

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
MUMBAI**

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 86054 of 2015

(Arising out of Order-in-Appeal No. NGP/EXCUS/000/APP/276/14-15 dated 03.02.2015 passed by Commissioner (Appeals) Central Excise and Customs, Nagpur)

SMV Beverages Private Limited

A-28, MIDC Industrial Area
Saoner, Nagpur – 441 107.

.... Appellants

VERSUS

Commissioner of Central Excise & Customs

Kendriya Utpad Shulka Bhawan
Telangkhedi Road,
Civil Lines, Nagpur – 400 020.

.... Respondent

APPEARANCE:

Ms. Surabhi Sinha, Advocate for the Appellants

Shri Aditya Singh Parihar, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86902/2025

Date of Hearing: 17.07.2025

Date of Decision: 08.12.2025

Per: M.M. PARTHIBAN

This appeal has been filed by M/s SMV Beverages Private Limited, Nagpur (herein after, referred to as "the appellants", for short) assailing the Order-in-Appeal No. NGP/EXCUS/000/APP/276/14-15 dated 03.02.2015 (herein after, referred together as "the impugned order") passed by Commissioner (Appeals) Central Excise and Customs, Nagpur.

2.1 The brief facts of the case are that the appellants herein are engaged *inter alia*, in manufacture of 'aerated waters with sugar' classifiable under tariff item (TI) 2202 1010; 'aerated waters without sugar' classifiable under TI 2201 1020; Packaged drinking water under TI 2201 9090; fruit pulp based beverages under TI 2202 9020 of the Central Excise Tariff Act, 1944. The said manufacturing unit is situated at A-28, M.I.D.C. Industrial Area, Saoner, Nagpur and is involved in bottling of aerated waters from the concentrates supplied by M/s. Pepsi Foods Private Limited/PepsiCo India Holdings Private Limited. For the purpose of payment of central excise duty on the final

products manufactured by the appellants, they are registered with the jurisdictional Central Excise authorities under Central Excise Registration No. AADCS8973LXM001 as a bottling unit. The appellant is also registered with the department for the taxable service of 'Goods Transport Agency' having Service Tax Registration No. AADCS8973LST001.

2.2 The appellants have also entered into a Bottling Appointment and Trademark License Agreement effective from 01.12.2000, with PEPSICO, INC. New York, USA in relation to the beverages to be bottled, sold and distributed by the appellants within the allotted territory. These beverages bear the brand name of PEPSI and the range of products include Pepsi, Mirinda, Mountain Dew, 7-up, Slice, Aquafina (mineral water) and fruit juices.

2.3 The department had noticed that the appellants had received certain amounts under the head "net incentive" and "Support and Other Receipt" from M/s. Pepsi Foods Private Limited (PFL) for advertising, promotion and marketing of Pepsi brand/trademark bearing excisable goods. Since these incentives are market need based support for which PFL contributes from time to time, the Department had interpreted that these incentives are given in order to increase the sale of Pepsi brand products in the market, and therefore concluded that such services provided by the appellants would amount to "Business Auxiliary Services" (BAS) which are liable to service tax under sub-clause (zzb) of Clause (105) of Section 65 of the Finance Act, 1994. Accordingly, show cause proceedings were initiated for recovery of service tax on such amounts received by the appellants during the period April, 2011 to January, 2012 by issue of Show Cause Notice (SCN) dated 17.04.2012.

2.4 In adjudication of the said SCN dated 17.04.2012, the Assistant Commissioner of Central Excise being the original authority had passed Order-in-Original dated 05.08.2014 in confirmation of the service tax demand of Rs.1,45,928/- along with interest under the proviso to Section 73 of the Act of 1994 and imposed penalties on the appellants under Sections 76, 77 and 78 *ibid* along with additional fee of Rs.20,000/- per return under Rule 7C of the Service Tax Rules, 1994. Being aggrieved by the said original order, the appellant had filed an appeal before the learned Commissioner (Appeals). In deciding the appeal, he had upheld the order of the original authority and rejected the appeal filed by the appellants. Feeling aggrieved with the impugned order, appellants have preferred this appeal before the Tribunal.

