IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.17151 of 2014

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M/s Indian Oil Corporation Ltd., a Company incorporated under the Companies Act, 1956 having its Registered Office at G-9, Ali Yavar Jung Marga, Bandra (East), Mumbi - 400051 and also carrying on business at Lok Narayan Bhavan, Dak Bunglow Road, P.S. Kotwali, Town and District Patna through its Assistant Manager, Finance, Punit Jain, S/o Sri Bajrang Lal Chouraria, Resident of Vishal Kunj Apartment, Kajipur, P.S. Kadampur, Town and District-Patna.

.... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary-cum- Commissioner of Commercial Taxes , Bihar, Vikash Bhawan, Bailey Road , Patna.
2. The Dy. Commissioner of Commercial Taxes, Special Circle, Patna.
3. The Assistant Commissioner of Commercial Taxes, Special Circle, Patna.

.... Respondent/s

With

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Civil Writ Jurisdiction Case No. 4870 of 2015

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M/s Indian Oil Corporation Ltd., a Company incorporated under the Companies Act, 1956 having its Registered Office at G-9, Ali Yavar Jung Marga, Bandra (East), Mumbai - 400051 and also carrying on business at Lok Narayan Bhavan, Dak Bunglow Road, P.S. Kotwali, Town and District Patna through its Chief Finance Manager, Sudhwa Brata Choudhury, S/o Late Saktipada Chaoudhury, Resident of S.K. Puri, P.S. S.K. Puri, Town and District Patna.

.... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary -cum- Commissioner of Commercial Taxes , Bihar, Vikash Bhawan , Bailey Road , Patna.
2. The Dy. Commissioner of Commercial Taxes, Special Circle, Patna.
3. The Assistant Commissioner of Commercial Taxes, Special Circle, Patna.

.... Respondent/s

With

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Civil Writ Jurisdiction Case No. 5022 of 2015

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M/s Indian Oil Corporation Ltd., a Company incorporated under the Companies Act, 1956 having its Registered Office at G-9, Ali Yavar Jung Marg, Bandra (East), Mumbai-400051 and also carrying on business at Lok Nayak Bhawan, Dak Bunglow Road, P.S. Kotwali, Town and District Patna through its Chief Finance Manager, Sudhwa Brata Choudhury S/o Late Saktipada Choudhury Resident of S.K. Puri, P.S. S.K. Puri, Town and District Patna.

.... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary-cum-Commissioner of Commercial Taxes, Bihar, Vikash Bhavan, Bailey Road, Patna.
2. The Dy. Commissioner of Commercial Taxes, Special Circle, Patna.
3. The Assistant Commissioner of Commercial Taxes, Special Circle, Patna.

.... Respondent/s

With

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Civil Writ Jurisdiction Case No. 9566 of 2015

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M/s Indian Oil Corporation Ltd., a Company incorporated under the Companies Act, 1956 having its registered office at G - 9, Ali Yavar Jung Marg, Bandra (East), Mumbai - 400051 and also Carrying on business at Lok Nayak Bhavan, Dak Bunglow Road, P.S. Kotwali, Town and District Patna through its C.F.M., BSO, Jagdish Kumar S/o Shri P.C. Karira, Resident of Flat No. F - 603, Ganga Five, Jalalpur City, P.S. Danapur, District - Patna.

.... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary-cum-Commissioner of Commercial Taxes, Bihar, Vikash Bhawan, Bailey Road, Patna.
2. The Dy. Commissioner of Commercial Taxes, Special Circle, Patna.
3. The Assistant Commissioner of Commercial Taxes, Special Circle, Patna.

... . Respondent/s

With

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Civil Writ Jurisdiction Case No. 9581 of 2015

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M/s Indian Oil Corporation Ltd., a Company incorporated under the Companies Act, 1956 having its registered office at G-9, Ali Yavar Jung Marg, Bandra (East), Mumbai - 400051 and also carrying on business at Lok Nayak Bhavan, Dak Bunglow Road, P.S. Kotwali, Town and District Patna through its CFM, BSO, Jagdish Kumar, S/o Shri P.C. Karira, Resident of Flat No. F-603, Ganga Five, Jalalpur City, P.S. Danapur, District- Patna.

.... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary-cum-Commissioner of Commercial Taxes, Bihar, Vikash Bhavan, Bailey Road, Patna.
2. The Dy. Commissioner of Commercial Taxes, Special Circle, Patna.
3. The Assistant Commissioner of Commercial Taxes, Special Circle, Patna.

.... Respondent/s

With

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Civil Writ Jurisdiction Case No. 13034 of 2016

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M/s Indian Oil Corporation Ltd., a Company incorporated under the Companies Act, 1956 having its Registered Office at G-9, Ali Yavar Jung Marg, Bandra (East), Mumbai-400 051 and also carrying on business at Lok Nayak Bhava, Dak Bunglow Road, P.S. Kotwali, Town and District Patna through its Accounts Officer, Manoj Kumar Mahto, S/o Sri R.P. Mahto, Resident of Flat No. 101, Grand Rashida Apartment, Bank Road, P.S. Gandhi Maidan, District- Patna

.... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary-cum-Commissioner of Commercial Taxes, Bihar, Vikash Bhawan, Bailey Road, Patna.
2. The Dy. Commissioner of Commercial Taxes, Special Circle, Patna.

3. The Assistant Commissioner of Commercial Taxes, Special Circle, Patna.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Arvind Datar, Senior Advocate
Mr. S. D. Sanjay, Senior Advocate
Mr. Alok Kumar Agrawal, Advocate
Mr. Alok Kumar, Advocate
Mrs. Priya Gupta, Advocate
Mr. Rishikesh Barua, Advocate

For the Respondent/s : Mr. S. Ganesh, Senior Advocate
Mr. Lalit Kishore, PAAG-I
Mr. Vikash Kumar, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE
And
HONOURABLE MR. JUSTICE SUDHIR SINGH

C. A. V. JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date: 19-04-2017

In these petitions, the Indian Oil Corporation, hereinafter referred to as 'the Corporation', challenge, various orders passed by the Assistant Commissioner of Commercial taxes, Special Circle, Patna, pertaining to imposition of entry tax for various periods between 2008-09 to 2014-15, as different orders have been passed on various dates, they are challenged separately in each of the petitions. However, as the facts and questions of law involved are identical, all the petitions are being disposed of by this common order.

2. For the sake of convenience, pleadings, documents and materials available in the record of CWJC No.17151 of 2014 are being referred to in this order.

3. The petitioner is a Government Company incorporated under the provisions of the Companies Act, 1956. The petitioner-Corporation is a dealer as defined in the Bihar Value Added Tax Act, 2005, the Central Sales Tax Act, 1956 and the Bihar Tax on Entry of Goods in to Local Areas for Consumption, Use or Sale Therein Act, 1993 (hereinafter referred to as the 'VAT Act', 'Central Act' and the 'Entry Tax Act', respectively).

4. In the State of Bihar, the Corporation has its marketing division with branches at Barauni (Begusarai), Patna, Ara, Raxaul, Gaya Airport and Patna Airport. From these branches, sales of petroleum products are effected. It is said that the Corporation receives crude oil which is imported into the State of Bihar, enters Barauni where the Corporation has its Oil Refinery and after undertaking certain manufacturing process, the crude oil is converted into various petroleum products, like High Speed Diesel, Petrol, Kerosene oil etc. The products manufactured in the Barauni Oil Refinery is from the crude material received from outside Bihar and then sent to the Branch in Patna primarily through a pipeline. Products are also sold directly from Barauni to various other marketing companies including the Nepal Oil Corporation from the Raxaul Depot. However, as far as present petitions are concerned, it is said that the petroleum products, particularly, High Speed Diesel and Petrol are sold by the Corporation

to other Oil Marketing Companies also known as 'OMCs', namely Bharat Petroleum and Hindustan Petroleum, who take the products from the depot of the Corporation situated primarily in Patna and the Oil Marketing Companies thereafter sell the products either to their retail dealers or send it for sale through the Companies Petroleum Outlet. The petitioner, apart from selling the petroleum products to the Oil Marketing Companies after they enter the local area of Patna, also sell the petroleum products to local retailers and also through their petroleum outlets in Patna. According to the petitioner, they are registered with the Special Circle of the respondent-Department at Patna and they have been filing returns for all the transactions that take place in Bihar with the Special Circle at Patna pertaining to VAT, Entry Tax, and the Central Sales Tax. As far as the products sold to the retailers by the Corporation after the product enters into the local area is concerned, initially on entry into Barauni local area, the Corporation pays entry tax at 16% and thereafter when the product enters the local area of Patna 24.5% VAT is paid and set off as per the provisions, namely, second proviso to Section 3 (2) of the Entry Tax Act and adjustment in payment is claimed. For the product, sold to other Oil Marketing Companies (OMC) after payment of entry tax by the Corporation on the product entering the local area of Barauni, 16% entry tax is paid. However, on entering into Patna local area, no VAT is paid in view of the exemption provided vide Notification issued by the competent authority on 04.05.2006, when the Oil Company sell the oil so purchased from the Corporation to the retailer, again they pay VAT at 24.5%, but the adjustment provided under the second proviso to Section 3(2) of the Entry Tax Act is not available in this transaction, and, therefore, in the matter of sale through the Oil Companies, the set off as provided under the second proviso to Section 3(2) of the Entry Tax Act is not available. Consequently, with respect to this transaction, both VAT and Entry Tax are paid without any set off being provided.

