

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA**

Appeal No. E/94/2011

(Arising out of Order-in-Original No.05/CE/Commr./Kol-VI/2010 dated 30.11.2010 passed by the Commissioner of Central Excise, Kolkata-VI Commissionerate)

Diamond Beverages Pvt. Ltd

Applicant (s)/Appellant (s)

Vs.

Commissioner of Central Excise, Kolkata-VI

Respondent (s)

Appearance:

Dr. S.Chakraborty, Sr. Advocate, Shri S.Banerjee, Advocate and Shri P.Sancheti, Advocate for the Appellant (s)
Shri Sumit Mukhopadhyay, Suptd. (AR) for the Respondent (s)

CORAM:

Hon'ble SHRI P.K.CHOUDHARY, Member (Judicial)

Hon'ble SHRI Bijay Kumar, Member (Technical)

Date of Hearing:- 12.06.2018

Date of Pronouncement:-10.07.2018

ORDER NO.FO/76414/2018

Per Shri P.K.Choudhary

The appellant is engaged in the manufacture of syrups and beverages classifiable under Chapters 21 and 22 of the First Schedule to the Central Excise Tariff Act, 1985. Show Cause Notice dated 26.03.2004 was issued for the period from April, 1999 to December, 2003 alleging that the value of the cups and carbon dioxide (Co₂) and also the maintenance charges of the vending machines have not been included in the transaction value of the syrup and as such there had been undervaluation and suppression with intent to evade payment of duty. It is the case of the Revenue that the syrup in canister did not have any self marketability and that the cups,

carbon dioxide gas and vending machines were essential and mandatory in connection with sale of the syrup and were part and parcel of such sale. The show cause notice referred to the agreement between the vendors and Taratala Soft Drinks Pvt Ltd. This show cause notice was thereafter followed by 10 periodical show cause notices for the subsequent period covering the periods from January 2004 to November 2009. The Adjudicating Authority vide Order-in-Original dated 30.11.2010 adjudicated all the 11 show cause notice (s) and confirmed the demand of duty alongwith interest and imposed equal penalty. Hence, the present appeal before the Tribunal.

2. Ld. Senior Advocate appearing on behalf of the appellant company submits that in terms of the agreement with the Coca Cola Company, the appellant uses the trade marks/brand names of the said company for the goods manufactured by it. For the manufacture of the final products, the appellant requires a non-alcoholic beverage base which is supplied to the appellant by Coca Cola India Pvt Ltd. at the agreed prices which are duty paid. The dealings between the appellant and Coca Cola India Pvt. Ltd. are on principal to principal basis. Ld. Senior Advocate further submits that the "Syrup" manufactured and cleared from the factory is a dutiable commodity and is covered by and classifiable under sub-heading 2108.10 of the Central Excise Tariff. As statutorily recognized in Note 5 of the Chapter 21, such syrup is intended for the use in the manufacture of aerated waters in vending machines installed at the premises of the retail vendors who manufacture aerated waters with the help of vending machines. Such aerated water manufactured by them was always fully exempt from duty. It is the case of the appellant that the "Syrup" was cleared from the factory in unit quantity of 18 litres packed in canisters. It was sold to various independent buyers who were not related to the appellant in any manner

and the price charged from them was always the sole consideration for the sales. The central excise duty was paid on the price charged from the buyers, which was always the transaction value. Ld. Senior Advocate strongly challenged the Adjudicating Authority's decision in holding that syrup by itself was not a marketable commodity. He further submits that the syrup by itself was marketable goods. The syrup manufactured by the appellant is specified in Chapter 21 of the Central Excise Tariff and was regularly sold by the appellant to the retail vendors. The Commissioner was wholly unjustified in judging the marketability of the syrup vis-à-vis the ultimate consumer of the aerated waters. He failed to appreciate that what was manufactured and sold by the appellant was the syrup for which there were ready buyers and the marketability of the syrup was to be determined vis-à-vis the appellant's customers and not the buyers' customers. The Commissioner also erred in referring to the syrup as an intermediate product. The syrup sold to the retail vendors was a final product chargeable to duty as excisable goods.

He also submits that the goods manufactured and cleared by the appellant were only the syrup and the price charged for the same was the assessable value for the purpose of payment of duty. The goods, namely the syrup, were to be subjected to duty, in the condition in which the same were removed from the appellant's factory, and there was no question of including in the value of the syrup, the cost of other goods and services used by the buyer of the syrup to manufacture different goods at his premises. There was no question of any enrichment of the sale of the syrup or the sale price thereof because the buyer used other goods and services provided by the seller of the syrup for separate consideration.

