

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA**

Excise Appeal No.77570 of 2018

(Arising out of Order-in-Original No.39/Commr./CGST & CE/HWH/Adjn./2017-18 dated 28.03.2018 passed by Commr. of CGST & Excise, Howrah)

M/s Bengal Beverages Pvt. Ltd.

Durgapur Expressway, Dankuni, Hooghly, Pin-712310

Appellant

VERSUS

CGST & Excise, Howrah

15/1 Strand Road, Kolkata-700001

Respondent

Appearance:

Shri Ankit Agarwal, C.A. for the Appellant

Shri K.Chowdhury, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER

HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER

FINAL ORDER NO.75561/2020

DATE OF E-HEARING : 09.10.2020

DATE OF DECISION : 09.10.2020

Per P.K.Choudhary :

The present appeal has been filed by the assessee being aggrieved with the Order-in-Original dated 28th March 2018 passed by the Ld. Commissioner, whereby the demand of service tax of Rs.4,68,27,090/- was confirmed for the period from 2012-13 to 2015-16, along with interest and penalty out of the total demand of Rs.5,67,30,450/-, as proposed in the Show Cause Notice dated 31st October 2017.

2. Briefly stated, the facts of the case are that the Appellant is engaged in the manufacture of Aerated water and fruit pulp or juice-based drinks, classifiable under Chapter No. 2202 of the Central Excise Tariff Act, 1985 on which central excise duty was being paid. In the course of business, the assessee company pays remuneration to its

Excise Appeal No.77570/2018

whole-time Directors which has fixed as well as variable component. The said variable component comprised of commission payable on the basis of percentage of profit in conformity with the provisions of the Companies Act. The Department has raised a demand of service tax under reverse charge mechanism on the entire remuneration paid to the whole-time Directors i.e. the fixed part as well as the variable pay, in terms of Notification No.30/2012-S.T., dated 20th June 2012, as amended. It is the case of the Department that the said remuneration paid to the Directors would constitute 'service' liable to service tax in the hands of appellant assessee under reverse charge mechanism.

3. Shri Ankit Kanodia, Ld. Chartered Accountant, appeared on behalf of the Appellant Company. He submitted that the present dispute is only in respect of the remuneration amount paid to the four Directors in the form of commission as a percentage of profit who are the whole-time Directors on the Board of the Company. The Ld. Adjudicating authority has dropped the demand of Rs.99,03,360/- representing service tax on the fixed salary component paid by the appellant to its four whole time Directors as proposed in the SCN. He states that the payment of remuneration to the whole time Directors is governed by the Companies Act, 2013 and has also produced certificate of the Company Secretary to provide that the remuneration paid by the appellant to its Directors are within the limits of the said provisions of the Companies Act. He further states that the whole-time Directors are actually salaried employees and whatever remuneration has been paid to the said Directors, on which the impugned demand has been raised, has been subject to deduction of tax at source (TDS) under Section 192 of the Income-tax Act, 1961, the provision as applicable to deduction of income-tax on employees. He also submitted Form no. 26AS Traces Statement issued by the Income Tax Deptt., wherein the details of TDS for the said whole-time Directors evidencing deposit of TDS as 'salaries'. He vehemently argued that when the Ld. Adjudicating authority has already held that the Directors are employees of the company and dropped a part of demand on the above ground, then confirmation of the balance demand on the ground

Excise Appeal No.77570/2018

that the Directors have provided services to the Appellant company cannot survive, as it is contradictory and unreasonable. The Ld. CA also submitted that the very definition of 'service' under Section 65B(44) of the Finance Act, 1994, excludes the services rendered by an employee to the employer, from the levy of service tax. In support of his submissions, he relied upon the decision of this Tribunal in the case of *MAITHAN ALLOYS LTD. versus COMMISSIONER OF C. EX. & S.T., BOLPUR reported in 2020 (33) G.S.T.L. 228 (Tri.-Kolkata)* wherein it was held that -

"7. Further, in the present case, the appellant has duly deducted tax under Section 192 of the Income-tax Act which is the applicable provisions for TDS on payments to employees. This factual and legal position also fortifies the submission made by the appellant that the whole-time directors who are entitled to variable pay in the form of commission are 'employees' and payments actually made to them are in the nature of salaries. This factual position cannot be faulted in absence of any evidence to the contrary. The submission of Ld. DR as well as the finding made by the Commissioner in the impugned order that since the whole-time directors are compensated by way of variable pay and hence not employees, does not have any legal basis and is completely misplaced, and the same cannot be sustained. The decision of the Tribunal in Rent Works India (supra) has clearly set the legal position that when the Income Tax Department considers payment in the nomenclature 'consultancy fee' as salaries, on which TDS is also made, the said payments cannot be said towards rendition of taxable service for levy of service tax. The decision in case of PCM Cement Concrete Pvt. Ltd. (supra) has set the legal proposition that consideration paid to whole-time directors would be treated as payment of salaries inasmuch as there would be employer-employee relationships and in such case the levy of service tax cannot be sustained.