5. It is a case of the petitioner that for the periods in question, they had submitted the returns as per the statutory provisions well within the time period prescribed, assessments were completed and all tax dues paid. However, to their surprise, based on certain audit objections raised by the Accountant and Auditor General of Bihar, the respondent- Deputy Commissioner of Commercial Taxes, Special Circle, Patna with respect to the period 2011-12, subject matter of dispute in Civil Writ Jurisdiction Case No.17151 of 2014, issued a show cause on 16.04.2014, vide Annexure-1, in exercise of the powers available under Section 8 of the Entry Tax Act read with Section 33 of the VAT Act making a demand for tax based on audit objection dated 4.4.2014, contained in Annexure-1 itself. The petitioner filed show

cause explaining the legal position and claimed that by virtue of the powers available under Section 33 of the VAT Act read with Section 8 of the Entry Tax Act, the demand raised is wholly illegal, the action is contrary to certain judgments and challenge was made to the show cause notice. However, the respondents did not accede to the objections, on the contrary, issued another notice on 21.06.2014, vide Annexure-3. This was also replied to and thereafter, a representation was also submitted, vide Annexure-6 on 22.08.2014, but ignoring all these when the impugned order was passed and the demand was raised, vide Annexure-7 on 21.07.2014, the petitions filed.

6. As similar orders and demands have been raised for various periods between 2008-09 to 2014-15, all these orders are challenged in these writ petitions.

7. Challenge to the action is made by contending that under the scheme of the Entry Tax Act, any Scheduled goods which is imported from outside the local area or the State for the purpose of sale and when these goods are taken out of the local area without any sale, use or consumption, within the local area, they cannot be subjected to entry tax. It was also said that in view of the repeal of the Bihar Finance Act by the Bihar VAT Act, 2005, Section 8 of the Entry Tax Act does not become workable and in the absence of any substantive provision for the purpose of assessment under the Entry

Tax Act, invoking the provisions of Section 33 of the VAT Act and based on an audit objection, the assessment cannot be reopened.

8. Challenge is also made to the imposition of interest by contending that in the Entry Tax Act, there being no substantive provision for imposition of interest on delayed payment of tax, interest could not be levied with the aid of VAT Act. Finally, after filing of the petition and during the pendency of the proceedings, second proviso to Section 3(2) of the Entry Tax Act was also challenged by contending that this proviso is *ultra vires* of the Constitution and even if it is not *ultra vires*, it should be read down or being arbitrary and discriminatory in nature struck down.

9. Based on the aforesaid grounds of challenge, Sri Arvind Datar, and Sri S. D. Sanjay, learned Senior Counsels, appearing for the petitioners, argued that the second proviso to Section 3(2) of the Entry Tax Act is *ultra vires* or in the alternate it may be declared as arbitrary and unreasonable or it may be read down. It was argued that the aforesaid provision seeks to levy tax on the goods and not on the dealer and if the goods have already suffered entry tax, it cannot be subjected to VAT in the same local area and to that extent, the provision will have to be read down else it be declared as *ultra vires* being discriminatory and arbitrary. It is said that the products sold to the Oil Marketing Companies are taken to different local areas

to be used either by them or they sell it on payment of VAT and as there is no use or consumption of the product in the local area at Patna, the petitioner cannot be held liable for payment of entry tax.

10. Taking us through the provision of Section 3(2) and the proviso to the said Section of the Entry Tax Act it was submitted that the provision is *ultra vires* and discriminatory in nature and if given effect to would result in serious absurd consequences and the discrimination in question was tried to be demonstrated by showing difference in the payment of petrol to be purchased by a consumer on the basis of two different taxing procedure followed. In order to illustrate the hostile discrimination, it was submitted before us that if Motor Spirit worth Rs.100 is brought from Barauni Local Area to Patna and when the same is sold to a retailer by the Corporation, the landing price for purchase would be Rs.124.5 paise after payment of 16% entry tax for entry of goods into the State, and 24.5% as VAT when the product is sold to the retailer at Patna. This is after grant of set off under the second proviso to Section 3(2) of the Entry Tax Act. However, when the same petrol is sold through Oil Companies, i.e. Bharat Petroleum Corporation Limited or Hindustan Petroleum Corporation Limited, the landing price to be paid by the retailer comes to Rs.144.42 paise. Here, entry tax at 16% is paid by the Corporation when the product enters into the State of Bihar. However, when the

petitioner sells the product to any Oil Company after the goods enter Patna, no VAT is payable in view of the exemption granted vide Notification dated 04.05.2006, but when the Oil Company sells the same to its retailer VAT at 24.5% is paid and the set off or adjustment under the second proviso to Section 3(2) of the Entry Tax Act in this case is not provided as a consequence thereof, the retailer has to pay the price which is approximately more than Rs.20/- and therefore, it is said that in the matter of denying the benefit of the second proviso to Section 3(2) of the Entry Tax Act in the second case, a hostile discrimination occurs, which is unreasonable, arbitrary, unworkable and therefore, on these grounds, the argument canvassed was that the provision is un-sustainable.

11. Placing reliance upon a judgment of Hon'ble the Supreme Court in the case of **Commissioner of Income-tax, Bangalore v. J. H. Gotla,** [AIR 1985 SC 1698]**,** it was argued that if the implementation of a provision by giving it strict legal construction leads to an absurd result which is not intended or which does not sub-serve the object of the legislature, such a provision should be declared as *ultra vires* or read down.

12. Similarly, reliance was placed to a judgment of the Supreme Court in the case of **State of Bihar and others v. Bihar Chamber of Commerce and others,** [(1996) 9 SCC 136]**,** to say that

the proviso is unsustainable.

13. By placing reliance on a judgment rendered in the case of **M/s. Indian Oil Corporation Limited & Anr. V. The State of Bihar & Ors.** [2007 (1) PLJR 502]**,** it was submitted that the provision made an apparent discrimination with regard to the same goods, it is dealt with in a different manner, in view of such a hostile discrimination in the matter of Scheduled goods brought into the local area being dealt with differently, the provision suffers from disability of being hostile and highly discriminatory in nature, therefore, liable to be struck down. Sri Arvind Datar took us through various provisions of the Act and tried to demonstrate that the second proviso is highly discriminatory, unworkable and therefore, even if it is not declared as *ultra vires*, it be read down to the extent that the discriminatory part of the provision is taken away.

14. However, during the course of hearing, he fairly submitted that in an earlier judgment on a petition filed by the petitioner themselves being Civil Writ Jurisdiction Case No.21535 of 2011 decided on 22.10.2013, even though this Court had dismissed the petition filed by the petitioner-Corporation by holding that the revenue has not committed any error in imposing entry tax on the petitioner in view of the provision of sub-section (2) of Section 3 and second proviso thereto, but, according to learned Senior Counsel this

judgment only refers to the second proviso of Section 3(2), it does not analyze the second proviso in the backdrop of the requirement of the charging Section, i.e. 3(2), and as this judgment is based on consideration of the second proviso only without taking note of the substantive provision, i.e. Section 3(2), the judgment heavily relied upon by the State for dismissal of the petition will not apply as it does not deal with the matter in accordance with the requirement of law inasmuch as the entire provision has not been taken note of. He further argued that this judgment rendered by a Division Bench of this Court is *sub-judice* in a Special Leave to Appeal pending before the Supreme court, and, therefore, ignoring the aforesaid judgment and holding it to be not applicable, the matter be decided.

15. Sri Arvind Datar further to demonstrate the discriminatory nature of the provisions so also the disastrous effect of its implementation invited our attention to a judgment of a Division Bench of this Court in the case of **Instakart Services Private Limited v. State of Bihar** (Civil Writ Jurisdiction Case No.6155 of 2016) decided on 27th September, 2016 and reported in **2016 SCC OnLine Pat 4865,** to canvass a contention that somewhat similar act which resulted in a product being subjected to tax and the consequential effect of different land pricing of the goods at the hands of the customer was held to be discriminatory and interfered with.

16. Thereafter, on behalf of the petitioner, the next ground canvassed was that on the tax assessed, interest has been levied even though; there is no provision for levy of interest under the Entry Tax Act. It was argued that levy of interest, based on the provisions of the Bihar Finance Act and the VAT Act, is not permissible. In the absence of there being any substantive provision in the Entry Tax Act, imposition of interest with the aid of Section 8 and by applying the provisions of the Bihar Finance Act, is not sustainable. It was argued that until and unless, there is a specific substantive provision in the Entry Tax Act itself for levy of interest, the same cannot be levied with the aid of another Act. By taking us through the provision of Section 8 of the Entry Tax Act and the following judgments, it was vehemently argued that levy of interest in the facts and circumstances of the case is highly illegal and arbitrary. The judgments in this regard relied upon are:- **India Carbon Ltd. and others *Versus* State of Assam [**(1997) 6 SCC 479]**; J. K. Synthetics Limited *Versus* Commercial Taxes Officer** [(1994) 4 SCC 276]; **Shri Bhagwati Steel Rolling Mills *Versus* Commissioner of Central Excise and another** [(2016) 3 SCC 643**];** and an unreported judgment of this Court in the case of **M/s Shree Shanker Ice & Cold Storage Versus The State of Bihar & Ors.,** Annexure-8 at page-60 of the paper book, i.e. Civil Writ Jurisdiction Case No.19512 of 2010 decided on 07.03.2011**.** It was

pointed out to us in this regard that in the order passed for the year 2011-12 on 27.08.2014, the revenue being conscious of these facts did not levy interest, but for all other years, interest has been levied which is said to be unsustainable.

17. The third ground canvassed was that once the assessment proceedings were completed and the returns accepted after assessment of tax, then with the aid of Section 33 of the VAT Act, based on audit objection, the impugned action taken is unsustainable. It was argued that based on audit objection, such an action is unsustainable. It is said that Section 33 of the VAT Act or any provision thereto has not been incorporated into the Entry Tax Act and, therefore, with the aid of Section 8, the assessment cannot be reopened. In support thereof, reference was made to a judgment of this Court in the case of **The Union of India Versus The State of Bihar & Ors.** [2012 (4) PLJR 616], to argue that the provisions of Section 33 of the VAT Act are not incorporated into the Entry Tax Act and, therefore, the provisions of Section 33 of the VAT Act cannot be made applicable.

