CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

SERVICE TAX APPEAL NO: 87856 OF 2014

[Arising out of Order-in-Appeal No: GOA-EXCUS-000-APP-021-13-14 dated 28th March 2014 passed by the Commissioner of Central Excise & Customs (Appeals), Goa.]

Hindustan Coca Cola Beverages Private Ltd
M-2 to M-11 Verna Industrial Estate, Phase – III
Verna, Goa … ***Appellant***

versus

Commissioner of Customs, Central Excise & Service Tax
ICE House, EDC Complex, Patto Plaza
Panaji, Goa ***…Respondent***

APPEARANCE:

Shri JH Motwani, Advocate for the appellant

Shri Dilip Shinde, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A/87665 / 2019

DATE OF HEARING: 04/11/2019
DATE OF DECISION: 04/11/2019

PER: C J MATHEW

The dispute in the appeal of M/s Hindustan Coca-Cola Beverages Pvt Ltd revolves around the conformation of tax liability of ₹ 2,02,418 under section 73 of Finance Act, 1994, along with applicable interest thereon under section 75 of Finance Act, 1994, besides imposition of penalty of like amount under section 78 of the Finance Act, 1994 on the receipt of ₹16,49,715, between 2007-08 and 2010-11, allegedly for having incurred expenditure towards promotional activities as provider of ‘business auxiliary service’ taxable under section 65(105)(zzb) of Finance Act, 1994. The first appellate authority upheld the liability leading to the present appeal impugning order-in-appeal no. GOA-EXCUS-000-APP-021-13-14 dated 28th March 2014 of Commissioner of Central Excise & Customs (Appeals), Goa.

2. According to Learned Counsel for the appellant, the issue stands decided by Tribunal in *Superior Drinks Pvt Ltd v. Commissioner of Central Excise, Nagpur [2019-TIOL-2266-CESTAT-MUM]* and in *Commissioner of Central Excise & Service Tax, Lucknow v. Brindavan Bottlers Ltd [2019 (3) TMI 1428-CESTAT Allahabad]* and that the competent authority, under section 86 of Finance Act, 1994, did, in review of decision to drop proceedings on identical grounds against M/s Diamond Beverages Pvt Ltd, decline any challenge thereof.

3. Learned Authorised Representative reiterates the findings in the impugned order.

4. As pointed out by Learned Counsel, the first appellate authority has chosen to redetermine the particular activity within the definition

of ‘business auxiliary service’ while accepting the contention of the appellant that the adjudicating authority had failed to do so.

5. It is seen from

> *‘5.7 Now examining the issue on merit of classification under the category of “Business Auxiliary Service”. The clause of the definition which is relevant for such invocation is “i. Promotion or marketing or sale of goods produced or provided by or belonging to the client;”. A plain reading of the said clause will make it evident that the activities undertaken by the service provider should be towards promotion or marketing or sale of goods produced or provided by the service recipient. In the present case how the Bottler Agreement or the clause 5 of the Business Protocol 2012, support such an conclusion is beyond comprehension of a rational mind. The clause 5 of Business Protocol clearly is not establishing the relationship of service provider and service recipient between the appellants and Coca Cola India. It only states what shall be the investment/ expenditure undertaken by both in respect of various activities specified therein. The said expenditure could have been incurred independently or jointly by the both in terms of the said clause. This expenditure if incurred in joint manner gets shared in the ratio indicated. The conclusion drawn by the revenue on the basis of said clause 5 and Bottlers Agreement do not flow from these and is a conclusion drawn to establish service provider and service recipient relationship. The conclusion drawn that these promote the sale of concentrate is also without any legal basis. Appellants use the concentrate supplied/ procured from Coca Cola India, for the production/ manufacture of finished products. They sell their finished products in the market as pr the plan and marketing strategy finalized by them in association with the brand*

> *owners. The objective of the sale promotion activities undertaken by them is to promote the sale of Beverages of various brands owned by Coca Cola USA and bottled by them. Any further extrapolation made by 15 ST/87258/2015 revenue for drawing the conclusion is beyond the express intent of the Bottler Agreement.'*

in *re Superior Drinks Pvt Ltd*, and from

> *'8. So far the next issue of the said appeal is concerned regarding reimbursement of advertisement and publicity and also the sales target incentives, it is explained by the Learned Counsel that such schemes - target schemes or incentive schemes are issued by the Coca-Cola Co. Ltd. of which the appellant is a franchisee bottler. Appellant on its own cannot issue any such scheme. Whatever schemes are floated by the Coca-Cola Company, the appellant is the implementing agency in their area of operation. Such expenses on actual basis for achieving the Sales target, incentive or advertisement and publicity expenses reimbursed to the appellant by the Coca-Cola Company Ltd. on actual basis. Accordingly, there is no element of receipt of any found toward service. Further, the appellant is not a service provider to Coca-Cola Company Ltd., they are working on principal to principal basis. Accordingly, following the precedent judgment of this Tribunal in the case of Narmada Drinks (P) Ltd. v Commissioner of Central Excise, Raipur, 2017 (5) GSTL 369 (Tri.-Del.) we hold that the appellant is not liable to pay service tax on reimbursement of such expenses from Coca-Cola Company Limited.'*

in *re Brindavan Bottlers Ltd* that the demand under 'business auxiliary service' will not sustain.

6. In view of settled law, as elaborated *supra*, we set aside the impugned order and allow the appeal.

(Pronounced in open court)

(Ajay Sharma)
Member (Judicial)

(C J Mathew)
Member (Technical)

**/as*