TELEGRAM : CEGCANAL
Website : www.cestat.gov.in

REGISTERED / AD
Email : delhi@cestat.gov.in

# CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

**PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066**

**EXCISE APPEAL BRANCH**

Appeal No. E/563 /2005 - EX[DB] Date **14/10/2011**
E/677-679 & 763/2006-EX WITH E/M/853-856/2009-EX

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

To :
HINDUSTAN COCA COLA BEVERAGES PVT. LTD.
GANGYAL JAMMU

**HINDUSTAN COCA COLA BEVERAGES PVT. LTD.** Appellant
Vs
**C.E.E. JALLANDHAR(HQ. AT CHANDIGARH)** MISC ORDER NO. 513-516/2011-EX Respondent

I am directed to transmit herewith a certified copy of **Final order No.884-888/ 2011 EX|DB|** dated 11-10-11 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. JALLANDHAR(HQ. AT CHANDIGARH)**
C.R.BUILDING, PLOT NO. 19,
SECTOR 17-C, CHANDIGARH.

2. Adv. / Consult
**SH. SHIRIN KHAJURIA,**
**S-336, FF GREATER KAILASH,**
**PART- II, N. DELHI-1**

3. C.D.R
4. Bar association. CESTAT. New Delhi
5. Director Publications. Customs. Excise. I.P. Estate. New Delhi
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd.. 59/32. New Rohtak Road. New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file
14. M/S. HINDUSTAN COCA-COLA BEVERAGES PVT LTD., 47-48, INDUSTRIAL EXTENSON AREA,GANGYAL, JAMMU (J.& K.)
15. CCE, CHANDIGARH

Assistant Registrar
(Excise Appeal Branch)

**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. I**

**Excise Miscellaneous Applications No. 853-856 of 2009 in Appeals No. 563 of 2005 & 677-679 and 762 of 2006**

[Arising out of the Order-in-Appeal No. 485/CE/JAL/2004 dated 27/10/2004 and 450 to 453/CE/CHD/05 dated 27th December, 2005 passed by The Commissioner (Appeals), Central Excise, Jalandhar and Commissioner (Appeals), Customs & Central Excise, Chandigarh.]

For Approval and signature :
**Hon'ble Mrs. Jyoti Balasundaram, 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 Hindustan Coca-Cola Beverages Pvt. Ltd. — Appellant

Versus

CCE, Chandigarh — Respondent

**Appearance**

Ms. Shirin Khajuria, Advocate – for the appellant.

Shri N. Pathak, Authorized Representative (DR) - for the Respondent.

CORAM : **Hon'ble Mrs. Jyoti Balasundaram, Vice President**
**Hon'ble Shri Rakesh Kumar, Member (Technical)**

**DATE OF HEARING : 17/08/2011.**
**DATE OF DECISION :** 11/10/2011

Misc. order no. 513-516/2011-EX
Final Order No. 884-888/2011-Ex Dated : 11.10.2011

**Per. Rakesh Kumar :-**

The appellant are manufacturers of soft drink syrup called post mix syrup (POM) under the brand name Coca Cola, Fanta, Thumps Up, Limca and Sprite, which is sold in 18 litres canisters, which on being fitted with the dispensing machine at the retailers' premises, generate soft drinks. The period of dispute in this case is from March 1999 to December 2003. During this period, the appellant were selling the POM in 18 litres canisters to their distributors who, in turn, were selling the same to retailers. The retail price of the goods had been fixed by the appellant. The appellant were clearing goods on payment of duty on their price to the distributors at the factory gate. The assessable value did not include the freight/transport charges up to the distributors premises, distributor's commission and the rental for the canisters. The department was of the view that there are no sales at the factory gate and the sales are actually taking place from the premises of the distributors and, hence, the freight/transport expenses upto the distributor's premises, distributor's commission and also the rental for the canisters would be includible in the assessable value of the goods. It is on this basis that five show cause notices dated 18/10/02, 30/4/02, 22/1/03, 30/10/03 and 15/3/04 were issued to the appellant for recovery of allegedly short paid duty amounting to Rs. 5,03,191/-, Rs.

4,40,410/-, Rs. 3,70,820/-, Rs. 89,164/- and Rs. 2,83,401/- respectively in respect of clearances of the goods during the period from March 1999 to March 2001, April 2001 to December 2001, January 2002 to September 2002, October 2002 to February 2003 and March 2003 to December 2003 respectively. The show cause notice dated 8/10/02 had been issued by invoking extended period under proviso to Section 11A (1) of the Central Excise Act. While the show cause notice dated 8/10/02 demanding duty of Rs. 6,36,387/- was adjudicated by the Additional Commissioner, who vide order-in-original dated 11/12/03 confirmed the demand of Rs. 6,07,051/- alongwith interest and imposed penalty of equal amount on the appellant under Section 11AC, the other four show cause notices were adjudicated by the Jurisdictional Assistant Commissioner/ Deputy Commissioner who confirmed the duty demands as raised in the show cause notices alongwith interest and imposed penalty of equal amount on the appellant under Section 11AC. On appeals being filed before the Commissioner (Appeals) the duty demands in respect of the orders passed by the original Adjudicating Authority were upheld except in respect of order-in-original dated 11/12/03, passed by Additional Commissioner, where the duty demand was reduced to Rs. 5,03,191/-. Against these orders of the Commissioner (Appeals), these appeals have been filed.

