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

Appeal No. : E/3822/2005-EX[DB]

Dated: **28/08/2012**

Assistant Registrar
C.E.S.T.A.T. New Delhi
To,
NIRULA CORNER HOUSE PVT LTD
HSIDC Shed Complex No 1, Okhla
Industrial ARea Phase-1, N Delhi.

NIRULA CORNER HOUSE PVT LTD (Appellant)

VS

C.C.E. DELHI II (Respondent)

I am directed to transmit herewith a certified copy of Final Order No. **A/980/2012-EX[DB]** dated **24/08/2012** passed by the Tribunal under section **35-C(1) of the Central Excise and Salt Act, 1944.**

Assistant Registrar
EXCISE Appeal Branch

Copy To,

1. Respondent
C.C.E. DELHI II
C.R. Building, I.P. Estate, New Delhi
110002

2. Advocate(s) / Consultant(s):
V.N.Sukhla
B-6/10, Safdarjung Enclave, New Delhi-
110029

3. C.D.R

4. Bar Association, CESTAT, New Delhi

5. Director Publications, Customs, Excise. I.P. Estate, New Delhi

6. M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, Opp. ICICI Bank of Defence Colony, New Delhi-3

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

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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
DATE OF HEARING : 31/07/2012.
DATE OF DECISION : 24/8 /2012.

Excise Appeal No. 3822 of 2005

[Arising out of the Order-in-Original No. 33, 34, 35 & 42/2005 dated 27/09/2005 passed by The Commissioner of Central Excise, New Delhi.]

Hon'ble Shri Justice Ajit Bharihoke, 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 Nirulas Corner House Pvt. Ltd. Appellant

Versus

CCE, Delhi – II Respondent

Appearance

Shri B.L. Narasimhan, Advocate – for the appellant.

Shri A.K. Jain, Authorized Representative (Jt. CDR) - for the Respondent.

CORAM : **Hon'ble Shri Justice Ajit Bharihoke, President**
Hon'ble Shri Rakesh Kumar, Member (Technical)

FINAL Order No. A/ 980/2012 Dated : 24/8/12

Per. Rakesh Kumar :-

The appellant have a chain of restaurants and also manufacture confectionary items Cakes, Pastries, Cookies, Sugar Confectionaries, Biscuits etc. chargeable to Central Excise duty. The goods manufactured are cleared to their own restaurants situated all over the country and also to their own business partners (franchisees) who run the restaurant in the name 'Nirulas'. The period of dispute is from 1997 to March 2004. The appellant, in terms of their agreement with their franchisees (business partners) charge lump sum amount of Rs. 3,00,000/- in the beginning as technical assistance fee, and thereafter a monthly amount @ 8.5% of the gross sales during the month. According to the department, the lump-sum amount of Rs. 3,00,000/- and the monthly amount @ 8.5% of gross sales excluding sales tax and other taxes, collected by the appellant from their franchisees should also be added to the assessable value of the goods being sold to them. It is on this basis that four show cause notices dated 25/3/03, 3/7/03, 30/4/04 and 16/9/04 were issued to the appellant for demand of allegedly short paid duty amounting to Rs. 91,66,397/-, Rs. 55,98,233/-, Rs. 23,51,492/- and Rs. 17,96,040/- respectively for the period from 1997-1998 to 31/3/2001; 2002-2003; April 03 to September 03 and October 2003 to 31/03/2004 respectively. The first show cause notice dated 25/3/03 demanding duty for the period from 1997-1998 to 31/3/2001 was issued by invoking extended period under proviso to Section 11A (1) of Central Excise Act, 1944. All these show cause notices, in addition to duty also demanded interest on the allegedly short paid duty and also sought imposition of penalty on the appellant under Section 11AC.

1.1 The above show cause notices were adjudicated by the Commissioner of Central Excise, Delhi – II vide order-in-original No. 33, 34, 35 and 42/2005 dated 27/09/2005 by which the duty demands were confirmed as under :-

Sl. No.	Show cause notice dated	Period	Amount demanded in the show cause notice (Rs.)	Demand confirmed (Rs.)
1.	25/03/2003	1997-1998 to 31/03/2001	91,66,397/-	80,70,383/-
2.	03/07/2003	2002-2003	55,98,233/-	34,49,791/-
3.	30/04/2004	April 2003 – September 2003	23,51,492/-	19,07,644/-
4.	16/09/2004	October 2003 to March 2004	17,96,040/-	14,12,713/-

The Commissioner by this order also demanded interest on above duty under Section 11AB and imposed penalties of equal amount on the appellant under Section 11AC. The Commissioner in this order while confirming the above-mentioned duty demands, held that the payment of monthly fee and one time technical assistance fee from the business partners (franchisees) is a pre-condition for sale of the goods and the same cannot be disassociated from the payment of sale price and, thus, the same has to be considered as part of the sales price being an additional consideration of sale.