18. Finally, the last ground canvassed was that the product brought into the local area by the Corporation after its sale to the other Oil Companies is neither consumed or used within the local area, on the contrary, the product is taken out of the area without any

consumption or use by the Oil Companies, they sell it to the retail dealers who take it out to another local area and sell it there and in view of this, there being no use or consumption of the product within the local area of Patna after its sale; no entry tax on the product can be imposed and in support thereof, reliance was placed on a judgment of this Court in the case of **Hindustan Lever Ltd. & Anr. Versus The State of Bihar & Ors. [**2003 (1) PLJR 535]; and judgments of the Hon'ble Supreme Court in the cases of **Entry Tax Officer, Bangalore and others Versus Chandanmal Champalal & Co. and others,** [(1994) 4 SCC 463]**; State of Bihar & others Versus Bihar Chamber of Commerce and others,** [(1996) 9 SCC 136]**; Municipal Council, Jodhpur Versus M/s Parekh Automobiles Ltd., and others** [(1990) 1 SCC 367]**; and Burmah-Shell Oil Storage and Distributing Co. of India Ltd., Belgaum Versus Belgaum Borough Municipality, Belgaum** [AIR 1963 SC 906]**.**

19. It was also submitted during the course of hearing that once VAT has been paid by the other Oil Companies before taking out the material by sale in the local area, the revenue does not suffer any loss and, therefore, recovery of entry tax from the petitioner is unsustainable. Reference in this regard were made to a judgment of this Court in the case of **Indian Oil Corporation Ltd. Versus State of Bihar** [2014 (3) PLJR 677] and a judgment of the Madras High

Court in the case of **Kasi and Sethu Versus Deputy Commercial Tax Officer (DG-CTO), Kumbakonam and another** [2003] 131 STC 73. Reference was also made to a judgment of the Supreme Court in the case of **Jaswal Neco Ltd. *Versus* Commissioner of Customs, Visakhapatnam** [AIR (SCW)-2015-0-4542]**,** to say that when there is no provision like Section 33 of the VAT Act for reassessment in the Entry Tax Act with the aid of Section 8 of the Entry Tax Act, reassessment on the basis of audit report is impermissible.

20. Sri S.D. Sanjay, learned Senior Counsel, took us through various provisions and tried to indicate that in this case, the revenue has acted in an arbitrary and illegal manner and merely on the basis of audit objection, the action taken is unsustainable.

21. Refuting the aforesaid contentions, Sri S. Ganesh, learned Senior Counsel and Sri Lalit Kishore, learned Principal Additional Advocate General-I, submitted that the issue involved in this case is no more *res integra*. It already stands decided against the Corporation at their own instance with regard to certain orders passed by the Commercial Taxes Department, Patna on 22nd October, 2013, in CWJC No.21535 of 2011 (supra) wherein similar arguments based on the interpretation of second proviso of Section 3(2) of the Entry Tax Act has been negated by a Division Bench of this Court. They took us through the aforesaid judgment to say that once the question is already

considered and rejected by a co-ordinate Bench of this Court, the same is a binding precedent and the set off claimed having been rejected in the case of the petitioner; the question cannot be re-agitated and re-opened now in these proceedings. Learned Senior Counsel argued that only for wriggling out of this obstacle or to avoid applicability of the judgment in the case of CWJC No.21535 of 2011, the petitioner has challenged the constitutional validity of second proviso to Section 3(2) of the Entry Tax Act without any basis or any reasonable justification being available. They took us through various judgments in the matter of challenge to a taxing provision, the scope of judicial review with regard to taxing provision, limits to interference into such matters and submitted the provision in question is a reasonable one and merely because it is not to the liking of the petitioner or it operates adverse to the petitioner's liking, it cannot be declared as *ultra vires*.

22. Sri S. Ganesh, learned Senior Counsel, by referring to various judgments argued that there is no question of reading down the second proviso as claimed by the petitioner. In fact, what the petitioner wants is to re-write the proviso in the manner suggested by them which is not permissible in law. Sri S. Ganesh took us through the second proviso to Section 3(2) of the Entry Tax Act and argued that it is a provision which grants set off in the matter of payment of entry tax where VAT is already paid. This set off is being availed of

by thousands or lakhs of consumers, suppliers, importers and even the petitioner, in cases when they make sale through their retail outlet or retailers in the local area of Patna and if the contentions of the petitioner are accepted and provision declared *ultra vires*, it would result in disastrous consequences inasmuch the benefit of set off available to lakhs of assessees would be taken away which could never be the purpose or intention of this Court while considering the constitutional validity of a provision.

23. Sri S. Ganesh also seriously questions the *locus standi* of the petitioner in challenging the aforesaid provision. He argued that the petitioner wants this provision to be held highly discriminatory and arbitrary because the consumer is required to pay an extra amount for purchasing the final petroleum product or the Oil Company which purchases the product from the petitioner is not getting the set off.

24. Sri S. Ganesh submitted that if that be the position, it should be the consumers or the Oil Companies who should be aggrieved and not the petitioner. He submitted that the petitioner should have arranged its business in such a manner that the eventualities or any adverse effect of the provision could be avoided, he pointed out since February, 2014, the petitioner itself has arranged their business in such a manner that tax liability arising out of the said

provision are being avoided. He further tries to demonstrate before us by referring to various facilities available to the Petroleum Companies, the facilities of subsidy provided by the Union of India and the design behind the Corporation in not selling the product at Barauni itself to say that it was the Corporation's choice in bringing the product into the local area, Patna and selling it to the consumers. He referred to certain submissions made in the supplementary affidavit to say that it was a method derived by the Corporation on business consideration to save tax etc. For the present, we need not advert more on these considerations.

25. The judgments relied upon by Sri S. Ganesh with regard to constitutional validity were in the cases of **Smt. Somawanti and others *Versus* The State of Punjab and others** [AIR 1963 SC 151]; **Ganga Sagar Corporation Ltd. *Versus* The State of Uttar Pradesh and others** [AIR 1980 SC 286]**; Godfrey Phillips India Ltd. and another *Versus* State of U. P. and others** [(2005) 2 SCC 515]**; P.M. Ashwathanarayana Setty and others *Versus* State of Karnataka and others** [AIR 1989 SC 100]**; The Twyford Tea Co. Ltd., and another *Versus* The State of Kerala and another** [AIR 1970 SC 1133]**;** and the judgment of the Karnataka High Court **in the case of Gurusiddappa Nurandappa Uppin and etc.etc. *Versus* State of Karnataka and another** [AIR 1981 Karnataka 216]**,** to say

that even double taxation is not prohibited under the Constitution and, therefore, in this case where there is only a single taxation, not even a double taxation, the contention of the petitioner to seek declaration of the provision as *ultra vires* is unsustainable.

26. Sri S. Ganesh submitted that Entry Tax and Sales Tax or VAT are two entirely different and distinct levies based on totally different taxable events and covered by distinct Entries, namely Entry 52 and 54 to List-II of the Seventh Schedule to the Constitution and it is the State prerogative to grant exemption, relaxation, set off etc. with regard to taxation and merely because exemption or set off is not granted, the provision would not become *ultra vires*. He pointed out instances in various States, like West Bengal, Rajasthan, Himachal Pradesh, Madhya Pradesh etc. to say that in these States both VAT and entry tax is levied without any provision for set off or any other benefits and if that be the legal position, Sri S. Ganesh argued that merely because set off is being denied or set off is being granted on the happening of some eventualities, the provision cannot be declared *ultra vires*. Non grant of set off cannot be a ground to challenge the constitutional validity of a provision. It is argued as an alternate that even if there can be any grievance in this matter, it could be canvassed only by an assessee who has to pay VAT, the petitioner in this case being not a VAT assessee for the transaction in question cannot

question the validity of a provision denying set off in payment of VAT. He referred to the argument of discrimination in detail and submitted that there is no question of discrimination in the matter.

27. As far as levy of interest is concerned, learned Senior Counsel Sri S. Ganesh argued that the provision of interest as contained in Section 39 of the VAT Act is incorporated into the Entry Tax Act by virtue of the provision of Section 8 of the Entry Tax Act. By referring to various judgments in the matter of legislation by incorporation or by reference, he submits that the provisions of the Bihar Finance Act have been bodily lifted and incorporated into Section 8 of the Entry Tax Act and, therefore, all the provisions in the Bihar Finance Act even after its repeal continued to be part of Entry Tax Act as it is a case of legislation by incorporation, therefore, interest could be charged as the provision for interest under the Bihar Finance Act and the VAT Act are incorporated into the Entry Tax Act and in support thereof, he relies upon the following judgments, namely, **New Central Jute Mills Co. Ltd.** ***Versus*** **The Asst. Collector of Central Excise** [AIR 1971 SC 451]**; Girnar Traders (3)** ***Versus*** **State of Maharashtra and others** [(2011) 3 SCC 1]**; and The State of Madhya Pradesh** ***Versus*** **M. V. Narasimhan** [(1975) 2 SCC 377]**;** and further argued that on the same principle, the provision of Section 33 of the VAT Act gets incorporated into the Entry Tax Act

and, therefore, reopening of assessment under Section 33 based on audit objection is permissible. He submitted that under the Entry Tax Act, no mechanism for implementing the provisions of the Act, particularly with regard to assessment, collection, payment, recovery etc. are available and, therefore, by incorporating the provisions of the Bihar Finance Act, Section 8 makes the procedural aspect available under the Bihar Finance Act applicable in the Entry Tax Act, which includes both the provisions for recovery of interest and Section 33 of the VAT Act.

