

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

10

Appeal No. E/3075/2005-3080/2005 - EX[DB]

Date 14/10/2008

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S VARANASI BOTTLING CO. PVT. LTD
GAUTAM BUDDHA MARG, PAHARIA VARANASI,
UTTER PRADESH
M/S VARANASI BOTTLING CO. PVT. LTD

Appellant

Vs
Respondent

C.C.E ALLAHABAD

EX[DB] dated 13-10-08

I am directed to transmit herewith a certified copy of Final order No. 751-756/08-EX

passed by the Tribunal under Section 35-C(1) of Central Excises Act, 1944


Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent

C.C.E ALLAHABAD

38.M.G.MARG, CIVIL LINES, ALLAHABAD

2. Adv. / Consult

MR.V.LAKSHMI KUMARAN

B-6/10, SAFDARJUNG ENCLAVE, NEW DELHI-110029

3. ~~I.C.D.R.~~

~~I.C.D.R.~~

5 Bar association, CESTAT, New Delhi

6 M/s. Deeparchi Publications, M-93, Marg, 46, Saket, New Delhi 110017

7 M/s Centax Publications (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New - 3

8 Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)

9 Raghuraman's 44-B, Regal Flat, Shipra Suncity, Indirapuram - 201010, Ghaziabad, DT, U.P.

10 Nidheshak publications, I.P.Estate, new Delhi

11 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026

12 Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagarava Road, T. Nagar, Chennai

13 Taxindiaonline.com Pvt.Ltd, B-XI/8183, Vasant Kuni, New Delhi - 110070

14 Easy Service Tax Online Dot Com Pvt.Ltd.407A.Iscon Mall.Above Star India Bazar,Satellite Road,Ahmedabad-1

15 Office Copy

16 Guard file


Assistant Registrar
(Excise Appeal Branch)

17. M/S ASHU MARKETING & ADVERTISING SERVICES
HOUSE NO. 14-HIG, PHASE-2, PAHARIA, VARANASI

P.T.O.

18. M/S NATIONAL DRINKS
23. SAMPURNAND NAGAR. SIGNA. VARANASI

19. SH C.P.N.KEJRIWAL MANAGING DIRECTOR
VARANASI BOTTLING CO. PVT LTD. GAUTAM BUDDA MARG. VARANASI

20. SH KANHAI LAL MORARKA PARTNER
NATIONAL DRINKS. 23. SAMPURNAND NAGAR. SIGRA. VARANASI

21. SRI PAWAN KUMAR AGRAWAL PARTNER
ASHU MARKETING & ADVERTISEMENT SERVICES. HOUSE NO. 14-HIG. PHASE 2. PAHARIA. VARANASI

11

(1)

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL**
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. II
Excise Appeal No. 3075 to 3080 of 2005

[Arising out of the Order-in-Original No. MP (Dem-39/2002, 102/04, 103/04, 104/04, 105/04) 5 to 9 of 05 dated 31/03/05 passed by The Commissioner of Central Excise, Allahabad.]

For Approval and signature :

Hon'ble Shri S.S. Kang, Vice President

Hon'ble Shri Rakesh Kumar, Member (Technical)

1. Whether Press Reporters may be allowed to see :
the Order for publication as per Rule 27 of the
CESTAT (Procedure) Rules, 1982?
2. Whether it would be released under Rule 27 of :
the CESTAT (Procedure) Rules, 1982 for
publication in any authoritative report or not?
3. Whether their Lordships wish to see the fair :
copy of the order?
4. Whether order is to be circulated to the :
Department Authorities?

M/s Varanasi Bottling Co. Pvt. Ltd. & Ors. Appellant

Versus

CCE, Allahabad

Respondent

Appearance

S/Shri B.L. Narshiman and Ravi Raghavan, Advocates – for the
appellant.

Shri H.K. Thakur, Authorized Representative (Jt. CDR) – for the
Respondent.

CORAM: Hon'ble Shri S.S. Kang, Vice President
Hon'ble Sh. Rakesh Kumar, Member (Technical)

DATE OF HEARING : 21/08/2008.
DATE OF DECISION: 13-10-2008

FINAL Order No. 751-756/08-CAF Dated : _____

Per. Rakesh Kumar :-

Facts of this case, in brief, are that M/s Varanasi Bottling Co. Pvt. Ltd., Varanasi [hereinafter referred as VBCL] manufactured aerated waters of different coca cola brands under franchisee arrangement with Coca Cola India Limited. During the period of dispute i.e. during period from 01/03/94 to 28/02/97, M/s Ashu Marketing and Advertisement Services, Varanasi (hereinafter referred to as AMAS) were their distributors, through whom 85% of the goods manufactured by them were being sold, the remaining 15% sales being directly to other dealers. Shri C.P.N. Kejriwal, was the Managing Director of VBCL and Ms. Kala Kejriwal was one of the Directors. AMAS was a partnership firm with Shri Kamlesh Morarka, son of Mrs. Kala Kejriwal's brother and Shri Pawan Kumar Agarwal, husband of Mrs. Kala Kejriwal's sister, as its two partners. M/s National Drinks, Varanasi were the transporters with whom VBCL had

an agreement for transportation of aerated water crates to the dealers and subsequently M/s AMAS entered into an agreement with M/s National Drinks for transportation. During the period of dispute, M/s VBCL were collecting from their dealers additional charges of :

