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

Appeal No. ST/57438/2013-Cu[DB]
[Arising out of Order-in-Appeal No. Commissioner/ RPR/ST/32/2013 dated 19.02.2013, passed by the Commissioner of Central Excise, Raipur]

M/s Narmada Drinks (P) Ltd **....Appellant**

Vs.

CCE, Raipur **....Respondent**

Appearance:
Sh. J.K. Mittal, Advocate for the Appellant
Ms. Neha Garg, DR for the Respondent

CORAM:
Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Shri V. Padmanabhan, Member (Technical)

Date of Hearing: 15.02.2017
Date of Pronouncement: 16.03.2017

FINAL ORDER NO. 52413 /2017-CU[DB]

Per V. Padmanabhan

The appeal is directed against the Order-in-Original no. 32/2013 dated 31.01.2013 passed by Commissioner Central Excise, Raipur, in which demand of service tax amounting to Rs 60,69,200/- has been confirmed on the appellant under "Business Auxiliary Service". The order also imposes payment of interest under Section 75 of the Finance Act, 1994 as well as penalties under various sections of the Finance Act. The appellant is a manufacturer of aerated water and was one of the authorized bottlers of Coca Cola. For manufacture of soft drinks, the appellant was procuring concentrate from Coca Cola and used such concentrate for manufacture of aerated products. The appellant received amounts from Coca Cola under the heads "Sales Target Incentive" and "Advertisement and Publicity expenses".

2. Department took the view that these amounts were received by the appellant towards expenditure incurred on advertisement and brand promotion of Coca-Cola. The Show Cause Notice dated 7.4.2011 was issued, which was followed by the confirmation of demand in the impugned order under the category of "Business Auxiliary Service" under Section (65)(105)(zzb) of the Act. Aggrieved by the impugned order, the present appeal has been filed.

3. With the above background, we heard Shri J.K. Mittal, ld. Advocate appearing for the appellant as well as Dr. Neha Garg appearing for the Revenue.

4. The appellant challenged impugned order mainly on the following grounds:

i. The SCN categorically states that the amount was received by the appellant from the brand owners to promote and market the brand. However, the taxable service for promotion of brand name came into existence only with effect from 1.7.2010 vide Notification no. 24/2010 ST dated 22.06.2010. The new service under Section 65 (105) (zzzzq) will cover the activity undertaken by them, which cannot be made applicable for the period upto 30.06.2010.

ii. The activity cannot be covered under "Business Auxiliary Services" under Section 65(19)(zzb) for the prior period; Since, BAS covered only promotion and marketing or sale of goods/service.

iii. They also relied upon the following case laws:

- **Commissioner of Service Tax, Delhi Vs. Shriya Saran 2014(36) S.T.R. 641 (Tri.-Del).**
- **Sourav Ganguly Vs. Union of India 2016(43) S.T.R. 482 (Cal.).**
- **Commissioner of C. Ex., Bhubaneswar-I Vs. Champdany Industries Ltd. 2009(241) E.L.T. 481 (S.C.).**
- **Precision Rubber Industries (P) Ltd. Vs. Commissioner of C. Ex. Mumbai 2016 (334) E.L.T. 577 (S.C.).**
- **Intercontinental Consultants & Technocrats Pvt. Ltd. Vs. Union of India 2013 (29) S.T.R. 9 (Del.).**

5. Ld. Advocate explained the grounds elaborately on behalf of the appellant. He also pleaded that the SCN, invoking extended

period of limitation, is hit by limitation inasmuch as the department had conducted audit of their records in 2008, 2009 and 2010.

6. Ld. DR on the other hand supported the impugned order. She submitted that even though the new service for promotion of brand name came into existence from 1.7.2010; the activity carried out by the appellant would be very much covered under "Business Auxiliary Services" which came to be included in the statue for much prior date. The appellant's has received certain amounts from M/s Coca-Cola in the books described as "incentive for achieving certain level of sales" which are clearly in the nature of sales promotion as covered within the definition of BAS. Accordingly, she prayed that the impugned order may be upheld.

