IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.17065 of 2022

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LG Electronics India Pvt. Ltd. having its registered office at A-24/6 Mohan Cooperative Industrial Estate, Mathura Road, New Delhi- 110044 and its Circle Office/Local office at 3rd Floor, 301/302, Kamala Business Park, East Boring Canal Road, Patna-800001, through its authorized signatory Mr. Pushpak Kumar (male), aged about 45 years, son of Late AP Singh, resident of Flat No. 304, Patliputra Garden Estate, New Patliputra Colony, Patna.

... ... Petitioner/s

Versus

1. State of Bihar through Commissioner-cum-Secretary, Commercial Taxes, Vikas Bhawan, Bailey Road, Patna- 800015.
2. Joint Commissioner of Commercial Tax (Appeals), Central Division, Patna.
3. Assistant Commissioner of Commercial Taxes, Patliputra Circle, Patna.

... ... Respondent/s

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Appearance :
For the Petitioner/s : Mr. Rahul Tangri, Advocate
Mr. Hrishikesh, Advocate

For the Respondent/s : Mr. Vikash Kumar (SC11)

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE MADHURESH PRASAD
ORAL JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 20-04-2023

The issue raised in the above case is as to whether the excess payment made under one head of tax can be set off in the other head, thus absolving the assessee from payment of interest on the short fall of tax in the latter head.

2. At the outset, the learned State Counsel had objected to the writ petition pointing out that there is an appellate remedy available before this Court itself under the Bihar Value Added Tax

Act, 2005 (hereinafter referred to as 'the Bihar VAT Act'). The learned counsel for the petitioner vigorously prayed for consideration of the writ petition, especially pointing out that there is an element of equity involved in the present case which cannot be urged in an appeal.

3. On facts, the petitioner is a Company incorporated under the Companies Act, 1956 and is one dealing in commercial electronic durables. The petitioner for the financial year 2011-12 paid an amount of Rs.2,74,87,667/- towards its entry tax liability, out of which Rs.1,50,00,000/- was deposited as advance entry tax on 20.03.2012, pursuant to payment notice dated 09.02.2012 issued under Section 3(7) of the Bihar VAT Act. At the same time, the petitioner also is said to have deposited Rs.1,25,00,000/- as advance tax towards discharge of VAT liability. The challans for such remittance are produced as Annexure-1 series. The annual returns for the financial year was filed separately disclosing particulars pertaining to VAT in RT Form 3 and Entry Tax in Form ET-05. The actual amount of entry tax payable was Rs.1,33,14,851.56 paise and there was an excess payment of Rs.1,41,72,815/-. The total output tax payable as disclosed in the VAT returns was Rs.29,71,95,126.32 paise. There was shortfall in payment of VAT. The entire amount of entry tax paid, i.e.

Rs.2,74,87,667/- was adjusted by way of set off to the VAT liability. The returns showing such adjustment are produced as Annexure-2 series.

4. On completion of assessment under the two separate enactments, the excess payment of entry tax amounting to Rs.1,41,17,815/- was recorded under the entry tax assessment dated 31.07.2014 and the shortfall of tax under the VAT returns was demanded by notice dated 31.07.2014. In the assessment under the Bihar VAT Act, entry tax amounting to Rs.1,33,14,851.56 paise alone was given set off and short payment of Rs.1,35,02,919/- was demanded under the VAT Act, interest of Rs.55,69,954/- for such short payment was also demanded with a penalty of Rs.5,000/-. The said demand is produced as Annexure-3.

5. The petitioner then moved CWJC No.16670 of 2014 before this Court challenging the demand notices which was disposed of by judgment dated 26.09.2014. Therein, this Court directed that excess amounts found in the entry tax assessment shall be refunded to the petitioner and the petitioner shall also pay the tax demanded, which payment shall be subject to any challenge to the tax liability, made by the petitioner. The directions in the judgment were complied with and the refund was made on

