Indian Oil Corporation Ltd. vs The State Of Bihar on 14 November, 2017

Equivalent citations: AIR 2017 SUPREME COURT 5643

Author: R.F. Nariman

Bench: Sanjay Kishan Kaul, R.F. Nariman

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.3018 OF 2017

INDIAN OIL CORPORATION LIMITED …APPELLANT

VERSUS

STATE OF BIHAR & ANR. ...RESPONDENTS

WITH

SPECIAL LEAVE PETITION (CIVIL) NO.15875 OF 2017

SPECIAL LEAVE PETITION (CIVIL) NO.15893 OF 2017

SPECIAL LEAVE PETITION (CIVIL) NO.15896 OF 2017

SPECIAL LEAVE PETITION (CIVIL) NO.15899 OF 2017

SPECIAL LEAVE PETITION (CIVIL) NO.15900 OF 2017

SPECIAL LEAVE PETITION (CIVIL) NO.15926 OF 2017

SPECIAL LEAVE PETITION (CIVIL) NO.16192 OF 2017

JUDGMENT

R.F. Nariman, J.

1. The present appeal and special leave petitions arise out of demands made from the Appellant for payment of Entry 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).

2. The Appellant has its marketing division in the State of Bihar with branches, inter alia, at Barauni and Patna. It is from these branches that sales of petroleum products are effected. The Corporation receives crude oil, which is imported from outside the State of Bihar, which then enters Bihar, where the Corporation has its oil refinery; and after undergoing certain processes, crude oil is converted into petroleum products, like High Speed Diesel, Petrol etc. The products manufactured in the Bihar oil refinery are then sent to a branch in Patna, mainly through a pipeline constructed specifically for this purpose. Some part of these petroleum products, namely, High Speed Diesel and Petrol are sold by the Appellant to two other oil marketing companies (OMCs), namely, Bharat Petroleum Corporation Ltd. (BPCL) and Hindustan Petroleum Corporation Ltd. (HPCL), who then take the products from the depot of the Corporation situated in Patna and thereafter sell the products to their retail dealers or through their petroleum outlets. The Appellants, apart from the sales made to these OMCs, also sell the aforesaid petroleum products to local retailers and through petroleum outlets in Patna. The Appellant pays Entry Tax at the rate of 16% when the product enters the local area of Patna and 24.5% VAT is paid and set off against the Entry Tax under Section 3(2) second proviso of the Entry Tax Act for sales made within the local area. The grievance of the Appellant in the present appeals is that when a sale is made to the OMCs, after payment of Entry Tax, VAT is not set off against the Entry Tax. VAT is not actually paid by the Appellant by reason of a notification dated 4th May, 2006 under the Bihar Value Added Tax Act, 2005 (VAT Act), where, in case of petroleum products sold by the Appellant to OMCs, the levy itself is at the point of sale by the aforesaid OMCs to their retailers or directly to their consumers, and this being the case, the set off of such VAT paid, as claimed by the Appellant, was allowed until the year 2014. However, pursuant to certain audit objections raised by the Accountant General, Bihar, the aforesaid set offs that were allowed to the Appellant, were re-opened with effect from the assessment year 2008-09, as a result of which set offs that were allowed were now disallowed. The Entry Tax demand arising from such disallowance for the assessment years 2008- 09 till 2014-15 amount to Rs.1,683.03 crores.

3. In Civil Appeal No.3018 of 2017, the impugned judgment dated 22nd October, 2013 of the Patna High Court agreed with the Advance Rulings Authority, and rejected the case of the Appellant under Section 3(2) second proviso of the Entry Tax Act, stating that the set off would not be allowable under the aforesaid proviso.

4. In the seven Special Leave Petitions before us by, a common judgment dated 19th April, 2017, a Division Bench of the Patna High Court framed five questions as follows:

"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?"

5. Questions 1, 3, 4 and 5 were answered against the assessee, but question 2 was answered in its favour by stating that since there was no substantive provision by which interest could be levied, interest that was charged to the Appellant by the assessment orders in question would have to be set aside.

6. Shri Arvind Datar, learned Senior Advocate appearing on behalf of the Appellant, has referred in copious detail to various provisions of the VAT Act, Rules made thereunder and Form RT-1 made under the VAT Act. He also referred in detail to various provisions of the Entry Tax Act. It is his case that the Entry Tax Act in Bihar, unlike other Entry Tax Acts, was essentially to ensure that VAT was collected under the VAT Act in the State. According to him, the moment products contained in Schedule IV of the said Act suffer tax, the scheme of the Entry Tax Act is that a set off on such goods, which bear VAT, is allowable. According to the learned counsel, Section 3(2) second proviso should be construed in such a manner as would accord with this object and set off, as claimed by the Appellant, cannot, therefore, be denied to it. According to the learned counsel, it is clear that this practice of allowing set off was followed right up to 2014, showing that both the Government as well as the assessee were clear that the provision had to be worked in this fashion. The reason for retrospectively reopening the assessments made from 2008-09 is due to an audit objection raised only in the year 2014, after which the assessee has so arranged its affairs that set off would be claimable and has, in fact, been allowed by the authorities. According to the learned counsel, the audit objection was itself only on the footing that a 2006 amendment had changed the definition contained in Section 2(1)(c) of the Entry Tax Act of the "entry of goods" and it is for this reason that set off was disallowed, and not the reasons given later by the State. According to the learned counsel, what has to be seen is the overall picture qua the goods under the Entry Tax Act and once it is clear that the aforesaid goods suffer VAT, then a set off becomes payable. According to the learned counsel, a large portion of Rs.1,683.03 crores that is demanded relate to sales that are made by