28. As far as the judgment in the case of **M/s Shree Shanker Ice & Cold Storage** (supra) on limitation is concerned, learned Senior Counsel Sri S. Ganesh argued that the said judgment will not apply in the facts and circumstances of the present case. He submitted by referring to the law laid down by the Supreme Court in the case of State of **U. P. and another Versus Synthetics and Chemicals Ltd. and another** [(1991) 4 SCC 139], that the principle of *per incuriam* will apply in the present case and as the law laid down in the **M/s Shree Shanker Ice & Cold Storage** (supra) having not taken note of the various statutory provisions and in view of the specific provision of Section 8 of the Entry Tax Act, he submitted that the said judgment will not be applicable.

29. As far as the question of imposition of duty on

account of goods being not used or consumed within the local area of Patna and the argument that mere sale within the local area will not give rise to an incidence of taxation, it was argued that this is a mixed question of law and facts. Referring to para 21 of the judgment in the case of **Hindustan Lever Ltd.** (supra) relied upon heavily by the petitioner, it was said that merely by producing some certificates issued by the Oil Companies to say that they have sold the material or product without anything more, the petitioner cannot wriggle out of the liability to pay entry tax. The burden heavily lies on the petitioner to establish that the product was neither consumed nor used in the local area at Patna. This should have been stated and established by filing a return and seeking exemption on this ground as this was neither done at the time of assessment by raising objection before the Assessing Officer. It is being done for the first time by producing some certificate which is not permissible. Relying upon certain observations made in the case of **Hindustan Lever Ltd.** (supra), so also the subsequent judgment of this Court in the case of **M/s. Escorts Limited *Versus* The State of Bihar & Ors. [**2003 (2) PLJR 668]**,** it is argued that in each case, this being a question of fact, a determination has to be made whether sale is for any other purpose, apart from the purpose of use or consumption in the local area and as this is a question of fact, a Writ Court, based on the evidence or the material adduced, i.e. only the certificate of the Oil Company, this issue cannot be decided. It was submitted that the petitioner should have adduced evidence in this regard before the competent authority. They having not done so have now missed the bus and cannot raise this ground. Accordingly, Sri S. Ganesh submits that no case for interfering into the matter in exercise of extra-ordinary jurisdiction of this Court in a petition under Article 226 of the Constitution is made out and, therefore, the petitions are liable to be dismissed.

30. Having heard learned counsel for the parties at length and on going through various aspects of the matter, we are of the considered view that the following questions arise for consideration in the petitions:-

(i) Whether the second proviso to Section 3(2) of the Entry Tax Act is *ultra vires* to the Constitution?

(ii) Whether interest can be levied in the matter of late payment of entry tax under the Entry Tax Act, by virtue of the provisions of the Bihar Finance Act, and, with the aid of Section 8 of the Entry Tax Act?

(iii) Whether entry tax is liable to be paid when the goods only enter the local area and after such entry is subjected to sell only without there being any use of consumption of the goods in the local area?

(iv) Whether based on audit objection as contemplated under the provisions of Section 33 of the VAT Act, assessment can be re-opened with the aid of Section 8 of the Entry Tax Act?

(v) Whether the assessment undertaken under Section 33 of the VAT Act is permissible after a period of four years in view of the provision of Section 31 of the VAT Act?

31. With regard to the first question, it would be appropriate to take note of the provision of Section 3(2) of the Entry Tax Act. Provisions of Section 3(2) and the second proviso thereto of the Entry Tax Act reads as under:-

> "3. (2) The tax leviable under this Act shall be paid by every dealer liable to pay tax under Bihar Finance Act, 1981 or any other person who brings or causes to be brought into the local areas such scheduled goods whether on his own account or on account of his principal or takes delivery or is entitled to take delivery of such goods on such entry:
>
> Xxx xxxx xxxx
>
> Provided further that where an importer of Scheduled goods liable to pay tax under the Act, incurs tax liability, at the rate specified under section-14 of the Bihar Value Added Tax Act, 2005 (Act 27 of 2005), by virtue of sale of imported Scheduled goods or sale of goods

> manufactured by consuming such imported Scheduled goods, his tax liability under the Bihar Value Added Tax Act, 2005 (Act 27 of 2005) shall stand reduced to the extent of tax paid under the Act:"

32. From the aforesaid, it is clear that the second proviso would apply only in a case where an importer of Scheduled goods is liable to pay VAT and while making such payment set off is permitted to the extent of entry tax paid. The purpose of this provision seems to be to give benefit to a person, who incurs liability for payment of VAT and Entry tax on the imported goods at the same time.

33. As far as question No.(i) pertaining to the constitutional validity of the provision is concerned, before adverting to consider this question, it would be appropriate to take note of the principles of law laid down by the Supreme Court in the matter of jurisdiction available to this Court while evaluating or testing the validity of a provision under a fiscal law. In the case of **Ganga Sagar Corporation Ltd.** (supra), the issue has been elaborately dealt with and it has been held by the Supreme Court in the aforesaid judgment that Article 14 of the Constitution when applied to test the validity of a taxing provision should be done in a manner which should not be liberal as done in other provisions. Practical considerations of

Administration, traditional practices in the trade, other economic *pros and cons* have to be taken care of and judicial generosity should be extended to the legislative wisdom and if it is found that the Statute suffers from madness in its method of implementation, gross disparity, judicial credulity may snap and then only interference should be made. It has been held by the Supreme Court that classification for taxation and uniformity in the application of taxation provision should be done with judicial restraint. In fact, after taking note of various judgments on the issue in question, in paragraphs 50 and 52, the law has been crystallized by the Hon'ble Supreme Court in the following manner:-

> "50. Fine-tuning to attain perfect equality may be a fiscal ideal but, in the rough and tumble of work-a-day economics, the practical is preferred to the ideal, provided glaring caprice or gross disparity does not make the levy arbitrary or frolicsome. Article 14 is not intellectual chess unrelated to actual impact or the wear and tear of life but even-handed justice with some play in the joints.
>
> 52. Reference to K.T. Moopil Nair' case (1961) 3 SCR 77 : (AIR 1961 SC 552) was made at the Bar to persuade us that unequals cannot be tortured into equality — a vice which stultifies the soul of Article 14 as Anatole France exposed in his sardonic epigram that "the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread". <u>We are sure that equality has two sides, both important, and Moopil Nair adverted to one of the facets. Nothing more can be squeezed out of that case. The inequality of situation, in the total conspectus of socio-economic facts and human condition, must be striking and the unjust equality the rule forces</u>

> down on unequals must be glaring. In taxation, the many criteria of intrinsic intricacy and pragmatic plurality persuade the court, as a realist instrument and respecter of the other two branches, to allow considerable free play although never any play for caprice, mala fides or cruel recklessness in intent and effect."
>
> (*Emphasis supplied*)

34. Similarly, in the case of **Godfrey Phillips India Ltd.** (supra), also similar principles have been laid down and a Writ Court is expected to be very cautious in striking down a taxing provision on account of it being the *ultra vires* to the Constitution.

35. In the case of **Smt. Somawanti** (supra), it has been indicated that normally, if a law has withstood the judicial scrutiny with regard to various provisions on various occasions and it has been upheld after such scrutiny, then merely upon pointing out some infirmity in a subsequent date based on a different provision, the Statute should not be declared as *ultra vires*. The observations made in paragraph 22 of the aforesaid judgment goes to show that merely on the pointing out a defect in a Statutory provision at a later point of time when the same has withstood judicial scrutiny earlier, the provision should not be declared as *ultra vires*.

36. In the case of **P.M. Ashwathanarayana Setty** (supra), it has been held that with respect to a taxing provision, the Court only have a power to destroy, but not to reconstruct it. The

limitations in the matter of judicial wisdom to be exercised while reconstructing a statutory provision have been discussed by the Supreme Court in the aforesaid case in paragraph 31 in the following manner:-

> " 31. …..In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not official deference to legislative judgment. The courts have only the power to destroy but not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events, self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability."
>
> "Laws regulating economic activity should be viewed differently from laws which touch and concern freedom of speech and religion, voting, procreation, rights with respect to criminal procedure, etc... judicial deference to legislature in instances of economic regulation is explained by the argument that rationality of a classification depends upon local conditions about which local legislative or administrative bodies would be better informed than a court."
>
> The lack of perfection in a legislative measure does not necessarily imply its unconstitutionality. It is rightly said that no economic measure has yet been devised which is free from all discriminatory impact and that in such a complex arena in which no perfect alternatives exist, the court does well not to impose too rigorous a standard of criticism, under the equal protection clause, reviewing fiscal services. In *G.K. Krishnan* v. *State of Tamil Nadu, (1975) 2 SCR 715 (730) :*

(AIR 1975 SC 583, 592-93) this Court referred to, with approval, the dissent of Marshal, J. in *San Antonio School District* v. B*odrigues, (1973) 411 US 1*:

"No scheme of taxation, whether the tax is imposed on property, income or purchases of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex arena in which no perfect alternatives exist, the court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection clause."

