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

Appeal No. ST/85 /2007,263 /2007-,266 /2007 - CU[DB] Date 12/01/2009

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

To :
M/S H.K. ASSOCIATES
KANDHARI BHAVAN, 1 STADIUM ROAD, PATIALA
(PUNJAB)
M/S H.K. ASSOCIATES Appellant
Vs
C.C.E. CHANDIGARH Respondent

I am directed to transmit herewith a certified copy of **Final order No.** ST/3-7 2009 CU[DB] dated 31.12.08

passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(Customs Appeal Branch)

Copy to :
1. Respondent
   C.C.E. CHANDIGARH
   PLOT NO 19, SEC 17-C, CHANDIGARH
2. Adv. / Consult
   MR.J.P.KAUSHIK
   A-14/3, SFS FLATS, SAKET, NEW DELHI-110017
3. S.D.R
4. J.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 Publictions (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). Thyagaraya Road. T. Nagar.Chennai
13. Taxindiaonline.com Pvt.Ltd. B-XI/8183.Vasant Kunj. New Delhi - 110070
14. Easy Service Tax Online Dot Com Pvt.Ltd.407A.Iscon Mall.Above Star India Bazar.Satellite Road.Ahmedabad-15
15. Office Copy
16. Guard file

Assistant Registrar
(Customs Appeal Branch)

17 H.K ASSOCIATES
1,STADIUM ROAD, PATIALA

PTO

18 M/S KANDHARI BEVERAGES
177/F,INDUSTRIAL AREA,PHASE-2,CHANDIGARH

19. SH HARMEET SINGH
M/S H.K.ASSOCIATES, 1, STADIUM ROAD, PATIALA.

20 Sh. Jaspal Singh Kandhari, Director
M/S Khandari Beverages Ltd
177/F Industrial Area,
Phase-I, Chandigarh.

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. III

Service Tax Appeal No. 85, 263-266 of 2007

[Arising out of Order-in-original No. 35-42/ST/CHD/2006 dated 22.11.2006 passed by Commissioner of Central Excise Chandigarh]

For approval and signature:

Hon'ble Mr. M. Veeraiyan, Member (Technical)
Hon'ble Mr. P.K.Das, Member (Judicial)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:	NO
2.	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:	Yes
3.	Whether Their Lordships wish to see the fair copy of the Order?	:	Seen
4.	Whether Order is to be circulated to the Departmental authorities?	:	Yes

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M/s. H.K. Associates — Appellant

Vs.

Commissioner of Central Excise Chandigarh — Respondent

AND

Commissioner of Central Excise Chandigarh — Appellants

Vs.

M/s. H.K. Associates — Respondent
M/s. Kandhari Beverages Pvt Ltd (KBPL)
Shri Jaspal Singh Kandhari, Director
Shri Harmeet Singh Kandhari, Partner

Appearance:

Mr. J.P. Kaushik, Advocate for the Appellants
Mr. V.Kumar, DR for the Respondent

CORAM:

Hon'ble Mr. M. Veeraiyan, Member (Technical)
Hon'ble Mr. P.K.Das, Member (Judicial)

Date of Hearing /Decision: 31.12.2008

Final **ORDER NO. ST/3-7/09**

Per M. Veeraiyan (for the Bench):

1.1 Appeal No. ST/85 of 2007 is filed by M/s. H.K. Associates challenging demand of service tax amounting to Rs.60,10,268/- and imposing equal amount of combined penalty under section 76, 77 and 78 of the Act.

1.2 Appeal Nos. 263/07 is filed by the Department seeking modification of the order of the Commissioner and consequently seeking separate penalties as provided under each of the sections 76, 77 and 78 on M/s. HK Associates. The other three appeals are also filed by the department against the order of the Commissioner in not imposing penalties on M/s. Kandhari Beverages Pvt Ltd.(KBPL, for short), Shri Jaspal Singh Kandhari, Director of KBPL and Shri Harmeet Singh Kandhari, partner of M/s. H.K. Associates.

