

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

Appeal No. ST/51 /2008 - CU[DB]

Date 12/01/2012

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

To :
C.C.E. RAIPUR

CENTRAL EXCISE BUILDING, DHAMTARI ROAD,
TIKRAPARA, RAIPUR 492001.
C.C.E. RAIPUR

Appellant

Vs
Respondent

M/S RAJ WINES

I am directed to transmit herewith a certified copy of **Final order No.ST/A/22/ 2012 CU[DB]** dated 11.01.12
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

M/S RAJ WINES

NETAJI CHOWK, KATORA

TALAB, RAIPUR, C.G.

2. Adv. / Consult

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

13. Guard file

Assistant Registrar
(Customs Appeal Branch)

**CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
Court No.III**

ST/Appeal No.51/2008

(Arising out of order in appeal No.85/ST/RPR.I/07 dated 15.10.07
passed by the Commissioner of Central Excise (Appeals), Raipur)

Date of Hearing: 8.9.2011

Date of Pronouncement: 11-1-12

For Approval and signature:

Hon'ble Ms Archana Wadhwa, Judicial Member
Hon'ble Mr.Mathew John, Technical Member

-
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?
-

CCE, Raipur

Appellants

Vs

M/s Raj Wines

Respondent

Appeared for the Appellant: Shri Amresh Jain, SDR

Appeared for the Respondent: None

Coram: **Hon'ble Ms. Archana Wadhwa, Member (Judicial)**
Hon'ble Mr. Mathew John, Member (Technical)

Final ORDER No. ST/A/22/12-Cus

Per Mathew John:

When the case was called none was present on behalf of the Respondents. So the Ld. SDR has been heard and the case records scrutinised to understand the arguments on both sides.

2. M/s Raj Wines, Raipur is the marketing agent of M/s Skol Beverages Ltd (M/s SBL) for the promotion and marketing of Indian Manufactured Foreign Liquor/Beer Products of the said principal, in the State of Chhattisgarh. M/s Raj Wines, Raipur had entered into agreements dated 6.9.2003, 31.8.04 and 1.4.2005 with M/s SBL for promotion and marketing of IMFL/Beer. The activities/services provided by M/s Raj Wines, Raipur under the aforesaid agreements are as under:

- i) to implement activities initiated by M/s SBL to maximize brand visibility and to fully exploit market potential of their brand;
- ii) to employ personnel of requisite qualification and experience for the effective implementation and discharge of various obligations;
- iii) to implement action plan as communicated by M/s SBL;
- iv) to bear expenses necessary in effective implementation of M/s SBL's activities
- v) to promote the IMFL/Beer Products manufactured by M/s SBL
- vi) to monitor and report competitor's activities;
- vii) to collect and send transport permits as per instructions of M/s SBL
- viii) to collect and deposit payments from the Chhattisgarh State Beverages Corporation Ltd (CSBCL);

- ix) to collect and send 'C' forms and excise verification certificates;
- x) to provide infrastructure facilities to the staff of M/s SBL;
- xi) to formulate and implement sales promotion scheme;
- xii) to submit periodic sales report to M/s SBL;
- xiii) to facilitate inter depot transfer and distribution of the concerned products.
- xiv) To liaison with Government agencies regulating the liquor trade, Bars, Club, etc.

3. M/s Raj Wines, Raipur was providing these services to M/s SBL since July, 2003.

4. The details of amounts received as service charges under various heads received from the aforesaid principal during the period 1.7.03 to 31.8.06 are as under:

Sl No.	Particulars of charges	Amount received Rs.
1.	Primary claim/Retailer Scheme	1,45,86,101
2.	Commission Claim	1,22,25,348
3.	Merchandiser Expenses	3,45,163
4.	Fixed Office Expenses	11,28,000
5.	Other expenses (label Reg. & Brand Reg., Courier, NOC & Excise on breakages)	1,50,341
	Total	2,84,34,953

5. The Respondents explained the activities associated with the terms "Primary Claim/Retailer Scheme", "Commission Claim", "Merchandiser Expenses", "Fixed office Expenses and Other Expenses (Label Registration & Brand Registration, Courier, NOC & excise on breakages)" as follows:

5.1 **Primary Claim/Retailer Scheme:** Primary claim/Retailer scheme is discount offered by liquor manufacturer on landing price to

the retailer; that the objective of Retailer scheme is to fight competition as all companies offer such discounts; that the other objective is to give target wise rebate to increase sale; that since M/s SBL cannot settle this scheme at the time of sale, the rebate is paid by the respondents to retailers and later on when the respondents submit rebate claims along with the proof, the company releases to the respondents the payments claimed by the respondents; that this scheme is decided by the manufacturer and the respondents are bound to implement it in the field; that whatever amount the respondents pay to the retailer under this scheme, only that much amount is claimed by the respondents from the manufacturer.

