IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.149 of 2015

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M/s ACC Limited, a Company incorporated under provisions of the Indian Companies Act, 1913, having its Office at Samridhi Complex, S.P. Verma Road, P.S. Gandhi Maidan, District-Patna (Bihar) through its Tax Incharge S U Patna Ms. Aditi Awasthi

... ... Petitioner/Appellant/s

Versus

1. The State of Bihar through the Principal Secretary, Commercial Taxes Department, Bihar, Patna.
2. The Joint Commissioner of Commercial Taxes (Appeals), Central Division, Patna.
3. The Assistant Commissioner of Commercial Taxes, Special Circle, Patna.
4. The Commercial Taxes Officer, Special Circle, Patna.

... ... Respondent/s

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Appearance :

For the Appellant/s : Mr. Ramesh Kumar Agrawal, Advocate
Mr. Shive Kumar, Advocate

For the Respondent/s : Mr. Ajay Behari Sinha, G.A.8
Mr. Vikash Kumar, SC 11
Ms. Kalpana, AC to G.A.8

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE RAJIV ROY

CAV JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 30-11-2023

The questions of law framed in the above appeal arising from the order of the Commercial Taxes Tribunal, Bihar (henceforth for short, 'the Tribunal') by order no.6 dated 27.07.2015 are the following:-

> "(I) *Whether on the facts and in the circumstances of the case, 'the Tribunal' was justified in denying adjustment of entry tax paid on the damaged cement against VAT liability?*

(II) *Whether on the facts and in the circumstances of the case, the appellant is liable to pay entry tax on damaged cement under the provisions of the Entry Tax Act and whether the appellant is not entitled for the refund or adjustment of the same?*

(III) *Whether on the facts and in the circumstances of the case, the imposition of interest under Section 39 (4) of the VAT Act is arbitrary, illegal and without jurisdiction?"*

2. The facts on which the above questions of law arise are as follows:- The appellant manufactures and sells cement across the country through its various sales unit, one of which is located at Patna and the appellant was also a registered dealer under the Bihar Value Added Tax Act, 2005 (for brevity, 'VAT Act'). The appellant imports cement into the State from outside the State of Bihar by way of stock transfer to its depot at Patna and the cement is sold within the capital city as also in other districts in the State. There are eight C&F agents appointed in Bihar for the fifteen Warehouses situated in different towns within the State, for storage of cement.

3. In the assessment year 2010-11, the appellant imported 10,12,535.90 MT of cement into the State from their own manufacturing units situated in Orissa, Chhattisgarh & Jharkhand. In addition to the freight paid to the Railways and

commission paid to the C&F agents, entry tax was also paid. The audit team of the Commercial Taxes Department (henceforth for short 'the department') found that the assessee had shown stock transfer from outside the State worth Rs.45,12,63,567.00 in the annual return as well as TAR and the total import value shown in ET-V (Entry Tax Payment) was Rs.527,56,05,041.00, thus concealing value worth Rs.76,29,71,474.00. It was also found that the adjustment of entry tax paid on damaged cement was not admissible under the provisions of the Bihar Tax on Entry of Goods into Local Areas for Consumption, Use or Sale therein Act, 1993 (for brevity, 'Entry Tax Act').

4. The matter travelled to 'the Tribunal' which on the question of freight and commission remanded the case to the Assessing Officer for verifying the documents to evidence the contention taken. As far as entry tax paid on damaged cement is concerned, 'the Tribunal' found that it cannot be adjusted from VAT liability, in the circumstance of the proviso to Section 3(2) of the Entry Tax Act having provided for such reduction of tax payable under the VAT Act only when the imported goods liable to pay tax under the Act, incurs tax liability within the State. The damaged goods having not incurred any tax liability, there

would be no reduction of VAT liability to the extent of the entry tax paid on such damaged goods was the finding; from which the questions of law in the appeal arise.

5. Learned counsel for the appellant argued based on a decision of the Hon'ble Supreme Court in ***Hindustan Lever Ltd. v. State of Bihar; (2004) 136 STC 396*** that the entry tax paid would be entitled to be reduced from the total VAT liability of the assessee, especially when the damaged goods were not sold within the State. Reliance is also placed on a decision of the Hon'ble Supreme Court in ***H.M.M Limited v. Administrator, Bangalore City Corporation; (1989) 4 SCC 640*** to contend that there can be no tax or duty levied without authority of law and that in the present case, the action of the Assessing Officer has resulted in levying of tax on goods which have not been sold or consumed within the State of Bihar, thus making the levy under the Entry Tax Act, one without authority of law.