1.2 Against the above order of the Commissioner, this appeal has been filed.

2. Heard both the sides.

3. Shri B.L. Narasimhan, Advocate, the learned Counsel for the appellant, pleaded that the finding of the Commissioner that realisation of one time technical assistance fee of Rs. 3,00,000/- and monthly fee @ 8.5% of the sale by the appellant from their franchisees is a pre-condition of sale of the goods to the franchisees and, therefore, is a part of the sales price, is without any basis, that there is no link between the price at which the Cookies, Cakes, Pastries, Sugar Confectionaries, Biscuits etc. manufactured by the appellant are sold to their franchisees and the collection of one time technical assistance fee and monthly fee being charged from the appellant from the franchisees, that the technical assistance fee and monthly fee is for providing certain technical assistance to the franchisees and for permitting them to operate by using their brandname and business model, that the sales of the goods, in question, to the franchisees had been made on purely commercial terms and the price charged is equal to the price adopted for clearances of the same goods to the appellant's own restaurants, that when this factual position is not disputed, there is absolutely no justification for adding the one time technical assistance fee and monthly fee being charged by the appellant from franchisees, to the assessable value, that

the one time technical assistance fee and monthly fee @ 8.5% of gross sale being charged by the appellant from their franchisees cannot be treated as additional consideration flowing directly or indirectly from the buyers (franchisees) to the appellant, that the lump-sum technical assistance fee of Rs. 3,00,000/- as mentioned in the franchise agreement covers the expenses incurred by the appellant on engaging the architect and consultants, designing of food facilities, interiors decoration, training of staff etc. at the time of starting a restaurant, that the monthly fee of 8.5% of the gross sales excluding taxes has nothing to do with the sale of the goods manufactured by the appellant to their franchisees and this amount is collected from the franchisees for various services provided by the appellant which are of ongoing nature, that the Commissioner's finding that the sale of the goods by the appellant to franchisees is subject to payment of technical assistance fee and monthly fee by them to the appellant is totally incorrect and without any basis, that in terms of Board's Circular No. 59/8/03-ST dated 20th June 2003, in the context of levy of service tax on the franchise service it has been clarified that similar activity would be covered under business franchise service and chargeable to service tax, that the appellant, in fact, have paid service tax on the amounts being received by them from the franchisees which has been accepted by the department and thus, recognising that these amounts are for providing business franchise services, that in view of this position the amount being received by the appellant from franchisees cannot be treated as an additional consideration for sale of Cookies, Pastries, Biscuits, Sugar Confectionary etc. sold to them, that without prejudice to the above submissions on merits, the duty demand raised for the period from 1997-1998, 2000-2001 by show cause notice dated 25/3/03 is fully time barred, as all the relevant facts were in the knowledge of the Departmental authorities, that this is clear from the fact that the Department had addressed a letter dated 9/2/98 to the appellant asking them to pay duty on the one time technical assistance fee and monthly fee @ 8.5% of the gross sale being collected from the franchisees and in response to this, the appellant addressed letters dated 12/2/98, 17/2/98 and 20/2/98 submitting that no duty is payable on amounts, that there was no response from the department to the appellant's letters dated 12/2/98, 17/2/98 and 20/2/98, that, thus the department was aware of this issue since February 1998 and hence show cause notice could not be issued in March 2003 invoking extended period under proviso to Section 11A (1) alleging that the appellant suppressed the relevant facts from the department and thus, irrespective of the merits of the case the duty demand of Rs. 80,79,383/- for the period from 1997-1998, 2000-2001 is time barred and that in view of the above submissions, the impugned order is not sustainable.

4. Shri A.K. Jain, the learned Jt. CDR defended the impugned order by reiterating the findings of the Commissioner in it and emphasised that the one time technical assistance fee and the monthly fee @ 8.5% of the gross sales being collected by the appellant from their franchisees are additional consideration for

sale and, hence, the duty had been correctly demanded on these amounts.