"In summary, it seems to me inescapably clear that this Court has consistently adjusted the care with which it will review State discrimination in light of the constitutional significance of the interests affected and the invidiousness of the particular classification. In the context of economic interests, we find that discriminatory State action is almost always sustained, for such interests are generally far removed from constitutional guarantees. Moreover, the extremes to which the court has gone in dreaming up rational bases for State regulation in that area may in many instances be ascribed to be a healthy revulsion from the court's earlier excesses in using the Constitution to protect interests that have more than enough power to protect themselves in the legislative halls." (Dandridge v. Williams, (1970) 397 US 471 at p. 520)

The observations of this Court in Income-tax Officer, Shillong v. N. Takim Roy Rymbai,(1976) 3 SCR 413: (AIR 1976 SC 670) made in the context of taxation laws are worth recalling: (at p.674):

"The mere fact that a tax falls more heavily on some in the same category. is not by itself a ground to render the law

> invalid. It is only when within the range of its selection, the law operates unequally and cannot be justified on the basis of a valid classification, that there would be a violation of Article 14."
>
> (E*mphasis supplied*)

37. Finally, in the case of **The Twyford Tea Co. Ltd.** (supra), in the matter of interfering with a statutory provision on account of it being discriminatory, it has been held by the Supreme Court that it is the burden on the person complaining a discrimination to prove not only inequality or unequal treatment, but hostile inequality or unequal treatment. It has been held in the matter of taxing provision, simple inequality or unequal is not sufficient to interfere but hostile treatment or hostile discrimination should be established showing unreasonable, discriminatory attitude of the State between the persons similarly situated.

38. That being the principle governing the standard of judicial scrutiny with regard to a taxing provision which is claimed to be *ultra vires*, and, when we analyze the grievance of the petitioner in the backdrop of the aforesaid provision, we find that the petitioner claims the provision to be *ultra vires* mainly on account of differential or discriminatory treatment in the matter of non-grant of set off. It is not petitioner's case that the provision is beyond the powers available

to the State to legislate on the subject in question. It is neither their case that it has been incorporated in violation to any provision of the Constitution which prohibits enactment of such a provision. It is primarily their case that it discriminates; the procedure is unreasonable resulting in the price of the petroleum product to be borne by the consumer to be different when sold through another Oil Company. The primary purpose of this provision is to grant set off to such of the assessees, who are required to pay VAT. Admittedly, the petitioner has not paid VAT in the transactions in question and if the petitioner has not paid VAT how can the petitioner claim set off when the basic liability to pay VAT in the case of the petitioner is not attracted. That being the position, it is not surprising that Sri S. Ganesh rightly raised a ground as to how the petitioner can be an aggrieved person. That apart, the provision has been incorporated to provide set off or rebate to assessees who have paid VAT and are required to pay entry tax on entry of goods into the local area. If the provision is incorporated for granting some benefits to some of the assessees, merely because the benefit is not applicable to the petitioner, the provision cannot be termed as arbitrary or discriminatory. The petitioner cannot say that because it is not beneficial to the petitioner, the provision should go and thereby depriving lakhs of assessees, who are reaping the benefit of the aforesaid provision. This could never be the purpose and intention of the legislature nor appropriate for this Court to make any indulgence. The legislature has incorporated the provision to grant benefit to certain assessees and on the grounds canvassed by the petitioner, we see no reason to declare the same as discriminatory, *ultra vires* or unreasonable.

39. In the case of **Gurusiddappa Nurandappa Uppin** (supra), the Karnataka High Court had occasion to consider certain provisions of law when it was tried to be argued that a particular provision in the Income Tax Act amounts to double taxation. It was observed by the Karnataka High Court after taking note of the law laid down by the Supreme Court in the case of **Jain Brothers Versus Union of India** [AIR 1970 SC 778]; **and Union of India Versus Tata Iron and Steel Co.** [AIR 1976 SC 599]**,** that the Constitution does not contain any prohibition against double taxation. The learned Court took note of various principles in this regard and held that even imposition of tax more than once cannot be prevented nor prohibited under the Constitution. If that be the position, we see no reason or ground to hold the provision to be *ultra vires* or unreasonable.

40. That apart, entry tax is a distinct subject covered under Entry 52 to List- II of Schedule VII of the Constitution, whereas Sales Tax or VAT fall in a different category, i.e. under Entry 54 to List-II of Schedule VII. Both these Entries are distinct and

independent of each other and the Constitution permits imposition of tax separately under both these heads and if taxation are differently permitted under both these Entries, merely because in the matter of imposition of one of the taxes under one of the Entries, if set off against a tax payable under another entry is not granted, we are unable to hold that such an act or provision is unreasonable or *ultra vires.* The petitioner, in our considered view, seems to have come out with this ground of *ultra vires* only to somehow get over the judgment of this Court in the case of **Indian Oil Corporation Ltd. Versus State of Bihar & Ors**. [Civil Writ Jurisdiction Case No.21535 of 2011] decided against the petitioner by a co-ordinate Bench of this Court. The Bench in the aforesaid judgment has taken note of the provisions of Section 3(2) and the second proviso thereto and after relying upon a judgment of the Supreme Court in the case of **Associated Cement Companies Ltd. Versus State of Bihar & Ors.** [(2004) 7 SCC 642] rejected petitioner's argument. The learned Court considered the matter in the following manner:-

> "The matter before us is slightly different. It is not the case that the Corporation is exempted from payment of VAT on sale of the Diesel to the Oil Marketing Companies. Section 13 of the 2005 Act provides for the points in a series of sales in the State of Bihar at which a dealer would be liable to pay VAT. Sub-section (2) thereof empowers the State Government to determine the point in respect of the

series of sales of the specified goods at which the VAT shall be levied. It is not in dispute that the High Speed Diesel Oil is the specified goods. In exercise of the aforesaid power conferred by Section 13(2)(a) of the 2005 Act, the Government of Bihar has issued the above referred Notification dated 4th May 2006 to determine the point in a series of sales at which the VAT would be payable. Under the said Notification, the VAT becomes payable on the sale of the High Speed Diesel Oil to the retail vendors or the consumers. The Oil Marketing Companies not being the retail vendors or the consumers, sale of the High Speed Diesel Oil to the Oil Marketing Companies is not exigible to VAT.

Thus, we are dealing with an article, the incidence of sale of which does not attract liability to pay VAT. In our opinion, the respondents are right in not allowing the Corporation the benefit of set off under the aforesaid second proviso to Section 3(2) of the 1993 Act in respect of sale of the Diesel to the Oil Marketing Companies on the premise that Corporation did not incur liability to pay VAT on such sale. The petition is devoid of any merit.

For the aforesaid reasons, the petition is dismissed."

41. It has been held that the petitioner was liable to pay Entry tax. This judgment is not only binding on us, but also binds the petitioner and on this ground alone, the claim made challenging the imposition of liability under the Entry Tax Act is liable to be dismissed. We are informed that the question is *sub-judice* before the

Hon'ble Supreme Court. There is no stay in the matter and as the Hon'ble Supreme Court has directed this Court to proceed and decide all these petitions within three months, we are required to proceed in the matter and take a decision and, therefore, we find that with regard to the first ground canvassed by the petitioner to say that the provision is *ultra vires*, arbitrary or discriminatory, we find the aforesaid submission to be wholly misconceived and untenable and the claim made by the petitioner to say that they are not liable to pay entry tax deserves to be dismissed on account of the fact that similar issue has already been considered in the case of the present petitioner themselves and rejected by this Court, as indicated hereinabove in CWJC No.21535 of 2011.

42. That apart, we find that recently, the Constitution Bench of the Supreme Court in the case of **Jindal Stainless and another Versus State of Haryana and others** [AIR 2016 SC 5617] had considered certain aspects in this regard. Hon'ble Justice Dr. D. Y. Chandrachud in the aforesaid judgment from paragraph 585 onwards has laid down certain principles pertaining to judicial review of a tax legislation in the backdrop of plea of discrimination or arbitrariness. It has been held after taking note of various provisions of the Constitution and the judgments in the case **of Moopil Nair v. The State of Kerala** [AIR 1961 SC 552) and **Ramjilal v. Income Tax**

Officer, Mohindargarh [AIR 1951 SC 97] that a taxing legislation can be impugned on the following three grounds: (i) lack of legislative competence; (ii) violation of a prohibition under a specific article of the Constitution; or (iii) repugnancy to the fundamental rights guaranteed by Part III. It has been held in the aforesaid judgment by His Lordship that a law imposing a tax is not immune from constitutional challenge merely because taxation is a manifestation of the sovereign power of the State or on account of the fact that tax is levied in public interest. It has been held that the guarantees of fundamental freedoms contained in Part III of the Constitution and its limitation would also apply. Thereafter while considering the question of judicial review of such a taxing provision, His Lordship says that if a classification is rational, a taxing statute cannot be challenged merely because different rates of taxation are prescribed for different categories of persons or objects. In paras-592 and 593 of the aforesaid judgment, the principle has been laid down in the following manner:-

> "592. The standard of judicial review in relation to taxing legislation however recognizes that there inheres in the legislature the power to determine the objects on which a tax should be levied and to classify persons or properties for the purposes of the levy. If the classification is rational, a taxing statute cannot be challenged merely because different rates of taxation are prescribed for different categories of persons or objects. The validity of a taxing

statute cannot be challenged merely on the ground that the rate of taxation is excessive. However, if the statute is a colourable piece of legislation or a fraud on legislative power, it would be open to challenge on the ground that while enacting the law, the legislature has adopted a cloak or devise to confiscate the property of a citizen who is taxed. But such a conclusion cannot be reached merely on a finding that the tax which is imposed is unreasonably high or excessive.

593. Conceptually, the availability of judicial review in regard to taxing legislation is distinct from the standard of judicial review. Taxing legislation is not immune from constitutional challenges based on a lack of legislative competence, a breach of fundamental rights or a violation of a constitutional limitation or provision. But the standard of judicial review in relation to fiscal statutes recognizes that the legislature must possess a wide latitude to classify persons or objects for the purposes of the levy.