6. Reliance is also placed on a decision of the Hon'ble Supreme Court in ***Associated Cement Company Limited v. State of Bihar; (2004) 7 SCC 642***. Therein, despite there being no liability to tax for the goods sold within the State of Bihar, which was imported from outside the State, the entry tax paid at

the time of import was permitted to be reduced from the total liability of the assessee. The learned counsel also placed a Division Bench decision of this Court in ***CWJC 19512 of 2010*** dated ***07.03.2011 M/s Shree Shankar Ice & Cold Storage vs. State of Bihar.***

7. Learned Government Advocate, Sri Vikash Kumar, on the other hand, supported the order of 'the Tribunal' specifically relying on the words employed in the statute. It is pointed out that there is no evidence produced as to how the damaged goods were disposed of. The damaged goods in normal conditions would be returned to the manufacturing unit, in which event the assessee could have claimed the refund. The State asserts that the appeal is liable to be dismissed and there arise no question of law. The State relied on ***Indian Oil Corporation v. State of Bihar 2018 (1) SCC 242.***

8. Section 3 (1) of the Entry Tax Act with the nominal heading 'Charge of Tax', levies tax on 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. The second proviso to Section 3 (1) is as below:-

> *"Provided further, that if an importer claims that he imported goods notified under sub-section (1) not for the purpose of consumption, use or sale, the burden of proving that the import was for purposes other than for consumption, use or sale shall be on importer importing such goods and making such claim."*

9. Sub-section (2) of Section 3 further makes it mandatory for every dealer liable to pay tax under the VAT Act or any other person; who imports scheduled goods into the local areas of the State of Bihar whether on his own account or on account of his principal or takes delivery or is entitled to take delivery of such goods, to the tax leviable under the Entry Tax Act. The second proviso to sub-section (2) of Section 3 is also extracted here under:-

> *"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:"*

10. The interpretation of the above provisos assume significance to resolve the dispute herein. Second proviso to Section 3(1) provides that if the assessee who imports scheduled

goods has a contention that it was not being imported for the purpose of consumption, use or sale, the burden of proving the said factum is on the importer. The second proviso to sub-section (2) also provides that on payment of entry tax by an importer of schedule goods who is also liable to pay tax under the VAT Act, when he incurs liability under the VAT Act, such liability shall stand reduced to the extent of tax paid under the Entry Tax Act. The set off under the VAT liability would arise only when there is a liability incurred under that Act and in the event of there being no consumption, use or sale within the State, the importer would have to prove as to how the goods were disposed of.

11. The above two contingencies are two different and distinct circumstances which cannot be mixed up in any manner. If the goods are imported for any purpose other than consumption, use or sale within the State, then the importer has to prove how the goods imported were disposed of. If the goods had, in the form in which it was imported or in any other form, incurred a liability under the VAT Act, then the tax paid on entry would be reduced from the liability incurred under the VAT Act. The appellant pleads neither but asserts; though the cement was imported for sale it was damaged and could not be sold and

offers no explanation as to what happened to the huge quantity of damaged cement.

12. ***Hindustan Lever Ltd.*** *(supra)* was a case in which the assessee had C&F agents within the State of Bihar and purchased goods (hydrogenated vegetable oil) from two local areas within the State and brought it into the Patna local area from which it was sold to persons in other local areas and also stock transferred to outside the State. Assessee claimed exemption on the ground that the goods were not consumed, used or sold within the Patna local area. It was held that a levy under the Entry Tax Act would be enabled only when the goods are brought into a local area for consumption or sale within the local area and not when it is intended to be taken out and consumed or used in other local areas. Even then, it was held that it was for the dealer to prove to the satisfaction of the assessing authority that the sale was for the purpose of taking out the goods or for re-export and not for the purpose of consumption or use within the local area.

13. ***H.M.M Limited*** *(supra)* was also a case of levy of Octroi on entry of goods brought for ‘consumption, use or sale’ within the municipal limits. Therein the assesee brought goods in bulk, into the municipal area, in containers, for repacking in

small units and to export outside the municipal limits. Here, the assessee has no such contention and the above cited decisions are not at all applicable to the facts of the instant case. The dictum of ***H.M.M Limited*** *(supra)* that there can be no tax or duty levied without authority of law cannot for a moment be doubted but the absence or lack of authority has to be found from the attendant facts juxtaposed with the levy, as coming out from the taxing statute.

14. ***Associated Cement Company Limited*** *(supra)* had two manufacturing units in the erstwhile State of Bihar and based on an incentive scheme of tax exemption to new units and existing units with additional/incremental production, the company invested money for incremental production; for which the Company was granted exemption from sales tax between the periods 1998 to 2007. The assessee, asserting the right to get the entire entry tax paid adjusted from the total liability to tax, contended that bifurcation of goods that suffered tax and those exempted from payment was not legally permissible. While, the State argued that, since by virtue of the exemption, there was no liability, there could be no adjustment of entry tax paid.

