# IN THE HIGH COURT OF JUDICATURE AT PATNA
**Civil Writ Jurisdiction Case No.21453 of 2018**

======================================================

M/s. Bharti Airtel Ltd., a Company incorporated under the provisions of the Companies Act having its registered office at Bharti Crescent, 1, Nelson Mandela Road, Vasant Kunj, Phase II, New Delhi- 110070, India and one of its Branch at Airtel Campus, Plot No. 18, Patliputra Industrial Area, P.S. Patliputra Colony, Patna Bihar through its authorized signatory Nishit Deo, S/o Sri Deonandan Mahto, Resident of Govindpur, Agapur, P.S.- Mansoorchak, District- Begusarai- 851128, Bihar.

... ... Petitioner

Versus

1. The State Of Bihar through the Secretary cum Commissioner State Tax, Department of State Tax, Vikash Bhavan, Bailey Road, Patna, Bihar
2. The Deputy Commissioner of Commercial Taxes, In-charge, Patliputra Circle, Patna, Presently known as Joint Commissioner, State Tax, Patliputra Circle, Patna, Bihar
3. The Assistant Commissioner of Commercial Taxes, Patliputra Circle, Patna, now known as Deputy Commissioner, State Tax, Patliputra Circle, Patna

... ... Respondents

======================================================

**Appearance :**
For the Petitioner/s : Mr. S.D.Sanjay, Sr. Adv.
Mr. Alok Kumar Agrawal, Adv.
Mr. Mohit Agrawal, Adv.
For the Respondent/s : Mr.Vikash Kumar, SC11

======================================================

**CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN**
**and**
**HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA**
**CAV JUDGMENT**
**(Per: HONOURABLE MR. JUSTICE JYOTI SARAN)**

**Date :26-04-2019**

The petitioner prays for a writ in the nature of Certiorari for quashing the order dated 3.7.2018 passed by the Deputy Commissioner, State Taxes for the period 2015-16, whereby he has held that the petitioner has made a short payment of tax under the Bihar Tax on Entry of Goods into Local Areas for Consumption, Use or Sale therein Act, 1993 (hereinafter referred to as 'the Entry Tax Act') to the tune of Rs.2,57,90,273/- and while holding as such has levied an interest to the tune of Rs.1,02,77,424/-, the total coming to Rs.3,60,67,697/-. The petitioner also questions the demand notice which follows the assessment order, copies of which are impugned at Annexure 4 and 4/A to the writ petition.

The petitioner is a Company incorporated under the Companies Act having its office at New Delhi and one of its Branch is in the town and district of Patna in the State of Bihar. The petitioner is a registered dealer under the Bihar Value Added Tax Act, 2005 (hereinafter referred to as 'the VAT Act'), 'the Entry Tax Act' as well as the Central Sales Tax Act, 1956 and now also registered under the Goods and Services Tax Act, 2017. The issue relates to the assessment under 'the Entry Tax Act' and it is because the petitioner has been held to have made a short payment under the said Act in an exercise initiated on an audit objection raised by the Comptroller and Auditor General which resulted in a short payment made by the petitioner to the tune of Rs.2,57,90,273/- for the period 2015-16 that the Assessing Authority under 'the Entry Tax Act' while raising such demand has also levied interest thereon and feeling aggrieved the petitioner is before this Court.

Although exhaustive arguments have been advanced by Mr. S.D.Sanjay, learned Senior Counsel appearing for the petitioner with due assistance of Mr. Alok Kumar Agrawal, Advocate and Mr. Vikash Kumar, learned SC-11 appearing for the State in criticism and in defence respectively of the impugned action but I do not deem it necessary to delve into the specific details of the arguments considering the facts which are apparent on record.

It is submitted by Mr. Sanjay, learned Senior Counsel appearing for the petitioner that even when the Assessing Authority was well aware that an advance tax realized from the petitioner under section 3(7) of 'the VAT Act' read alongside Rule 7 framed thereunder to the tune of Rs.4 Crores during the period 2014-15 of which, a sum of about Rs.2,50 Crores was yet to be adjusted against the liability of the petitioner, yet it is in gross abuse of the statutory powers and ignoring this relevant aspect as well as past precedence followed by the Department in similar situation that the demand in question has been raised for the period 2015-16 which accompanies interest and the arbitrariness in the action of the statutory authority is confirmed when it is after raising such illegal demand, he proceeds to adjust the advance excess amount of Rs.2,50,17,765/- as against the dues pertaining to the same period i.e. 2015-16 but only after raising a penal demand which accompanies interest vide Annexure 4 series.

