CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

REGIONAL BENCH – E-Hearing

Service Tax Appeal No. 51051 of 2015

(Arising out of Order-in-Original No. CHD-CEX-001-COM-91-92-2014 dated 29.12.2014 passed by the Commissioner, Chandigarh)

M/s Kandhari Beverages P Ltd **……Appellant**
(Plot No.- 177-f Industrial Area Phase-I, Chandigarh, Punjab)

VERSUS

C.C.E.- Chandigarh **……Respondent**
(Plot No. 19, Central Revenue Building, Sector 17-C, Chandigarh-160017)

APPEARANCE:

Ms. Krati Somani, Advocate for the Appellant

Shri Vijay Gupta, Authorised Representative for the Respondent

CORAM: HON'BLE MR. ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. 60411 of 2020

DATE OF HEARING: 25.11.2020
DATE OF DECISION: 25.11.2020

PER ASHOK JINDAL:

Heard both side.

2. The Ld. Counsel for the appellant submits that this is a subsequent show cause notice for the period 2011, to June, 2012 and the show cause notice issued for the earlier period, this Tribunal dealt the issue and pass the order reported in ***2020 (3) TMI 913 – CESTAT Chandigarh*** by following the decision of this Tribunal in the case of ***Superior Drinks Pvt Ltd Vs. CCE, Nagpur-2019 (6) TMI 272 – CESTAT Mumbai***. The said decision was further followed in the case of ***Wave Beverages Pvt Ltd vs. C.C.E & ST, Ludhiana*** reported in ***2020 (2) TMI 1255-CESTAT, Chandigarh***.

3. The facts of the case are as under:

1. The Appellant is engaged in the manufacture of non-alcoholic beverages and fruit pulp based products like Maaza under the brand name of The Coca-Cola Company (USA) ('**CCI**'). The Appellant has entered into a 'Bottlers Agreement' with CCI wherein the Appellant has been authorised to use the trade marks in connection with preparation, packing, distribution and sale of beverages in and throughout a specified territory (pg. no. 73-108 of Memo of Appeal).

2. The Appellant purchases the concentrates, required for manufacture of final products, from Coca Cola India Pvt. Ltd. ('**CCIPL**'), the authorised representative of CCI in India.

3. As per the Bottlers Agreement, the Appellant is required to take steps for advertising, marketing and promoting the sale of beverages by creating its own funds, and CCI agreed to contribute financially in the marketing program. Further, CCIPL executed Business Protocol during the relevant period based on annual business plan for the Appellant, highlighting various marketing activities to be executed during the year for achieving the desired growth.

4. Two SCNs dated 16.04.2013 & 23.05.2014 were issued to the Appellant alleging that while marketing beverages, the concentrate owned by CCI was also getting marketed and that promotion of concentrate was inextricably linked to the promotion of brand name. Thus, the Appellant is promoting sale of concentrate of CCI for which, the latter is paying a consideration in the form of support price. In turn, the Appellant is providing BAS of "promotion or marketing of goods produced or provided by or belonging to the client" to CCI. The department relied on the clause 7 of the agreement between the Appellant and CCI, which is extracted below:

"The Bottler must, for its own account, budget and expend such funds for advertising, marketing and promoting the Beverage as may be reasonably required by the Company to create, stimulate and sustain the demand for the Beverage in the Territory, provided that the Bottler shall submit all advertising, marketing and promotional projects relating to the Trade Marks or the Beverage to the Company for its prior approval, and shall use, publish, maintain or distribute only such advertising, marketing or promotional material relating to the Trade Marks or the Beverage as the Company shall approve and

authorize. The Company may agree from time to time and subject to such terms and conditions as it shall stipulate in each case to contribute financially to the Bottler's marketing programs. The Company may also undertake, at its own expense and independently from the Bottler, any additional advertising or sales promotion activities in the Territory it deems useful or appropriate."