2. Heard both sides and perused the records.

3. The relevant facts, in brief, are as follows:-

a) KBPL are manufacturers of Coca Cola brand of aerated waters and selling the same through a network of their dealers. They have entered into an agreement dated 3.5.99 with M/s. HK Associates reportedly to ensure collection of sale proceeds from the dealers in Punjab, Haryana and Himachal Pradesh and for the said purpose, the latter was entitled to receive 2% of the sale proceeds realised by the manufacturer as commission. They have also entered into agreement with M/s. HK Associates on 1.4.03 on similar lines in respect of dealers in Punjab and Haryana and the rate of commission was enhanced to 3% of the sale proceeds received by the manufacturer. M/s. HK Associates have received about Rs.9 crores during the period from 3.5.99 to 9.9.04.

b) Audit of KBPL was conducted and it was noticed that the amount of commission paid to M/s. H.K. Associates was recorded under the head 'advertisement and sale promotion expenses'. Initial statements of officials of the KBPL indicated that the said payments were towards advertisement undertaken by M/s. H.K. Associates on behalf of KBPL.

c) Two show cause notices, one dated 13.10.04 and another dated 20.10.05 were issued to KBPL and H.K. Associates, Director of KBPL and a partner of M/s. H.K. Associates, proposing demand of duty from M/s. H.K. Associates and proposing imposition of penalty on all the four parties.

d) Commissioner confirmed the demand of service tax as proposed in the show cause notice from M/s. H.K. Associates and imposed a combined penalty under section 76 and 77 and 78 of the Act and dropped proceedings against the other three parties.

4. Learned advocate appearing for the parties made the following submissions.

a) The agreements dated 3.5.99 and 1.4.03 were for the purpose of collecting promptly the sale proceeds from various dealers to whom KBPL sold the goods. The agreement specifically envisages that advertisement expenses are to be borne by KBPL. The payments made by KBPL were no doubt entered in their balance sheets under the head 'advertisement and sale promotion services' but the balance sheets contained 'notes' indicating that amounts paid to M/s. H.K. Associates are only commission on sales. These notes were specifically appended in the balance sheets, as per the requirement of the company law, as M/s. H.K. Associates, a partnership concern, has partners related to the Director of KBPL.

b) Even though M/s. H.K. Associates are not required to incur any expenses on advertisement, they have on their own undertaken advertisement, in the form of wall painting through various advertising agencies/ parties. For example, they have incurred a sum of Rs.12,49,084/- during the year 1999-2000, out of nearly Rs.1.2 crores received as sales commission from KBPL. Similarly in other years about 10-26% of amounts received from KBPL have been spent towards advertisement expenses. M/s H.K. Associates incurred expenses on advertisement voluntarily for enhancing the sale by KBPL, as such increase in sale would result in increased payment of commission to M/s. H.K. Associates.

c) The agreement and the balance sheet are contemporaneous documents. The initial statements of individuals which are contrary to these documents should be ignored. In this context, he submits that Shri Maneej Gupta was not aware of the nature of transactions as he was appointed only in August, 2003.

d) M/s. H.K. Associates have also received the above amount as commission and accounted the same as commission in their books of accounts and balance sheets. Merely because a portion of the sum was spent on advertisement by H.K. Associates, the entire amount of about Rs.9 crores received from KBPL cannot be treated as representing payment for rendering advertisement service. M/s. H.K. Associates have not rendered any service as advertising agency.

e) The service of advertisement has actually been rendered only by the firms/ persons who undertake the painting / advertisement.

5. Learned SDR made the following submissions:

a) The claim of the parties that 2-3% of sale proceeds were received merely for the purpose of collecting cheques from the dealers is not logical or reasonable. Out of amounts paid to M/s. H.K. Associates, substantial amounts have been paid to the partners as salary and commission. Therefore, the initial statement of Maneej Gupta of M/s. H.K. Associates that it was towards the advertising agency expenses is to be accepted.

b) The amount paid to M/s. H.K. Associates have been recorded in the balance sheet of KBPL only under the advertisement and sale promotion expenses. Under these circumstances, no other meaning should be given to such transactions/expenses. The claim that it represents sale commission as per 'Notes' given in the balance sheets does not merit acceptance.

c) The authorised signatory has not disclosed the existence of the agreement dated 1.4.2003 at the initial stage of investigation. Further, the Director of KBPL and the partner of the M/s. H.K. Associates are closely related. Therefore, the inference of the Commissioner that the agreement was anti-dated and the same is a colourable device adopted to evade service tax should be accepted.