HPCL and BPCL outside the local area of Patna, which would, therefore, not attract Entry Tax at all. This has not been segregated, and if segregated, the demand for the assessment years in question would fall by at least Rs.1,000 crores. The Appellants were given no opportunity to demonstrate this in detail, despite the fact that they were able to give certificates by HPCL and BPCL for all the assessment years in question that those companies had, in fact, effected sales worth over a thousand crores outside the area of Patna.

7. According to Shri Datar, if this Court were to decide against the appellant on the construction of Section 3(2) second proviso, then, in any case, he would be liable to succeed, as the said proviso should be read down to make it constitutionally valid, as otherwise it would fall foul of Article 14 of the Constitution of India. According to the learned counsel, the same goods cannot bear different rates of tax which are ultimately passed on to the consumers and this ex facie discrimination would, therefore, make the proviso bad in law requiring this Court to read it down, so that, at least so far the Appellant is concerned, a set off would be granted. Also, according to him, in any case, the matter should go back to the Appellate Tribunal to determine as to how much of the sales made by HPCL and BPCL would be outside the Patna area and, therefore, not exigible to Entry Tax at all.

8. Shri S. Ganesh, learned Senior Advocate, appearing on behalf of the Revenue, has countered each of these submissions. According to the learned counsel, a plain reading of Section 3(2) second proviso of the Entry Tax Act would make it clear that the provision is assessee based and not goods based. According to the learned counsel, none of the conditions of the second proviso have been met by the Appellant and only if the said provision is completely rewritten, can the Appellant be given relief. Re-writing of the aforesaid provision, being a legislative function, would, therefore, be outside the judiciary's ken. According to the learned counsel, in any case, VAT and Entry Tax are separate taxes levied under separate Entries of List II of the Seventh Schedule. The granting of set off is a matter of indulgence and cannot be claimed as a matter of right. It is of essence that the same person should have paid both Entry Tax and VAT to claim set off. In the present case, the Appellant admittedly pays only Entry Tax and no VAT as there is no levy on the Appellant when it sells oil to other OMCs. According to the learned counsel, Article 14 of the Constitution cannot be invoked in the present case for the reason that there is no clear and hostile discrimination, which is the requirement of several judgments of this Court, before Article 14 can be used to strike down tax legislation. In any event, according to the learned counsel, striking down the second proviso would only result in no set off being claimable at all and would be counterproductive. The learned counsel made a fervent plea that interest by way of restitution, at least, should be given to the Government since the Writ Petitions that were filed in 2014 resulted in stay orders which have continued till date, making it impossible for the State to recover interest on the demands made. He cited a number of judgments to support all these propositions.

9. Having heard learned counsel for both the parties, it is necessary to set out some of the provisions of the two Acts in question. Since we are directly concerned with the Bihar Entry Tax Act, the following provisions need to be adverted to:

> "2. Definitions.– (1) In this Act unless the context otherwise requires,–

(c) "Entry of goods", with all its grammatical variations and cognate expressions, means, entry of goods:

(i) into a local area from any place outside such area,

(ii) into a local area from any place outside the State,

(iii) into a local area from any place outside the territory of India, for consumption, use or sale therein.

Provided that in case of such goods which are liable to tax under Section–12(1) of the Bihar Finance Act, 1981, entry of goods shall mean entry of goods into local area from any place outside the State for consumption, use or sale therein.

Explanation– Entry of goods into a local area for consumption, use or sale therein from any place outside the territory of India shall also be deemed to be an entry of goods for the purposes of this Act.

3. Charge of Tax– (I) There shall be levied and collected a 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, as may be specified by the State Government in a notification published in a official gazette subject to such conditions as may be prescribed:

Provided different rates for different scheduled goods may be specified by the State Government. 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.

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 providing that the import was for purposes other than for consumption, use or sale, shall be on importer importing such goods and making such claim.

(IA) The tax under sub-section (1) shall be continued to be levied till such time as is required to improve infrastructure within the State such as power, road, market condition etc. with a view to facilitate better market condition for trade, commerce and industry and to bring it to the level of, National average.

(2) The tax leviable under this Act shall be paid by every dealer liable to pay tax under Bihar Value Added Tax Act, 2005 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:

Provided no tax shall be leviable in respect of entry of such scheduled goods effected by a person other than the dealer if, the value of such goods does not exceed one thousand in a year.