7. Heard both sides and perused the records.

8. The appellant has manufactured aerated drinks with the brand name of coca cola, which is owned by M/s Coca Cola. Since, the latter continuous to supply the concentrate, which is used for manufacture of aerated product with the brand name of Coca Cola, any activity undertaken with the intention of promoting the brand name will also resultant promotion of the sale of goods produced by the appellant. The department has issued a Show Cause Notice and proceeded to confirm the demand of service tax on the basis of notice. During the course of audit of goods of accounts of the appellant; the appellant was found to have received certain

amounts from M/s Coca Cola variously described as "Sales Target Incentives" and "advertisement and Publicity" etc. The SCN alleges that the appellant has received the aforesaid amount from the brand owners to promote and market the brands of the brand owners. Service Tax has been demanded by considering that such services fall under the category of "Business Auxiliary Service" defined under Section 65(105)(19).

9. BAS is an omnibus service covering within its fold various types of services. It has not been indicated either in the Show Cause Notice or Order-in-Original under which sub clause the appellant's service is being charged to service tax. By process of elimination, we conclude that it is likely to be under "Promotion or marketing or sale of goods produced or service provided by the client"; we note that no investigation has been undertaken by Revenue into the reasons for which appellants have received the payments. Hence, it is not very clear why the appellant has received the said amounts from M/s Coca cola. However, the Show Cause Notice, in Para 6.2, has stated that the amounts have been received from the brand owners to promote and market the brands of the brand owners.

10. When we look at the clause (i) the definition of the BAS, which covers promotion or marketing or sale of goods produced or service provided, we fail to see how the promotion of the brand name can be brought under the above clause. The appellant has

received concentrate from M/s Coca Cola. Obviously, the appellant is not marketing or selling the concentrate as a brand name. The appellant's contention is that they are manufacturing the goods bearing the brand name and not the brand owners and therefore they cannot be charged service tax for marketing and promotion of sales of their own goods.

11. A new service stands introduced with effect from 1.07.2010, which covered specifically "Brand Promotion Service". The contention of the appellant is that only the new service will cover the activity undertaken by them and the same activity cannot be charged to service tax under BAS for the earlier period.

12. It is useful to refer to Para 4.2 of the TRU letter dated 26.02.2010 issued at the time of introduction of the new services w.e.f. 1.07.2010. As per the above clarification, while promotion or marketing or sale of goods produced provided or belonging to a client and promotion or marketing of services provided by the client are already covered under Business Auxiliary Service and such activities would continue to remain classified under " Business Auxiliary Service", the difference between the services classifiable under "Business Auxiliary Service" and newly proposed services of promotion or marketing of brand or goods of services, is that the latter has a wider coverage in the sense that mere promotion of a brand would attract tax under this service, even if such promotions cannot be directly linked to a particular product or service. It is

settled law that when a new service is introduced, the activities which are covered under the new services cannot be covered under any earlier services for the prior period.

13. The new service has been introduced under Section (65)(105)(zzzzq), which covers the service of promotion of brand names. Even if a view is taken that the service rendered by the appellant is covered under the new service w.e.f. 01.07.2010, the same cannot be charged to service tax under BAS for the earlier period. This view has been settled through various decisions of the High Courts and the Tribunal in the case of Sourav Ganguly vs. Union of India 2016 (43) S.T.R. 482 (cal.). The Hon'ble High Court at Calcutta has dealt with an identical fact, the Hon'ble High Court held as follows:

> "67. I am inclined to agree with the submission of ld. Counsel for the petitioner that since by amendment of the Finance Act, 1994, a new taxable service category of 'Brand Promotion' was introduced with effect from 1 July, 2010, the logical corollary and inevitable inference is that such category of service was not taxable prior to 1 July, 2010. In this connection, I am in agreement with the decision of the CESTAT, Principal Bench, New Delhi in the case of Commissioner of Service Tax, Delhi v. Shriya Saran (supra), and the decision of the Division Bench of the Bombay High Court in the case of Indian National Shipowners' Association v. UOI (supra). Business auxiliary service and brand promotion are distinct service heads as admitted in the order of the Respondent No. 3 that the amount of Rs. 2,62,61,782/- was received by the petitioner on account of brand endorsement. Since brand endorsement was not a taxable service during the period of time for which the tax demand has been raised, such demand cannot be sustained. Such service rendered by the petitioner could not taxed under the head of Business Auxiliary Service as has been sought to be done."

We find that the above decision of the High court settles the present issue in favor of the appellant.

14. In view of the above discussions, we find no justification for the demand of service tax raised under BAS for the period 2006-07 to 2009-2010. Consequently, the impugned order is set aside and the appeal allowed.

[Pronounced in the open court on 16.03.2017]

(Justice (Dr.) Satish Chandra)
President

(V. Padmanabhan)
Member(Technical)

Ritu S.