6.1. We have carefully considered the submissions from both the sides. At the outset, we find that the Commissioner has concluded that because the agreement dated 1.4.03 was not disclosed by Maneej Gupta of M/s. H.K. Associates in his statement would mean that the agreement was prepared later, and is anti-dated. In fact, we find from the statement of Maneej Gupta, agreement dated 3.5.99 has been disclosed by him. The learned advocate claims that the agreement dated 1.4.03 is an amended version of the agreement dated 3.5.99, as it restricted the area to Punjab and Haryana only and the commission was enhanced to 3%. Further, the amounts in pursuance to these agreements are admittedly paid by KBPL to M/s. H.K. Associates over the years. These amounts have been admittedly reflected in the balance sheets of KBPL as well as those of M/s. H.K. Associates as commission for sale.

6.2 The learned DR submits that the payment of commission at the rate of 2% /3% for the purpose of a simple assignment of collecting the cheques as claimed by them is very much the higher side. It was also pointed out by the learned DR that out of amounts paid to M/s. H.K. Associates, substantial amounts have been paid to the partners as salary and commission. However, these cannot lead to a conclusion that the payment is for a different purposes. To make such an allegation or to come to such a conclusion, investigation should have been conducted. We find that none of the dealers have been contacted by the investigating officers to find out whether the services as envisaged in the agreement were rendered by M/s. H.K. Associates or not and also whether any other services were rendered by them. This appears to be a case of missed opportunities.

6.3. Under these circumstances, we are not inclined to suspect the veracity of agreement produced before the lower authorities especially in the absence of evidence to the contrary.

7.1. The issue to be decided is whether M/s. H.K. Associates have rendered the services of advertising agency to KBPL. It is not disputed that actual work of painting on the walls / advertisements were undertaken by various parties to whom M/s. H.K. Associates have paid the amount as mentioned earlier. No evidence have been relied upon to hold that M/s.

H.K. Associates have conceived, designed, prepared the advertisements in question.

7.2. The the amounts paid to M/s. H.K. Associates have been accounted under the category of advertisement and sales promotion expenses by KBPL. A portion of the sum so received was spent on advertisement by H.K. Associates. These facts alone can not lead to an inference that M/s. H.K. Associates have rendered the services as advertising agency and the entire amount of about Rs.9 crores received from KBPL has to be treated as representing payment for rendering advertising services.

7.3. We have also perused the notes given in the balance sheets of KBPL. For example, in the balance sheet for the year 1999-2000, a sum of Rs.4,88,23,638/- is accounted as advertisement and sales promotion expenses. In the schedule Q to the balance sheet relating to the head "other expenses", there is a 'note' which clarifies as under:-

> "Commission on sales amounting to Rs. 1,19,77,790.27 paid to M/s. Harmeet Kandhari & Associates, belonging to a relative of the directors of the company, has been clubbed with the Advertisement & Sales Promotion expenses."

Similar clarifications appear in the balance sheets for the other years as well. Whether commission of sales could be treated as advertisement and sales promotion expenses is a debatable point. However, this is not an issue to be decided by us. It suffices to say that the terms of the agreement produced and the entries in the balance sheets of manufacturing company and those of M/s. H.K. Associates support the claim by the learned advocate for the parties. The balance sheet of M/s. H.K. Associates also mentions these amounts only as commission on sales.

8. In view of the above, we find merit in the appeal of M/s. H.K. Associates and accordingly, allow the same. Inasmuch as the appeal of main party M/s. H.K. Associates is allowed on merit, the question of enhancement of penalty on M/s. H.K. Associates and imposition of penalties on other three parties as prayed for in the other appeals by the department does not does not arise.

9. The appeal by M/s. H.K. Associates is allowed with consequential relief. Appeals of the Department are rejected.

(Dictated & Pronounced in the open Court)

(M. Veeraiyan)
Member(Technical)

(P.K.Das)
Member(Judicial)

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