IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.1050 of 2018

==========

United Breweries Limited (Formerly M/s Millennium Beer Industries Limited) havinh its registered office at UB Towers, U.B. City No.24, Vittal Mallya Road, Bangalore 560001 through its Authorised Signatory Shri Ajay Kumar Singh, aged about 53 years, Son of Late Sarbdeo Singh, Resident of Shail Bhawan, R.M.S. Colony, Kankarbagh, P.S. Kankarbagh, District Patna.

... ... Appellant/s

Versus

1. The State Of Bihar through the Commissioner of Commercial Taxes, Bihar, Patna having its office at Vikas Bhawan, Bailey Road, Patna.
2. The Deputy Commissioner of Commercial Taxes, Patliputra Circle, Patliputra.
3. The Assistant Commissioner of Commercial Taxes, Patliputra.
4. The Commercial Taxes Officer, Patliputra.

... ... Respondent/s

==========

Acts/Sections/Rules:

- Bihar Tax on Entry of Goods into Local Areas for Consumption, Use or Sale Therein Act, 1993 - Section 3

Cases referred:

- Associated Cement Companies Ltd. v. State of Bihar - (2004) 7 SCC 642
- M/s ACC Limited v. State of Bihar & Ors. - M.A. No. 149 of 2015
- Unitech Wireless (Tamilnadu) P. Ltd. v. State - 2016 (1) PLJR 147
- Indian Oil Corpn. v. Municipal Corpn. - (1993) 1 SCC 333

Appeal - filed for refund of Entry tax for the beer stock that was lost due to breakage and thus not sold finally.

Held - Insofar as the import into the State for consumption, use or sale, there is no exemption given to breakage under the statute levying Entry Tax or the VAT Act and there cannot be any incorporation of the concession given in another statute, to the taxing statute, by this Court. - Further, if such unlimited breakage is permitted then even without any breakage, the same could be claimed for refund. (Para 9)

It is for the State to decide whether such benefit can be conferred on the assessee. So long as such benefit is not conferred, it is for the assessee to take proper care and ensure that there is no breakage. (Para 9)

Appeal dismissed. (Para 11)

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.1050 of 2018

==========

United Breweries Limited (Formerly M/s Millennium Beer Industries Limited) havinh its registered office at UB Towers, U.B. City No.24, Vittal Mallya Road, Bangalore 560001 through its Authorised Signatory Shri Ajay Kumar Singh, aged about 53 years, Son of Late Sarbdeo Singh, Resident of Shail Bhawan, R.M.S. Colony, Kankarbagh, P.S. Kankarbagh, District Patna.

... ... Appellant/s

Versus

1. The State Of Bihar through the Commissioner of Commercial Taxes, Bihar, Patna having its office at Vikas Bhawan, Bailey Road, Patna.
2. The Deputy Commissioner of Commercial Taxes, Patliputra Circle, Patliputra.
3. The Assistant Commissioner of Commercial Taxes, Patliputra.
4. The Commercial Taxes Officer, Patliputra.

... ... Respondent/s

==========

Appearance :
For the Appellant/s : Mr. Satyabir Bharti, Advocate
Ms Kanupriya, Advocate
Mr. Abhishek Kumar, Advocate
For the Respondent/s : Mr. Vikash Kumar, Advocate

==========

CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE RAJIV ROY
CAV JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 24-01-2024

The following substantial questions of law arise in the above case :-

1. Whether under Section 3 of the Bihar Tax on Entry of Goods into Local Areas for Consumption, Use or Sale Therein Act, 1993 read with Entry 52 List II, as it existed prior to its repeal, mere Entry of Goods into a local area, is

sufficient for levy of 'Entry Tax', or such entry should be for the purposes of consumption, use or sale in the State of Bihar?

2. Whether since certain quantity of goods were destroyed in transit and storage at the warehouse, the appellant is entitled to refund of Entry Tax deposited on such stock and enable refund by way of an adjustment against the VAT liability?

2. The assessee is engaged in the manufacture of beer brands, which are imported and sold within the State of Bihar. The appellant while importing beer from breweries situated outside the State of Bihar through stock transfer deposit Entry Tax on the import value of beer. The Entry Tax paid at the rate of 16% is set off on the tax payable on beer sold within the State, which in the subject year was at the rate of 50%. In the financial year 2008-09, the appellant deposited Entry Tax of Rs. 2,66,86,475/-. It is alleged that beer valued at Rs. 12,32,966/- was lost in transit and while stored in the godown, due to breakage. It is the contention of the appellant that the stock so destroyed was never sold, used or consumed

within the State and hence, the Entry Tax paid will have to be refunded.