(*Emphasis supplied*)

43. Thereafter certain principles laid down in the case of **Federation of Hotel and Restaurant Association of India v. Union of India** [AIR 1990 SC 1637] is taken note of wherein it has been held that taxing laws are not outside the purview of Article 14. However, having regard to the wide variety of diverse economic criteria that go into the formulation of a fiscal policy, the legislature enjoys a wide latitude in the matter of selection of persons, subject-matter, events etc. for taxation. It is held that rigors of discrimination is less in a

taxing statute and while examining the provision on allegations of discrimination, existence of hostile discrimination should be strictly analyzed and exercise of extremely wide discretion are available to the legislature in this regard. That is the principle applicable while evaluating taxing law which is said to be discriminatory in nature.

44. If we analyze the impugned provision in this backdrop of the law and principles, it would be clear that the petitioner alleges discrimination only because the price of petrol, which is paid by the consumer, varies, and therefore, this amounts to hostile discrimination. In our considered view, this cannot be a ground for holding the provision as un-constitutional. In fact, difference in the pricing of the petroleum product which is ultimately sold to the consumer, is more so, because of the method adopted by the Corporation and other Oil Companies in the matter of transportation of the product from Barauni to Patna. It is the arrangement and system followed by the Oil Companies which resulted in the consequences, which is alleged to be discriminatory and it is not a direct result of the legislative policy of the Government. That being so, we are not impressed with the allegation of discrimination made and demonstrated before us in this regard. Accordingly, with regard to the first ground, we see no reason to make any indulgence into the matter.

Question No.(ii)

45. The next question is with regard to imposition of interest on the entry tax to be recovered. Before considering this question, it would be appropriate to take note of Section 8 of the Entry Tax Act which reads as under:-

> "8. Applicability of the provisions of the Bihar Finance Act, 1981 (Bihar Act 5, 1981) and rules made thereunder.- Subject to other provisions of this Act and the Rules framed thereunder the authority empowered to assess, reassess, collect and enforce Payment of tax and penalty payable by a dealer under the Bihar Finance Act, 1981 (Bihar Act 5, 1981) shall assess, reassess, collect and enforce payment of tax and penalty payable under this Act and for this purpose they may exercise all or any of the powers assigned to them under the said Act and Rules made thereunder for the time being enforce including the provisions relating to returns, assessment, reassessment, escaped assessment, recovery of tax, special mode of recovery, maintenance of accounts, inspection, search and seizure liability in representative character, refund, appeal, revision and reviews, statement of cases to the High Court, compounding of offences and other miscellaneous matter and the provisions of the said Act shall *mutatis mutandis* apply accordingly."
>
> (*Emphasis supplied*)

46. Section 39(3) of the VAT Act provides for recovery of simple interest. Sub-section (3) of Section 39 of the VAT Act reads as under:-

> **"39.** (3) If a dealer or a person fails to make payment of any amount of tax by the period specified in the notice issued under sub-section (2) or fails to make payment of tax by the date extended or has defaulted in making payment of instalments under the first proviso of the said sub-section, the dealer shall, for such failure or default, pay, in addition to the amount of tax, an amount by way of simple interest calculated at the rate of one and a-half per cent for each calendar month or part thereof on the amount of such tax."

47. According to the petitioner, under the Entry Tax Act, there is no provision for levy of interest, but the provision of Section 39 (3) is made applicable by virtue of the powers or the provisions of Section 8 of the Entry Tax Act. It is the case of the petitioner that as Section 8 does not specifically provide for recovery of interest and, therefore, with the aid of Section 39(3), interest cannot be imposed, whereas it is the case of the revenue that the language of Section 8 would show that the entire provisions of the Bihar Finance Act stands implanted into the Entry Tax Act with regard to recovery, assessment, collection and enforcement of payment of tax and penalty which includes the provision for recovery of interest as contemplated under Section 39(3) of the VAT Act and, therefore, the interest can be levied.

48. It was argued by the learned Senior Counsel Sri S. Ganesh that the principle is nothing but legislation by incorporation, the provisions of the Bihar Finance Act and the provision as are

contained in the said Act have been bodily lifted and implanted into Section 8 of the Entry Tax Act and therefore, it becomes part and parcel of the provisions of Section 8 of the Entry Tax Act.

49. In the matter of legislation by incorporation, learned Senior Counsel Sri S. Ganesh has placed reliance on the following three judgments, viz., **New Central Jute Mills Co. Ltd.; Girnar Traders; and M. V. Narasimhan** (supra). We have gone through these judgments and we have no hesitation in accepting the proposition put forward in this regard by Sri S. Ganesh. It is a fact that the wordings of Section 8, if read in the backdrop of the aforesaid judgment, would show that the entire provisions of the Bihar Finance Act with regard to assessment, reassessment, collection and enforcement of payment of tax, penalty have been bodily lifted from the Finance Act and incorporated into the Entry Tax Act.

50. However, in spite of the aforesaid, we have to consider this issue in the backdrop of the law laid down by the Supreme Court in the cases strongly relied upon by Sri Arvind Datar and Sri S. D. Sanjay, Senior Counsels, particularly the Constitution Bench judgment in the case of **J. K. Synthetics Ltd**. (supra). In the case of **J. K. Synthetics Ltd**. (supra), the Constitution Bench considered the provisions relating to the charging and levying of interest in a taxing statute and it has been held that a provision relating

to charging and levying of interest is a substantive provision. The matter has been so dealt with by the Constitution Bench in the case of **J. K. Synthetics Ltd**. (supra) in paragraph 16 in the following manner:-

> "16. It is well-known that when a statute levies a tax it does so by inserting a charging section by which a liability is created or fixed and then proceeds to provide the machinery to make the liability effective. It, therefore, provides the machinery for the assessment of the liability already fixed by the charging section, and then provides the mode for the recovery and collection of tax, including penal provisions meant to deal with defaulters. Provision is also made for charging interest on delayed payments, etc. Ordinarily the charging section which fixes the liability is strictly construed but that rule of strict construction is not extended to the machinery provisions which are construed like any other statute. The machinery provisions must, no doubt, be so construed as would effectuate the object and purpose of the statute and not defeat the same. (See Whitney v. IRC, 1926 AC 37: 42 TLR 58, CIT v. Mahaliram Ramjidas, (1940) 8 ITR 442: AIR 1940 PC 124: 67 IA 239, India United Mills Ltd. v. Commissioner of Excess Profits Tax, Bombay, (1955) 1 SCR 810: AIR 1955 SC 79: (1955) 27 ITR 20, and Gursahai Saigal v. CIT, Punjab, (1963) 3 SCR 893: AIR 1963 SC 1062: (1963) 48 ITR 1). But it must also be realised that provision by which the authority is empowered to levy and collect interest, even if construed as forming part of the machinery provisions, is substantive law for the simple reason that in the absence of contract or usage interest can

be levied under law and it cannot be recovered by way of damages for wrongful detention of the amount. (See Bengal Nagpur Railway Co. Ltd. v. Ruttanji Ramji, AIR 1938 PC 67: 65 IA 66 : 67 CLJ 153 and Union of India v. A.L. Rallia Ram, (1964) 3 SCR 164, 185-90: AIR 1963 SC 1685). Our attention was, however, drawn by Mr Sen to two cases. Even in those cases, CIT v. M. Chandra Sekhar, (1985) 1 SCC 283: 1985 SCC (Tax) 85: (1985) 151 ITR 433 and Central Provinces Manganese Ore Co. Ltd. v. CIT, (1986) 3 SCC 461: 1986 SCC (Tax) 601: (1986) 160 ITR 961, all that the Court pointed out was that provision for charging interest was, it seems, introduced in order to compensate for the loss occasioned to the Revenue due to delay. But then interest was charged on the strength of a statutory provision, may be its objective was to compensate the Revenue for delay in payment of tax. But regardless of the reason which impelled the Legislature to provide for charging interest, the Court must give that meaning to it as is conveyed by the language used and the purpose to be achieved. Therefore, any provision made in a statute for charging or levying interest on delayed payment of tax must be construed as a substantive law and not adjectival law. So construed and applying the normal rule of interpretation of statutes, we find, as pointed out by us earlier and by Bhagwati, J. in the Associated Cement Co. case, (1981) 4 SCC 578 : 1982 SCC (Tax) 3 : (1981) 48 STC 466, that if the Revenue's contention is accepted it leads to conflicts and creates certain anomalies which could never have been intended by the Legislature."

(*Emphasis supplied*)

51. This judgment of the Constitution Bench in the case of **J. K. Synthetics Ltd**. (supra) has been again considered by the Supreme Court in the case of **India Carbon Ltd**. (supra). In the case of **India Carbon Ltd** (supra), the assessee was a registered dealer registered under the Central Sales Tax Act and was liable to pay tax under the said provision with regard to petroleum coke which was subject of inter-State sales. The payment of tax on the inter-State Sales of petroleum coke was delayed and therefore the revenue imposed interest on the payment. Even though, there was no specific provision for levying interest under the Central Sales Tax Act, interest was levied in exercise of the powers available under Section 35-A of the Assam Sales Tax Act, 1947. While analyzing the question as to whether in the matter of delayed payment of sales tax under the Central Sales Tax Act, with the aid of the provision of Assam Sales Tax Act, interest could be levied. The question was answered against the revenue in the case of **India Carbon Ltd** (supra) and it was held after relying upon the judgment in the **J. K. Synthetics Ltd**. (supra), that a provision for charging and levying of interest is a substantive law and in the absence of there being any specific provision in the Central Sales Tax Act providing for levy of interest, the same could not be done. While doing so, provision of Section 9 (2) of the Central Sales Tax Act was taken note of. Section 9(2) of the Central Act which

was considered by the Supreme Court reads as under:-

> "9. (2) Subject to the other provisions of this Act and the rules made thereunder, the authorities for the time being empowered to assess, reassess, collect and enforce payment of any tax under the general sales tax law of the appropriate State shall, on behalf of the Government of India, assess, reassess, collect and enforce payment of tax, including any penalty, payable by a dealer under this Act as if the tax or penalty payable by such a dealer under this Act is a tax or penalty payable under the general sales tax law of the State; and for this purpose they may exercise all or any of the powers they have under the general sales tax law of the State; and the provisions of such law, including provisions relating to returns, provisional assessment, advance payment of tax, registration of the transferee of any business, imposition of the tax liability of a person carrying on business on the transferee of, or successor to, such business, transfer of liability of any firm or Hindu undivided family to pay tax in the event of the dissolution of such firm or partition of such family, recovery of tax from third parties, appeals, reviews, revisions, references, refunds, rebates, penalties charging or payment of interest, compounding of offences and treatment of documents furnished by a dealer as confidential, shall apply accordingly."