3.1 When the appeal was firstly heard by the Tribunal on 16.02.2022, the Co-ordinate Bench had noticed that the issue for earlier period from 01.05.2006 to 31.03.2011, stood covered in favour of the appellants by the earlier decision of the Tribunal rendered in the case of self-same appellants reported in 2018 (17) G.S.T.L. 284 (Tri. Mumbai) on 17.03.2017. However, as the Co-ordinate Bench felt that in view of the decision of the Hon'ble Bombay High Court in *Coca Cola India Pvt. Ltd. Vs. Commissioner of C. Ex., Pune-III – 2009 (16) S.T.R. 657 (Bom.)*, having a bearing on the disputed issue, it referred the matter to a Larger Bench of the Tribunal to decide whether the decision of the Tribunal in the matter of the appellants requires re-consideration.

3.2 The Larger Bench of the Tribunal had considered the reference made by the Co-ordinate Bench of the Tribunal and had ordered as follows.

"40. The reference is, accordingly, answered in the following terms:

*The decision of the Bombay High Court in **Coca Cola India Pvt. Ltd. vs. Commissioner of C. Ex., Pune-III** would have no application in the present case and, therefore, the decision of the Tribunal in the matter of the appellant in **SMV Beverages Pvt. Ltd. vs. Commissioner of Central Excise, Nagpur** does not require any re-consideration."*

In arriving at such a conclusion, the Larger Bench of the Tribunal had examined the disputed issue in detail, and held that since the appellant was promoting the trademark/brand name of Pepsi Foods, but section 65(19) of the Finance Act, 1994 does not cover promotion of brand name or trademark of a client, it cannot, be urged that BAS was provided by the appellant to Pepsi Foods. Therefore, in terms of the Final Order dated 17.03.2017 already passed in favour of the self-same appellants holding that demand of service tax on BAS is not sustainable, the adjudged demands in the impugned order dated 03.02.2015 does not stand the legal scrutiny; and therefore the same is not sustainable and is liable to be set aside, the Larger Bench had decided that said decision of the Tribunal does not require re-consideration.

3.3 The relevant paragraphs of the said order of the Larger Bench dated 07.06.2024 is quoted herein below:

*"17. When the present appeal came up for hearing, the Division Bench referred the matter to a Larger Bench of the Tribunal in view of the judgment of the Bombay High Court in **Coca Cola**.*

*18. It would, therefore, be appropriate to examine the judgment of the Bombay High Court in **Coca Cola**.*

19. The question that arose for consideration before the Bombay High Court in **Coca Cola** was whether the appellant that was engaged in the manufacture of 'concentrates' would be eligible to avail credit of the service-tax paid on the advertising, sales promotion and market research services and could utilize such credit towards payment of excise duty on the manufacture of 'concentrates'. The two questions on which the appeal was admitted are as follows:

"(a) Whether services of advertising and marketing procured by the Appellants in respect of advertisements for aerated waters are covered by the definition of the words "input services" as defined in Rule 2(I) of the CENVAT Credit Rules, 2004, when admittedly the Appellants manufacture concentrates exclusively used for the manufacture of the respective aerated waters which are advertised by the Appellants?

(b) Whether the advertisement or sales promotion of aerated waters undertaken by manufacturer of concentrate is covered by the inclusive part of the definition of "input service" contained in Rule 2(I) of the CENVAT Credit Rules, 2004?"

20. For this purpose, the Bombay High Court examined rule 2(I) of the CENVAT Credit Rules 2004, which is as follows:

"2(I) – 'input service' means any service,-

(i) used by a provider of taxable service for providing an output service; or

(ii) used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal, and includes services used in relation to setting up modernisation, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, **activities relating to business**, such as, accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal."

(emphasis supplied)

21. It is seen that clause 2(I) (ii) of the 2004 Credit Rules covers a manufacturer who uses the 'input service' directly or indirectly, in or in relation to the manufacture of final products and includes services used in relation to activities relating to business. It is in this context that the appellant therein had contended that the advertisement of the brand name has a direct relationship with the manufacture of concentrate inasmuch as the demand, and consequently the production, of concentrate depends on the consumption of the soft drink and would, therefore, be covered by clause (ii) of rule 2(I), which permits an indirect use in or in relation, to the manufacture of the final product.

