meaning of Section 39 of the Act. It is contended that there is provision to scrutinize every return and so long as the return filed discloses the full particulars of the sale or purchase, there is no question of levy of any penalty.

It is further submitted that upon failure of the concerned officer to scrutinize return under Section 25 of the Act, the same is deemed to have been assessed. Thereafter, the only remedy under Section 3 (1) of the Entry Act is to recover the tax paid at lower rate while assessing or re-assessing the said tax and payment of the same along with interest.

Learned counsel for the State submits that the authorities have rightly acted in the present case under Section 31 (1) of the Act as the petitioner had knowingly not paid the tax for part of the period under assessment at the proper rate but he had correctly paid entry tax at the rate of 4% for the earlier period and further deliberately for the remaining period he paid the same at a lower rate of 1% and upon such deliberate failure to pay tax @ 4%, the Assessing Officer was entitled to levy penalty under sub section (2) of Section 31 of the Act.

We are unable to accept such submission of learned counsel for the State and find sufficient force in the submission of learned counsel for the petitioner. It is evident both from the report of the CAG as also from the impugned order 09.07.2015 that the same has been passed on the basis of the full and correct particulars of sale or purchase already disclosed by the petitioner in his entry tax returns and thus it is not a case of any concealment, omission or failure to give correct particulars of sale or purchase. All that has been done in the CAG's report is to point out that there was payment of less tax and not any concealment or omission to disclose full and particulars of sale or purchase. The officer concerned was required to make scrutiny of the returns of the petitioner, which was his bounden duty under Section 25 (1) of the Act, which he has failed to do and the entire objection of CAG is based upon the returns already filed and not upon any evidence which has come to his notice. Thus, it cannot be said to be a case where the petitioner had concealed or failed to disclose full particulars of purchase or sale in the returns. It is clearly a case under Section 25 (1) ( c ) of the Act and even under Section 31 (1) of the Act such failure to assess the tax at a proper rate can be rectified by assessing or re-assessing the same along with interest.

Unless there is a finding of concealment, omission or failure to disclose full particulars of sale or purchase, there can be no question of resorting to the provision of Section 31 (2) of the Act. Nothing is found in the impugned order nor in the counter affidavit filed on behalf of the respondents showing such concealment, omission or failure to disclose full and correct particulars of sale or purchase or input tax credit.

In support of his stand, learned counsel for the petitioner has relied upon a decision of this Court in the case of Unitech Pvt. Ltd. vs. The State of Bihar and others along with analogous cases reported in 2016 (1) PLJR 147, which is clearly applicable to his case.

In the light of the aforesaid discussions, the writ application is partly allowed and the impugned order dated 09.07.2015 is quashed to the extent of penalty under Section 3 of the Bihar VAT Act read with Section 8 of the Bihar Entry Tax Act.

We may observe at this stage that the officers of the Commercial Taxes should be careful in the future in not passing a single order in such matters where separate orders ought to have been passed under the Bihar VAT Act and the Bihar Entry Tax Act.

**(Ramesh Kumar Datta, J)**

V.P.Sinha/-

**(Sudhir Singh, J)**

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