
(2009) 01 PAT CK 0086
In the Patna High Court
Case No : Tax Case No. 7 of 2001

Lumbini Beverages Pvt. Ltd.

APPELLANT

Vs

Commissioner of C. Ex., Patna

RESPONDENT

Date of Decision : 15-01-2009

Acts Referred:

Citation : (2009) 01 PAT CK 0086

Judgement

Chandramauli Kr. Prasad, ACJ

1. Appellant Lumbini Beverages Private Limited (hereinafter referred to as the "assessee") purchased capital goods from indigenous manufacturer/suppliers. In these purchases, invoices were in the assessee's name. Assessee also imported capital goods from foreign countries and got those cleared from the customs by filing bills of entry and paying the duties thereon. The assessee availed Modvat credits of Central Excise duties paid on the indigenous capital good and countervailing (additional) duties paid on the imported capital goods. The total Modvat credit taken by the assessee on the said capital goods is to the extent of Rs. 68,27,831,24/-. A show cause notice was issued to the assessee, inter alia, alleging that the foresaid credits were taken without satisfying the procedure provided under Rule 57R(3) of the Central Excise Rules, 1944 and the assessee was required to show cause as to why the said credits be not disallowed. Assessee filed its reply, inter alia, contending that all the capital goods in question were directly purchased or imported by it on principal to principal basis and were not acquired by it on lease, hire-purchase or loan agreement nor these were acquired by any financing company and it being the owner of the said goods the procedure under Rule 57R(3) of the Central Excise Rules, 1944 (hereinafter referred to as the "Rules") is not required to be followed. The Deputy Commissioner rejected his submission and disallowed the Modvat credits.

2. Aggrieved by the same, the assessee filed appeal before the Commissioner (Appeals), Customs and Central Excise, Patna, who allowed the appeal, inter alia, observing that the assessee is the owner of the capital goods and it being so the

procedure of Rule 57R(3) of the Rules was not required to be complied with. It also held that IDBI and IIBI are not covered by the expression "financing company" as used in Rule 57R(3) of the Rules.

3. The Commissioner of Central Excise, aggrieved by the order of the Commissioner (Appeals) in so far as it relates to the Modvat credit of Rs. 68,27,831.24/-, filed appeal before the Customs, Excise & Gold (Control) Appellate Tribunal, which accepted its plea that the procedure laid down in Rule 57R(3) of the Rules is required to be followed irrespective of the ownership of the goods. It further observed that since the assessee had taken the loans from IDBI and IIBI, which are covered by the expression "financing company" as used in Rule 57R(3) of the Rules and accordingly, set aside the order of the Commissioner (Appeals).

4. Assessee thereafter has preferred this application u/s 35G of the Central Excise Act, 1944.

5. By order dated 5-5-2004, this Court had directed the Customs, Excise and Gold (Control) Appellate Tribunal to refer the following questions of law :

1. Whether on a true and correct interpretation of the provision relating to allow ability of Modvat credit on capital goods, the Tribunal was correct in law in holding that the procedure under Rule 57R(3) of the Central Excise Rules, 1944 has to be followed irrespective of as to whether the assessee is the owner of the goods?

2. Whether the procedure under Rule 57R(3) has to be followed in a case where the assessee directly and in its own name purchases the capital goods from the manufacturers/suppliers thereof and also pays for the same simply because a general financial loan agreement was entered into between the assessee and the banks?

Accordingly, the Tribunal had referred the aforesaid questions of law for our determination.

6. It is evident from the record that the assessee has entered into a loan agreement with two major financial institutions viz. IDBI and IIBI for the establishment of the plant. According to the loan agreement, the loan is secured "by a first charge by way of hypothecation in favour of the lenders in all borrower's movable machinery, machinery spares, tools and accessories, present and future".