Ld. Senior Advocate by challenging the impugned order contends that the decision of the Adjudicating Authority has infact subjected the aerated

water manufactured by retail vendors, at their respective premises and exempt from excise duty, in terms of notifications issued by the Government from time to time, liable to excise duty in the hands of the appellant. It is his submission that the amount of duty sought to be demanded from the appellant in respect of syrup by including the price of the cups and Co₂ gas and maintenance charge of the vending machines is even more than the duty which the appellant would have to pay, if they had manufactured the aerated water in its own factory. Ld. Senior Advocate submits that it would not be out of place to mention that for the subsequent period on the self-same issue the Department issued 4 show cause notices covering the period December, 2009 to February 2013. Show Cause Notice dated 14.12.2010 was adjudicated vide the adjudication order dated 20.12.2011 confirming the demand. On appeal the Commissioner (Appeals) vide Order dated 09.03.2012 set aside the Adjudication Order and dropped the show cause notice. In respect of other three show cause notices, the Adjudicating Authority passed orders in favour of the appellant. The department preferred appeals against those orders before the Commissioner (Appeals). All the appeals filed by the Department were rejected by the Commissioner (Appeals). All the orders of the Commissioner (Appeals) were accepted by the Department by not preferring any appeal before the Tribunal.

Ld. Senior Advocate also argued the case on limitation. He submits that the syrup was manufactured at and cleared from the factory in identical manner for several years prior to the relevant period. He submits that the entire relevant facts relating to manufacturing activities were all along fully and truly disclosed to the Central Excise Authorities and they were fully aware of the same. There was no fraud or collusion or misstatement, willful or otherwise or suppression of facts or contravention of any of the provisions

of law with intent to evade payment of duty or otherwise. None of the conditions precedent for invoking the longer period of limitation of 5 years' as laid down in the proviso to Section 11A(1) exists or is satisfied in the present case. During the period prior to the relevant period and after the relevant period, the appellant always complied with all required central excise formalities and maintained all required central excise records. The invoices also mentioned the transaction value and the duty on such transaction value was always paid. The statutory documents were subject to periodical audits by the department. He filed a brief notes of argument alongwith compilation of relied-upon judgments and a compilation of subsequent show cause notices, replies filed, Order-in-Original, and made the bench go through each of the orders. He prayed for setting aside of the impugned order and allowing the appeal.

3. Ld. A.R. reiterated the findings of the impugned order. According to him, the beverage is not marketable in its original form and cannot be consumed without adding Co₂. It is marketable only when it is sold alongwith predetermined quantity of Co₂ and cost of such Co₂ is includible for payment of duty.

4. Heard both sides and perused the appeal records.

5. We find that the appellant is supplying beverages to various retail outlets for the manufacture of aerated water at the vending machines. For better appreciation of facts the method and diagram of the whole process as submitted by the appellant is reproduced:

" METHOD: Dispensing Machines / Vending Machines-(DIAGRAM II)

(i) This Equipment – Mini Manufacturing Plant is installed at Retailers Shop.

- *He operates this Machine and Manufactures Carbonated Soft Drink with the help of this Machine.*

(ii) At the outset let us clarify that the equipment involved is not a Dispensing Machine i.e. dispensing of a Small Quantity from a Bigger Container or even Vending Machine.

(iii) It is in fact a “Mini Carbonated Soft Drink Manufacturing Plant” which contains Refrigeration System, Filtration, Proportionate Mixing Equipment, Carbonation Equipment.

(iv) Paper Cups carrying brand name are bought out and sold to these Retailers.

