CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70060 of 2015

(Arising out of Order-In-Appeal No.NOI/SVTAX/000/APPL-I/83/2015-16 dated 25/06/2015 passed by Commissioner (Appeals-I) Central Excise, Meerut)

M/s Beltek Canadian Water Ltd.……Appellant
(A-16, Hosiery Complex, Phase-II,
Noiad)

VERSUS

Commissioner of Service Tax, Noida ....Respondent
(Renu Tower, C-56/42
Sector-62, Noida)

APPEARANCE:

Shri Atul Gupta, Advocate for the Appellant
Shri A.K. Choudhary, Authorized Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.-70206/2024

DATE OF HEARING : 01.04.2024
DATE OF DECISION : 01.05.2024

P. K. CHOUDHARY:

The present appeal has been filed by the Appellant assailing the Order-In-Appeal No.NOI/SVTAX/000/APPL-I/83/2015-16 dated 25/06/2015 passed by Commissioner (Appeals-I) Central Excise, Meerut.

2. The facts of the case in brief are that the Appellant is engaged in the manufacture of Bulk Packaged Drinking Water under the brand name 'Aquafina' in terms of franchisee Agreement dated 09.06.2003 with M/s Pepsi Foods Private Limited[1]. The brand name 'Aquafina' belongs to M/s Pepsi. It is not disputed on record that the franchisee services are liable to

[1]Pepsi

Service Tax. Earlier the dispute arose for Financial 2007-08 relating to the service tax on the incentive received from M/s Pepsi to allegedly promote the sales of goods of Pepsi brand.

2. The allegations were made vide Show Cause Notice [2]dated 18.09.2012 that these services provided by the Appellant to M/s Pepsi falls under the taxable category of 'Business Auxiliary Services' defined under Section 65(19) of the Finance Act, 1994[3]. The SCN was adjudicated vide Order-In-Original No.86/Commissioner/Noida/2012-13 dated 31.03.2013 against which an appeal bearing No.ST/58604/2013 was filed before the Tribunal. The appeal was allowed by the Tribunal vide Final Order No.70040/2024 dated 30.01.2024. For the subsequent period impugned SCN dated 18.11.2013 was issued (for the period from April 2012 to March 2013) proposing to demand service tax amounting to Rs.12,00,356/- and to impose penalty under Sections 70,76 & 77 of the Act.

3. The said SCN was adjudicated vide Order-In-Original No.22/ST/ADC/Noida/2014-15 dated 23.12.2014 confirming the proposal of show cause notice holding as under:-

ORDER

> *"1. I hereby confirm the demand of service tax amounting to Rs. 12,00,356/- (Rupees Twelve Lacs. Three hundred and fifty six only) against M/s Beltek Canadian Water Ltd., A-16, Hosiery Complex Phase-II, Noida under Section 73 of the Finance Act, 1994.*
>
> *2 I order to recover the above said confirmed dues along with appropriate rate of interest as provided under Section 75 of the Finance Act, 1994.*
>
> *3 I impose penalty of Rs.10,000/- (Rupees ten thousand only) or two hundred rupees for every day during which such failure continues, whichever is higher, starting with the first day after the due date, till the date of actual compliance under Section 77 of Finance Act, 1994.*
>
> *I impose a late fee of Rs. 20,000/-(Rupees Twenty Thousands only) under section 70 of the Finance Act, 1994.*

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[2]SCN

[3]The Act

5 I also impose penalty of Rs. 6,00,178/- (Rupees Six Lacs, One Seventy Eight only) upon M/s Beltek Canadian Water Ltd., A-16 Hosiery Complex Phase-II. Noida under Section 76 9f the Finance Act, 1994."

4. Being aggrieved, the assessee filed appeal before the First Appellate Authority and the learned Commissioner (Appeals) confirmed the order of recovery of service tax for the period from April 2012 to June 2012 amounting to Rs.6,56,200/- under Section 73 of the Act along with interest. He set aside the confirmation of demand and imposition of penalty for the period from 01.07.2012 to 31.03.2013 as the Appellant had paid the tax on their own ascertainment. He imposed penalty of Rs. 3,28,100/- under Section 76 of the Act since the demand is confirmed with interest and same is provided in the statute. He also imposed penalty of Rs. 10,000/- under Section 77 (1) (a) of the Act for non-registration under `Business Auxiliary Service' and non-filing of ST-3 returns and late fee of Rs. 20,000/- under Section 70 of the Act for not filing ST- 3 return.

