CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Excise Appeal No. 52270 of 2018

(Arising out of Order-in-Appeal No. 215 (SM) CE/JPR/2018 dated 2nd May, 2018 passed by the Commissioner (Appeals) office of the Commissioner (Appeals), Central Excise & CGST, Jaipur, NCRB, Statue Circle, Jaipur 302005)

M/s Sabmiller India Limited ..... **Appellant**

VERSUS

Commissioner, CE & CGST ..... **Respondent**
Block-A, Surya Nagar, Alwar (Rajasthan)-301001

APPEARANCE:

Shri Krishan Rao & Ms. Aakansha Wadhwani, Advocate for the Appellant
Shri Ravi Kapoor, Authorized Representative of the Department

CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO.51122/2022

DATE OF HEARING/ DECISION: November 22, 2022

JUSTICE DILIP GUPTA

M/s SABMILLER INDIA LTD.[1] has filed this appeal to assail the order dated 27.04.2018 passed by the Commissioner (Appeals) holding that the appellant is liable to pay Central Excise duty on the carbon dioxide generated during the process of fermentation of beer and used for its carbonation. Earlier, the Deputy Commissioner by order dated 16 March, 2017 had also confirmed the demand of Central Excise duty with interest and penalty.

2. The appellant is engaged in the manufacture of beer on which no excise duty is payable. However, during the process of

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1. the appellant

manufacture of beer, carbon dioxide gas is generated. The dispute relates to interpretation of the notification dated 16.03.1995 that exempts the goods manufactured in the factory, particularly to the proviso that provides that nothing in the notification shall apply to inputs used in or in relation to the manufacture of final products which are exempt from the whole of duty of excise leviable thereon or are chargeable to nil rate of duty.

3. The case of the Department is that since no excise duty is payable on the final products, the exemption notification would not be applicable to the appellant and, therefore, the appellant would have to pay Central Excise duty on carbon dioxide used captively in the factory.

4. It was found on scrutiny of records that during the period July 2015 to March 2016, carbon dioxide was generated in the appellant factory during the course of manufacture process of beer and it was captively used for manufacture of beer to enhance its taste but excise duty was not paid. Accordingly, a show cause notice dated 04.08.2016 was issued for recovery of Central Excise duty.

5. Shri Krishan Rao assisted by Ms. Aakansha Wadhwani, learned counsel appearing for the appellant has placed reliance upon the judgment of the Kerala High Court in the case of the appellant itself in **SABMILLER INDIA LTD.** v/s **Union of India**[2] to contend that the demand of duty on the carbon dioxide generated during the process of manufacture of beer and captively used could not have been confirmed.

6. Shri Ravi Kapoor, learned authorized representative appearing for the Department has however, supported the impugned order.

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2 . 2019 (367) E.L.T 696 (Kerala)

7. It is seen from the perusal of the judgment of the Kerala High Court in **SABMILLER INDIA LTD** that the period involved was from July 2009 to January 2014 and the dispute was with regard to carbon dioxide produced in the factory and captively consumed in the course of manufacture of beer. The Kerala High Court observed that carbon dioxide may be an independent product mentioned in the central excise tariff but it was a product that arose in the manufacturing process and would only be seen as an efficient process for manufacture of beer. The High Court, therefore, held that in such a situation central excise duty would not be payable. The relevant portion of the judgment is reproduced below:-

> " 6. The Central Excise Act is a Central legislation enacted pursuant to the legislative power conferred on the Parliament in terms of Article 246 read with Entry 84 of List I of the VII[th] Schedule to the Constitution. Entry 84 of List I as is stood during the relevant time read as follows:
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> > "84. Duties of excise on tobacco and other goods manufactured or produced in India except (a) alcoholic liquors for human consumption and (b) opium, Indian hemp and other narcotic drugs and narcotics."
>
> Under the Central Excise Act, the levy and collection of duty is envisaged under Section 3, which is the charging Section. As per the said Section, the levy and collection of Central Excise duty is to be on all excisable goods produced or manufactured in India and at the rates set forth in the Schedule to the Act. Excisable goods are in turn defined under the Act to mean those goods that are specified in the First and Second Schedule to the Central Excise Tariff Act, 1985. The word "produced" or "manufactured" in Section 3 of the Act has to be read as in relation to the excisable goods resulting from such processes, and when so read, it would follow that the provisions of the Central Excise Act, including the procedure for levy and collection of duty, would apply only to such production or manufacturing process that result in the production/manufacture of excisable goods. In the instant case, the final product manufactured by the petitioner company being beer, which is an alcoholic liquor for human consumption, the manufacturing process cannot be seen as coming under the purview of the Central Excise Act.