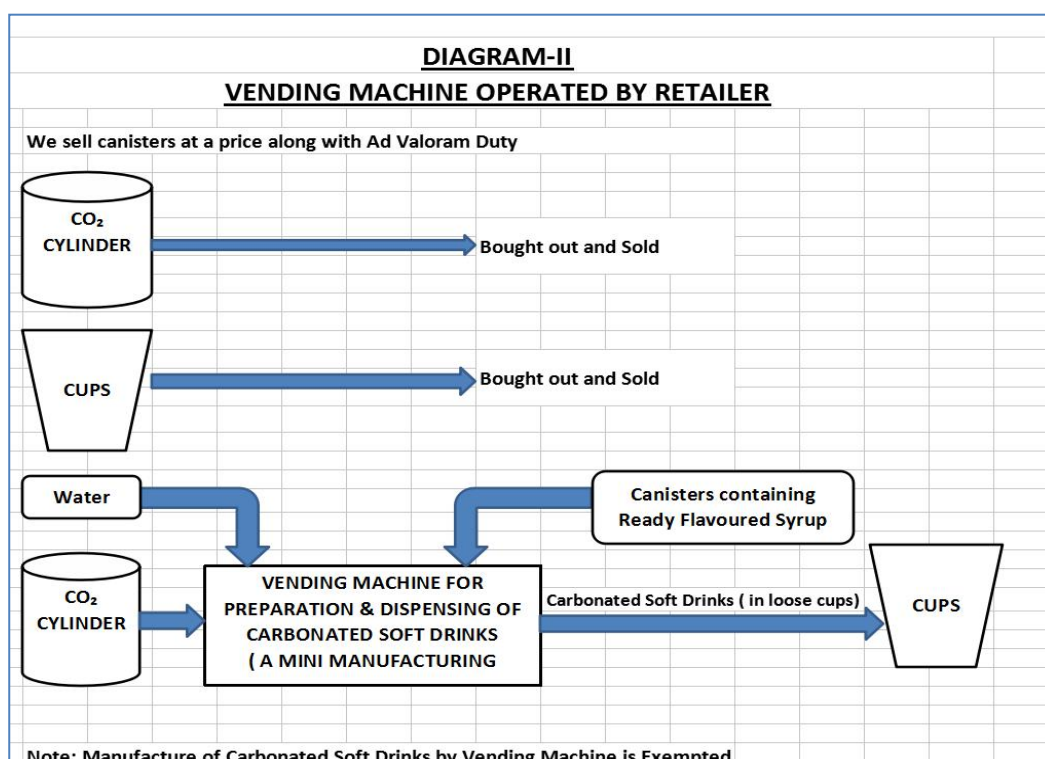
(v) Co₂ Cylinders (Small) are also bought out item and being sold to these Retailers.

(vi) Co₂ Cylinder and Canister containing the Ready Flavour Syrup and Water are being connected into the Machine.

(vii) Machine Manufactures Carbonated Soft Drink and the same is being dispensed in a Cup/Glass of varying sizes depending upon the Retailers Choice.

MOST IMPORTANT

Manufacturing of Carbonated Soft Drinks by the Dispenser Machine / Vending Machine is exempted all through as per Notifications stated in para 4 (p4) of AP.”



6. The issue involved in the instant case is whether the value of Co₂ gas, cups and Annual Maintenance Charge (AMC) of the dispensing machines are includible in the assessable value of syrup manufactured and cleared by the

appellant upon payment of Central Excise duty as per the provisions of the Act. According to the Revenue the syrup manufactured and sold by the appellant by itself is not marketable since cup, Co₂ gas and AMC are essential for manufacturing of syrup. It is the case of the Revenue that syrup is actually an intermediate product of aerated water and marketability of the syrup has been achieved by supply of cups and Co₂ gas alongwith syrup and by installing the vending machines at the dealers premises and accordingly the cost of cups and Co₂ gas and the AMC charges relating to vending machines is includable in the assessable value of the syrup.

7. We find that the vending machine was obtained by the retail vendor first and thereafter the vendor purchased the syrup, carbon dioxide and cups, as the case may be. The Adjudicating Authority failed to appreciate that it was the choice of the vendor whether or not to obtain the vending machine. It was only if a vendor obtained the vending machine that he thereafter required the syrup, carbon dioxide and cups, as the case may be. The syrup, carbon dioxide and cups were distinct and different commodities and the vendor purchased the same according to his requirements. Some of the vendors did not purchase the cups from the appellant at all. Sometimes a vendor purchased all the three items namely syrup, carbon dioxide and cups, sometimes only the syrup, sometimes only carbon dioxide and sometimes only the cups. Even if the syrup, carbon dioxide and cups were simultaneously purchased that could not result in the value of the carbon dioxide or the cups or the maintenance charge for the vending machine being added to the price of the syrup. The sale or the price of the syrup was not in any way enriched by reason of sale of other goods and provision of a separate service for separate consideration. The Commissioner erred in holding that the cups, carbon dioxide and the vending machine were

essential for the marketability or marketing of the syrup or promoted sale of the syrup.