5.2 Commission Claim: The respondents provided various services relating to marketing and promotion of various IMFL/Beer of aforesaid liquor manufacturer in the State of Chattisgarh. For the services so provided, the service charges per case per brand is fixed by the liquor manufacturer and accordingly, the manufacturer is paying them their commission; that whatever investment such as payment to the retailers, payment for label registration, payment of excise duty etc. they make on behalf of the manufacturer, the interest accrued in such investment is also included in the service charges and they did not get anything extra from the liquor manufacturer; that this commission also has component of return on the investment component which they have assumed to be a fair rate of return of 12% per annum; that thus the commission amount includes interest on the investment made by them.

5.3 Merchandiser Expenses: The Respondents have employed person(s) to attend to work relating to the marketing and promotion of various brands of liquor in the State of Chhattisgarh. The salary and other expenses are paid to the said person(s) by them and subsequently they claim the said amount from the manufacturer; that in this whole transaction, they receive no profit.

5.4 Fixed office/Other expenses: They are meeting various expenses such as paying loading and unloading charges, freight on behalf of the company, misc promotion expense etc. on behalf of the

manufacturer; that these actual expense are claimed by them and are reimbursed by the manufacturer; that in this whole transaction, they receive no profit; that sometimes, liquor is required to be transported from CSBC, Bilaspur and they on behalf of the company arrange the transportation, pay to the transporter and then later on claim the said amount from the company.

6. Raj Wines was not registered with Service Tax authorities and they were not paying any service tax. However they paid tax on commission income received for the period 09-07-2004 to 31-08-2006 as calculated by them amounting to Rs. 5,46,945/- on 26-10-2006.

7. Based on investigations conducted, a Show Cause Notice was issued to the Respondents on 21-11-2006 demanding service tax to the tune of 25,57,063/- from the Respondents for the period 01-07-2003 to 31-08-2006. The Show Cause Notice was adjudicated by the Additional Commissioner confirming the demand along with appropriate interest. Further penalties under section 76 and 78 were also imposed. Aggrieved by the order, the Respondents filed an appeal with Commissioner (Appeal).

8. The Commissioner (Appeals) observed that the demand should have been confirmed only for the commission amount received and not for the reimbursable expenses received. Further he observed that it is not clear whether the demand confirmed is inclusive of the amount of Rs. 5,46,945/- paid by the respondents because the said amount is not appropriated in the order-in-original. Further he held that the Respondent had no malafide intention to evade tax and therefore they are entitled to the benefit of section 80. He reduced the penalty under section 76 to Rs. 55,000/- and set aside the penalty under section 78. Aggrieved by the order of the Commissioner (Appeal), Revenue has filed this appeal.

9. The Appeal is filed on the following grounds:-

- (i) The respondent was not merely acting as a Commission Agent but was also doing business promotion activity. So

the Respondent is not entitled to the benefit of Notification 13/2003-ST dated 20-06-03;

(ii) The Appellate authority has erred on holding that the consideration received by the respondents as reimbursable expenses is not taxable. It is pointed out that the respondents did not produce any evidence that what was reimbursed was the actual expenses only;

(iii) The Appellate authority has erred in reducing the penalty under section 76 by invoking provisions of section 80 of the Finance Act, 1994 and waiving the penalty imposed under section 78 because the Respondent had deliberately suppressed the value of taxable service provided by them.

10. We have heard arguments on both sides. The first issue to be decided is whether the Respondents were eligible for exemption under Notification No. 12/2003-ST dated 20.6.2003 for the period 1.7.2003 to 8.7.2004 during which period the said Notification was in force. The said Notification reads as under:-

"In exercise of the powers conferred by section 93 of the Finance Act, 1994 (32 of 1994), the Central Government being satisfied that it is necessary in the public interest so to do, hereby exempts the business auxiliary services provided by a commission agent from the service tax leviable thereon under sub-section (2) of section 66 of the said Act.

Explanation: for the purpose of this notification, 'commission agent' means a person who causes sale or purchase of goods, on behalf of another person for a consideration which is based on the quantum of such sale or purchase."

11. It is seen from letters dated 6.9.03, 22.5.03, 1.4.2004, 31.8.04 and 1.4.05 as discussed in para 4 of the impugned order that payments made by M/s SBL to the respondent was not merely based on the volume of sales. For example, the remuneration payable on the basis of letter dated 6.9.03, was as under:-

"Subject: Letter of intent for sales promoter – Chattisgarh 2003-04

Further to your meetings with T.J. Venkateshwaran & subsequently with me during my visit to Raipur on 21st August 2003, we are pleased to inform that you are continuing as our Sales Promoter agent for the state of Chattisgarh during the financial year 2003-04. We are detailing below the major terms and conditions under this renewed agreement, which has been agreed in principle with you.

