**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Buxar Trading Company**

**vs.**

**The State of Bihar & Ors.**

Civil Writ Jurisdiction Case No.17358 of 2018

with

Civil Writ Jurisdiction Case No. 17453 of 2018

07 April 2023

**(Hon'ble The Chief Justice & Hon'ble Mr. Justice Madhuresh Prasad)**

**Issue for Consideration**

Whether the reassessment order and consequent demand notice issued by the Assistant Commissioner, Commercial Taxes were without jurisdiction.

**Headnotes**

Impugned order, and the consequential demand notice, is wholly without jurisdiction, as the Assessing Officer has no authority under the Statute to reopen/review an order passed under Section 33 of the Act. Petition is allowed. Jurisdiction vested in this Court by the Constitution of India, cannot be divested merely for the fact that an alternative remedy is available to the petitioner, even though the action of the Authority impugned, as in the instant case, is without jurisdiction.(Para 8, 10, 12)

**Case Law Cited**

Commissioner of Central Excise, Calcutta-IV v. Pandit D.P. Sharma, **(2003) 5 SCC 288**; MP State Agro Industries Development Corporation Ltd. & Anr. v. Jahan Khan, **(2007) 10 SCC 88**

**List of Acts**

Bihar Value Added Tax Act, 2005; Drugs and Cosmetics Act, 1940

**List of Keywords**

VAT reassessment; Jurisdictional error; Ayurvedic medicine; Audit objection; Section 33 BVAT Act; Public Accounts Committee; Alternative remedy; Reopening of concluded assessment

**Case Arising From**

Reassessment order and demand notice both dated 20.06.2018 issued by the Assistant Commissioner, Commercial Taxes, Buxar Circle.

**Appearances for Parties**

(In Civil Writ Jurisdiction Case No. 17358 of 2018)

For the Petitioner : Mr. Manish Jha, Advocate

For the State : Mr. Vikash Kumar, SC-11

(In Civil Writ Jurisdiction Case No. 17453 of 2018)

For the Petitioner : Mr. Manish Jha, Advocate

For the State : Mr.Vikash Kumar, SC-11

Headnotes Prepared by Reporter: Amit Kumar Mallick, Adv.

**Judgment/Order of the Hon’ble Patna High Court**

# IN THE HIGH COURT OF JUDICATURE AT PATNA

**Civil Writ Jurisdiction Case No.17358 of 2018**

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Buxar Trading Company, having its Office situated at -Anand Bhawan, Charitravan, P.S- Model Thana, P.O, Town & District- Buxar, through Karta of the HUF, namely Rakesh Singh, S/O Late Shivajee Bhai.

... ... Petitioner

Versus

1. The State of Bihar through Commissioner of Commercial Taxes, Commercial Taxes Department, govt. of Bihar, Vikas Bhawan, Bailey Road, Patna- 800 001
2. The Commissioner of Commercial Taxes, Commercial Taxes Department, Govt. of Bihar, Vikas Bhawan, Bailey Road, Patna- 800 001.
3. Assistant Commissioner, Commercial Taxes, Buxar, Circle, Buxar.

... ... Respondents

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with

**Civil Writ Jurisdiction Case No. 17453 of 2018**

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... ... Petitioners

Versus

1. The State of Bihar through Commissioner of Commercial Taxes, Commercial Taxes Department, Govt. of Bihar, Vikas Bhawan, Bailey Road, Patna- 800 001
2. The Commissioner of Commercial Taxes, Commercial Taxes Department, Govt. of Bihar, Vikas Bhawan, Ba
3. Assistant Commissioner, Commercial Taxes, Buxar Circle, Buxar.

... ... Respondents

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**Appearance :**
(In Civil Writ Jurisdiction Case No. 17358 of 2018)
For the Petitioner : Mr. Manish Jha, Advocate
For the State : Mr. Vikash Kumar, SC-11
(In Civil Writ Jurisdiction Case No. 17453 of 2018)
For the Petitioner : Mr. Manish Jha, Advocate
For the State : Mr.Vikash Kumar, SC-11

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**CORAM: HONOURABLE THE CHIEF JUSTICE**
**and**
**HONOURABLE MR. JUSTICE MADHURESH PRASAD**

**ORAL JUDGMENT**
**(Per: HONOURABLE MR. JUSTICE MADHURESH PRASAD)**

**Date : 07-04-2023**

Heard learned counsel for the petitioner and learned counsel for the State.