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:

Provided also that if the sale of such scheduled goods is exempted from tax under any notification issued under Section 7 of the Bihar Value Added Tax Act, 2005, reduction of his liability under the Bihar Value Added Tax Act, 2005, as provided in this section or any notification there under, issued shall not be made.

(1) The amendment made in section 3 of the said Act shall be deemed to be, and to always have been, for all purposes, as validity and effectively in force at all material times (w.e.f. 25.2.1993) (2) Any assessment, collection, adjustment, reduction or computation made or any other action taken or anything done or purported to have been taken or done under the Bihar Finance Act, 1981 and the Bihar Tax on Entry of Goods into Local Areas for Consumption, Use or Sale Therein Act, 1993 and notifications issued and rules made there under shall be deemed to be and to have always been, for all purposes, as validly and effectively, assessed, collected, adjusted, reduced, computed or taken or done as if the said Act as amended by this Ordinance had been in force at all material times and accordingly, notwithstanding anything contained in any judgment, decree, or order of any court, or tribunal or other authority:–

(a) no suit or other proceedings shall be maintained of continued in court or tribunal or other authority for the refund of any amount received or realized by way of such tax;

(b) no court, tribunal or other authority shall enforce any decree or order directing the refund or any amount received or realized by way of such tax;

(c) recoveries shall be made in accordance with the third proviso to subsection (2) of Section 3 of the Bihar Tax on Entry of Goods Into Local Areas for Consumption, Use or Sale Therein Act, 1993 of all amounts which could have been collected as tax under the said Act by reason of amendment made in Section 3 by this Ordinance but which had not been collected.

(3) For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this section has not come into force.

Provided that in case of a manufacturer the reduction in tax liability as aforesaid shall only be allowed to industrial units of the small scale sector, the medium scale sector and sick industrial units:

Provided that the said reduction in tax shall be available to manufacturer if the imported scheduled goods are used or consumed in the manufacture of goods which are sold within the State of Bihar or in the course of inter-State trade and commerce or in the course of export out of the territory of India. In case only a part of the goods manufactured out of imported Scheduled goods are sold within the State of Bihar or in the course of inter-State trade and commerce or in the course of export out of the territory of India, the claim for reduction in tax liability shall stand proportionately reduced:

Provided further that such reduction from the tax liability shall be admissible only if the dealer specifically mentions in the returns, filed under Section-24 of the Bihar Value Added Tax Act, 2005 (Act 27 of 2005), the Number, date and the amount of the Challan by which the payment of Entry tax in relation to which the reduction has been claimed, has been made.

(3) The liability to pay tax on Scheduled goods shall only be at the point of first entry into a local area and any subsequent entry or entries into any other local area or areas of the said Scheduled goods shall not be subject to tax provided the subsequent importing dealer produces before the assessing officer the original copy of the cash memo, invoice, bill or challan issued to him by the dealer from whom he purchased or received the said Scheduled goods, and files a true and complete declaration in the Form and manner prescribed:

Provided that no tax shall be levied and collected in respect of any motor vehicle which was registered in any other State or Union Territory under the Motor Vehicles Act, 1988 for a period of fifteen months or more before the date on which it is registered in the State under that Act.

THE BIHAR TAX ON ENTRY OF GOODS INTO LOCAL AREA RULES, 1993

8. Manner for claiming reduction in the liability to pay sales tax.—(1) A claim for reduction in the liability to pay sales tax shall be made by registered dealer who is entitled to claim such reduction under sub-section (1) of section 4 or in accordance with the notification issued under sub-section (1) of Section 3 of the Act.

(2) The claim shall be valid only when the amount of entry tax has been paid on the concerned goods. (3) The burden of proving the claim for reduction of sales tax shall be on the dealer.

(4) Such claim shall be made by furnishing a statement in triplicate in Form ET-X which shall be filed along with the quarterly return.

(5) On receipt of the claim in Form ET-X, the authority prescribed for assessment of tax shall scrutinize the same before the date for filing of the next quarterly return and shall satisfy itself regarding the correctness of the claim. He shall make appropriate endorsement in the assessment record of the dealer and sign the certificate in the said form.

(6) Two copies of the statement containing certificate of the assessing authority shall be returned to the dealer. He shall furnish one copy of the form to the authority prescribed under the Bihar Value Added Tax Act, 2005 to enable it to reduce the dealers liability at the time of assessment of sales tax payable under the said Act and shall keep other copy as evidence with himself.

FORM E.T.-X (See Rule 8) Statement of claim for reduction in the liability of sales tax payable under the Bihar Finance Act, 1981 consequent upon payment of entry tax.