28.10.20214 pursuant to which short fall VAT was also paid on 31.10.2014 which is evidenced by Annexure-5 series. The petitioner challenged the legality of the demand, on the ground of there being excess payment made under the Entry Tax Act, before the first appellate authority in which was passed Annexure-6 order. The first appellate authority on the premise that if the petitioner had received refund of the excess payment of entry tax earlier, then there would have been no shortfall of VAT payment, found the levy of interest not correct and remanded the matter for consideration whether the penalty was proper or not. The order is produced as Annexure-7. Here it is pertinent to observe that the reservation made in CWJC No.16670 of 2014 was only with respect to the liability to tax under the VAT Act as is clear from the last paragraph of the decision:-

> "We also make it clear that the payment, which would be made by the petitioner pursuant to the direction of this Court of the said sum of Rs. 1,90,77,873.29 paise, shall be subject to the decision, which may be arrived at, <u>if the petitioner challenges the petitioner's legal liability to pay the said sum of Rs.1,90,77,873.29 paise and/or any part thereof.</u>"
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> (Emphasis supplied)

There is but no challenge made to the tax liability under the VAT Act of Rs.1,90,77,873.29. The petitioner's challenge was only on the demand of set-off, which was not statutorily permissible.

6. The Department preferred a revision under Section 73A of the Bihar VAT Act before the Commissioner of Commercial

Taxes, Patna, Bihar, who by order dated 10.11.2015 set aside the first appellate authority's order to the extent it held that the levy of interest by the Commercial Tax Officer was incorrect. The reasoning was that it was incumbent upon the petitioner to have applied for refund which application was made only on 08.10.2014 after the order of this Court in the writ petition filed. Annexure-8 is the order in revision, of the Commissioner which was challenged before the Tribunal, by the assessee, unsuccessfully as is evident from Annexure-9, the order of the Tribunal.

7. Before us, challenging the order of the Commissioner and the Tribunal, the learned counsel pointed out that the money was with the State and it is immaterial as to whether the same was under one head or the other head. It is argued that in similar circumstances, the Calcutta High Court had allowed set off of the amounts paid, as is seen from the judgment in **Hindustan Unilever Limited v. Deputy Commissioner, Commercial Taxes, Corporate Division & Ors. 2014 SCC OnLine Cal 17634.**

8. Admittedly, there was an excess payment under the Entry Tax Act by the assessee and though the assessee would submit that the same was on the insistence of the department, we are unable to understand, why amounts should be paid over and above that due, merely on the insistence of the department. We

cannot countenance such argument and we see that the assessee's own submission before this Court in paragraph 6 was that they deposited Rs.1,50,00,000/- as advance entry tax on 20.03.2012. It was obviously in the course of the year that further amounts were deposited which the assessee had no reason to deposit other than contemplation of input of more goods into the State.

9. The entry tax on goods can be set off on the output tax payable under the VAT Act, only in certain circumstances is very evident from Section 3 of the Bihar Tax on Entry of Goods Into Local Areas for Consumption, Use or Sale Therein Act, 1993. The charge as per Section 3 is on the entry of scheduled goods into a local area for consumption, use or sale therein for the purpose of development of trade, commerce and industry in the State, at such rate, not exceeding twenty percent, of the import value of such goods, as specified in a notification. Sub-section (2) makes such tax payable by every dealer on entry of scheduled goods into the local areas of the State. The second proviso to sub-section (2) provides that when such importer of scheduled goods incurs tax liability under Section 14 of the Bihar VAT Act, by virtue of either of (i) sale of imported scheduled goods or (ii) sale of goods manufactured by consuming such imported scheduled goods, the tax liability under the Bihar VAT Act would stand

reduced to the extent of tax paid under the Entry Tax Act. Hence, in consonance with the value added scheme of levy and payment of tax, when entry tax is levied on the goods on its entry, if such goods are sold or converted into other items, which are sold within the State of Bihar, thus enabling further levy of tax on such sale or manufactured goods, only then could there be set off provided for VAT, with the entry tax paid. If the imported goods do not suffer tax within the State, in cases, like consumption without sufferance of tax and even in manufacture of goods which are exempted category, then there could be no set off of the entry tax paid. The principle is that when tax is suffered on goods; which either in the same form or in a manufactured form, suffers tax, the entry tax is given set off on the final sale affected, within the State. If excess entry tax has been paid, for whatever reason, the assessee's entitlement is to file a refund application and get the same refunded. There is no provision either in the Entry Tax Act or in the VAT Act permitting the assessee to avail set off for the amounts paid in excess, by mistake, inadvertence or coercion.

