FAX : 0532-2400149 REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

Dated: 27/12/2017

To
Appellant as per address in table below
Respondent as per address in table below

Final Order No. A/71960-71962/2017-SM[BR] dated 21/09/2017

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the Central Excise and Salt Act, 1944.

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
1	E/70064/2017	**Bright Enterprises Private Limited** Radisson Blu,mbd Hotel,l-2,sector-15 NOIDA UP
2	E/70065/2017	**Sonica Malhotra Director** C/o Bright Enterprises Private Limited, Radisson Blu,mbd Hotel,l-2,sector-15 NOIDA UP
3	E/70066/2017	**Nimit Gupta Finance Manager** C/o Bright Enterprises Private Limited,l-2,sector-18 NOIDA UP
		Name and Address of Respondent
4		C.C. & C.E. & S.T.-Noida C-56/42...SECTOR 62, NOIDA, UTTAR PRADESH-201307
5		C.C. & C.E. & S.T.-Noida C-56/42...SECTOR 62, NOIDA, UTTAR PRADESH-201307
6		C.C. & C.E. & S.T.-Noida C-56/42...SECTOR 62, NOIDA, UTTAR PRADESH-201307

Other Appellants and Respondents as per Annexure

Copy To

7 Advocate(s) / Consultant(s):

**RAHUL AGARWAL,
ADVOCATE
C-308 BLOCK-2, 3RD
FLOOR, LOTUS
APARTMENT, 39-A,
TASHKAND MARG, CIVIL
LINES ALLAHABAD**

8 Bar Association, CESTAT, Allahabad

9 Director Publications. Customs, Excise. I.P. Estate, Delhi

10 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, Opp ICICI Bank of Defence Colony New Delhi-3

11 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

12 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

13 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

14 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

15 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

16 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082

17 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032

18 C.D.R. 19 Office Copy 20 Second Folder Copy 21 Guard File

Asstt. Registrar

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

REGIONAL BENCH : ALLAHABAD

COURT No. I

APPEAL No: E/70064, 70065 & 70066/2017-EX[SM]

(Arising out of Order-in-Original No. 22/Pre. Comm./Noida-I/2016-17 dated 27/10/2016 passed by Commissioner of Central Excise, Noida-I)

M/s Bright Enterprises Private Ltd.,

Ms Sonica Malhotra Director &

Mr. Nimit Gupta Finance Manager **Appellant (s)**

Vs.

Commissioner of Central Excise & Service Tax, Noida **Respondent (s)**

Appearance:

Shri Rahul Agarwal (Adv.) & Ms Sanyukta Singh (Adv.) for Appellant
Shri Sandeep Kumar Singh (Dy. Commr.) AR for Respondent

CORAM:

Hon'ble Mr. Anil Choudhary, Member (Judicial)

Date of Hearing : 21/09/2017
Date of Decision : 21/09/2017

FINAL ORDER NO- 71960-71962/2017

Per: Anil Choudhary

The appellants Bright Enterprises Private Ltd. are running a hotel business under the brand name Radisson. The appellants also have got restaurant and other services in the Hotel. The appellants also manufacture confectionery (cakes, pastries biscuits etc.) in their in-house manufacturing facility for confectionery. A part of the confectionery so manufactured is consumed within the hotel premises in their business of catering/restaurant service. A minor part of the confectionery manufactured is sold to customers across the counter which is located inside the Hotel. The appellants are registered with the Service Tax Department and are paying service tax regularly including the services of Mandap keeper & Catering, Restaurants, etc. Prior to 2010, the appellants were availing SSI exemption. There was an inspection by Anti-Evasion Wing of the Department on 11/09/2008 and pursuant thereto show cause notice dated 03/06/2009 was issued alleging that during checking of Radisson MBD Hotel at Noida, it was observed that there is a in-house bakery for the manufacture of cakes, pastries etc. situated in the premises of the Hotel, are being transferred to the pastry shop situated on the ground floor inside the Hotel. From the pastry shop, which is known as 'chocolate box' the cakes pastry etc. are sold to the customers who visit the pastry shop namely the chocolate box. It appeared to Revenue that the appellants are using the brand name of 'Radisson' below the words 'chocolate box' on the packing material. It is mentioned "Radisson MBD Hotel, Noida." This show cause notice was issued from the period 2005-06 to 31/03/2008. The said show cause notice was finally settled in favour of the appellants by Order-in-Appeal No. 211-12/CE/APPL/Noida/2010 dated 27/07/2010 wherein it was held that the appellants are not using the brand name of another and accordingly, the amount deposited during investigation etc. was ordered to be refunded.