(To be furnished in triplicate)

1. Name of the dealer.

2. Style of business & full address

3. Registration number under the B.T. on E. of G. into L.A. Ord., 1993

4. Registration No. under the Bihar Finance Act, 1981.

5. Period to which the claim relates.

I ..... (Full name of the dealer) hereby request for reduction in my liability of sales tax payable under the Bihar Finance Act, 1981 in accordance with the provision of sub-section (1) of section 4 of the Bihar Tax on Entry of Goods into Local Areas for Consumption, Use or Sale therein Ordinance, 1993 the notification issued under sub-section (12) of section 3 in respect of the goods on which entry tax has been paid by me/us and which have been sold subsequently and sales tax under the Bihar Finance Act, 1981 has become payable.

PARTICULARS			
Sl. No.	Description of schedule goods on which entry tax has been	Concerned Quantity Bill / Invoice / Challan No. & date in case of Motor	Value

paid by the Vehicles

dealer. mention Chassis no. & Engine No. also

Amount of entry tax paid (Quote T.C. No. & date)	Period during which sold	C.M. Bills / Invoice no. & date relating to sale	Sales tax payable	Sale tax payable after reduction of liability	Remarks

I hereby declare and certify that the above particulars are collect and complete to the best of my knowledge and belief.

I further certify that the amount of entry tax shown in this statement has been paid by me.

Signature of the dealer or his declared manager.

CERTIFICATE (To be signed by the assessing officer) Certified that the particulars furnished in this statement have been scrutinised by me and found to be correct. The amount of entry tax on the goods concerned, to the extent of which the liability of sales tax under the Bihar Finance Act, 1981 has been claimed to be reduced has been duly paid by the dealer.

Signature & designation of the authority."

10. So far as the Bihar VAT Act is concerned, it is necessary to refer to the following provisions:

> "3. Charge of tax.– (1) Every dealer who is registered under the Bihar Finance Act, 1981 (Bihar Act 5 of 1981), as it stood before its repeal by section 94, shall be liable, on or after the commencement of this Act, to pay tax under this Act on sale or purchase, made by him.
>
> (2) Every dealer to whom the provisions of sub-

section (1) do not apply and whose gross turnover of sales calculated from the commencement of the year ending on the day immediately before the commencement of the Act, exceeds the specified quantum, as applicable to him under the Bihar Finance Act, 1981, as it stood before its repeal by Section 94, on the last day of such year shall, in addition to the tax, if any, payable by him under any other provision of this Act, be liable to pay tax under this Act on all his sales.

(3) Every dealer to whom the provisions of sub- section (1) or sub-section (2) do not apply, shall be liable to pay tax under this Act -

(a) on all his sales of goods which have been imported by him from any place outside Bihar, with effect from the day on which he effects first sale of such goods; or

(b) in any other case, from the date on which his gross turnover, during a period not exceeding twelve months, first exceeded such taxable quantum as may be prescribed:

> Provided that the taxable quantum as may be prescribed under this sub-section shall not exceed ten lakh rupees.
>
> Provided further that different taxable quantum may be prescribed for different classes of dealers.
>
> 13. Point or points in series of sales at which Sales Tax shall be levied.- (1) (a) Subject to the provisions of section 16 and section 17, tax on sale of goods shall be levied at each point in a series of sales in Bihar by a dealer liable to pay tax under this Act.

(b) Where the tax is levied at each point of sale, the tax payable by a dealer at any point shall be the amount arrived at after deducting, the input tax credit specified under section 16 or section 17, from the tax computed at that point of sale.

(2) (a) Notwithstanding anything contained in sub- section (1), the tax on the sale of goods specified in Schedule IV shall be levied at such point or points in a series of sales in the State as the State Government may, by notification, specify.

(b) Where by a notification published under clause

(a), the State Government specifies, in respect of any goods specified in Schedule IV, that the tax shall be levied at the first point of their sale in the State of Bihar by a dealer, subsequent sales of the same goods in the State of Bihar shall not be levied to tax, if the dealer making subsequent sale produces before the prescribed authority the original copy of the cash memo, or invoice or bill issued to him and files a true and complete declaration in the form and in the manner prescribed.

(c) Where by a notification published under clause

(a), the State Government specifies, in respect of any goods specified in Schedule IV, that the tax shall be levied at more than one point or on all points of sale, the amount of tax paid at each preceding stage of sale shall be adjusted against the amount of tax payable at each subsequent stage of sale in the manner prescribed.

(d) The declaration referred to in clause (b) shall be issued by the selling dealer to the purchasing dealer not later than the 30th day of September of the year following the year to which such sales relate. (3) If upon information, the prescribed authority has reasons to believe that the selling dealer has, without reasonable cause, failed to issue to the purchasing dealer the declaration referred to in sub- section (2), he shall, after giving the selling dealer a reasonable opportunity of being heard, direct that the selling dealer shall pay, by way of penalty, a sum of rupees five thousand per month for every month of default or the amount of tax involved, whichever is less.

14. Rate of Tax.- (1) Tax shall be payable on the sale price of—

(a) the goods specified in the Schedule II, at the rate of one percent;

(b) the goods specified in the Schedule III, at the rate of six percent;

(bb) the goods specified in the Schedule IIIA, at the rate of five percent;

(c) the goods specified in the Schedule IV, at the rate not below ten percent and not exceeding fifty percent and subject to such conditions and restrictions, as the State Government may, by notification specify.