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

6. The appellant manufacture Confectionary items, Cakes, Pastries, Cookies, Sugar Confectionaries, Biscuits etc. chargeable to Central Excise duty, a part of which are cleared on payment of duty to their own restaurants and remaining quantity is sold to their business partners (franchisees) who operate under franchise agreement with the appellant. It is not disputed that the price at which the goods, in question, are sold by the appellant to their franchisees is the same as the price on which the duty is paid in respect of clearances of the same items to the appellant's own restaurants. The appellant in terms of their agreement with their franchisees charge a one time technical assistance fee of Rs. 3,00,000/- and, also a monthly fee @ 8.5% of the gross sales excluding sales tax, and other taxes. The point of dispute is as to whether these amounts received by the appellant from their franchisees are in connection with the sale of the goods to the franchisees and thus an additional consideration received for sale of the goods or the same have no connection with the sale of the goods.

7. In terms of Rule 6 of the Central Excise Valuation Rules, 2000 in force w.e.f. 1/7/2000 and Rule 5 of the Central Excise

Valuation Rules, 1975, which were in force during the period prior to 1/7/2000, where the excisable goods are sold in the circumstances specified in Clause (a) of sub-Section (1) of Section 4 of the Act, except the circumstance where the price is not sole consideration for sale, the value of such goods shall be deemed to be the aggregate of such transaction value and the amount of money value of any additional consideration flowing directly or indirectly from the buyer to the assessee. What constitutes additional consideration is explained in the Explanation to Rule 6 of the Central Excise Valuation Rules, 2000 and according to this Explanation, the additional consideration would be -

(a) supply of goods and services by the buyer to the manufacturer either free of charge or at reduced rate, for use in the manufacture of goods;

(b) value of tools, dies, moulds, drawings and similar items supplied by the buyer to the manufacturer free of charge or at reduced cost for use in the manufacture of the goods.

7.1 Thus, the price cannot be said to be sole consideration for sale and can be said to be subject to some additional consideration when there is some supply of goods or services either free or at reduced cost from the buyer to the manufacturer for use in the manufacture of the goods which are to be sold to the buyer. Similarly, price cannot be said to be sole consideration for sale when –

(i) the sale price is subject to condition that the buyer discharge some obligation having financial implication on behalf of the seller ; or

(ii) the sale price is subject to condition that the buyer buys some goods or services from the seller at a price which is much higher than the price at which those goods or services are normally available.

(iii) In other words, for additional consideration to exist, there must be some direct or indirect financial flow from the buyer to the seller.

8. In this case, the appellant are receiving from their franchisees a one time technical assistance fee of Rs. 3,00,000/- and monthly fee @ 8.5% of the gross sale excluding sales tax and another taxes. On going through the appellant's agreement with their franchisees, it is clear that these amounts being received by the appellant are for certain services being provided by the appellant to the franchisees. For example in terms of the appellant's agreement with their franchisees, the technical assistance fee of Rs. 3,00,000/- is for advice with regard to putting the restaurant in a befitting running condition which includes appointment of architects and other consultants and their remuneration, designing of food facilities, advice on functional design of food units, interiors, advice on sitting up of control systems of food unit, selection and training of staff etc.. Thus, this amount of Rs. 3,00,000/- received by the appellant from franchise is for certain services being provided by the

appellant to the franchisees. Similarly, the monthly charges @ 8.5% of the gross sales excluding sales tax being collected by the appellant from their franchise is for a bunch of other services rendered by the appellants and also right to use the technical know-how and brand name of the appellant. In fact the department has not denied the appellant's plea that the appellant even since the business franchise service became taxable, are also paying the service tax on the amount of 8.5% of the gross sale being collected by them from the franchisees. When the amounts, in question, being received by the appellant from the franchisees are for certain services being rendered by the appellant to the franchisees, in our view it cannot be said that the same are additional consideration for sale. It is not allegation of the department that the one time technical assistance fee of Rs. 3,00,000/- and monthly fee @ 8.5% of the gross sale being received by the appellant from their franchisees have no relation to any services being provided by the appellant to their franchisees or that the same are highly inflated as compared as to actual value of the services being provided by the appellant to the franchisees.

9. In view of these circumstances, we are of the view that the amounts being collected by the appellant from their franchisees in terms of their agreement with them, cannot be said to be an additional consideration for sale and, as such, there is no case for rejecting the normal price/transaction value on which the duty

had been paid and invoking Rule 6 of the Central Excise Valuation Rules for determining the assessable value.

10. The impugned order is, therefore, is not sustainable. The same is being set aside. The appeal is allowed.

(Pronounced in the open court on 24/8/2012.)

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Member (Technical)

PK