8. We also find that the Commissioner proceeded on a wholly erroneous construction of the agreement relating to supply of the vending machines to the retail vendors. The said agreement provided the terms and conditions on which the vending machines were provided free of cost to the retail vendors. One of the provisions in the said agreement was that the retail vendor would purchase the syrup, carbon dioxide and cups from the designated authorised bottler of Coca Cola Company and shall not use or dispense any other products through the vending machine without obtaining prior permission. The said agreement was not for sale of syrup and did not stipulate any condition for sale of the syrup. The said agreement was entered into prior to the sale of the syrup. It was only because the retail vendor took the vending machine on the terms and conditions stipulated in the said agreement that the vendor purchased his requirement of syrup, cups and carbon dioxide from the appellant. The purported findings of the Commissioner that the said agreement provided for any terms or conditions for sale of the syrup or related to sale of syrup or that it was a prerequisite for the appellant to make available the vending machine to the retail vendor free of cost for sale of the syrup are wholly erroneous and misconceived.

9. We also find that the evidence on record which went to show that sometimes a vendor bought all the three items namely, syrup, carbon dioxide and cups; sometimes only syrup was bought; sometimes only carbon dioxide was bought and sometimes only cups were bought. Further, it is an undisputed fact on record that 31 vendors did not buy any cup from the appellant. The Commissioner erred in proceeding on the basis, as if it was the admitted position, that cups and carbon dioxide were sold to the retail

vendors along with the syrup in all cases or that there was any such stipulation in the agreement relating to the vending machines or that the appellant realised the value of the cups and carbon dioxide in proportion to sale of the syrup. No such admission was made by the appellant and the purported finding of the Commissioner to the contrary is wholly erroneous and perverse.

10. We find that the cups and carbon dioxide were not manufactured by the appellant. The appellant purchased the cups and carbon dioxide from manufacturers and/or from the market and merely resold the same to the retail vendors. Because the cups and carbon dioxide were the appellant's trading items, it did not take any cenvat credit upon purchase thereof. The appellant had separate prices for the cups and carbon dioxide which were sold to only those vendors who wanted the same. The sale of the cups and carbon dioxide for separate price had nothing to do with the sale of the syrup or the sale price of the syrup which was the same for all the vendors irrespective of whether they purchased any cups or carbon dioxide from the appellant. The separate price charged for the trading goods, namely, cups and carbon dioxide cannot be included in the value of the syrup.

11. We find that the vending machines were used by the retail vendors at their respective premises for manufacture of aerated water by using the syrup, carbon dioxide and water and such aerated water was sold by the retail vendors in cups to the consumers. For maintenance of the vending machines, which was a separate service (chargeable to service tax with effect from July 2003), the retail vendors paid the maintenance charge to the service provider, namely Taratala Soft Drinks Pvt. Ltd. which provided the service upto March 31, 2005 and to the appellant from April 1, 2005 to March 31, 2008, since it provided such service during the said period. The

Commissioner failed to appreciate that there was no question of including the maintenance charge in respect of the maintenance service rendered in respect of the vending machines in the assessable value of the syrup manufactured by the appellant. Such maintenance charge was an item of cost for the retail vendors engaged in the manufacture of aerated water and there was no question of the maintenance charge enriching the sale of the syrup.

12. We also find that reliance by the Commissioner on the provisions of Section 4(3)(d) of the Act and Rule 6 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 (in short, **"Valuation Rules"**) for including in the transaction value of the syrup the price separately charged for the cups and carbon dioxide and the maintenance charge of the vending machine is entirely misplaced. The Commissioner failed to appreciate that the said provisions did not permit the inflation of the actual price charged for the sale of the syrup by the separate consideration charged for other goods and services. The Commissioner failed to appreciate that the separate consideration paid by the retail vendors for purchase of the cups or carbon dioxide or for the maintenance service in respect of the vending machines was not by reason of or in connection with the sale of the syrup nor did such separate consideration for the cups, carbon dioxide or maintenance service represent any additional consideration for sale of the syrup by the appellant to the retail vendors. The price charged by the appellant for sale of the syrup was the sole consideration for sale thereof and there was no question of including in such price the separate consideration for other goods and services. The findings of the Commissioner to the contrary are wholly erroneous, misconceived and untenable.