5. Hence the present appeal before this Tribunal.

6. We find that the issue in the present appeal is no more *res integra* and this Bench of the Tribunal vide Final Order No.70040 of 2024 dated 30.01.2024 has allowed the appeal of the Appellant being Service Tax Appeal No.58604 of 2013. The relevant paragraphs of the order are reproduced below for ready reference:-

"4.3 The only issue for consideration in this appeal is whether the sale incentive, advertisement and publicity charges received by the appellant can be subjected to service tax, under the taxable category of Business Auxiliary Services. We find that the issue involved in the present case is no longer res-integra. Reliance is placed on the following decisions:

- *Superior Drinks Pvt Ltd [2019 (6) TMI 272 –CESTAT Mumbai]*
- *Narmada Drinks (P) Ltd [2017 (5) GSTL 369 (T-Del)]*
- *Narmada Drinks (P) Ltd [2018 (6) TMI 899 CESTATDelhi]*

- *Brindavan Bottlers Ltd [2019 (27) GSTL 354 (T-All)]*
- *SMV Beverages Pvt Ltd [2018 (17) GST 284 (T-Mum)]*
- *Nahar Inustrial Enterprises Ltd [2010 (19) STR 166 (P & H)]*
- *Parker Markwel Industries Pvt Ltd [2019 (24) GSTL 42 (THyd)]*
- *Datamani Technologies (India) Ltd [2017 (51) STR 145 (T-Mum)]*

4.4 Delhi Bench has in the case of NARMADA DRINKS (P) LTD. [2017 (5) G.S.T.L. 369 (Tri. - Del.)] held as follows

> *"8. The appellant has manufactured aerated drinks with the brand name of coca cola, which is owned by M/s. Coca Cola. Since, the latter continues to supply the concentrate, which is used for manufacture of aerated product with the brand name of Coca Cola, any activity undertaken with the intention of promoting the brand name will also result in promotion of the sale of goods produced by the appellant. The Department has issued a Show Cause Notice and proceeded to confirm the demand of service tax on the basis of notice. During the course of audit of goods of accounts of the appellant; the appellant was found to have received certain amounts from M/s. Coca Cola variously described as "Sales Target Incentives" and "Advertisement and Publicity", etc. The SCN alleges that the appellant has received the aforesaid amount from the brand owners to promote and market the brands of the brand owners. Service Tax has been demanded by considering that such services fall under the category of "Business Auxiliary Service" defined under Section 65(105)(19).*
>
> *9. BAS is an omnibus service covering within its fold various types of services. It has not been indicated either in the Show Cause Notice or Order-in-Original under which sub-clause the appellant's service is being charged to service tax. By process of elimination, we conclude that it is likely to be under "Promotion or marketing or sale of goods produced or service provided by the client"; we note that no investigation has been undertaken by Revenue into the reasons for which appellants have received the payments. Hence, it is not very clear why the appellant has received the said amounts from M/s. Coca Cola. However, the Show Cause Notice, in Para 6.2, has stated that the amounts have been received from the brand owners to promote and market the brands of the brand owners.*
>
> *10. When we look at the clause (i) the definition of the BAS, which covers promotion or marketing or sale of goods produced or service provided, we fail to see how the promotion of the brand name can be brought under the above clause. The appellant has received concentrate from M/s. Coca Cola. Obviously, the appellant is not marketing or selling the concentrate as a brand name. The appellant's*

> *contention is that they are manufacturing the goods bearing the brand name and not the brand owners and therefore they cannot be charged service tax for marketing and promotion of sales of their own goods."*

4.5 In case of Brindavan Bottlers Ltd [2019 (27) GSTL 354 (T-ALL)], Allahabad bench has observed as follows:

> *"8. So far the next issue of the said appeal is concerned regarding reimbursement of advertisement and publicity and also the sales target incentives, it is explained by the Learned Counsel that such schemes - target schemes or incentive schemes are issued by the Coca-Cola Co. Ltd. of which the appellant is a franchisee bottler. Appellant on its own cannot issue any such scheme. Whatever schemes are floated by the Coca-Cola Company, the appellant is the implementing agency in their area of operation. Such expenses on actual basis for achieving the Sales target, incentive or advertisement and publicity expenses reimbursed to the appellant by the Coca-Cola Company Ltd. on actual basis. Accordingly, there is no element of receipt of any found toward service. Further, the appellant is not a service provider to Coca-Cola Company Ltd., they are working on principal to principal basis. Accordingly, following the precedent judgment of this Tribunal in the case of Narmada Drinks (P) Ltd. v Commissioner of Central Excise, Raipur, 2017 (5) G.S.T.L. 369 (Tri.-Del.) we hold that the appellant is not liable to pay service tax on reimbursement of such expenses from Coca-Cola Company Limited."*