7. Mr. J.P. Khaitan, appears on behalf of the assessee, whereas the revenue is represented by Mrs. Archana Meenakshi.

8. Mr. Khaitan, submits that the assessee is the owner of the capital goods and, as such, procedure as required under Rule 57R(3) of the Rules is not required to be followed. According to him, capital goods have not been acquired by the assessee on lease, hire-purchase or loan agreement from a financing company,

but under a loan agreement from the bank, money has been used for the purchase of the capital goods and those capital goods have been hypothecated to the bank. According to him, in case of loan agreement, the financing company would be the owner and the term agreement with the banks is not with specific reference to the capital goods. To support his contention that in case of hypothecation of the capital goods, assessee shall not be ceased to be the owner of the capital goods and, as such, the provisions of Rule 57R(3) of the Rules shall not be attracted, placed reliance on a judgment of the Gujarat High Court in the case of Bank of Baroda, Ahmedabad Vs. Rabari Bachubhai Hirabhai and Others, and our attention has been drawn to the following passage from paragraph 6 of the said judgment, which reads as follows :

The hypothecating Bank, a creditor, had merely advanced a loan against the security of that vehicle and had a special right to recover its dues in the event of default by, if need be, the sale of the vehicle. It had, therefore, no title over the vehicle. It was not even in constructive possession of the vehicle but it had merely a right to recover its dues by the sale of that vehicle. So long as there was no default in the payment of the loan amount, it could not exercise that special right to sell the vehicle for realization of its dues. Under the circumstances, we feel that the view taken by the Claims Tribunal is contrary to law and ignores the elementary fact that under the agreement of hypothecation neither the title in the property nor the possession thereof stands transferred to the creditor Bank. The Claims Tribunal has betried total non-application of mind as regards the jural relationship which comes into existence on the hypothecation of the vehicle for securing the debt. We are, therefore, of the opinion that the Claims Tribunal committed a gross error in law in holding that the hypothecating Bank had stepped into the shoes of the owners for having advanced a loan against the security of the vehicle in question.

To drive home his point, Mr. Khaitan states that hypothecation is the pledging of something as security without delivery of title or possession.

9. Mrs. Archana Meenakshi, appearing on behalf of the Commissioner of Central Excise, Patna (hereinafter referred to as the "revenue") submits that the provisions of Rule 57R(3) of the Rules shall be attracted in case the capital goods have been brought under a financial arrangement for financing the cost of the same.

10. Having appreciated the rival submission, I do not find any substances in the submission of Mr. Khaitan and the authority relied on in no way supports his contention. It is not dispute that the assessee has entered into a financial arrangement with the banks for financing the cost of capital goods. In my opinion, hypothecation of the machine does not change the ownership of the capital goods to the lender inasmuch as hypothecation is only as security for repayment of loan within a time frame. When the loan is not returned within the time stipulated, the ownership is transferred from the borrower to the lender in case the clause of the agreement so provides. Rule 57R(3)(II)(A) of the Rules

requires the manufacturer availing credit of duty paid on the capital goods, who has entered into a financial arrangement, for financing the cost of such capital goods to produce a copy of the invoice evidencing of payment of specified duty along with the copy of the agreement entered by it with the financing company. Further Rule 57R(3)(II)(B) of the Rules requires production of a certificate from the financing company to the effect that duties specified on such capital goods have been paid by the manufacturer to such financing company prior to the payment of first installment of repayment of loan. Accordingly, I am of the opinion that provision of Rule 57R(3) of the Rules is required to be followed even when the capital goods were acquired by the assessee under a loan agreement from the bank.

11. In view of the discussion aforesaid, my answer to question no. 1 set out above is in the affirmative, in favour of the revenue and against the assessee and it is held that the Tribunal in the facts and circumstances of the case is correct in law in holding that the procedure under Rule 57R(3) of the Rules is required to be followed.

12. Now referring to the decision of the Gujarat High Court in the case of Rabari Bachubhai Hirabhai (supra), same has no bearing in the facts and circumstances of the case. In this case the question before the Court was as to whether the hypothecating bank, a creditor of the owner of the vehicle had de jure or de facto possession or title over the vehicle and it has been held that the bank can only recover its dues, in the event of default, by sale of the vehicle and the bank can never be taken to step into the shoes of the owner and consequently not liable to pay compensation to the victims of an accident caused by the owner. Here in the present case, I am not concerned with the liability of the bank to the payment of compensation under the Motor Vehicles Act and, as such, the decision relied on has no bearing in the facts and circumstances of the case.

13. In view of the discussion aforesaid, answer to the second question has also to be rendered in favour of the revenue and against the assessee that in view of the financial loan agreement between the assessee and the bank, assessee was required to follow the procedure under Rule 57R(3) of the Rules.

14. Reference is answered accordingly.

15. Tax case stands disposed off.

16. Let a copy of our opinion be sent to the Customs, Excise & Gold (Control) Appellate Tribunal, Eastern Bench Calcutta.

Ravi Ranjan, J.

17. I agree.