10. The assessee admittedly short paid the VAT payable on sale of goods, which payment has to be made within one month of the sale of goods, the invoice of which collects not only the value of the goods, but also tax from the ultimate consumer. The

assessee cannot in every monthly return claim that there is excess entry tax paid and thus resort to short fall in payment of VAT; which also has not been done by the assessee since the set off has been claimed in the annual return. Hence there was obvious shortfall in payment of VAT as per monthly returns. As we noticed at the outset an excess payment made could as well be on contemplation of import of goods or it could also be for import of goods, which are consumed within the State without any tax liability. There is no question of any equity being employed, especially when the enactments are two separate enactments, the liability to which flows from distinct charge and distinct incidence of levy. Insofar as the Statute does not provide for such set off, there is no question of the assessee claiming such a set off in the annual return, when the assessee's short fall is in the due payments to be made, along with each monthly return.

11. So far as the judgment of the Calcutta High Court in **Hindustan Unilever Limited** (supra) is concerned, we notice that the same is of a Single Judge and in any event has only a persuasive value. Therein, the collection was under the Central Sales Tax Act and the VAT Act both of which were credited into the Consolidated Fund of the State. Therein, a Mysore High Court decision was specifically referred to, which held so in **Cotmac**

Private Ltd. v. Commercial Tax Officer, 20 STC 20, a Division Bench, as under:-

> *"It is not possible, in our opinion, to adjust the tax refundable under one Act against Tax due under another Act. The fact that even the tax levied under the Central Act is ultimately intended for State purposes and may therefore get directly credited into the Consolidated Fund of the State, would make no difference, because the two taxes are distinct and different, and levied under two different statutes, one of the State Legislature and the other of Parliament."*

12. The Calcutta High Court departed from the dictum in **Cotmac Private Ltd**. (supra) relying on the facts coming out before it. Therein, a clerical mistake had given rise to a problem in making entries and writing challans and also depositing tax. The clerical staff of the writ petitioner deposited a part of the Central Sales Tax collection as Sales Tax under the State Act. A Circular bearing No.9 of 2006 was specifically noticed which is extracted herein.

> *"Thus a tax payable under the West Bengal Value Added Tax Act, 2003 can be given credit under the same Act although the challans has been used under the West Bengal Sales Tax Act, 1994 or under the Central Sales Tax Act, 1956. Similarly a tax meant for deposit under the Central Sales Tax Act, 1956 may be given credit under the same Act although the challans used for such deposit is either under the West Bengal Value Added Tax Act, 2003 or the West Bengal Sales Tax Act, 1994. Likewise a tax required to be deposited under the West Bengal Sales Tax Act, 1994 may be given credit under the same Act although the challans for the purpose has been used inadvertently under the West Bengal Value Added Tax Act, 2003 or the Central Sales Tax Act, 1956."*

It is based on the Circular that a set off was granted the liability under the State Act, when there was excess payment under the Central Act. We do not find such a Circular in the present case.

13. The liability is under two separate enactments and the set off has also to follow the procedure in the separate enactments. It was perfectly permissible for the assessee to have sought for refund immediately on the close of the year and paid the amounts under the VAT Act, thus avoiding a portion of the interest liability. In the present case, attempt of the assessee is to take advantage of an excess payment; made by reasons not clear, to be set off on the short payment made in VAT which had to be paid along with the monthly returns. Obviously, the interest starts running from the date such payment fell due and stood defaulted.

14. We find no reason to entertain the writ petition and the same stands dismissed.

15. Learned counsel for the petitioner then sought for permission to file an appeal which would be futile and unnecessary since, sitting in Division, we have decided the writ petition and answered the specific question of law raised before us. We have also found that there is no reason to exercise the equitable jurisdiction under Article 226 of the Constitution of India,

especially in tax matters and also when the procedure has not been followed as delineated in the Statute. It is trite that, when something has to be done in a particular manner, it has to be done in that manner or not at all.

16. The writ petition stands dismissed.

(K. Vinod Chandran, CJ)

(Madhuresh Prasad, J)

Sunil/-

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