22. The Bombay High Court noticed that the definition of input service employs the phrase 'activity relating to business'. The words 'relating to' further widens the scope of the expression 'activities relating to business'. Therefore, it must follow that all and any activity relating to business falls within the definition of 'input service' provided there is a relation between the manufacturer of concentrate and the activity. One of the five categories contained in the definition of 'input service', in so far as a manufacturer is concerned, would be any service used by the manufacturer, **whether directly or indirectly**, in or in relation to the manufacture of final products

and if an assessee can satisfy this limb, then credit of the input service would be available. As an illustration, the Bombay High Court pointed out that input services used in relation to setting up, modernization, renovation or repairs of a factory will be allowed as credit, even if they are assumed as not an activity relating to business as long as they are associated directly or indirectly in relation to manufacture of final products and transportation of final products upto the place of removal. The Bombay High Court ultimately held:

"44. Having thus arrived at the conclusion on the meaning of the expression of input services and that manufacturer can avail of the credit of the services tax paid by him for payment of CENVAT duty, the question referred for our consideration will have to be answered as under : Question (a) is answered in the affirmative in favour of the assessee and against Revenue and question (b) again answered in the affirmative in favour of the assessee and against revenue."

23. It would thus be seen that the decision of the Bombay High Court in **Coca Cola** is in respect of availment of 'input service' tax credit in respect of advertising and marketing services. The question that arose was whether the advertisement or sale promotion of aerated water undertaken by the manufacturers of concentrates would be covered under rule 2(I) of the 2004 Credit Rules. The Bombay High Court held that since the advertisement of aerated water **indirectly** also promotes the sale of 'concentrates', service tax paid on the advertisement of aerated water would be covered by the definition of 'input service' and hence credit could be taken.

24. In the present case, the issue is regarding interpretation of clause (ii) of section 65(19) of the Finance Act. It would apply if the appellant promotes or markets the goods produced or provided by or belonging to the client. The client, in the present case, is Pepsi Foods and it produces 'concentrates' and not aerated water. Aerated water is manufactured by the appellant though the main raw material for this is 'concentrate', which is purchased by the appellant from Pepsi Foods. The definition of 'input service' contains the expression 'directly or indirectly', but such an expression does not find place in the definition of BAS, for the definition of BAS does not mention any service in relation to promoting or marketing of sale, **directly or indirectly** of the goods produced.

25. The view of the department is that advertising of aerated water by the appellant would also result in increase of the sale of 'concentrates' purchased by the appellant from Pepsi Foods. Though, 'concentrate' is the main raw material for the manufacture of aerated water by the appellant, but the definition of BAS in section 65(19)(ii) of the Finance Act does not provide that the appellant would render BAS since the advertisement of aerated water would increase the sale of 'concentrate'.

26. BAS under section 65(19)(ii) of the Finance Act means any service in relation to promotion or marketing of service provided by the client. This would, therefore, be attracted only if the appellant was promoting or marketing the goods produced or provided by or belonging to the client i.e. Pepsi Foods. The goods that are produced by Pepsi Foods are 'concentrates' and not 'aerated water', which is manufactured by the appellant. The promotion schemes floated by the appellant do not relate to 'concentrate' at all.

27. The decision of the Bombay High Court in **Coca Cola** would, therefore, not be relevant to the issue involved in the present appeal.

28. It may now be useful to refer to some of the decisions of the Tribunal in identical matters where the judgment of the Bombay High Court in **Coca Cola** in the context of BAS has been considered and distinguished.

29. In **Superior Drinks**, the appellant was engaged in bottling and marketing of beverages under the brand name Coca Cola, Kinley and Sprite. During the course of investigation and scrutiny of records, it was found that the appellant had received certain amount from Coca Cola under the head 'marketing support receipt'. The department sought to subject this amount to service tax under BAS for the period up to 01.07.2012. The demand was proposed treating this amount received by the appellant towards undertaking sale, marketing and promotion of the goods belonging to the client i.e. 'concentrate'

supplied by Coca Cola. In this connection, the Tribunal examined the Bottlers Agreement, which is almost similar to the Agreement involved in the present appeal. The Tribunal noticed that though the Commissioner had relied heavily upon the judgment of the Bombay High Court in **Coca Cola**, but this decision would not be applicable for the following reasons:

"5.9 There cannot be more convoluted application of the decision of the High Court and stretching the provisions in an agreement for purpose of levy of tax. If the arguments of the Commissioner were to be accepted then in that case every manufacturer/ producer/ supplier of the goods who purchases and material/ inputs is promoting the sale of his input supplier. **Since as the sale of his finished goods goes up automatically consumption of inputs will go up and accordingly he promotes the sale of input manufacturer/ supplier. In our view such an interpretation is neither logical or rational. Both input suppliers and the finished product manufacturer are independent business entity acting in the interest of their business.** The issue before the High Court was vis a vis the admissibility of CENVAT Credit in respect of Advertisement services availed by the Coca Cola India as is evident from para 2 & 3 of order reproduced below: xxxxxxxxxx 5.10 While considering the questions as above High Court has recorded what has been state by the Commissioner. In the case before High Court, the advertisement expenses were incurred by Coca Cola India and High Court had held that expenses towards advertisement services are part of the cost incurred for production of the finished product, and hence these services are to be treated as input services for determining eligibility to CENVAT Credit. In our view the decision of High Court does not state what Commissioner has intended to conclude from the same."
(emphasis supplied)

30. The Bench, thereafter, also examined the position after 01.07.2012 and observed as follows:

"5.13 From the definition of "service" as per section 65B(44), the essential ingredient of same are "any activity carried out by a person for another" and "consideration for undertaking such and activity". Admittedly the dispute is not in respect of declared services or negative list of services or those falling in the exclusion clause. Hence these are left out from our consideration in subsequent paragraphs.

5.14 The phrase "any activity carried out by a person for another", is very clear that the activity sought to be taxed, should be the activity carried out by one person for the another person. Thus any activity which has been undertaken by a person on his own account for himself

cannot be said to be covered by the said phrase even if this activity is undertaken by the person with the financial assistance/ support of other person either partially or completely. xxxxxxxxxxxx.

5.15 In the present case the appellants were undertaking the marketing and sales promotion activity on their own account, Coca Cola India was only providing certain financial assistance in undertaking such activity. The activity undertaken were not performed by the appellant for Coca Cola India, but was performed for themselves. Since no activity has been performed by the appellant for Coca Cola India, we are of view that mere receipt of amounts under the head "Market Support Received" will (not) qualify them as "service" under Section 65B(44).

5.16 We do not find any merits in the order of the Commissioner for the period after 01.07.2012 also."

(emphasis supplied)

31. In **Wave Beverages**, the decision of the Tribunal in **Superior Drinks** was followed and it was also noticed that the decision of the Bombay High Court in **Coca Cola** had been distinguished by the Tribunal in **Superior Drinks**. The relevant portions of the decision of the Tribunal in **Wave Beverages** is reproduced below:

"4.2 **We find that the issue involved in the present appeal is squarely covered by the decisions of the tribunal in case of Superior Drinks Pvt Ltd** [2019 (6) TMI 272-CESTAT Mumbai]. This decision in turn follows the decisions rendered by the Delhi Bench in case of Narmada Drinks (P) Ltd reported at 2017 (5) GSTL 369 (T-Del)] and also in case of Narmada Drinks (P) Ltd reported at [2018 (6) TMI 899 (T- Del)]. Similar view has been expressed by the Allahabad Bench in case of Brindavan Bottlers Ltd [2019 (27) GSTL 354 (T-All)] and Mumbai Bench in case of SMV Beverages Pvt Ltd [2018 (17) ELT GSTL 284 (T-Mum)]

xxxxxxxxxxxx

4.7 **The decision of the Hon'ble Bombay High Court relied upon by the Commissioner in the impugned order and by the Authorized Representative has been distinguished by the Mumbai Bench in case of Superior Drinks xxxx."**

(emphasis supplied)

32. In **Kandhari Beverages**, the Tribunal again followed the decision of the Tribunal in **Superior Drinks** and also noticed that the decision of the Bombay High Court in **Coca Cola** had been distinguished in **Superior Drinks**. The relevant portion of the order is reproduced below:

"4.2 **We find that the issue involved in the present appeal is squarely covered by the decisions of the Tribunal in case of Superior Drinks Pvt Ltd** [2019 (6) TMI 272 -CESTAT Mumbai]. This decision in turn follows the decisions rendered by the Delhi Bench in case of Narmada Drinks (P) Ltd reported at 2017 (5) GSTL 369 (T-Del)] and also in case of Narmada Drinks (P) Ltd reported at [2018 (6) TMI 899 (Tri.- Del)]. Similar view has been expressed by the Allahabad Bench in case of Brindavan Bottlers Ltd [2019 (27) GSTL 354 (T-All)] and Mumbai Bench in case of SMV Beverages Pvt. Ltd [2018 (17) ELT GSTL 284 (T-Mum)].