- 1) Brands: Castle Lager, Royal Challenge, Hawards Lager, Haywards 5000, Knowout. Haywards 2000, Lal Toofan.*
- 2) Volume target: In view of the fact that the minimum guarantee has been fixed at 40% as against 50% last year, the volume target has been retained at last year's achievement level of 2,40,000 cases of erstwhile Shah Wallace brands and minimum 10,000 cases of SAB Miller brands.*
- 3) Remuneration: Based on the return on investment (ROI) model, the commission amount was fixed at Rs. 8.10 per case w.e.f. 1 Aug 03 at an average investment level to Rs. 50 lacs throughout the year. We would be furnishing Rs. 6 lacs ban guarantee to CSBC (during the week commencing 31st Aug 2003) and hence arrange for refund of Rs. 10 lacs from the corporation as soon as the guarantee reaches you. Till such time, the refund of Rs. 10 lacs is not effect from CSBC remuneration of Rs. 8.60 per case would be settled.*
- 4) Credit period: Promoter will arrange to clear payments by the 7th day from the date of dispatch of goods to CSBC. On receipt of payments from CSBC, the company will reimburse the same to you.*
- 5) Incentive: On completion of the combined target of 2,50,000 cases on incremental volume an amount of Rs. 4 per case would be payable over and above the basic remuneration of Rs. 8.10 per case.*
- 6) Fixed expenses: Expenses amounting to Rs.38,000/- per month (2 merchandisers Rs. 16,000/- pm office expenses Rs. 22,000/- pm)*

and Rs. 67,000/- pm towards fixed expenses at the corporation would be reimbursed against a written claim only.

7) Period: This agreement is valid till 31 Mar 2004. In order to renew the terms of the agreement for the succeeding year, negotiations can be held in the 1st week of Mar 2004 and on mutual consent can fresh agreement be finalised.

8) Termination: In case of failure to adhere to the above mentioned terms and conditions, company would be intimating the promoter regarding the defaults and upon that if no corrective steps are taken, then the company would be compelled to terminate the services of the promoter by issuing a 30 days notice.

Please note all the previous terms and conditions pertaining to the promoters appointment stand cancelled with immediate effect.

Both parties will enter into a comprehensive agreement in due course. We would appreciate if copy of this letter is signed and returned to us at your earliest convenience.

Looking forward to a long lasting association with you."

12. Some of these conditions got modified by later letters. But even under letter dated 31.8.2004, the reimbursements of expenses of the staff employed by the respondents were being given. Such a type of arrangement is clearly not covered by the definition of commission agent in Notification No.12/2003-ST. So this issue is answered in favour of the Revenue.

13. The next issue to be decided is whether expenses reimbursed are to be part of the gross value of services received. In the case of money received on account of the arrangements as stated in para 5.1, it is very clear that the amount payable is towards discounts given to the customer, as a part of the business model. This money cannot form part of the gross value of services rendered. However, expenses reimbursed as per arrangements stated in par 5.3 and para 5.4 are of a type which forms integral part of the value of service rendered. Without employing manpower the respondents could not have

provided the service in question. The case laws on "reimbursable expenses" developed around expenses incurred by Clearing and Forwarding agents for godown rented out for keeping the goods of the principal and freight paid for forwarding the goods. These essentially do not form part of the value of the services of C&F agents. Now such decisions are being further interpreted to argue that any amount like wages of the personnel employed by the service provider, the telephone expenses incurred by the service provider, office rent of the service provider etc. will not form part of the value if billed as reimbursable expenses. This matter has been examined by a Larger Bench of the Tribunal in the case of Shri Bhagavathy Traders Vs. CCE 2011 (24) S.T.R. 290 (Tri. - LB). the ratio laid down in that decision would apply and service tax has to be paid on value inclusive of such amounts even if billed as reimbursements. In the matter of Misc. expenses like Registration fees for label or brand, the expenses is not for providing the service being provided by the respondents. So if there is any proof of such expenses incurred by the respondent and reimbursed by SBL, such reimbursed amount will not form part of gross value of services. Similar is the case of transportation expenses paid by respondents on behalf of the SBL. The respondents are not in the business of organising or doing transportation. Transportation is not part of business promotion activity. So actual transportation cost reimbursed will not form part of value of service rendered by the respondents.

14. The gross value of service rendered needs redetermination based on the above findings. There is also need to verify that the amount of Rs. 5,46,945/- already paid by the respondents is included in the demand or not.

15. In the matter of involving section 80 of the Finance Act, 1994, we are not in agreement with the finding of the Commissioner (Appeals). A person giving his own interpretation of notification and then arguing that he was under the bonafide belief cannot get the protection of such section 80. Further the arrangements made for claiming expenses of staff as reimbursement and claiming that it is outside the taxable value speaks of intention to evade tax. However

we note that the adjudicating authority did not give the option of paying 25% of the duty demanded within 30 days of the order for discharge of the liability imposed as penalty. Following the decision of the Delhi High Court in the case of K. P. Pouches Vs UOI, the adjudicating authority may give an opportunity to the respondent to pay 25% of the tax dues within 30 days of receipt of this order. We further hold that there is no need to impose penalties under Section 76 when penalty is imposed under Section 78.

16. Thus the matter is remanded to the adjudicating authority for re-determining the tax due and penalty payable based on rulings given above.

(Pronounced on 11-01-2012)

(~~Mathew John~~)
Member (Technical)
MPS*

(Archana Wadhwa)
Member (Judicial)