- (a) Rs. 10 per crate of 24 bottles and Rs. 5 per crate of 12 bottle as crate hire charges and
- (b) 8 per crate as transportation charges.

Besides this, AMAS were collecting from all the dealers, including the dealers to whom the crates were being sold by VBCL directly, an amount @ 11.50 per crate as advertisement and sales promotion expenses on the ground that they were organizing the sales promotion and advertisement activities at local level in respect of the goods. The Revenue's allegation is that AMAS were doing this as per their tacit understanding with VBCL, as VBCL, as franchisee of Coca Cola India Ltd., had an obligation in this regard. The Revenue, therefore, has alleged that VBCL and AMAS are related persons within the meaning of the term, as defined under Section 4 (3) (c) of the Central Excise Act, 1944, as they had interest directly or indirectly, in the

business of each other and, therefore, in respect of the sales of aerated water through AMAS, it is the price at which AMAS were selling to the dealers which, should be adopted as assessable value. Besides this, the Revenue also seeks to add the crate higher charges, the transportation charges and also the advertisement expenses being recovered by AMAS from the dealers to the assessable value. On this basis, five show cause notices demanding total differentially duty of Rs. 1,83,42,000/- alongwith interest, were issued to M/s VBCL. The show cause notices also sought imposition of penalty on VBCL under Section 11AC of Central Excise Act, 1944 and also penalty on Shri C.P.N. Kejriwal, Managing Director of VBCL; AMAS, Shri Pawan Kumar Agarwal and Santosh Kumar Kejriwal, partners of AMAS and M/s National Drink and its partner Shri K.L. Morarka, under Rule 209A of Central Excise Rules, 1944. Earlier only one show cause notice dated 25/02/99 demanding differential duty of Rs. 1,64,18,167/- had been adjudicated by the Commissioner vide order-in-original dated 31/10/2000, but since that order was an ex-parte order, without granting personal hearing, on appeal before this Tribunal, the same was set aside vide

Tribunal's order No. 312-17/01-NB (A) dated 24/07/01 for denovo adjudication after granting personal hearing to the noticees. The show cause notice dated 25/02/99 alongwith four other show cause notices dated 05/02/96, 24/05/96, 04/09/96 and 03/04/97 were adjudicated by the Commissioner vide order-in-original dated 31/03/05 by which the Commissioner holding that AMAS and M/s National Drink and VBCL were related person and the transportation charges, crates hire charges and advertisement charges are includable in the assessable value –

- (a) confirmed the duty demand of Rs. 1,83,42,000/- under proviso to Section 11 A(1) of Central Excise Act, 1944 against VBCL alongwith interest on this duty, under Section 11AB and imposed a penalty of equal amount on VBCL under Section 11AC of Central Excise Act ;
- (b) imposed penalty of Rs. 50,00,000/- on Shri C.P.N. Kejriwal, M.D. of VBCL, penalty of Rs. 15,00,000/- on AMAS, penalty of Rs. 10,00,000/- on M/s National Drinks, penalty of Rs. 10,00,000/- each on Shri Pawan Kumar Agarwal and Santosh Kumar Kejriwal, partners of AMAS and penalty of Rs. 10,00,000/- on Shri K.L. Morarka, partner of

M/s National Drink. It is against this order that the six appeals have been filed.

2. Heard both the sides.

2.1 Shri B.L. Narsimghan, Advocate, the learned counsel for the Appellants made the following submissions.

(1) VBCL and AMAS are two totally different and independent entities. There is no evidence of any kind of financial flowback from AMAS to VBCL. The fact that two partners of AMAS namely Shri Kamlesh Morarka and Shri Pawan Agarwal are relatives of Mrs. Kala Kejriwal, Director of VBCL is of no relevance.

(2) There was no agreement between VBCL and AMAS legally binding AMAS to incur advertisement expenses. If AMAS on their own were incurring expenditure for promoting the sales of the goods manufactured by VBCL, the advertisement expenses, even if recovered by AMAS from dealers, cannot be added to the assessable value of the goods manufactured by VBCL.