(d) any other goods, not specified in the Schedules I, II, III, IIIA and IV, at the rate of fifteen percent. (2) The State Government may, by notification, alter any Schedule to this Act.

16. Input Tax Credit (3) No input tax credit under sub-section (1) shall be claimed or be allowed to a registered dealer —

(a) in respect of goods specified in Schedule-IV or such other goods as may be prescribed;

35. Taxable Turnover.- (1) For the purposes of this Act, the taxable turnover of a dealer shall be that part of his gross turnover which remains after deducting therefrom —

(f) sale price at the subsequent stages of sale of such goods as are specified in Schedule IV of the Act as being subject to tax at the first point of their sale in the State of Bihar, if necessary evidence as required by sub-section (2) of section 13 are filed with the return filed by the dealer under sub-section (3) of section 24.

Schedule-IV (See section 14) Goods

1. Country liquor including spiced country liquor.

2. Portable spirit, wine or liquor whether imported or manufactured in India.

3. High Speed Diesel Oil and Light Diesel Oil.

4. Motor Spirit.

5. Natural Gas.

6. Aviation Turbine Fuel

7. Tobacco and tobacco products, except biri and unmanufactured tobacco (commonly known as "Khaini"), and other unmanufactured tobacco used in manufacture of biri.

Bihar Value Added Tax Rules, 2005

18. Taxable turnover- For purposes of section 35 the taxable turnover of the dealer shall be that part of his gross turnover which remains after deducting therefrom:

(6) Sale price at the subsequent stages of sale of such goods:

(a) specified in Schedule IV of the Act as being subject to tax at the first point of their sale in Bihar, or

(b) on the sale whereof tax at the maximum retail price has been paid at the first point of its sale in Bihar, if necessary evidence as required by sub-section (2) of section 13 is annexed with the return required filed by the dealer under sub-section (1) of section

24.

19. Returns. – [(2) Every registered dealer, other than a dealer paying tax under sub-section (1) or sub-section (1A) or sub-section (4) of Section 15, shall furnish to the authority specified in Rule 62:-

(a) A quarterly return in Form RT-I in duplicate;

(b) An annual return in Form RT-III in duplicate.

Provided that every registered developer, who has opted to pay compounding tax under the provisions of Section-15C of Bihar Value Added Tax Act, 2005 in lieu of tax payable under the Act shall furnish to the authority specified in Rule 62-

(a) a quarterly return in Form RT-IA;

(b) an annual return in Form RT-IIIB.

FORM RT-I [See Rule 19(2)] Quarterly Return under Section 24 of the Bihar Value Added Tax Act, 2005 Name and style of the dealer:

TIN:

Period of Return (Quarter and Year):

Part I (Details of turnover/transfers) 1 Gross Turnover (including value of debit notes): Deductions:

2 Sales in the course of inter-state trade and commerce 3(i) Value of sales outside the State under Section 4 of the Central Sales Tax Act, 1956 3(ii) Value of stock transfer to outside the State 4 Value of sales return of goods within 6 months of sale under the Act 5 Export sales 6 Amount of other allowable deductions [As per Box A] 7 Total of deductions [2+3+4+5+6] 8 Taxable turnover [1-7] Box A (other allowable deductions) Deduction on account of: Value

(ii) Sale of Petrol, Diesel, ATF and Natural Gas by an Oil Company to another Oil Company (a list of different goods to be annexed to this return separately alongwith their respective sales values) [Details of goods sold to different companies to be submitted as per Box E-2]

11. A notification dated 4th May, 2006 issued under Section 13(2)(a) of the VAT Act reads as follows:

“In exercise of the powers conferred by clause (a) of sub-section (2) of section 13 of the Bihar Value Added Tax Act, 2005 the Governor of Bihar is pleased to direct that tax on the sale of goods specified in column 2 of the table appended hereto shall be levied at point or points in a series of sales specified in column 3 of the said table subject to the conditions and restrictions specified in column 4 of the said table.

Table

	Description of Goods	Stage at which said tax is to be levied	Conditions and Restrictions
1	Motor spirit (Petrol)	(A) At the point of sale by importer if the goods are imported from outside Bihar or at the point of sale by manufacturer if the goods are manufactured in	

		Bihar or, (b) at the point of sale by oil companies to the retailer or direct to the consumers, if goods are sold by these companies.
2	High Speed Diesel Oil and Light Oil	Do

12. 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.

13. It will be seen that the tax leviable under the Entry Tax Act shall be paid by every dealer liable to pay tax under the VAT Act. Under Section 3(1) of the VAT Act, all persons who are registered dealers under the Bihar Finance Act, 1981, as it stood before its repeal, are liable to pay tax under the said Act on sales and purchases made by them. There is no dispute that the Appellant is a registered dealer under the Bihar Finance Act, 1981 and is thus liable to pay tax under the VAT Act. Condition (i), therefore, is certainly fulfilled.