4.6 In case of SMV Beverages [2018 (17) G.S.T.L. 284 (Tri. - Mumbai)] Mumbai Bench held as follows:

> ***"8.*** *The adjudicating authority has sought to tax the amounts received by the main appellant under category (i) or (ii) of the definition as reproduced herein above. For doing so, he has relied upon the PFL's Bottling Appointment and Trade Mark Licence Agreement entered into by the main appellant.*
>
> ***9.*** *We have perused the agreement entered into by the main appellant with PFL and find that the entire agreement talks about the sale of concentrate to the main appellant and the conditions for bottling the said trade mark like Pepsi, Mirinda, 7-up etc. The said agreement also provides for rights of PFL to sell and distribute beverages in other areas by appointing various bottlers. We have specifically perused the clauses relied upon by the adjudicating authority which is 11(b) and (d). On perusal of the said clauses, we notice that it talks about the steps necessary to be taken by the main appellant to promote and enhance the visibility and goodwill of trademarks and in particular the main appellant shall endeavour to maximize the sales and to increase the beverage's share of market. Both the clauses when scrutinized in depth, do not indicate that the main appellant is required to promote or market or sale of goods produced or provided or belonging to PFL. In the case in hand, PFL is*

> *only producing and selling concentrate to the main appellant for converting into aerated water. The adjudicating authority's findings that the concentrates are belonging to PFL, also does not cut the ice, inasmuch as the said concentrate is sold on payment of excise duty to the main appellant, which would indicate that once the sale takes place, the concentrate does not remain the property of PFL.*
>
> ***10.*** *The definition of "business auxiliary service" may not cover the transaction in this case, as the main appellant is not promoting or marketing of services provided by PFL as there is no service which has been provided by PFL in the case in hand. The findings of the adjudicating authority that the agreement requires the main appellant to promote the trademarks, which in term is nothing but the goods, seems to be farfetched as in the case in hand there is no mention of trade marks in the definition of BAS (as reproduced herein above). In short, we conclude that the main appellant is not promoting or marketing or selling the concentrates which are produced or provided by PFL to them for manufacturing of aerated waters."*

4.7 In case of Narmada Drinks Pvt Ltd [Final Order No ST/A/52245/2010-CU(DB) dated 18.06.2018]

> *"5. After hearing both sides and perusal of record, we note that the lower Authority has held the appellant as liable to payment of Service Tax under BAS, for the amounts received from brand owners such as M/s Coca Cola India Ltd. for marketing of their product. It is well known that the bottlers receive concentrate from the brand owners such as M/s Coca Cola, manufacture aerated products there from and sell the same. Para 6.2 of the relevant show cause notice alleges that the amounts have been received from the brand owners to promote and market the brand name of such brand owners. One of the activities for which BAS is leviable is for Promotion or Marketing or Sale of Goods Produced or Service provided. The appellant has received concentrate from the brand owners but is not marketing or selling the concentrate itself. The appellant's contention is that they are manufacturing and selling the aerated water bearing the brand name and are not engaged in marketing or promotion of the said goods.*
>
> *6. From the activities undertaken by the appellant, it is evident that they have not acted towards marketing and promotion or sale of goods produced by their client. At best it can be said that they have participated in promotion of the brand name of 'Coca Cola', 'Pepsi' etc. Such activities cannot be brought under 'Promotion or Marketing or Sale of Goods Produced or Service Provided by the Client', appearing under 'Business Auxiliary Service'."*

7. We find that the facts of the present case are squarely covered by the above mentioned judgments and the Final Order No.70040 of 2024 dated 30.01.2024. The impugned order is set

aside to the extent of confirmation of demand and penalties by the learned Commissioner(Appeals). The appeal filed by the Appellant is allowed in the above terms with consequential relief as per law.

(Pronounced in open court on 01.05.2024)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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