Mr. Vikash Kumar, learned SC-11, has in reference to the counter affidavit filed in the present proceedings submitted that it is on an audit objection raised by the Accountant General who also recommended imposition of interest on the deficit tax amount for the period of delay that the demand has been raised and which suffers no infirmity. In reference to the adjustment order dated 29.9.2018 at Annexure 6 he submits that it is on an application filed by the petitioner under section 68 of 'the VAT Act' on 20.7.2018 that the excess amount was adjusted but since prior thereto the reassessment order had already been passed under section 31 of the 'VAT Act' read alongside the provisions of Section 8 of the 'Entry Tax Act' on 3.7.2018, the petitioner cannot avoid liability. Mr. Vikash Kumar has relied upon the following judgment in support of his contention:

(i) 2012(4) PLJR 616 (**Union of India v. State of Bihar & ors.**)

(ii) (2018)1 SCC 242 (**Indian Oil Corporation v. State of Bihar & ors.**).

Learned counsel for the parties do agree that while there is specific provision under section 3(7) of 'the VAT Act' for a deposit of advance tax, there is no such corresponding provision under 'the Entry Tax Act'.

Annexure 2 is a demand issued under section 3(7) of the 'VAT Act' read with Rule 7 framed thereunder from the office of the Deputy Commissioner, Commercial Taxes, Patliputra Circle, Panth Bhawan, Bailey Road, Patna to the petitioner on 2.3.2015 directing him to deposit a sum of Rs.400 lacs towards his tax liability for the month of March, 2015 by 20.3.2015. It is to be noted that the petitioner is not exigible to liability under the 'VAT Act' as also accepted by the respondents in the assessment orders on record. According to the petitioner, though he had already paid the quarterly taxes as per the returns filed but maintaining obedience that he complied with the demand to deposit Rs.400 lacs i.e. 4 crores accordingly. An assessment order was passed for the period 2014-15 vide Annexure 3 and obviously since the demand by way of advance tax under 'the VAT Act' had been deposited by the petitioner that the liability assessed for the period 2014-15 by the Assessing Authority under 'the Entry Tax Act' read alongside the provisions of 'the VAT Act' showed an excess deposited by the petitioner to the tune of Rs.20,36,27,015/- as against a tax liability of Rs.17,86,09,250/-. A copy of the assessment order for the period 2014-15 dated 3.7.2018 is at Annexure 3 and the demand notice shows an excess deposit of Rs.2,50,17,765/- at Annexure 3/A.

The relevant aspect of the matter here which gains importance is that though the demand for advance tax was made by the Assessing Authority as against the liability under ‘the VAT Act’ for the period 2014-15 but while assessing the tax liability of the petitioner under ‘the Entry Tax Act’, the Assessing Authority took note of this advance tax deposit under ‘the VAT Act’ to adjust tax liability under ‘the Entry Tax Act’ as against the advance deposit made by the petitioner of Rs.4 Crore under ‘the VAT Act’ and which is reflected in the demand notice which shows an excess deposit of Rs.2,50,17,765/-. While the act of the Assessing Authority i.e. the Assistant Commissioner of Commercial Taxes in adjusting excess advance tax deposited by the petitioner under ‘the VAT Act’ for the period 2014-15 while computing liability of the petitioner under ‘the Entry Tax Act’ bears relevance to the contest, even the date of assessment i.e. 3.7.2018 is of much importance because the assessment order and the demand put to challenge in this writ petition passed for the period 2015-16 is also dated 3.7.2018 as manifest from Annexure 4 series.

Annexure 4 series is an order of reassessment passed following an audit objection made by the Accountant General vide Audit Note No.8 dated 1.12.2017 in which it is stated that the tax liability of the petitioner under ‘the Entry Tax Act’ for the period

2015-16 was much higher than as admitted by the petitioner. It is proceeding on the audit objection that the assessment order at Annexure 4 was passed accepting the details present in the audit note and whereby the petitioner was found to have made a short deposit of entry tax for the period 2015-16 to the tune of Rs.2,57,90,273.00. Since according to the Assessing Authority the short deposit continued for months that he has proceeded to impose interest to the tune of Rs.1,02,77,424/- for the delay of 26 months 17 days at the rate of 1.5% monthly. It is concluding thus that the demand is raised, copy of which is at Annexure 4/A to the writ petition.

Surprisingly that even when the assessment order takes note of the plea taken by the petitioner that in fact there was no short payment because there was already an excess tax deposit made by him during the period 2014-15 and which was yet to be adjusted against the tax liability of the petitioner, the plea was rejected by the Assessing Authority on the grounds that since the petitioner did not make sale of the imported goods rather capitalized it he was not entitled for any adjustment. It is rather peculiar that even when the same Assessing Authority adjusts the advance tax made under the 'VAT Act' against the liability of Entry Tax for the period 2014-15 on the same day i.e. 3.7.2018, he proceeds to reject the explanation of the petitioner for the period 2015-16 on grounds that the advance tax deposit under 'the VAT Act' could not be adjusted against the liability of 'the Entry Tax Act' because the petitioner made no sales of goods imported. The frivolity of such objection gets established because the Joint Commissioner, State Taxes, Patna Circle, Patna subsequently adjusts the said excess amount of Rs.2,50,17,765/- on 29.9.2018 as against the tax liability for the same period 2015-16 as admitted by the respondents at paragraph 11 of the counter affidavit.