52. A perusal of the aforesaid Section shows that it is a *pari materia* of Section 8 of the Entry Tax Act which is applicable in the present case. In Section 9 (2) of the Central Act relied upon by the Supreme Court in the case of **India Carbon Ltd** (supra) also, the rules

and the process of assessment, reassessment, collection, enforcement of payment of tax under the appropriate State Act was made applicable with regard to assessment, reassessment, collection, enforcement of payment of tax, including penalty payable. However, in Section 9 (2), the provision of interest was not included and after interpreting Section 9(2) of the Central Act, Hon'ble Supreme Court held that interest can be levied and charged on delayed payment of tax only if the statute that levies and charges the tax makes a substantive provision in this behalf. Thereafter, considering the provisions of Section 9(2) of the Central Sales Tax Act in para-11 it has been held that Section 9(2) makes applicable to the assessment, reassessment, collection and enforcement of Central Sales Tax the provisions relating to offences and penalties contained in the State Acts as if the Central sales tax was a State sales tax. But as Section 9(2) makes no reference to interest, it was held that there was no substantive provision in the Central Act requiring payment of interest on Central sales tax and, accordingly, it was held that the assessee was obliged to pay tax on delayed payments of Central sales tax. The matter has been dealt with in paras-11 and 12 in the following manner:-

> "**11.** Section 9(2-A) makes applicable to the assessment, reassessment, collection and enforcement of Central sales tax the provisions relating to offences and penalties contained in the State Acts as if the Central sales

> tax was a State sales tax. But Section 9(2-A) makes no reference to interest.
>
> **12.** There is no substantive provision in the Central Act requiring the payment of interest on Central sales tax. There is, therefore, no substantive provision in the Central Act which obliges the assessee to pay interest on delayed payments of Central sales tax."

53. In paragraph 13 thereafter, it is held that the provision relating to interest can be employed by the States' Sales Tax Authorities while implementing the Central Act only if a substantive provision is available in the Central Act and assessment of interest was held to be illegal in the aforesaid case.

54. In the present case also, the legal position, in our considered view, is identical to what was considered by the Supreme Court in the case of **India Carbon Ltd** (supra). If Section 8 of the Entry Tax Act is analyzed, it would be seen that it makes applicable the provisions of the Bihar Finance Act to the Entry Tax Act in the matter of assessment, reassessment, collection and enforcement of payment of tax and penalty payable by a dealer under the Bihar Finance Act. Nowhere in the provisions of Section 8 is there any mention of recovery or imposition of interest. It empowers the authorities to apply the provisions of the Bihar Finance Act or, in fact, makes the provisions of the Bihar Finance Act, 1981 applicable

mutatis mutandis in the matter of collection and enforcement with regard to payment of tax and penalty so also with regard to assessment, reassessment escaped assessment, recovery of tax, special mode of recovery, maintenance of accounts, inspection, search and seizure. There is no mention of recovery of interest in the aforesaid provision. That being the position, in the backdrop of the law laid down in the cases of **India Carbon Ltd** (supra) and **J. K. Synthetics Ltd**. (supra), we are of the considered view that interest could not be recovered from the assessee in view of the aforesaid.

55. The other judgments relied upon by the petitioner, as referred to in the preceding paragraphs of the judgment, are nothing but the judgments relying upon the law laid down by the Supreme Court in the case of **J. K. Synthetics Ltd**. (supra), and **India Carbon Ltd** (supra) and we need not refer to all of them separately, except for one judgment in the case of **Jaswal Neco Ltd.** (supra), wherein the Hon'ble Supreme Court after considering the principles laid down in the cases of **India Carbon Ltd** (supra) and **J. K. Synthetics Ltd**. (supra), have held that in the absence of any indication in the statute itself either specifically or by necessary implication indicating liability to pay interest on the assessed duty, no interest could be levied. It has been held in the aforesaid case after taking note of the principles laid down by the Supreme Court in the case of **India Carbon Ltd** (supra)

in paragraphs 11, 12 and 13 that in the absence of there being a substantive provision, interest cannot be levied. This judgment also addresses the issue of levying interest in favour of the assessee.

56. As far as levy of interest is concerned, apart from the fact that Section 8 of the Bihar Entry Tax Act does not contemplate a provision for levy of interest, we may take note of the fact that Section 8 of the Entry Tax Act has been substituted and amended by the Bihar Finance Act of 2015, namely Act No.9 of 2015, wherein amendments have been made to the VAT Act of 2005 and the Entry Tax Act of 1993. By this amendment incorporated with effect from 6th May of 2015, Section 8 has been substituted with a new Section and if we go through the amended Section, we find that the provision has been included for survey, assess, reassess, collect and enforce payment of tax, interest, fine and penalty payable under the VAT Act. The very fact that the words, 'interest' and 'fine' have been incorporated by amendment in 2015 clearly shows that prior to this amendment, which was brought into force on 06.05.2015, there was no provision for recovery of interest under the Entry Tax Act.

57. As far as levy of interest is concerned, this issue has also been decided by this Court in CWJC No.19512 of 2010 [M/s Shree Shanker Ice & Cold Storage Versus The State of Bihar & Ors.] and the issue has been decided in the following manner:-

> "That leaves us with the third question whether the petitioner is liable to pay interest imposed by the assessing authority. Section 8 of the Act of 1993 empowers the assessing authority to collect or enforce payment of tax and penalty and for that purpose they may exercise all or any of the powers assigned to them under the Bihar Finance Act, 1981. Section 8 of the Act of 1993 refers to recovery of tax and penalty alone. The Act of 1993 does not envisage recovery of interest on the amount of entry tax levied.
>
> In our opinion, learned counsel Mr. Jain has rightly contended that assessing authority has no right to recover interest on the amount of entry tax levied under the orders of recovery made under section 39(4) of the Act of 2005.
>
> For the aforesaid reasons, we partially allow this petition. We uphold the assessment of entry tax made by the Deputy Commissioner of Commercial Taxes, West Circle, Muzaffarpur. We hold that the petitioner is not liable to pay interest over the amount of entry tax levied by the assessing officer. The impugned orders of recovery made under section 39(4) of the Act of 2005 are quashed and set aside insofar as the interest is sought to be recovered on the amount of entry tax assessed. The Deputy Commissioner of Commercial Taxes will, within two months from today, modify the impugned orders and issue orders of recovery of entry tax in accordance with law and in consonance with the above discussion."
>
> (*Emphasis supplied*)

58. We are in full agreement with the aforesaid principle laid down by the Division Bench as it is nothing but interpretation of

Section 8 of the Entry Tax Act and it is in conformity with the interpretation recorded by us hereinabove. That being so, even in view of the law laid down by this Court in M**/s Shree Shanker Ice & Cold Storage** (supra), levying of interest is unsustainable.

59. The contention of learned Senior Counsel Sri S. G. Ganesh to say that the judgment in the case of M**/s Shree Shanker Ice & Cold Storage** (supra), does not consider various other judgments and the provision of law is *per incuriam* cannot be accepted. The judgment is by interpretation of the provision of Section 8 of the Entry Tax Act and the same being correct, we have no reason to take a different view.

60. Therefore, we answer question No.(ii) by holding that in the absence of there being any specific provision authorizing the revenue to assess interest under the Entry Tax Act and in the absence of Section 8 of the Entry Tax Act contemplating a provision for recovery of interest, recovery of interest is not permissible and to that extent, relief has to be granted to the petitioner. We hold that charging of interest and proposing to recover interest on the duty or the tax determined is unsustainable. Section 8 of the Entry Tax Act only permits the respondents to take steps for assessment, reassessment, recovery of tax and penalty, but not interest, and that being the position, another question involved in the matter, i.e., question no.(iv),

can also be addressed at this stage itself.

Question No. (iv)

61. At this stage before adverting to consider Question No.(iii) it may be appropriate to consider question No.(iv) as it can be decided on the basis of the same legal principle and provision discussed with respect to question No.(iii).

62. Question No.(iv) formulated pertains to whether with the aid of Section 33 of the VAT Act, based on audit objection, assessment could be reopened and action taken. It was the case of the petitioners that Section 33 of the VAT Act will not apply for reopening assessment pertaining to Entry Tax Act. If we take note of the provisions of Section 8 and its interpretation, which has been discussed hereinabove, we find that the authority empowered to assess, reassess, collect and enforce payment of tax and penalty by a dealer under the Bihar Finance Act is also empowered under the Entry Tax Act to assess, reassess, collect and enforce payment of tax and penalty payable under the Entry Tax Act and for that purpose, they are further empowered to exercise all the powers assigned under the Bihar Finance Act and the Rules framed thereunder pertaining to provisions relating to returns, assessment, reassessment, escaped assessment, escaped assessment, recovery of tax, special mode of recovery,

maintenance of accounts etc. The provisions of assessment, reassessment, escaped assessment as is applicable under the Bihar Finance Act and the Bihar VAT Act having been made applicable, the provisions of reassessment under Section 33 of the VAT Act would apply and, therefore, to that extent, we find no error in the act of the respondents. Accordingly, question No.(iv) raised by the petitioner has to be rejected.