3. The assessment passed based on the entire Entry Tax being set off against the VAT liability resulted in an audit objection. Reassessment was carried out and the tax component with respect to the value of destroyed stock was denied set off in the final liability.

4. The Appellate Authorities confirmed the order of reassessment against which the instant appeal was filed by the assessee. The learned counsel for the assessee relied on **Hindustan Lever Ltd. v. State of Bihar; (2003) 1 PLJR 535** to contend that the Entry Tax paid would be entitled to be reduced from the total liability, when the damaged goods were not sold within the State. Reliance was placed on **Unitech Wireless (Tamilnadu) P. Ltd. v. State; 2016 (1) PLJR 147**, to contend that the intention not to consume, sale or use need not be there at the time of import of goods. It was held therein, that, in the normal course of running of a business, if there is no actual consumption, sale or use within the local area, then there can be no levy of Entry Tax on import of such goods. Reliance is also placed on **Indian Oil Corpn. v. Municipal Corpn., (1993) 1 SCC 333,**

wherein it was held that the State legislature was competent to levy tax only on the entry of goods for consumption, use or sale into a local area; wherein the issue was with respect to the levy of Octroi by a Municipality on petroleum products transported by the oil company to its depot situated within municipal limits for export thereof to dealers outside the municipal limits, for consumption, use or sale in the limits outside the limits of the municipality, within which was located the godown.

5. The learned Government Advocate submits that the issue is covered squarely by the decision in Division Bench in **M.A. No. 149 of 2015** titled as **M/s ACC Limited v. State of Bihar & Ors.** dated 30.11.2023. The learned Government Advocate also relies on **Associated Cement Companies Ltd. v. State of Bihar; (2004) 7 SCC 642.**

6. The issues are squarely covered and is no longer *res integra* going by the decision of the Hon'ble Supreme Court in **Associated Cement Companies Ltd.** (supra). The decision in **Hindustan Lever Ltd.** (supra) was considered in **M.A. No. 149 of 2015** (supra). In **Hindustan Lever Ltd.** (supra) the goods brought into the Patna local area were sold to persons in other local areas and stock transfered

outside the State thus establishing that the goods were not brought into the local area for consumption, sale or use within the local area. Even then, it was found that it was for the dealer to prove to the satisfaction of the assessing authority, that the import was for the purpose of re-export and not for the consumption, sale or use within the local area. The decision in **Unitech Wireless (Tamilnadu) P. Ltd.** and **Indian Oil Corpn.** (both supra) were also only to the said effect.

7. We perfectly agree with the opinion of the Division Bench in **Unitech Wireless (Tamilnadu) P. Ltd.** (supra) that the intention not to consume, sale or use need not be there at the time of import of goods. But **Unitech Wireless (Tamilnadu) P. Ltd.** (supra) cannot be relied on by the appellant since the goods were brought into the State for sale, which did not fructify, only because they were destroyed. When there is an import of goods into the local area of the State, definitely there should be payment of Entry Tax. If the said goods are not consumed, sold or used within the local area; as was the case in the cited decision, wherein goods were then exported outside the local area, then necessarily a refund could be claimed, based on the substantiation of such

export having been carried out. This is a reaffirmation of the principle that if the goods are not used, consumed or sold within the State of Bihar, then the fact should be proved by sufficient evidence.

8. The decision in **M.A. No. 149 of 2015** (supra) also considered **Indian Oil Corpn.** (supra). **M.A. No. 149 of 2015** (supra) as is seen from paragraph nos. 18 to 20 of the decision are extracted hereunder:-

> 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.

9. We perfectly understand that there could be no substantiation of the claim of breakage. The learned counsel also submitted that for the purpose of levy of excise duty, breakage is reckoned, which is available in the statute itself. Insofar as the import into the State for consumption, use

or sale, there is no exemption given to breakage under the statute levying Entry Tax or the VAT Act and there cannot be any incorporation of the concession given in another statute, to the taxing statute, by this Court. Further, it has to be noticed that if such unlimited breakage is permitted then even without any breakage, the same could be claimed for refund. It is for the State to decide whether such benefit can be conferred on the assessee. So long as such benefit is not conferred, it is for the assessee to take proper care and ensure that there is no breakage.

10. We find absolutely no reason to entertain the appeal. The questions of law are to be answered against the assessee and in favour of the revenue.

11. The appeal stands dismissed.

(K. Vinod Chandran, CJ)

Rajiv Roy, J: I agree

(Rajiv Roy, J)

Aditya Ranjan/-

AFR/NAFR	AFR
CAV DATE	16.01.2024.
Uploading Date	24.01.2024.
Transmission Date	