5. The show cause notices were adjudicated and the entire demands, after granting cum-tax benefit, were confirmed along with interest and penalty. It has been held that the activities undertaken by the Appellant not only promote the sale of products of the Appellant, but also promote the concentrates manufactured by CCIPL and brands owned by CCI. Thus, the Appellant was providing BAS to CCI/CCIPL. Being aggrieved by the impugned order, the Appellant has filed the present appeal before the Hon'ble Tribunal."

4. The Ld. AR filed written submissions and the same are taken on record and considered.

5. As the issue has been dealt by this Tribunal in appellant's own case for the earlier period, wherein this Tribunal observed as under:

"**4.2** *We find that the issue involved in the present appeal is squarely covered by the decisions of the Tribunal in case of Superior Drinks Pvt Ltd [2019 (6) TMI 272 –CESTAT Mumbai]. This decision in turn follows the decisions rendered by the Delhi Bench in case of Narmada Drinks (P) Ltd reported at 2017 (5) GSTL 369 (T-Del)] and also in case of Narmada Drinks (P) Ltd reported at [2018 (6) TMI 899 (TDel)]. Similar view has been expressed by the Allahabad Bench in case of Brindavan Bottlers Ltd [2019 (27) GSTL 354 (T-All)] and Mumbai Bench in case of SMV Beverages Pvt Ltd [2018 (17) ELT GSTL 284 (T-Mum)].*

4.3 *Learned Authorized Representative does not dispute that the issue is squarely covered by the above decisions but questions the decisions themselves. In his submission, he has referred to Service Agreement between Coca Cola USA (CCI) and Coca Cola India Pvt Ltd (CCIPL) to state that "Coca Cola USA work as an agent of Coca Cola India and all terms and conditions of have been set by Indian Co which nis the supplier of concentrate." Thus the findings recorded by the Mumbai bench in case of Superior Drinks (supra) in para 5.2 to 5.4 are not correct in as much as that it holds that there is contract between Coca Cola USA and bottler but not between bottler and Coca Cola India who is the supplier of concentrate.*

This agreement now being referred to by the learned Authorized Representative is not even part of relied upon documents or have even been referred in the Show Cause Notice. In such a situation the reliance placed by the learned Authorized Representative to various clauses of this agreement is totally uncalled for. However, even in terms of this agreement also we do not find any support to the arguments being advanced. There is no dispute that bottler is under obligation in terms of bottlers agreement with the Coca Cola USA to promote Beverage and the Brand.

4.4. *Undisputedly Appellant purchases the concentrate from the Coca Cola India. Learned Authorized Representative after referring to various terms of agreement argues stating that "all these conditions reflect that concentrate is only transferred for use and not sold to the bottler." The fallacy in the arguments advanced is self evident if we refer to the definition of sale and purchase as per Section 2(h) of the Central Excise Act, 1944 as it existed then. The said definition has been made applicable to Chapter V of Finance Act, 1994 as per Section 65 (121) ibid. The relevant provisions are reproduced below:*

Section 2(h) of Central Excise Act, 1944

"sale" and "purchase", with their grammatical variations and cognate expressions, mean any transfer of the possession of goods by one person to another in the ordinary course of trade or business for cash or deferred payment or other valuable consideration; Section 65 (121) of Finance Act, 1994:

words and expressions used but not defined in this Chapter and defined in the Central Excise Act, 1944 (1 of 1944) or the rules made thereunder, shall apply, so far as may be, in relation to service tax as they apply in relation to a duty of excise. Thus in terms of Section 2(h) of Central Excise act, 1944 the transfer of possession for a consideration in normal course of trade would signify the sale. CESTAT Bangalore Bench has in case of Nestle India Ltd [2009 (248) ELT 737 (T-Bang)] held as follows:

"3 As per the definition of "Sale" or "Purchase" under Section 2(h) of Central Excise Act, 1944 "means ….". In the instant case, the sale is transfer of ownership of goods from M/s Nestle India Ltd to Indian Army/ ITBP. From the Central Excise point of view the transaction ends there. Beyond the point of sale, The Central Excise Act, 1944 does not have any provisions to look into the intended use of the goods transacted. Once the ownership of the goods is transferred to the buyer of goods, the intended use of the goods must not be, a factor to determine the manner of assessment of the goods for duty under Section 4/ 4A of the Central Excise Act, 1944." Thus by stating that the goods namely concentrate was transferred for use by M/s Coca Cola India Pvt Ltd to the Appellant for consideration, a fact not in dispute, the sale of the goods in term of Central Excise Act, 1944 has occurred. The imposition of restrictions or conditions in respect of the

usage and consumption of the concentrate, by the seller cannot alter that position. Hence we do not merit in the submission of the Authorized Representative that this transaction was not a truncation of sale but only "transfer to use".

4.5 *Thus the arguments advanced by the Authorized Representative in respect of non applicability of the decision of CESTAT in case of SMV Beverages, too need to be rejected.*

4.6 *In any case if the arguments advanced by the Authorized Representative, were to be accepted then in every case, sale promotion activities undertaken by the manufacturer of finished product, shall amount to sale promotion of the raw material, and the service so rendered to the raw material supplier will be taxable as Business Auxiliary Service in this category. This is neither the intention nor the rationale of the scheme of taxable category defined as "Business Auxiliary Service".*

4.7 *The decision of the Hon'ble Bombay High Court relied upon by the Commissioner in the impugned order and by the Authorized Representative has been distinguished by the Mumbai Bench in case of Superior Drinks stating as follows:*

"5.9 There cannot be more convoluted application of the decision of the High Court and stretching the provisions in an agreement for purpose of levy of tax. If the arguments of the Commissioner were to be accepted then in that case every manufacturer/ producer/ supplier of the goods who purchases and material/ inputs is promoting the sale of his input supplier. Since as the sale of his finished goods goes up automatically consumption of inputs will go up and accordingly he promotes the sale of input manufacturer/ supplier. In our view such an interpretation is neither logical or rational. Both input suppliers and the finished product manufacturer are independent business entity acting in the interest of their business. The issue before the High Court was vis a vis the admissibility of CENVAT Credit in respect of Advertisement services availed by the Coca Cola India as is evident from para 2 & 3 of order reproduced below:

"2. The main question which is therefore, required to be considered, in the present Appeal, is whether the Appellants, who are manufacturers of non-alcoholic beverage bases (concentrates) are eligible to avail credit of the service-tax paid on advertising services, sales promotion, market research and the like availed by them and utilize such credit towards payment of excise duty on the concentrate. As now judicially recognized, Service tax is VAT which in turn is destination based consumption tax in a sense that it is on commercial activities and is not a charge on the business but on the consumer. Just as excise duty is a tax on value addition on goods. Service tax is on the value addition by rendition of service. See All India Federation of Tax Practitioners v. Union of India - 2007 (7) S.T.R. 625 (S.C.) = (2007) 7 SCC 527.

3. Credit has been denied on the ground that the advertisements do not relate to concentrates manufactured by the Appellants. It is not disputed that the advertisement expenses incurred by the Appellant form part of the sale price of the concentrates on which duty has been paid."

5.10 While considering the questions as above High Court has recorded what has been state by the Commissioner. In the case before High Court, the advertisement expenses were incurred by Coca Cola India and High Court had held that expenses towards advertisement services are part of the cost incurred for production of the finished product, and hence these services are to be treated as input services for determining eligibility to CENVAT Credit. In our view the decision of High Court does not state what Commissioner has intended to conclude from the same."

4.8 *In view of the discussions as above, we do not find any merits in the submissions an arguments advanced by the learned Authorized Representative. Since issue as observed by us in para 4.2, squarely covered by various decision referred in that para, we do not find any merits in the impugned order.*

5.1 We do not find any merits in the impugned order and set aside the same thereby allowing the appeal.

6. As issue has already been settled in favour of the appellant, therefore, we hold that no demand of service tax is sustainable against the appellant, therefore, we set aside the impugned order and allow the appeal with consequential relief.

(Dictated and pronounced in the open court)

(ASHOK JINDAL)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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