Excise Appeal No.77570/2018

8. *In view of the above discussions and the settled legal judicial precedence and provisions contained in statutes referred to above, demand of service tax on remuneration paid to whole-time directors cannot be sustained and hence set aside. Since demand of service tax is set aside, penalty and interest are also not sustainable."*

4. He also relies upon the judgment of the ALLIED BLENDERS AND DISTILLERS PVT. LTD. versus C.C.E. & S.T., AURANGABAD reported in 2019 (24) G.S.T.L. 207 (Tri.-Mumbai) wherein it was held by the Tribunal -

"16. *Also, from the documents produced by the appellant it is crystal clear that the Directors who are concerned with the management of the company, were declared to all statutory authorities as employees of the company and complied with the provisions of the respective Acts, Rules and Regulations indicating the Director as an employee of the company. No contrary evidence has been brought on record by the Revenue to show that the Directors, who were employee of the appellant received amount which cannot be said as 'salary' but fees paid for being Director of the company. The Income Tax authorities also assessed the remuneration paid to the said directors as salary, a fact cannot be ignored. The judgments cited by the revenue cannot be applied to the present case as the facts are different and the finding of Income tax authorities accordingly also different in the said case.*

17. *In these circumstances, we do not find merit in the impugned order. Consequently, the impugned order is set aside and the appeal is allowed."*

5. He further relied on the C.B.E. & C. Circular No. 115/9/2009-S.T., dated 31st July 2009, wherein it has been clarified that no service tax is leviable on commission paid to managing directors/whole-time Directors, even if the remuneration is termed as 'commission',

Excise Appeal No.77570/2018

inasmuch as the said managing Directors/whole-time Directors do not perform consultancy or advisory function. The Ld. Consultant also referred to the relevant provisions contained in the Companies Act and the Income Tax Act pertaining to whole-time Directors and applicability of TDS on employees respectively. It is his submission that the entire payment made to the whole-time Directors and other Directors are duly disclosed in the balance sheet and necessary compliance is being made by filing returns with the ROC under the Companies Act and therefore, there is no question of any fraud or suppression and hence, no penalty is imposable.

6. The Ld. Departmental Representative (DR), Shri K.Chowdhury, while supporting the impugned order passed by the Commissioner, reiterated the findings made therein. He stated that since the Directors are paid a variable amount based on the percentage of profit though approved by the Company's Board, it cannot be said to have constituted the employer-employee relationship, despite the fact that they are whole-time Directors. He accordingly prayed for confirming the entire service tax demand.

7. Heard both sides and perused the appeal records.

8. In the instant case, the only dispute herein is for payment of remuneration in the nature and form of commission based on percentage of profit to whole time directors, which is a fact on record. Section 2(94) of Companies Act, 2013, duly defines 'whole-time director' to include a director in the whole-time employment of the company. A whole-time Director refers to a Director who has been in employment of the company on a full-time basis and is also entitled to receive remuneration. The certificate issued by the company secretary states that the remuneration is given in various form as allowed under the Companies act, 2013. We further find that the position of a whole-time director is a position of significance under the Companies Act. Moreover, a whole-time director is considered and recognized as a 'key managerial personnel' under Section 2(51) of the Companies Act.

Further, he is an officer in default [as defined in clause (60) of Section 2] for any violation or non-compliance of the provisions of Companies Act. Thus, in our view, the whole-time Director is essentially an employee of the Company and accordingly, whatever remuneration is being paid in conformity with the provisions of the Companies Act, is pursuant to employer-employee relationship and the mere fact that the whole-time Director is compensated by way of variable pay will not in any manner alter or dilute the position of employer-employee status between the company assessee and the whole-time Director. We are thoroughly convinced that when the very provisions of the Companies Act make whole-time director (as also in capacity of key managerial personnel) responsible for any default/offences, it leads to the conclusion that those directors are employees of the assessee company.

9. Further, the judgment of this Tribunal in the case of MAITHAN ALLOYS LTD Versus COMMISSIONER OF C. EX. & S.T., BOLPUR (supra) is squarely applicable to the facts of the case. Further, the Ld. Adjudicating authority has also allowed part of the demand on the ground that there exists an employer-employee relationship between the whole time Directors and the appellant assessee, then the ground of confirming the balance demand that the directors have provided service to the company becomes infructuous and hence cannot survive before the eyes of the law. Since demand of service tax is set aside, penalty and interest are also not sustainable.

10. The appeal filed by the Appellant is thus allowed with consequential relief, if any, as per law.

(Dictated and pronounced in the open court)

Sd/

(P. K. Choudhary)
Member (Judicial)

Sd/

(P. Anjani Kumar)
Member (Technical)