1.1 Miscellaneous Application nos. E/853-858 of 2006 have also been filed in respect of these appeals for admission of additional evidence in support of the appellant's plea that the goods were being sold at the factory gate, not at the distributor's premises.

2. Heard both the sides.

2.1 Ms. Shirin Khajuria, Advocate, the learned Counsel for the appellant, pleaded that all the sales of the appellant during the period of dispute were at the factory gate, that the transactions between the appellant and their distributors were on principal to principal basis, that the department's contention that there are no sales at the factory gate and the sales were taking place from the distributor's premises and the distributors are actually the consignment agents, is absolutely wrong, that in this regard the appellant intend to introduce additional evidence in form of invoices issued by them which clearly mention that the goods were delivered at the factory gate, and that the amount indicated in the invoices represents the price actually charged and there is no flow of additional consideration directly or indirectly from the buyers except for the rent and service charge of the empty bottles and freight, which have been separately charged, that in respect of sales at the distributor's end, it is the distributors who have issued the invoices and not the appellant, that these invoices were not considered by the original Adjudicating Authorities and 1st Appellate Authority, that since sales were taking place at the factory gate, there is no question of inclusion of the distributor's commission or the freight expenses from the factory gate to the distributor's premises, in the assessable value, and that as regards the rental for the canisters, the

Tribunal in the appellant's own case for the period from January 2004 to September 2004 period, vide order reported in **2008 (230) E.L.T. 613,** has held that the same are not includible in the assessable value. She, therefore, pleaded that the additional evidence sought to be introduced by the appellant vide miscellaneous petition No. 853-856/2009 may be admitted and that since this additional evidence clearly shows that all the sales of the appellant to their distributors were at the factory gate, the impugned order ordering inclusion of the distributor's commission and transport expenses upto the distributor's premises, in the assessable value and upholding duty demands on this basis, would not be sustainable.

2.2 Shri N. Pathak, the learned Senior Departmental Representative, defended the impugned order by reiterating the findings of the Commissioner (Appeals) in the impugned orders-in-appeal and pleaded that so far as the issue as to whether the appellant's sales are at the factory gate or at the distributor's premises or whether distributor's commission and freight expenses up to the distributor's premises are includible in the assessable value or not, has been decided by the Tribunal against the appellant in their own case, in the judgment reported in **2008 (230) ELT. 613**, that this order has not been stayed or set aside, that in this order, the Tribunal after detailed discussion has held that the transactions between the appellant and their distributors were not on principal to principal basis and sales were taking place from the distributor's premises only, that the appellant have not produced their agreements with the distributors in support of their claim, that their transactions with them were not on principal to principal basis, that during transit, the insurance of the goods was being arranged by the appellant which also shows that the ownership of the goods during transit was with the appellant, that the appellant have suppressed the relevant facts from the department and, therefore, in the show cause notice dated 8/10/02, longer limitation period under proviso to Section 11A (1) has been correctly invoked, that as regards the miscellaneous petitions filed by the appellant for introduction of the additional evidence, the invoices and the affidavits filed by the buyers had been considered by the Tribunal in the final order dated 15/6/07 in their own case and it was held that these invoices and buyer's affidavits do not prove that the appellant's transactions with their distributors were ~~not~~ on principal to principal basis and in view of this the same invoices etc. cannot be admitted as additional evidence and considered afresh, that when the issue as to whether the distributor's commission and freight charges is includible in the assessable value or not, has already been decided by the Tribunal against the appellant in their own case for the period from January 2004 to September 2004, and that judgment dt 15/6/07 of the Tribunal has not been stayed or reversed by any higher Court, in these proceedings, the appellant cannot take up the same issue again and that in view of this, there is no infirmity in the impugned orders.

2.3 Ms. Shirin Khajuria, Advocate, the learned Counsel for the appellant, in rejoinder pleaded that though the issue as to whether the transactions between the appellant and their distributors were on principal to principal basis and whether the distributor's commission and freight charges from the appellant's factory to the distributor's premises are includible in the assessable value or not, has been decided against the appellant in their own case vide judgment reported in **2008 (230) E.L.T. 613**, in that judgment the invoices issued by the appellant clearly mentioning that the sales are at the factory gate had not been appreciated, that there is no res-judicata in the taxation matters and in this regard, she relies upon the judgment of Hon'ble Supreme Court in the case of **Commissioner of Income Tax, West Bengal vs. Brij Lal Lohia and Mahabir Prasad Khemka** reported in **1972 (84) ITR 273 (S.C.)**, that just because the transit insurance had been arranged by the appellant, it cannot be concluded on this basis that the ownership of the goods during transit was of the appellant and in this regard she relies upon the judgment of Hon'ble Supreme Court in the case of **Escorts JCB Ltd. vs. CCE, Delhi – II** reported in **2002 (146) E.L.T. 31 (S.C.)**, that the bulk of the duty demand covered under show cause notice dated 8/10/02 for the period from March 1999 to March 2001, is time barred, as in respect of this show cause notice, longer limitation period would not be available to the department for the reason that on the basis of same facts, earlier a show cause notice dated 30th April 2002 for the period from April 2001 to December 2001 had been issued without invoking extended period and, therefore, in view of judgment of Hon'ble Supreme Court in the case of **Nizam Sugar Factory vs. CCE, A.P.** reported in **2006 (197) E.L.T. 465 (S.C.)**, the longer limitation period in respect of the subsequent show cause notice dated 8/10/02 issued on the basis of the same facts would not be available to the department.