(3) There is absolutely no evidence of any mutuality of interest between VBCL and AMAS just because the price at which VBCL sold the goods to AMAS is lower than the price at which the same goods were resold by AMAS to their buyers, it cannot be a ground to allege mutuality of interest between the two, as the reason for the price differential is that AMAS were incurring marketing expenses to promote the sales and they were also entitled to earn some margin after adjusting other costs. The dealings between the VBCL and AMAS are purely on commercial basis and at arms length.

(4) The advertisements done by AMAS cannot make them related to VBCL. The department has not produced any evidence that VBCL, as per their franchise agreement with Coca Cola India Ltd. had some obligation for organizing local advertisement and that VBCL in turn had some agreement legally binding VBCL to incur the advertisement expenses.

(5) The crate hire charges and transportation charges were being recovered from the buyers on actual basis and it is settled law that neither crate hire charges nor transportation

charges for transport of the goods from the place of removal are includable in the assessable value.

(6) Demand for period from March 1994 to June 1995 raised by show cause notice dated 25/02/99 by invoking proviso to Section 11A (1) is barred by limitation, as the issues raised in this show cause notice were known to the concerned departmental officers, since as early as in March 1994, when VBCL had filed the price list claiming deduction of crate hire and transportation charges etc. and on inquiry from the department, the detailed calculations of the crate hire charges and transportation charges had been given to the department. There was absolutely no ground to allege suppression of facts against VBCL and other noticees and there is no justification of imposition of penalty on them.

2.2 Shri H.K. Thakur, Jt. CDR, the learned departmental representative, mainly reiterating the findings of the Commissioner of the impugned order emphasized that VBCL and AMAS are related persons and that AMAS had been floated just to transfer the advertisement expenses to that entity and thereby reduce the assessable value and hence duty

liability. He emphasized that the advertisement expenses were being incurred by AMAS only at the instance of VBCL, otherwise there was no incentive for AMAS to do so and this shows that VBCL and AMAS were related persons.

3. We have given careful consideration to the submission from both the sides. First point of dispute is as to whether M/s National Drinks as well as AMAS and VBCL are [“]related persons.”

3.1 As regards M/s National Drinks, the allegation against them is that earlier they entered into an agreement with VBCL and subsequently when AMAS became VBCL's Distributor, they entered into similar agreement with AMAS for transportation of the goods manufactured by VBCL from the place of removal to the dealer's premises and that they connived with VBCL in inflating the transport charges.

3.1.1 Transport charges were being received from the dealers at the rate of Rs. 8/- per crate whose deduction had been claimed by VBCL in the price list effective from 01/3/94 filed by them and they had clarified to the Department that they

have entered into an agreement with M/s National Drinks for payment of Rs. 8/- per crate, irrespective of the distance for transportation of their product, which they charge from their customers and pay to the transporter as such. When as per the provisions of Section 4 of the Act, as it stood during the period of dispute, the transport charges from the place of removal to the place of delivery were not includible in the assessable and in terms of the Hon'ble Supreme court's judgment in case of **Baroda Electric Meters vs. CCE, Vadodara** reported in **1997 (94) E.L.T. – 13 (S.C.)** freight differential, i.e. the transportation charge recovered from the customers on equalized basis, which is in excess of the expenses actually incurred on transportation, is not includible in the assessable value, the question whether VBCL have recovered transportation charge from their customers in excess of the expenditure actually incurred in this regard is irrelevant. Tribunal in case of **India Chemicals (P) Ltd. vs. CCE, Meerut-I** reported in **2006 (195) E.L.T. 279 (Tri. – Del.)**, relying upon Hon'ble Supreme Court's judgment in case of **Baroda Electric Meters vs. CCE, Vadorara (Supra)** has held that unless that there is evidence indicating that the

assessable value of the goods has been suppressed and transferred to transportation charges by inflating the same, the excess transportation charges are not includible in the assessable value. But in this case, there is no such evidence.

3.2 As regards AMAS, they were the distributors of VBCL and about 85% of the goods manufactured by VBCL were being sold to AMAS who, in turn, were selling the same to dealers. The remaining 15% sales of VBCL were direct to their dealers. VBCL and AMAS are alleged to be related persons under Section 4 (3) (c) of the Act on the grounds that—

- (a) AMAS are selling the goods at a price much higher than the price at which VBCL sell the goods to them ;
- (b) AMAS have undertaken the burden of sales promotion and marketing of the products manufactured by VBCL and thereby benefiting VBCL by enriching the marketability of their products ; and
- (c) both the partners of AMAS are relatives of Mrs. Kala Kejriwal, Director VBCL – Shri Pawan Kumar Agarwal being husband of Mrs. Kejriwal's sister and Shri Kamlesh Murarka being son of Mrs. Kejriwal's brother.