13. We find that the Commissioner has completely failed to appreciate the true terms and scope of Section 4(3)(d) of the Act. The finding of the Commissioner in this respect is completely contrary to the interpretation settled by the Apex Court in, inter alia, the case of **Commissioner of Central Excise Vs. Acer India Ltd., 2004 (172) ELT 289 (SC)**. Dealing with this provision the Supreme Court in paras 54 to 57 of the judgment observed and held as under:

"54. It may be true that the definition of "Transaction Value" which is incorporated in Clause (d) of Sub-section (3) of Section 4 for the purpose of said Section states that the price actually paid or payable for the goods, when sold, would include in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale. Only because the expressions "by reason of, or in connection with the sale" have been used in the definition of "Transaction Value", the same by itself would not take away the rigours of Sub-section (1) of Section 4 as also the requirement of charging section as contained in Section 3.

55. It must be borne in mind that central excise duty cannot be equated with sales tax. They have different connotations and apply in different situations. Central excise duty is chargeable on the excisable goods and not on the goods which are not excisable. Thus, a 'goods' which is not excisable if transplanted into a goods which is excisable would not together make the same excisable goods so as to make the assessee liable to pay excise duty on the combined value of both. Excise duty, in other words, would be leviable only on the goods which answer the definition of "excisable goods" and satisfy the requirement of Section 3. A machinery provision contained in Section 4 and that too the explanation contained therein by way of definition of 'transaction value' can neither override the charging provision nor by reason thereof a 'goods' which is not excisable would become an

excisable one only because one is fitted into the other, unless the context otherwise requires.

56. *It is not a case where the software is being supplied to the customer along with the computer by way of incentive or gift. The Respondent is charging the price therefor. Software therefor along with a computer is being sold both in the form of the information loaded in the computer as also in the form of a CD-ROM. In the invoice, the composite price of the computer and software is being shown, as noticed hereinbefore and therefrom, the price of the software is only being deducted. The invoice price, thus, also shows the actual price of the computer as also the price of the software together with the licence to use the same. The Appellant while calculating the price of the computer had shown all expenses which are borne by it in terms of the decision of this Court in **Union of India and Others Vs. Bombay Tyre International Ltd. and Others [(1984) 1 SCC 467]**. Thus, the requirements contained in the second part of the definition of 'transaction tax' are met. Furthermore, invoice value is not always excisable value in respect of the goods.*

57. *In the instant case, having regard to the decision of this Court in Bombay Tyre International Ltd. (supra) the excisable value of the computer has been disclosed. The cost of loading the softwares which would enhance the value of the goods had also been added. There cannot, thus, be any doubt whatsoever that while computing such costs of manufacturing expenses which would add to the value of the excisable goods (in this case the computer) must be taken into consideration but not the value of any other goods which is not excisable."*

14. We find that this finding of the Three Member Bench of the Supreme Court has since been upheld by the Constitution Bench of the Supreme Court in **Commissioner of Central Excise Vs. Grasim Industries Ltd., 2018-TIOL-181-SC-CX-CB**, para 22.

15. We find that the Annual Maintenance Charges relating to vending machines is not includible in assessable value of syrup:-

(i) The vending machines installed at the places of the buyers have nothing to do with and were not at all related to manufacturer of syrup. There can be absolutely no scope to include any maintenance charges relating to vending machines in the assessable value of syrup. The vending machines were not installed at appellant's factory nor these were ever used for manufacturer of syrup.

(ii) Secondly, the vending machines were not owned by the appellant. During the material period there were 147 vending machines in use by retail vendors at different locations in the area served by the appellant. Of the said 147 vending machines, 109 machines belonged to Coca-Cola India and/or its subsidiaries, Britco Foods Company Limited/Hindustan Coca-Cola Beverages Private Limited (hereinafter referred to as "**the Coca Cola Subsidiaries**"). Coca-Cola Subsidiaries entered into agreements with the retail vendors in terms of which the said 109 machines were delivered and installed by them at the premises of the vendors. The remaining 38 machines were purchased by the appellant and were received at the separate warehouse of the appellant's Sales and Marketing Department at P-43, Taratala Road, Kolkata-700088. The delivery and installation of the said 38 machines at the premises of the retail vendors was handled by the separate staff of the appellant's said Department through a separate dedicated vehicle. In respect of the said 38 machines belonging to the appellant, since the maintenance was undertaken by a company called Taratala Soft Drinks Private Limited (earlier known as Calcutta Soft Drinks Private Limited) as stated in great detail hereinafter, the agreement with the vendors was made by Taratala

Soft Drinks Private Limited using the same format as that used by the Coca-Cola Subsidiaries.