2. Subsequently there was an audit by the Noida, Commissionerate, for Customs, Central Excise and Service Tax, wherein the appellants were directed to produce balance sheets for the Financial Year's 2006-07 to 2009-10 along with copies of income tax returns, Director's report, Bank statements, Trial balance, a chart showing details of billed amount, amount received that is value of taxable service for each service separately, service tax paid by cash and by Cenvat account for the last 3 years, copy of ST returns, etc. Pursuant to audit no objection has been raised by the Department. In the meantime the appellants had surrendered that Central Excise Registration Certificate as they were not having taxable clearance of the confectionery items, as the SSI limit had been increased to about Rs. 4 crores. The appellants also filed application for refund of duty paid under protest which was refunded to them vide order dated 22/02/2011 passed by the Deputy Commissioner

of Central Excise, Noida. Subsequently the appellants applied for grant of Central Excise registration in April 2014, which was granted to them being certificate dated 24/04/2014. The reason stated by the Learned counsel for appellants for obtaining registration certificate is that they had started using the 'Radisson' brand on the boxes used for packing and clearing pastry from their pastry counter. There was an inspection by the Anti-Evasion Wing on 26/06/2014 and pursuant thereto show cause notice dated 08/07/2015 was issued wherein it was alleged that the appellants are manufacturing and clearing dutiable food items namely chocolate and other food preparations containing cocoa falling under CETA 1806, pastry cakes and biscuits falling under CETA 1905, lemonade and fresh lime falling under CETA 22021020, beverages like tea and coffee falling under Chapter 22 and juices falling under Chapter 20. The appellants have got food revenue of more than Rs.4 crore in 2008-09 (total of restaurant sales + pastry shop). The appellants had never submitted any information to the Central Excise authority about their sale crossing the assessable value of Rs.4 crore in each of the Financial Year's 2010-11 to 2014-15 as admitted by Mr. Sanjay Arora Vice-President of Finance. The appellants have not paid excise duty on a year-to-year basis from 2010-11 to 2014-15. It further appeared that the appellants have cross the food revenue Rs.4 crores in the year 2008-09 itself and it also appeared that they were not eligible for availing any exemption from 2009-10 onwards as the aggregate value of clearances of all the excisable goods (dutiable and exempted) for home consumption exceeds Rs.4 crores in each of the Financial Year from 2008-09 onwards and it does not include any of the clearances mention in Para-3A of said Notification. Accordingly, it appeared that appellants were liable to pay Central Excise Duty at appropriate rate as amended from time to time for clearance of the manufacture dutiable food items. For invocation of the extended period it was alleged that the appellants were working under self-assessment method and they had food revenue of more than Rs.4 crores in 2008-09, but they never submitted any information to the Central Excise Authority about their sale being more than Rs. 4 crores since 2008-09, nor they paid Central Excise duty on year-to-year basis from 2010-11 to 2014-15 and it was also alleged that from April 2014, the appellants have again started using brand name, have taken registration with the Department and are paying duty. However, in respect of beverages, they are still not discharging their liability. Accordingly, the appellants were called upon to show cause as to why Central Excise duty amounting to Rs.74,45,620/- be not demanded for the period June, 2010 to March, 2015 with proposal to appropriate Rs. 8 lakhs deposited vide Challan during investigation on 05/07/2014. Further penalty was proposed on the appellant company and the Director Ms Sonica Malhotra and the Manager Finance, Shri Nimit Gupta.