14. So far as Condition (ii) is concerned, the Appellant is an importer of scheduled goods, viz., petroleum products. Words and expressions that are not defined under the Entry Tax Act shall have the meaning assigned to them under the VAT Act, (See Section 2(2) of the Entry Tax Act). Under the VAT Act, "importer" is defined as follows:

"2. Definitions- In this Act, unless the context otherwise requires:

> (p) "importer" means a dealer who brings any goods into the State of Bihar or to whom any goods are despatched from any place outside the State of Bihar." It can be seen from the aforesaid definition that an importer would necessarily refer to a dealer who imports scheduled goods from outside the state. The question arises as to whether, on such goods, the Appellant, as importer, is liable to pay tax under the VAT Act.

15. As is clear from Section 13(1) of the VAT Act, all sales of Schedule II and III goods have to suffer a levy of tax at each point in the series of sales by a dealer liable to pay tax under the said Act. This is subject, however, to Section 16, by which once the goods have suffered tax, input tax credit is given at every stage thereafter. This scheme applies generally down the line to all Schedule II and III goods. However, when it comes to tax on the sale of goods specified in Schedule IV, Item 3 of which includes High Speed Diesel oil and light diesel oil, the levy under the said Act is only at such point as the State Government may, by notification, specify. This takes us to the notification dated 4th May, 2006, which clearly states that when it comes to motor spirit, High Speed Diesel oil and light diesel oil, the levy is at the point of sale by oil companies to the retailer or direct to the consumer. On a reading of the aforesaid notification, it is clear that when a sale is effected by the Appellant to BPCL and HPCL, there is no levy of any VAT that is contemplated at this point. The VAT gets levied only at the next point in the chain of sales, which is the sale from BPCL and HPCL to their retailers and/or consumers. Thus, it is clear that the second condition is not fulfilled as the importer of the scheduled goods i.e. the Appellant is not at all liable to pay tax under the VAT Act.

16. So far as the Condition (iii) is concerned, there being no levy on the Appellant, the Appellant does not incur any tax liability at the rates specified under Section 14 of the VAT Act.

17. So far as Condition (iv) is concerned, in any case, this must be by virtue of sale of the very imported scheduled goods, which means that the sale must be by the Appellant itself and not by the other OMCs. This becomes clear from the second part of this provision which reads:

> "……. or sale of goods manufactured by consuming such imported scheduled goods……."

18. Further, Condition (v) must be that "his" i.e. the Appellant's tax liability under the VAT Act will then stand reduced, and this is only to the extent of tax paid under the Act. This condition is also not met inasmuch as the set off is person specific and not goods specific, as is correctly contended by Shri Ganesh, learned Senior Advocate, appearing on behalf of the Revenue.

19. Thus, it will be seen that on a literal reading of Section 3(2) second proviso, the Appellant would not be entitled to claim set off. However, Shri Datar relied strongly on the judgment in Associated Cement Companies Ltd. v. State of Bihar & Ors., (2004) 7 SCC 642. In this judgment, two manufacturing units of the Appellant, post-bifurcation of the State of Bihar, fell into the State of Jharkhand. Thanks to an industrial policy to give incentives to existing units to encourage additional production, the Appellant was exempted in terms of the aforesaid policy from payment of sales tax on additional production for the period in question. The Entry Tax Act, as it then stood, was set out

in the judgment and this Court held that, despite the fact that sales tax on cement was exempted, the Appellant was held to be a person who was liable to pay tax as the question of exemption would arise only when there is a liability to pay tax in the first place. The Appellant was liable to pay tax but for the exemption, and since it paid tax on the original production, apart from the additional production, it would be entitled to set off of tax paid under the Entry Tax Act. In our opinion, it is clear that this judgment would have no direct application in the facts of the present case, inasmuch as the aforesaid judgment related to exemption of sales tax on production of additional cement in order that production of cement be boosted in the State. The expression "liable to pay tax" was held to apply because the question of exemption would arise only if there is a liability to pay tax in the first place. Cement was, at the relevant time, "scheduled" goods and, therefore, sales tax was liable to be paid on such goods. It is only on account of an exemption notification issued under Section 7 of the Act, as it then stood, that additional production of cement stood exempted from payment of sales tax. In the present case, there is no exemption at all. The present is a case where the importer under the second proviso must first be liable to pay tax under the Act. We have already seen that the Appellant is a registered dealer under Section 3(1) of the VAT Act and would be a dealer liable to pay tax under the aforesaid Act within the meaning of the enacting part of Section 3(2) of the Entry Tax Act. However, it is clear that as importer of scheduled goods, the Appellant must be liable to pay tax under the VAT Act. As has already been found, the Appellant as an importer of scheduled goods is not liable to pay tax as the levy of tax is itself postponed when the Appellant sells the oil to another OMC, and VAT is leviable only on the transaction between the said OMC and its retailer or other customers. In the ACC (supra) case, the levy on cement was always there, being a scheduled item, an exception to which by way of exemption was allowed only on additional production of cement. It is also important to note that the expression "by virtue of sale of imported scheduled goods or sale of goods manufactured by consuming such imported scheduled goods ....." was added later by way of amendment and was not contained in Section 3(2) second proviso which was construed in the ACC (supra) case. This condition has clearly not been met in the present case as has been held by us hereinabove. In any case, the effect of the aforesaid judgment has been nullified by the addition of a third proviso to Section 3(2) by the Bihar Finance Act, 2006, which specifically provides that exempted goods will not be entitled to set off. For all these reasons, we are of the view that this judgment does not take the Appellant's case very much further.