15. The Hon'ble Supreme Court though found that, literally an 'exemption' is freedom from liability, in fiscal terms

it assumes varying shapes and hence, considered the term ‘liability’ in the context of an exemption notification. From the statutory provisions it was held that the charging section provides for payment of sales tax while another provision empowered the State Government to exempt from such payment. Liability to pay tax and the actual payment of tax were held to be conceptually different. The exemption notification does not efface the liability created by the charging section, but merely absolves the assessee from paying the tax, was the finding rendered in favour of the assessee.

16. This does not come to the aid of the appellant in the facts of this case since there is no question raised of an exemption and the unsubstantiated version is that so much of the goods were damaged and were hence not sold and thus there was no liability incurred. In fact, going by the dictum of the cited decision, unless there is a liability incurred; to tax, there can be no adjustment of entry tax and in the instant case, the claim of the appellant for exemption going by the above dictum, has to fail.

17. In ***Shree Shankar Ice & Cold Storage*** *(supra)* the assessee challenged the demand of entry tax for containers imported into the local area on the ground of it having been

packed with dry fruits and exported outside the State of Bihar. The Division Bench found that the containers since were packed with dry fruits, were consumed and used in the State and hence was liable to entry tax. This does not in any way help the appellant because they have already paid the entry tax, which liability is admitted, and the further claim for adjustment in or set off, from its total sales tax liability, is the question urged herein. The cited decision only considered the liability under the Entry Tax Act and not the further set-off, which is subject to specific conditions.

18. ***Indian Oil Corporation Ltd.*** *(supra)* is a case on point, dealing with the set-off of entry tax when the imported goods did not suffer further liability to tax within the State of Bihar at the hands of the importer itself. The assessee therein imported crude oil from outside the State of Bihar, manufactured high speed oil, petrol etc. at its refinery within the State and transferred it to its branch at Patna from where it was sold *inter alia* to other oil marketing companies (OMC) who in turn sold it to retailers, end consumers through its own petroleum outlets inside and outside Patna; which sales were effected by the assessee too. The sale to OMCs did not suffer tax under the Bihar Finance Act, 2005 since by a notification,

the point of levy of tax on petroleum goods, sold to OMCs, was shifted to the point of their sale to retailers and end consumers. The appellant paid entry tax at the rate of 16% and was liable to sales tax @ 24.5%, from which total liability, set-off was claimed and accepted by the department; which later stood reversed giving rise to proceedings before the Advance Ruling Authority. After copious reference to the provisions the Hon'ble Supreme Court held so in paragraph 13:

> **"13.** *Since the set-off in question depends upon the interpretation of Section 3(2) of the Entry Tax Act, it is necessary to state, at the outset, that the following conditions need to be satisfied for claim of set-off under the said provision:*
>
> *(i) First and foremost, under Section 3(2) itself, the tax leviable by way of entry tax can only be paid by every dealer liable to pay tax under the VAT Act;*
>
> *(ii) The set-off can only be granted if the assessee is an importer of scheduled goods, who is liable to pay tax under the VAT Act;*
>
> *(iii) The assessee must incur tax liability at the rates specified under Section 14 of the VAT Act;*
>
> *(iv) This must only be by virtue of the sale of imported scheduled goods; and*
>
> *(v) "His" tax liability under the VAT Act will then stand reduced to the extent of tax paid under the Act."*

19. The assessee being a registered dealer under the Finance Act was found to be satisfying the first condition and though the assessee was the importer of the goods, it had no liability to pay VAT on its sales to OMCs thus not satisfying the second & third condition. The assessee also did not satisfy the

fourth condition since the words employed in the provision; '*or sale of goods manufactured by consuming* ***such*** *imported scheduled goods'* which connotes a sale by the importer itself, who alone is entitled to the set-off as per the fifth condition. The dictum squarely applies in the instant case where admittedly the appellant- assessee did not suffer tax on the imported goods within the State of Bihar thus disabling the appellant from claiming set-off to the extent of ***such*** imported goods which did not suffer tax within the State of Bihar.

20. ***Associated Cement Company Limited*** *(supra)* strongly relied on by the assessee was distinguished in ***Ĭndian Oil Corporation Ltd.*** *(supra)* on two counts; one, that there the question was raised of an exemption which does not efface the liability to tax and next that the words: *'by virtue of sale of imported scheduled goods or sale of goods manufactured by consuming* ***such*** *imported scheduled goods'* was added to the provision granting set-off by way of an amendment, later to the ***ACC case***. It was categorically held that set-off is a concession which none can claim as a matter of right unless the specific conditions under which it is granted are satisfied. The matter was remanded only for consideration of the ground raised of no liability of entry tax since the OMC's to which the appellant had

sold petroleum products had sold it outside Patna and thus the goods were not consumed, used or sold within the local limits of Patna.

21. The instant appeal by the assessee has to fail and the questions of law are answered against the assessee and in favour of the respondents.

22. The appeal stands dismissed.

(K. Vinod Chandran, CJ)

Rajiv Roy, J. I agree.

Sunil/-

(Rajiv Roy, J)

AFR/NAFR	AFR
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