(iii) The vending machines required regular maintenance by qualified mechanics and technicians by way of checking the machines, repairing, sanitization, replacement of defective parts, etc. The appellant states that during the period upto March 31, 2005, such maintenance service in respect of the vending machines, whether belonging to Coca-Cola India and/or its subsidiaries or to the appellant, was provided by Taratala Soft Drinks Private Limited against payment by the vendors. However, Taratala Soft Drinks Private Limited had nothing whatsoever to do with the sale of the syrup, cups or gas, which were sold by the appellant to the vendors. From April 1, 2005, such maintenance service was provided by the appellant through its team of qualified mechanics and technicians against payment by the vendors. The appellant states that from April 2008, the system of charging maintenance charges was discontinued.

(iv) The appellant states that the maintenance service provided to vendors became chargeable to service tax with effect from July 2003 and M/s. Taratala Soft Drinks Private Limited paid service tax thereon for the period from July 2003 to March 2005. From April 1, 2005 to March 31, 2008, the appellant paid service tax on the maintenance charge.

(v) It is mentioned herein that the aforesaid submissions relating to non-includibility of Annual Maintenance Charges of vending machines in the assessable value syrup are fully supported by the decision of the Hon'ble Tribunal reported in **2004 (163) ELT 478 (Pepsico India Holdings Pvt. Ltd. Vs. CCE)**, which was upheld by the Hon'ble Supreme Court reported in **2009 (234) ELT 385 (SC)**.

16. Whether the cost of cups and Co₂ gas is includable in the assessable value of syrup:

(i) Cups and Co₂ gas were merely the trading goods. These were not the inputs of syrup. There can be no question of including the cost of cups and Co₂ gas in the assessable value of syrup. Syrup was sold by the appellant to various retail vendors. Such retail vendors have got at their places "Automatic Vending Machines" (also called Dispensing Machines). The syrup purchased from the appellant was used by the said buyers in manufacture of aerated waters with the help of vending machines installed at their places. For manufacture of aerated waters from the syrup, the retail vendors require Co₂ gas and for delivering the aerated waters to the consumers, they require cups, these two items, namely, Co₂ gas and cups were purchased by the appellant from their manufacturers and or market and were merely resold to the retail vendors. The appellant never manufactured Co₂ gas and cups at the factory nor the appellant has got any infrastructure or machinery or plant to manufacture the same. These were merely trading goods which were purchased and resold as such.

17. We find that the impugned order passed by the Commissioner has in effect resulted in the aerated water manufactured by the retail vendors, at their respective premises and exempt from excise duty in terms of notifications issued by the Government from time to time, being subjected to excise duty in the hands of the appellant. In fact, the amount of duty sought to be demanded from the appellant in respect of the syrup by including the price of the cups and carbon dioxide and maintenance charge of the vending machine is even more than the duty which the appellant would have had to

pay had it manufactured the aerated water in its own factory like the rest of its production and sold the same in bottles.

18. We also find that the Commissioner was wholly unjustified in not following the decisions of this Tribunal relied upon on behalf of the appellant and in purporting to distinguish the same on wholly untenable grounds. The said decisions are fully applicable to the instant case.

19. We also find that for the subsequent period on the self-same issue the Department issued 4 show cause notices covering the period December 2009 to February 2013. In respect of the show cause notice dated December 14, 2010 adjudicating authority passed an order confirming the demand vide adjudication order dated December 20, 2011. The appellant preferred an appeal before the Commissioner (Appeals). The Commissioner (Appeals) vide Order dated March 9, 2012 set aside the impugned adjudication order and dropped the show cause notice. In respect of other three show cause notices, the adjudicating authority passed orders in favour of the appellant. The department preferred appeals against those orders before the Commissioner (Appeals). All the three appeals filed by the Department were rejected. All the orders of the Commissioner (Appeals) were accepted by the Department by not preferring any appeal before the Tribunal.

20. We find no authority for inclusion of the cost of cups, Co₂ gas and AMC charges of the vending/dispensing machine in the assessable value of the syrup. The appellant is not mixing the Co₂ gas with beverage and cleared the aerated water produced only at the vending machine. According to the Revenue, beverage syrup is not marketable. Therefore, if it is not marketable, it is also not excisable. In that case there is no question of adding Co₂ gas and cost of AMC charges in the assessable value of syrup. In these circumstances we do not find any merit in the impugned order and the

same is set aside. The appeal filed by the appellant is allowed with consequential relief.

(Pronounced in the Open Court on 10.07.2018)

S/d.
(Bijay Kumar)
Member (Technical)

S/d.
(P.K.Choudhary)
Member (Judicial)

SS