20. Shri Datar also heavily relied upon The State of Tamil Nadu v. M.K. Kandaswami & Ors., (1975) 4 SCC 745, in which this Court, while construing Section 7A of the Madras General Sales Tax Act, referred with approval to a Kerala High Court judgment to hold that a dealer selling goods may still be liable to pay tax in circumstances in which no tax is payable under the Act. We must remember that this Court was dealing with a provision which was stated to be a charging as well as a remedial provision, the main object being to plug leakage and prevent evasion of tax. It is in this situation that the aforesaid provision was given a purposive interpretation. In the present case, Section 3(2) second proviso is neither a charging section nor a prevention of evasion of tax section. It is a section which gives a certain concession as to set off, provided its conditions are fulfilled. This judgment, therefore, also does not avail the Appellant.

21. Shri Datar also relied upon A.V. Fernandez v. The State of Kerala, 1957 SCR 837, for the proposition that the gross turnover of the dealer should be looked at for finding out whether a dealer

is liable to pay VAT and clearly all sums payable, including sums by way of inter-State sales and exports, are taken into account for calculating gross turnover which would then show that the dealer would be liable to pay tax. This case again need not detain us any further because we are not concerned with dealers liable to pay tax, but with importers of scheduled goods who are liable to pay tax in order that Section 3(2) second proviso is attracted. We have already held that in the enacting part of Section 3(2), the Appellant is certainly a dealer liable to pay tax under the VAT Act, in that it is a registered dealer falling within Section 3(1) of the said Act. Therefore, any argument based on gross turnover is wholly unnecessary to include the Appellant under Section 3(2) of the Entry Tax Act.

22. Shri Datar then referred to State of Bihar & Ors. v. Bihar Chamber of Commerce & Ors., (1996) 9 SCC 136, for the proposition that the Objects and Reasons appended to the Bill of the Entry Tax Act showed that it was with a view to make the provision of the Bihar Finance Act more workable. From this it can scarcely be held that this being the object, the second proviso must be completely altered in order that it subserves such object. We have already held that a literal reading of the second proviso, which gives a concession by way of set off, cannot possibly be held to be altered qua every material condition, so that the Appellant be entitled to claim a set off. Consequently, this judgment and other judgments cited by the Appellant, such as Commissioner of Income Tax, Bangalore v. J.H. Gotla, Yadagiri, (1985) 4 SCC 343, to buttress the plea of purposive interpretation cannot be held to apply in the facts and circumstances of this case.

23. Shri Datar's next plea was that a literal reading of the second proviso would lead to a situation where the same goods would suffer different rates of tax and this would be discriminatory. We are afraid that this plea also does not avail the Appellant for the simple reason that there are two taxes which are levied in the present case, one is VAT and the other is Entry Tax. In one case, VAT is set off against the Entry Tax and in another, VAT is not so set off. Any anomaly arising from the aforesaid position would not lead to a charge of clear and hostile discrimination.

24. When it comes to taxing statutes, the law laid down by this Court is clear that Article 14 of the Constitution can be said to be breached only when there is perversity or gross disparity resulting in clear and hostile discrimination practiced by the legislature, without any rational justification for the same. (See The Twyford Tea Co. Ltd. & Anr. v. The State of Kerala & Anr., (1970) 1 SCC 189 at paras 16 and 19; Ganga Sugar Corporation Ltd. v. State of Uttar Pradesh & Ors., (1980) 1 SCC 223 at 236 and P.M. Ashwathanarayana Setty & Ors. v. State of Karnataka & Ors., (1989) Supp. (1) SCC 696 at 724-

726).

25. We must also not forget that no assessee can claim set off as a matter of right and the levy of Entry Tax cannot be assailed as unconstitutional only because set off is not given. (See Godrej & Boyce Mfg. Co. Pvt. Ltd. & Ors. v. Commissioner of Sales Tax & Ors., (1992) 3 SCC 624 at para 9 and State of Karnataka v. M.K. Agro Tech Pvt. Ltd, C.A. 15049-15069 of 2017 decided on 22 nd September, 2017, at para

31).