3.2.1 None of these are valid grounds for treating VBCL and AMAS as related persons. There is no evidence that AMAS have holding in VBCL and VBCL are a partner of AMAS or that AMAS is a dummy entity fully controlled by VBCL. The Commissioner in para 5.2.1.3 of the impugned order has observed as under –

“Further AMAS failed to provide any agreement between them and the brand owner i.e. Coca Cola India that the firms shall undertake advertisement work for them. This fact clearly establishes that AMAS have undertaken advertisement of the products for and on behalf of the Assessee and collecting its burden from the dealers obviously benefiting the assessee by way of enriching the marketability of their product. The work of advertisement has not been done on principal to principal basis. It has been admitted by the assessee that they have entrusted the advertisement work to AMAS. Thus there exists mutuality of interest in the business of each other making AMAS a related person within the meaning of Section 4 of Central Excise Act.”

The above observations of the Commissioner do not make any sense at all. Nowhere in the adjudication order any evidence indicating that the sales promotion and

advertisement of the goods was being done by AMAS on the instructions of VBCL, has been brought on record. Moreover when brandname – owner of the aerated waters being manufactured by VBCL are Coca Cola India, VBCL do not get any exclusive gain by sales promotion and advertising being done by AMAS, while increase in volume of sales would benefit AMAS and the dealers also. We, therefore, hold that there is no basis for treating VBCL and AMAS as “related person”.

3.2.2 Para 2.4.3.1 and Para 5.2.3.2 of the impugned order mentions that it is on record that VBCL were not selling their products at a cheaper rate to AMAS and that they were charging the same amount of profit from AMAS as they did from other dealers. When this is so, the whole basis of allegation that VBCL and AMAS are related persons collapses.

4. Next question to be decided is as to whether the crate hire charges being recovered by VBCL from their dealers at the rate of Rs. 10/- per crate of 24 bottles/Rs. 5/- per crate of 12 bottles are includible in the assessable value of the goods

are not. This Tribunal in case of **Poona Bottling Co. Ltd. vs. CCE, Pune** reported in **1999 (110) E.L.T. – 691 (Trib.)**, relying on Hon'ble Supreme Court's judgment in case of **India Oxygen Co. Ltd. vs. Union of India** reported in **1988 (36) E.L.T. – 723 (S.C.)** has held that crate hire charges are not includible in the assessable value of beverages, even if the same are not in proportion of actual cost incurred. The Revenue has cited Hon'ble Supreme Court's judgment in case of **CCE, Pune vs. Poona Bottling Co. Ltd.** reported in **2005 (182) E.L.T. 23 (S.C.)**, wherein Hon'ble Supreme Court, observing that crate hire charges are not normally includible in the assessable value, had remanded the matter to the adjudicating authority for examining as to whether the chartered accountant's certificate certifying the crate hire charges was acceptable or otherwise and whether the crate hire charges have been inflated. But this judgment does not help the Appellants, as in this case no evidence has been produced that the crate hire charges have been artificially inflated so as to reduce the assessable value. In view of this, we hold that in this case, the crate hire charges are not includible in the assessable value.

5. Third question to be decided is as to whether advertisement charge being recovered by AMAS from dealers at the rate of Rs. 11.50 per crate are includible in the assessable value of the aerated water being cleared by VBCL. Tribunal in a similar case of **CCE, Chennai vs. Chennai Bottling Company Ltd.** reported in 2007 (217) E.L.T. 556, relying upon Hon'ble Supreme Court's judgment in case of **Phillips India Ltd. vs. CCE, Pune** reported in 1997 (91) E.L.T. 540 (S.C.) has held that – "the question whether advertisement expenses incurred by a buyer of excisable goods on his own account is includible in the assessable value of such goods in the hand of its manufacturer, is no longer resintegra in as much as it has been consistently held by the Apex Court and this Tribunal that such advertisement charges would not be includible in the assessable value." In this case, it is not the Revenue's case that VBCL have agreement with AMAS making it mandatory for AMAS to incur certain quantum of expenditure on advertisement and sale promotion of the goods manufactured by VBCL or that there is other evidence indicating that AMAS are incurring advertisement

expenses and recovering the same from the dealers, on instructions of VBCL. If AMAS, with the dealer's consent incur certain expenses for sales promotion and advertisement of the goods, which will benefit AMAS as well as the dealers and AMAS share the advertisement expenses with the dealers, such advertisement expenses cannot be added to the assessable value of the goods manufactured by VBCL. We, therefore, hold that the advertisement charges being recovered by AMAS from dealers at the rate of Rs. 11.50 per crate are not includible in the assessable value.

6. In view of our above findings, the impugned order is not sustainable and the same is set aside. The appeals are allowed.

(Pronounced in open court on 15/10/88)

(S.S. Kang)
Vice President

(Rakesh Kumar)
Member (Technical)

PK