3. We have carefully considered the submissions from both the sides and have perused the records.

4. Coming first to the question of admission of additional evidence for which miscellaneous petition No. 853-856/2009 have been filed, the additional evidence which is sought to be introduced by the appellant is – (i) the invoices issued by the appellant to their distributors which mention that the delivery of the goods was at the factory gate and their responsibility ceased as soon as the goods were handed over to the carriers, (ii) the invoices issued by their distributors and (iii) affidavit filed by the Accounting Manager of the appellant, wherein it has been stated that all the sales invoices issued by the appellant clearly mention the terms and conditions of the sales, that their responsibility ceases as soon as the goods are handed over to the carriers and that there were no separate agreements with the distributors of the post mix concentrate and the terms and conditions of the sales to the distributors were mentioned in the invoices themselves. In our view since from para 7.9 of the Tribunal's order dated 15/6/07 **[2008 (230) E.L.T. – 613 (Tri. – Del.)]**,

it is clear that the invoices issued by the appellant and the fact that there were no written agreements of the appellant with their distributors had been considered by the Tribunal, and the Tribunal after going through the evidence on record had decided the question regarding inclusion of distributor's commission and the freight expenses against the appellant by holding that the transactions between the appellant and the distributors were not on principal to principal basis, at this stage, the same evidence cannot be admitted as additional evidence and considered afresh. In the case of **CIT, West Bengal vs. Brij Lal Lohia & Mahabir Prasad Khemba** (supra) cited by the appellant, there was no dispute about the fact that the fresh evidence on the basis of which the question of genuineness of gifts during subsequent years was decided in favour of the assessee, had not been considered while deciding the same question for the previous period, but in this case, it cannot be said that documents sought to be introduced as additional evidence had not been considered by the Tribunal in the appellant's own case involving identical issues for the period from January 2004 to September 2004. The miscellaneous applications are, therefore, dismissed.

5. The question as to whether the appellant's transactions with their distributors were on principal to principal basis and whether the sales were taking place at the factory gate or on distributor's premises has already been decided by the Tribunal in its judgment dated 15/6/07 in the appellant's own case for the period from January 2004 to September 2004 and, as mentioned

above, in this judgment, the Tribunal after considering the evidence on record, has given a clear finding that sales were taking place at the distributor's premises and, therefore, the distributor's commission and freight expenses upto the distributor's premises would be includible in the assessable value. This judgment of the Tribunal has not been stayed or reversed by any High Court or Hon'ble Supreme Court and, therefore, in these appeals, which pertains to the period from March 1999 to December 2003, a different view cannot be taken. As discussed above, the judgment of Hon'ble Supreme Court in case of **CIT, West Bengal vs. Brij Lal Lohia and Mahabir Prasad Khemka** (supra) cited by the Appellant is not applicable to the facts of this case. In view of this, we hold that the sales were taking place at distributor's premises and, therefore, the distributor's commission and freight expenses upto the distributor's premises would be includible in the assessable value. However, so far as appeal No. 563/2005 in respect of the period from March 1999 to March 2003 is concerned, since show cause notice has been issued on 8/10/02 by invoking extended period under proviso to Section 11A (1) and since prior to this another show cause notice dated 30th April 2002 for the period from April 2001 to December 2001 on the basis of same facts had been issued, in view of judgment of Hon'ble Supreme Court in the case of **Nizam Sugar Factory vs. CCE, A.P.** (supra), in respect of the show cause notice dated 8/10/02, only the normal limitation period would be available to the department for recovery of short paid duty.

6. As regards the issue regarding inclusion of rental for canisters, this issue already stands decided by the Tribunal in favour of the appellant in their own case vide judgment reported in **2008 (230) E.L.T. 613.** Following this judgment, we hold that the rentals for canister would not be includible in the assessable value.

7. In view of the above discussion, while we hold that distributor's commission and freight charges would be includible in the assessable value and the rentals for canisters would not be includible in the assessable value, the matter has to be remanded for requantification of duty demands on the above basis. So far as appeal No. E/563/2005 for the period from March 1999 to March 2001 is concerned, as discussed above, the duty demand would be limited only to that which is within normal limitation period. The penalties have also to be scaled down to the quantum of requantified duty demands. The matters are, therefore, remanded to CCE (Appeals) for requantification of duty demands and penalties as per our above directions.

(Order pronounced in the open court on 11/10/2011)

**(Jyoti Balasundaram)**
**Vice President**

**(Rakesh Kumar)**
**Member (Technical)**

PK