Question No. (iii)

63. That brings us to question no.(iii) which is to the effect that the goods that enter the local area but when they are not used or consumed in the local area, mere sale of the goods will not make it liable for payment of entry tax. There is no dispute in accepting the aforesaid provision. To attract liability for payment of entry tax, apart from the fact that there is entry of goods into the local area, there has to be sale, use and consumption in the local area. Mere entry or sale of the goods into the local area without its consumption or use in the local area will not make the goods liable for payment of entry tax and to that effect, we are of the considered view that there is no dispute with regard to the legal principles applicable. That is the law laid down by this Court in the case of **Hindustan Lever Ltd.** (supra) after following various judgments in this regard as laid down

by the Hon'ble Supreme Court, including the judgment in the case of **Bihar Chamber of Commerce** (supra). However, if we take note of the principles laid down in the case of **Hindustan Lever Ltd.** (supra) and para 21 thereof, we find that principle has been discussed in the following manner:-

> "21. Thus, in view of the settled law, the authorities under the Act including the Tribunal, have committed a serious error of law in holding that once the goods have entered into the local area and have been sold, the charging section will come into play and the dealer will be liable to pay tax. The authorities have to decide while levying tax under the Act apart from entry of goods for consumption and use, the sale was also made for consumption and use in the concerned local area or taken out and consumed in other local areas. <u>However, it is for the dealer to prove at the relevant stage to the satisfaction of the assessing authority that the sale was for the purpose of taking out the goods to the other local areas or goods were re-exported and were not for the purposes of consumption or use.</u> Therefore, the first point urged on behalf of the petitioners succeeds and it is held that the respondent-authorities have committed a serious error of law in coming to the aforesaid conclusion."

64. In the aforesaid judgment, the underline portion clearly shows that for asserting the contention that the goods after entering the local area is neither used or consumed in the local area, it is for the dealer to prove at the relevant stage to the satisfaction of the

assessing authority that the sale was for the purpose of taking out the goods to the other local area or goods were exported and they were neither used or consumed in the local area. This burden is to be discharged by the assessee.

65. Thereafter in a subsequent judgment in the case of **M/s. Escorts Limited** (supra), this Court again considered this question. After taking note of the principles laid down in the case of **Hindustan Lever Ltd.** (supra), i.e. para-21, as indicated hereinabove, in para-8 it has been held by the Division Bench of this Court that in each case it is a question of fact to determine as to whether sale is for any of the aforesaid purposes, i.e. as indicated in para 21 of the judgment of **Hindustan Lever Ltd.** (supra). It has been held that this question cannot be said to be a pure question of law justifying interference in writ jurisdiction bypassing right of statutory appeal provided to the petitioner. It has been held that this question has to be considered by the competent authority after evaluating the facts of the case. In para-8 in the case of **M/s Escorts Limited** (supra), the principle has been so crystallized:-

> "8. Thus, in each case it is a question of fact to determine as to whether sale is for any of the aforesaid purposes or the sale is not connected with use, consumption or sale therein. The said question cannot be said to be pure question of law justifying interference in writ jurisdiction

> bypassing right of statutory appeal provided to the petitioner. In our view, the authorities are competent to consider the matter in the light of law settled by this Court as well as Apex Court reference of which has been made in the aforesaid judgment of this Court."

66. That being the position, it is clear that the question as to whether the goods after they enter the local area at Patna and after they were sold to the Oil Marketing Companies were re-exported by them out of the District without any consumption or use in the area is a mixed question of law and fact and it should have been pleaded, established and proved by adequate material by the petitioner-assessee before the competent authority in reference to the show cause notice issued and the proceedings held.

67. On going through the record, we find that after notices were issued vide Annexure-1 on 16.04.2014 and the audit objection dated 04.04.2014 were supplied to the petitioner, they submitted their show cause vide Annexure-2 on 16.06.2014. They raised various legal questions in this reply, but did not specifically plead or establish by cogent evidence or material that the product after entry into local area was not used or consumed in the local area. No averment in this regard has been made in the show cause. Thereafter, vide Annexure-3, dated 21.06.2014, they were directed to produce evidence and documents in support of their contention and they were

given a date for their appearance to do so on 24.06.2014. In reply to this notice Annexure-3 dated 21.06.2014, petitioner vide Annexure-4 on 27.06.2014 submitted their reply and made a vague assertion and did not again produce any evidence. However, again they filed another reply on 22.08.2014 vide Annexure-6 and it is in this reply that certain averments were made to say that the goods brought by the petitioner from Barauni to Patna was sold to Oil Marketing Companies from their Patna terminal and thereafter, the goods sold to the OMCs was never used or consumed into the local area, but they were taken over by the OMCs to 17-18 districts of Bihar. Except for filing certificates dated 14.08.2014, 13.08.2016 submitted by the Bharat Petroleum Corporation Limited and Hindustan Petroleum Corporation Limited, no cogent evidence or material was adduced to substantiate this factual aspect of the matter and as held in the case of **Hindustan Lever Ltd.** (supra) and **M/s Escorts Limited** (supra), this question is a mixed question of law and fact and as rightly submitted by the learned Senior Counsel Sri S. Ganesh that the petitioner should have established this fact before the assessing officer when the proceedings were held. They having failed to do so, they missed the bus. We find that based on the material adduced, we cannot record a positive finding in favour of the petitioner absolving the petitioner from payment of tax on this ground. It is for the petitioner to adduce cogent evidence and documents in this regard before the Assessing Officer. Mere filing of the documents before the Assessing Officer cannot be said to have resulted in discharging the petitioner from this burden. During the course of hearing Sri S. D. Sanjay, learned Senior Counsel, had submitted that in the statutory form to be submitted with the returns there was no column or provision to indicate these facts and, therefore, the petitioner cannot be held responsible. On this ground, we cannot enter into this factual dispute in a petition under Article 226 of the Constitution.

68. Accordingly, we hold that this issue is a mixed question of law and fact and cannot be interfered into this proceeding. In case, the petitioner has remedy of assailing the assessment order on factual aspect before any statutory appellate authority, liberty may be available to the petitioner to raise this ground and, if permissible, the appellate authority may go into this aspect of the matter. Accordingly, question No.(iii) is also decided by holding that on this ground in these writ petitions, no relief can be granted to the petitioner.

Question No. (v)

69. Finally, during the course of hearing, as an additional ground, it was tried to be argued on behalf of the petitioner that the assessments were for the years 2008-09 to the year 2014-15. The

assessments were completed during the relevant financial years and the proceedings for reassessment by virtue of Section 33 of the VAT Act have been decided by the impugned orders which are passed between 27.08.2014 to 26.08.2016 and as they are passed beyond the period of four years as contemplated under Section 31 of the VAT Act, they are beyond the period of limitation. We have taken note of the submissions made in this regard both by Sri S. D. Sanjay, learned Senior Counsel for the petitioner and Sri S. Ganesh, learned Senior Counsel for the revenue. We find that Section 31 of the VAT Act contemplates a provision for assessment or reassessment of tax which has escaped turn over and Section 33 provides for assessment of tax based on audit objection. However, a perusal of Section 31 would go to show that when proceedings are held under Section 31, period of limitation of four years from the expiry of the date of original order is indicated therein, but the last part of the Section provides that in a case where the dealer has concealed, omitted or failed to disclose such sale or purchase or input tax credit, so far as may be applicable, the same shall be decided in accordance to as if the proceeding under this sub-section was a notice under Section 27. This Section 27 provides for assessment of a dealer not filing return. It is a case where the proceedings were held against the petitioner after issuing notice under Section 27 and in this provision, there is no provision for issuing notice within four years. This Section only contemplates that the proceedings shall be completed within a period of two years from the date of initiation. Accordingly, we see no reason to interfere on this ground. That apart, this ground was never challenged either before the Assessing Officer in the objection filed and we further find that when initially certain *ex parte* assessment orders were passed, the petitioner challenged the same by filing a writ petition before this Court being CWJC No.5775 of 2014 and CWJC No.5776 of 2014 and by an order passed on 31.07.2014, a co-ordinate Bench of this Court considered the grievance of the petitioner, quashed the assessment order and remanded the matter back to the Assessing Officer for making the assessment afresh after granting opportunity to the petitioner to represent their case. It is seen that in the earlier writ petitions being CWJC Nos.5775 of 2014 and 5776 of 2014, no such ground was raised as is being raised before us now, nor was such a ground in the assessment proceedings before the Assessing Officer. The question of delay in initiating a proceeding again being a mixed question of law and fact, we are of the considered view that it cannot be permitted to be raised now at this stage in these proceedings. Accordingly, this ground is also rejected.

70. Taking into consideration the aforesaid discussions and findings, we hold that the petitions have to be allowed in part. Even

though, we find no case made out for allowing the prayer made by the petitioner for declaring second proviso of Section 3(2) of the Entry Tax Act to be *ultra vires*; nor do we find any case made out for holding that recovery and imposition of entry tax on the petitioner by the impugned order is illegal. We do find that imposing interest on the amount of entry tax to be recovered is unsustainable and to that extent we allow the objection and restrain the respondents from recovering the interest¸ accordingly, setting aside the orders impugned so far as they direct for recovery of interest. We uphold the orders with regard to all other aspects of the matter and dismiss the writ petitions to that extent. No order on costs.

(Rajendra Menon, CJ)

Sudhir Singh, J I agree.

(Sudhir Singh, J)

Sunil

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