xxxxxxxxxxxx

4.7 **The decision of the Hon'ble Bombay High Court relied upon by the Commissioner in the impugned order and by the Authorized Representative has been distinguished by the Mumbai Bench in case of Superior Drinks. xxxxxxxxxxxx"**

(emphasis supplied)

33. In **Ludhana Beverages**, the decision of the Tribunal in **Kandhari Beverages** was followed.

34. The decision of the Tribunal in **Beltek Canadian Water** that was decided on 30.01.2024 now needs to be examined. This decision was rendered after the reference was made by the Division Bench. The appellant was engaged in the manufacture of packaged drinking water. It was noticed that the appellant had received incentives from M/s. Pepsi Foods to promote the sales of the goods of Pepsi brand, but it had not paid service tax. The issue, therefore, that arose before the Tribunal was whether the sale incentive, advertisement and publicity charges received by the appellant could be subjected to service tax under BAS. The Tribunal followed its earlier decisions in **Narmada Drinks (P) Ltd. vs. Commissioner of Central Excise, Raipur**¹⁶; **Commissioner of C. Ex. & S.T., Lucknow vs. Brindavan Bottlers Ltd.**¹⁷; and **SMV Beverages** and held:

"4.8 In view of the decisions as above we do not find any merits in the impugned order demanding the service tax by classifying the incentive and sale promotion receipts, to be towards the provisions of "business auxiliary services".

35. The aforesaid Division Bench of the Tribunal have for good reasons distinguished the decision of the Bombay High Court in **Coca Cola**.

36. The view taken in the reference order that "net incentive" and "support and other receipt" are not only for enhancement of the visibility and goodwill of the brand name owned by Pepsi Foods, but also promote the sale of 'concentrates' has been found to be too farfetched and has not been accepted by benches of the Tribunal. The receipt of incentives by the appellant from Pepsi Foods under the head "net incentive" and "support and other receipts" for advertising, promoting and marketing the trademark would not mean that BAS has been provided by the appellant.

37. The decision of the Tribunal in the matter of the appellant for the earlier period would, therefore, cover the controversy involved in this appeal. This decision was not followed by the Division Bench in the reference order only because of the decision of the Bombay High Court in **Coca Cola**.

38. This apart, the appellant was promoting the trademark/brand name of Pepsi Foods, but section 65(19) of the Finance Act does not cover promotion of brand name or trademark of a client. It cannot, therefore, be urged that BAS was provided by the appellant to Pepsi Foods.

39. In this connection, it needs to be noted that brand promotion service was made taxable w.e.f. 01.07.2010 by section 65(105)(zzzzq) of the Finance Act. Introduction of a new entry and inclusion of certain services in that entry pre supposes that there was no earlier entry covering the said service. In this connection reference can be made to the decision of the Bombay High Court in **Indian National Shipowners' Association vs. Union of India**¹⁸, wherein it was held:

"38. xxxxxxxx. Introduction of new entry and inclusion of certain services in that entry would presuppose that there was no earlier entry covering the said services. Therefore, prior to introduction of entry (zzzzj), the services rendered by the members of the 1st petitioner were not taxable. Creation of new entry is not by way of amending the earlier entry. It is not a carve out of the earlier entry. Therefore, the

services rendered by the members of the 1st petitioner cannot be brought to tax under that entry."

4. From the above detailed discussions and analysis by the Larger Bench, for arriving at the conclusion that the service tax levy on BAS shall not be sustainable, we are of the view that the issue under dispute is no more open for debate. Therefore, on the basis of the decision taken by the larger Bench and in view of the Final Order No. A/86400-86401/17/STB dated 17.03.2017 setting aside the demands and allowing the appeal in favour of the self-same appellants, we are of considered opinion that the impugned order dated 03.02.2015 in the present appeal is unsustainable.

5. In the result, the impugned order dated 03.02.2015 is set aside and the appeal filed by the appellants is allowed in their favour.

(Order pronounced in open court on 08.12.2025)

(S.K. MOHANTY)
MEMBER (JUDICIAL)

(M.M. PARTHIBAN)
MEMBER (TECHNICAL)

Sinha