26. However, Shri Datar referred to observations contained in Ayurveda Pharmacy & Anr. v. State of Tamil Nadu, (1989) 2 SCC 285, Aashirwad Films v. Union of India & Ors., (2007) 6 SCC 624, State of Uttar Pradesh & Ors. v. Deepak Fertilizers and Petrochemical Corporation Ltd., (2007) 10 SCC 342 and Union of India & Ors. v. N.S.Rathnam and Sons, (2015) 10 SCC 681. Each of these judgments concerned taxation rates that were ex-facie arbitrary and/or discriminatory, in that the very same tax was levied at different rates without any rational justification for the same and were, thus, struck down as being arbitrary and/or discriminatory. None of these judgments would have any application to the facts of the present case, in which it is clear that the plea of discrimination is qua a set off of one tax against a separate and independent tax imposed. This fact circumstance would be sufficient to distinguish the said judgments from the facts of the present case.

27. Since we have found that the plea of discrimination must fail on the aforesaid grounds, no question of reading down the provisions would then arise.

28. However, when it comes to the levy of interest, the impugned judgment dated 19th April, 2017, held that there can be no levy of interest as there is no substantive statutory provision for the same. The assessee succeeded on this point and the State has not filed any appeal against the same. Therefore, the finding qua interest, having become final, cannot be interfered with by us.

29. However, Shri S. Ganesh, learned Senior Advocate appearing for the Revenue, has argued before us that, as a matter of restitution, interest must be granted in favour of the Revenue for the period for which stay orders have been obtained in writ petitions filed in 2014 and 2015. This Court has held that, if a party ultimately succeeds, it must be put back in the same position as if no such stay orders have been passed, and for this purpose he referred to and relied upon State of Rajasthan & Anr. v. J.K. Synthetics Limited & Anr., (2011) 12 SCC 518 at paras 18 and 23 and Nava Bharat Ferro Alloys Limited v. Transmission Corporation of Andhra Pradesh Limited & Anr., (2011) 1 SCC 216 at paras 16 to 27.

30. It will be noticed, on a reading of para 23 of Bharat Ferro Alloys (supra), that ultimately restitution is not a matter of right, but is a matter of discretion, and that hardships on both sides must be looked at in order to find a pragmatic solution by way of restitution. Given the fact that the State continued with the grant of set off till the year 2014, and reopened assessments beginning from 2008-09 based on an audit objection, we are of the view that it would be highly inequitable at this juncture to allow the State to charge interest, which would arise as a result of stay orders being passed in the writ petitions. The principal amount also is not something that the Appellant was able to pass on to the ultimate consumer in the peculiar facts of this case. Had the Appellant known, from the assessment year 2008-09, and had the Department raised an objection in that very year, it would have arranged its affairs in such a manner as to avail of set off under the Entry Tax Act, which it did after 2014, when the audit objections were raised for the first time. On the facts of this case, therefore, we are not inclined to exercise our discretion to grant restitutional interest to the Revenue.

31. The matter, however, does not end here. Shri Datar pointed out that after the audit objections; a show cause notice dated 16th April, 2014 was issued by the authority, which was replied to by letters dated 16 th June, 2014 and 27th June, 2014, in which the assessee repeatedly asked for time to make a detailed objection on the merits of the case. Finally, by a letter dated 22nd August, 2014, the assessee was able to muster certain certificates for the assessment years in question given by BPCL and HPCL to show that a large amount of the sales made by them in turn to their retail consumers and though retail outlets were outside the local area of Patna, and, therefore, not exigible to Entry Tax at all. We find that, without asking for further data and back up details, the Assistant Commissioner of Commercial Taxes passed an assessment order immediately thereafter, on 27th August, 2014, and issued demand notices on the very same date. We are of the view that the Revenue appeared to have been in a great hurry to issue the aforesaid demand notices, and since we are dealing with OMCs who have complete details of sales made for the years in question to their retail customers and outlets outside the area of Patna, we feel that Shri Datar is right in asking that we give an opportunity to the Appellant to produce all relevant documentary material, which would show that a large amount of the demand for these years (of Rs.1,683.03 crores), would be liable to be done away with as Entry Tax would not be leviable on these transactions at all as the consumption, use or sale of petroleum products has taken place outside the local area of Patna. Indeed, all these sales must have suffered Entry Tax in the local area outside Patna, where such retail sales were made, provided, of course, that they were made within the State of Bihar. We are, therefore, of the view that the Appellant will approach the Appellate Tribunal with all relevant materials in this behalf, and the Appellate Tribunal will render a finding as to how much of the demand of Entry Tax for the assessment years in question would have to be struck down, in that sales made by HPCL and BPCL to their retail consumers and to others are made outside the local area of Patna. We give the Appellants 12 weeks' time to approach the Appellate Tribunal with all details as aforesaid and request the Appellate Tribunal to render findings as required by this judgment, as expeditiously as possible thereafter. The stay orders granted in the writ petitions, which have been continued till date, will continue till the decision of the Appellate Tribunal.

32. With these observations, the Civil Appeal and the Special Leave Petitions are disposed of.

.....J. (R.F. Nariman) .....J. (Sanjay Kishan Kaul) New Delhi;

November 14, 2017.