In my opinion, the assessment order dated 3.7.2018 for the period 2015-16 in so far as it proceeds to impose an interest of Rs.1,02,77,424/- in the circumstances noted, is not sustainable for many a grounds, namely:

(a) The past precedence. Annexure 1 is the assessment order for the period 2012-13 and while taking note of the excess advance tax made by the petitioner under section 3(7) of 'the VAT Act' for the period 2011-12 and while noting that the petitioner is not exigible to taxation under 'the VAT Act' but only 'the Entry Tax Act' that the Assistant Commissioner of Commercial Taxes has allowed adjustment of the excess advance tax deposited under section 3(7) of 'the VAT Act' for the year 2011-12 as against the liability of the petitioner under 'the Entry Tax Act' for the period 2012-13.

Following the said precedence, even for the period 2014-15, the Assessing Authority bearing note of the advance tax made by the petitioner to the tune of Rs.4 crores under 'the VAT Act' for the period 2014-15 has adjusted the advance tax under 'the VAT Act' against the liability under 'the Entry Tax Act' for the said period to show a negative demand of Rs.2,50,17,765/-. This order as I have noted was passed on 3.7.2018.

(b) The assessment order for the period 2015-16 passed in purported exercise of powers vested under section 8 of 'the Entry Tax Act' read alongside Section 31 of 'the VAT Act' is illegal and dehors the provisions of Section 31 of 'the VAT Act' seen alongside the provisions underlying section 33 of 'the VAT Act' which enables an Assessing Authority to proceed for reassessment on an audit objection made by the Comptroller and Auditor General. Section 8 of 'the Entry Tax Act' makes the provision of 'the VAT Act' applicable to a proceeding initiated thereunder. Meaning thereby that the provisions underlying Chapter VI of the 'VAT Act' and the procedure provided thereunder shall be followed by the Assessing Authorities while holding assessment or reassessment under 'the Entry Tax Act'. In the present case, the reassessment has been held on the basis of an audit objection raised by the Accountant General through audit note dated 1.12.2017. The provisions under 'the VAT Act' which enables the Assessing Authority to proceed on such objection raised by the Accountant General, is found in section 33 and the manner prescribed is provided under Rule 25 of the Bihar Value Added Tax Rules, 2005.

A plain reading of Section 33 of 'the VAT Act' would confirm that while it advises the Assessing Authority to proceed on an audit objection for its disposal in the manner prescribed and which is provided under Rule 25 of the Rules framed thereunder, it does not authorize the assessing authority to levy penalty or interest. The legislature while drawing the contours for the exercise has made no reference to the provisions of Section 31 while advising the Assessing Authority on the procedure that they need to follow on an audit objection. With such clear mandate present under section 33 and Rule 25 of the Rules framed thereunder, I completely fail to appreciate the recourse taken by the Assessing Authority to the provisions of Section 31 of the Act for not only to quantify the liability but also to impose interest thereon.

The issue as to the distinctive nature of the proceeding under sections 31 and 33 came up for consideration before this

Court in a case arising from C.W.J.C.No. 24431/2018 (**M/s Tata Project Limited vs. the State of Bihar & ors**.) and this Court after dealing with the scheme of the Act as present under sections 25,31 and 33 has held that the Assessing Authority would be overstepping its jurisdiction in resorting to the provision of Section 31(2) of ‘the VAT Act’ for imposing a penalty which is not available to a proceeding initiated on an audit objection made by the Comptroller and Auditor General under section 33.

Having held as such and the order passed by the Assessing Authority impugned at Annexure 4 being an order passed in purported exercise of jurisdiction under section 33 of ‘the Act’, since neither Section 33 of ‘the VAT Act’ nor Rule 25 of the Rules prescribed thereunder provides for imposition of interest, I am of the opinion that the recourse taken by the assessing authority to the provisions of Section 31 to levy interest to the tune of Rs.1,02,77,424/- is wholly illegal and without jurisdiction and the assessment order as well as consequential demand notice to the extent it raises a demand towards interest are quashed and set aside.

The assessment order dated 3.7.2018 together with the demand notice of the even date, impugned at Annexures 4 and 4/1 stands modified to that extent and since the respondents have proceeding to adjust the excess amount deposited by the petitioner for the period 2014-15 as against the liability for the period 2015-16 vide Annexure 6 as also admitted by the State at paragraph 11 of the counter affidavit, let the balance remaining i.e. Rs.2,57,90,273 – Rs,2,50,17,765= Rs.7,72,508/- if yet payable, should be deposited by the petitioner within four weeks from today.

The writ petition is allowed with the directions above.

**(Jyoti Saran, J)**

**Arvind Srivastava,J.**

I agree.

**( Arvind Srivastava, J)**

Surendra/-

| | |
|---|---|
| **AFR/NAFR** | AFR |
| **CAV DATE** | 01.02.2019 |
| **Uploading Date** | 30.04.2019 |
| **Transmission Date** | NA |