**2.** Petitioner is aggrieved by reassessment of petitioner's tax liability by the Respondent No. 3 (Assessing Officer) under order dated 20.06.2018 and the consequential demand notice dated 20.06.2018. The reassessment is in respect of petitioner's liability towards Bihar Value Added Tax Act, 2005 (for brevity 'the Act'). The petitioner has, thus, been required to pay a sum of Rs. 70,21,262.81/- towards tax and interest.

**3.** It is the petitioner's case that the petitioner is a dealer of '*Himgange Ayurvedic Oil*'. He has purchased the goods from the manufacturer upon payment of tax and is regularly paying tax as required under the law. There is an audit objection, raised by the office of the Accountant General that the oil is not a medicine, nor in any schedule of Act, and therefore requiring the petitioner to pay differential tax treating the sale of the oil as an *unspecified goods*. Petitioner was, served with a show-cause, based on the audit objection under Section 33 of the Act. Petitioner submitted his clarification and the Assessing Officer, being satisfied with the submission and relying upon the judgment of the Apex Court in the Case of ***Commissioner of Central Excise, Calcutta-IV v. Pandit D.P. Sharma,*** reported in ***(2003) 5 SCC 288,*** treated the oil

to be a drug and held imposition of tax @ 4%, as justified recommending closure of the audit objection by order dated 04.11.2016.

**4.** The said order was again reopened by the same Assessing Officer. This time, on the basis of report of the Public Accounts Committee, show-cause was issued to the petitioner on 31.05.2018, as contained in Annexure-3 to the writ petition. Petitioner reiterated his earlier explanation. However, the Assessing Officer has passed an order on 20.06.2018, refusing to accept the oil in-question as a medicinal product under the Drugs and Cosmetic Act, 1940 (for brevity 'Act of 1940'). He has held the petitioner liable to payment of tax @ 12.5%, treating the oil as an *unspecified item*. The petitioner's counsel is aggrieved by such reopening of the issue by the Assessing Officer.

**5.** Learned counsel for the petitioner has submitted that reopening/reconsideration does not have any sanction of law.

**6.** Learned counsel for the State, on the other hand, submits that if at all, the petitioner was aggrieved, there was alternative remedy available to the petitioner under the VAT Act itself.

**7.** Considering the rival submissions, this Court would find that the issue that arises for consideration is whether the Statute permitted reopening of the issue, after closure of audit objection in

a proceedings under Section 33 of the Act. Learned counsel for the State is not in a position to point out that there is any provision in the Statute permitting the Assessing Officer to reopen such an issue.

**8.** This Court would thus find that the impugned order dated 20.06.2018, and the consequential demand notice dated 20.06.2018, is wholly without jurisdiction, as the Assessing Officer has no authority under the Statute to reopen/review an order passed under Section 33 of the Act.

**9.** This Court, therefore, is not impressed by submission of the learned counsel for the State regarding alternative remedy being available to the petitioner. The law, by now, is well-settled that Rule of exclusion of writ jurisdiction in cases where alternative remedy is available is a Rule of discretion, and not one of the compulsions. In spite of alternative remedy being available, the writ Court may still exercise its discretionary jurisdiction at least in three contingencies, as has been laid down by the Apex Court in the Case of ***MP State Agro Industries Development Corporation Limited & Anr. Vs. Jahan Khan*** reported in ***(2007) 10 SCC 88,*** one of them being when an order is wholly without jurisdiction.

**10.** The objection of alternative remedy, therefore, has to be considered on a case to case basis and the jurisdiction vested in this Court by the Constitution of India, cannot be divested merely for the fact that an alternative remedy is available to the petitioner, even though the action of the Authority impugned, as in the instant case, is without jurisdiction.

**11.** We, therefore, have no hesitation in quashing the reassessment of petitioner's liability by Respondent No. 3 under order dated 20.06.2018, as also the consequential demand notice dated 20.06.2018.

**12.** The writ application is allowed.

**(K. Vinod Chandran, CJ)**

**(Madhuresh Prasad, J)**

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| **Uploading Date** | 18.04.2023 |
| **Transmission Date** | N/A |