3. The SCN was adjudicated on contest vide Order-in-Original dated 27/10/2016 and a reduced amount of Rs.21,54,521/- was confirmed towards chocolate and other food preparations including cocoa like pastry cakes, biscuits, etc. alongwith appropriation of Rs. 8 lakhs, as proposed. The demand of duty on other items like tea, coffee, juice, lemonade etc. was dropped. Further equal amount of penalty was imposed on the appellants company and further penalty of Rs. 2 lakhs was imposed on the Director Ms Sonica Malhotra under Rule 26 and also penalty was Rs.1 lakh on Shri Nimit Gupta, Manager of Finance under Rule 26 of the CER, 2002. As regards dropping of the demand with respect to the beverages etc., the Learned Commissioner have observed that tea, coffee, lemonade juice are not served to the customers in

packed condition. Rather it is for immediate use or the consumption. None consumption of these products for even more than 10 minutes will render it useless. Further, observing that the process of making tea, coffee, lemonade, juice, cannot be said to be manufacturing process and therefore held that these are not liable to excise duty.

4. Being aggrieved the appellants are before this Tribunal. The Learned counsel for the appellants urges that under the facts and circumstances the extended period of limitation is not invocable. It is an admitted fact that the earlier show cause notice was issued in June 2009, which was finally settled in favour of the appellants by Order-in-Appeal passed by the Commissioner (Appeals) in July, 2010 and subsequent grant of refund. Further, there was an audit during year 2010 in which the appellants had produced all the relevant documents more fully noticed hereinabove, before the audit team, up to the period March, 2010 and /till the date of audit. Further the admitted fact that the appellants were paying service tax also on the confectionery manufactured and consumed within its Hotel premises, either in their restaurant or in their banquet hall under various heads of service like

restaurant service, Mandap keeper service, etc. Such service tax was paid on proper due dates and service tax returns filed disclosing the turnover. Thus admittedly Revenue had all the information about the activities of the appellant company. And as such it is the admitted facts that Revenue accepted the service tax. The Central Excise duty cannot be demanded on the sales across the counter and even if it is for argument sake, accepted to be excisable, in that case, the appellants will entitled to Cenvat credit of inputs used for manufacture of the confectionery and also adjustment of service tax already paid and thus the situation will be wholly Revenue neutral. Further, the appellants shall be entitled to the benefit of cum duty calculation of tax. It is also an admitted fact that the appellants have consumed the major part of the confectionery manufactured inside the Hotel premises in the course of the business of restaurant service. Thus, in such case, excise duty is not chargeable on the MRP of the product but on the cost of the product in accordance with CAS 4 guidelines. Accordingly Learned Counsel prays for allowing the appeals and setting aside the impugned order.

5. The Learned AR for the Revenue have relied on the findings of the Learned Commissioner in the impugned order.

6. Having considered the rival contentions I find that extended period of limitation is not invocable in the facts and circumstances, as admittedly the appellants were all along registered with the Central Excise Department/Services Tax Department. They had been filing their service tax returns which have never been found to be untrue and rejected by the Revenue. The earlier show cause notice dated 03/06/2009 was finally settled in their favour and refund allowed in July, 2010. Further, there was audit by the Commissionerate in July, 2010 and their books of accounts, balance sheet etc. were all scrutinized and no objection was raised. Further, the appellants had suo motu taken registration under Central Excise, in March, 2014 for manufacture and clearance of branded confectionery. I hold that no case of mis-interpretation, suppression or concealment of facts is made out against the appellants. Accordingly I hold that the extended period of limitation is not invocable. So far the demand for the normal period is concerned I find that it is admitted fact that the major part of the confectionery manufactured by them is consumed in-house in

rendering of services like restaurant service, Mandap keeper service, etc. Admittedly the appellants have paid the service tax on such services and filed appropriate returns. So far the normal period is concerned I find that there is no demand for the normal period as admittedly the appellants have taken registration since April, 2014 and are paying duty in accordance with law as advised. Accordingly I hold that the show cause notice is not maintainable. I allow the appeals and set aside the impugned order. Thus all the appeals stand allowed with consequential benefits.

(Dictated & Pronounced in Court)

-Sd/-

(ANIL CHOUDHARY)
Member(JUDICIAL)

Lks

प्रमाणित प्रति/Certified True Copy
25/01/18
सहायक पंजीकार/Asstt. Registrar
सीमा शुल्क, उत्पाद शुल्क एवं सेवा कर
अपील अधिकरण(C.E.S.T.A.T.)
38, एम.जी.मार्ग, इलाहाबाद-211001
38, M. G. MARG,ALLAHABAD-211001