7. Captive consumption in the context of a manufacturing process is a concept that is relevant in the context of payment of Central Excise duty under the Central Excise Act. It essentially ensures that there is a payment of Central Excise duty on every dutiable product that emerges in the factory of a manufacturer of an excisable final product even though the manufacturer may not clear the said product outside his factory but chooses to use the said product in the manufacture of the excisable final product. In such cases, the manufacturer is said to resort to a captive consumption of the first product to manufacture the ultimate final product, which is then cleared from his factory. While, prior to the introduction of the MODVAT/CENVAT Scheme under the Central Excise Act, the requirement of payment of Central Excise duty on each dutiable product manufactured in the factory of the manufacturer led to an increase in the cost of manufacture of the final product (since the duty paid on the intermediate product had to be absorbed by the manufacturer into the cost of manufacture of the final product), with the introduction of the MODVAT/CENVAT Scheme that was designed to avoid the cascading effect of taxes on the various products that went into the manufacture of a final product, it became possible for a manufacturer to set off any duty paid on a captively consumed product in his factory, against the duty paid on the final product that was cleared from his factory. With a view to spare the manufacturer of the requirement of maintaining additional MODVAT/CENVAT records, Notification No.67/95-C.E., dated 16.03.1995 was published which exempted manufacturers from the requirement of payment of duty on captively consumed products so long as they paid duty on the final product that was cleared from their factory premises. This intention can also be gathered from the proviso to the Notification itself, which clearly indicates that if the final product cleared from the factory of the manufacturer attracts only a Nil rate of duty or is otherwise exempt from payment of duty, then the benefit of exemption at the captive consumption stage will not accrue to such manufacturer. What is significant to note, in the proviso to the Notification, is that the non-payment of duty by a manufacturer on his final product must be on account of the final product being exempt from duty or attracting a NIL rate of duty. Non-payment of duty by the manufacturer on account of his final product being non-excisable is not a situation covered by the notification. In my view, this is yet another indication that the levy of duty on a product, at the captive consumption stage, was not envisaged in

circumstances where the final product cleared from the factory was non- excisable.

8. **In the instant case, it is not in dispute that the carbon dioxide that is generated in the factory of the petitioner manufacturer is a byproduct that arises in the fermentation process leading to the production of alcoholic liquor for human consumption.** While carbon dioxide may be an independent product mentioned under the Central Excise Tariff, in the instant case, **it is a product that arises in a manufacturing process that does not attract the levy of Central Excise duty under the Central Excise Act. The further use of the carbon dioxide by the manufacturer can only be seen as an efficient process for the manufacture of beer, where the manufacturer puts to use the carbon dioxide generated, which otherwise would have to be let out from the factory as a waste gas.** In my view, the levy of Central Excise duty is not attracted in such cases, where a byproduct emerges in the course of manufacture of non-excisable products and the captive consumption of the said byproduct is only intended to efficiently manufacture a non-excisable product. Inasmuch as the final product emerging from the factory of the manufacturer is not excisable (as opposed to exempt or cleared at Nil rate of duty), I am of the view that, Ext.P1 show cause notice has been issued on an erroneous premise and without jurisdiction. The Writ Petition is therefore allowed by quashing Ext.P1 notice as one issued without jurisdiction, with consequential reliefs to the petitioner. "

(emphasis supplied)

8. For the reasons stated in the aforesaid judgment of the Kerala High Court, the order dated 27.04.2018 passed by the Commissioner (Appeals) cannot be sustained and is set aside. The appeal is, accordingly, allowed.

(Order dictated and pronounced in the open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

Rekha