2020-TIOL-1650-CESTAT-KOL

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH, KOLKATA
REGIONAL BENCH
COURT NO. II

Excise Appeal No.77571 of 2018

Arising out of Order-in-OriginalNo.40/COMMR/CGST & CE/HWH/Adjn/2017-18, Dated: 28.03.2018
Passed by Commissioner of Central Tax (GST & C.EX), Howrah Commissionerate

Date of Hearing: 13.10.2020
Date of Decision: 12.11.2020

M/s BENGAL BEVERAGES PVT LTD
(DURGAPUR EXPRESSWAY, DANKUNI, HOOGHLY, PIN-712310)

Vs

COMMISSIONER OF CGST AND CENTRAL EXCISE
HOWRAH COMMISSIONERATE
(MS BUILDING, CUSTOMS HOUSE, 15/1, STRAND ROAD
KOLKATA-700001)

Appellant Rep by: Shri Ankit Kanodia, CA
Respondent Rep by: Shri S Mukhopadhyay, AR

CORAM: P K Choudhary, Member (J)
P Anjani Kumar, Member (T)

CX - The assessee manufactures aerated water and sells the same in glass bottles of assorted sizes to its various customers such as distributors and institutional buyers for sale to the ultimate consumers - The Adjudicating Authority has confirmed service tax demand on glass bottles and crate rentals under Supply of tangible goods service - It is the case of department that the said rental charges are in the nature of supply of tangible goods service as the effective control and possession of such crates and glass bottles are not transferred by assessee to the customers, though it is not disputed that the assessee has paid VAT on the same and has been all along assessed by VAT authorities for such levy of VAT under the deemed sales clause - The issue is settled by judgment of Andhra Pradesh High Court, wherein it was held that such crate rentals would be liable to VAT/Sales tax on the ground that it

amounted to deemed sale of crates inasmuch as there was transfer of right to use with effective control and possession of crates - It is trite that the transactions which are deemed sales cannot be liable to service tax - Also, it is seen from the order of Adjudicating authority that he has not at all considered the submissions of assessee as regards payment of VAT on the said rentals - The entire goods are handed over to the customer who gets the effective possession as well as control to use the goods - Hence, the observation of Adjudicating authority that the control and possession has not been passed is not justified and hence is liable to be rejected - Further, the decision of Tribunal in case o*f HINDUSTAN COCA COLA BEVERAGES PVT. LTD.* ***2015-TIOL-2899-CESTAT-DEL*** squarely covers the issue at hand - Further, on perusal of records, it is found that the demand has been raised for the period 2011-12 in 2017 onwards whereas the spot memo was issued by Department in 2014 itself - No explanation has been furthered by Department in respect of such gross delay in proceeding with the matter - Demand of service tax on glass bottles and crate rentals cannot be sustained both on merits and on limitation and is accordingly set aside: CESTAT

Appeal allowed

Case laws cited:

HINDUSTAN COCA COLA BEVERAGES PVT. LTD. Versus COMMR. OF S.T., DELHI - 2015-TIOL-2899-CESTAT-DEL... Para 3.1

COMMISSIONER OF C. EX. & S.T., LUCKNOW Versus BRINDAVAN BOTTLERS LTD. [2019 (27) G.S.T.L. 354 (Tri. - All.)]... Para 3.1

FINAL ORDER NO. 75582/2020

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 learned Commissioner, whereby the demand of service tax of Rs.5,71,11,725/- has been confirmed for the period 2011-12 to 2014- 15, along with interest and penalty as proposed in the Show Cause Notice dated 14th August 2017.

2. Briefly stated, the facts of the case are that the appellant manufactures aerated water and sells the same in glass bottles of assorted sizes to its various customers such as distributors and institutional buyers for sale to the ultimate consumers. The said product is assessed under MRP based valuation under Section 4A of the Central Excise Act, 1944. While delivering such aerated water in the glass bottles, plastic crates are required to keep the glass bottles properly arranged in order to prevent any breakage of same. The right of possession and effective control of such glass bottles and plastic crates is transferred by the appellant to its purchasers against payment of rental charges, which is included in the sale price of the aerated water in the tax invoice prepared by the appellant. The appellant's customers have the legal right to use the bottles and crates in respect of which tax invoice is raised by the appellant. On such rental charges in respect of glass bottles and plastic crates, the appellant has duly paid tax under the West Bengal Value Added Tax Act, 2003 (hereinafter referred to as the 2003 Act). Under the provisions of the 2003 Act, the transfer of right of possession and effective control of the glass bottles and plastic crates is treated as a transfer of the right to use such bottles and crates and as amounting to a deemed sale of goods within the meaning of Article 366(29A) of the Constitution of India for the purpose of levy of VAT. Such definition of sale in clause (39) of section

2 of the 2003 Act is in line with the provisions of clause (29A) of Article 366 of the Constitution. The sales tax authorities have all along taken the view that the appellant is liable to pay VAT on the rental charges of bottles and crates. Whereas the appellant paid VAT @ 4%/5%, as applicable, the said authorities sought to demand tax @13.5%/14.5%. However, there is no dispute between the appellant and the sales tax authorities that such rental charges are liable to VAT as consideration for transfer of right to use the goods amounting to deemed sale thereof within the meaning of section 2(39)(c) of the 2003 act and Article 366(29A) of the Constitution of India. Tax on the sale or purchase of goods within the State is a subject which falls in the State List under the Seventh Schedule to the Constitution and it is beyond the competence of the Central Government to levy Service Tax on such sale or purchase. The transfer of right to use the bottles and crates having been taxed as deemed sale of goods, there can be no question of charging any service tax in respect thereof. On August 25, 2014 a spot memo was issued by the Audit team, inter alia, with regard to taxability of rental charges in respect of bottles and crates. By a letter dated January 30, 2015, the appellant denied taxability. After nearly 3(three) years, on August 14, 2017, the Commissioner of Central Tax (GST &C.Ex) (hereinafter referred to as the Commissioner) issued a show cause – cum – demand notice to the Appellant proposing to demand service tax on amounts received by the Appellant for the period 2011-12 to 2014-15 on account of rental charges in respect of returnable glass bottles and plastic crates in which aerated water manufactured by the appellant was sold to customers on the allegation that the appellant rendered 'supply of tangible goods for use' service as defined in Section 65(105)(zzzzj) of the Finance Act, 1994 (hereinafter referred to as the 1994 Act). The appellant by its letter dated March 5, 2018 duly replied to the said show cause – cum – demand notice pointing out inter alia that under the different statutory provisions governing the long period in consideration, both from April 1, 2011 to June 30, 2012 and from July 1, 2012 to March 31, 2015, the transfer of right to use goods treated as a deemed sale on which VAT was chargeable was not to be subjected to any service tax. The appellant further contended that the said show cause – cum – demand notice was substantially barred by limitation. Department has raised demand of service tax under supply of tangible goods service as defined under Section 65(105) (zzzzj) of the Finance Act, 1994 as applicable to service tax. Hence, the present appeal before the Tribunal.

3. Shri Ankit Kanodia, learned Chartered Accountant, appeared on behalf of the Appellant. He contended that the service tax demand on glass bottles and crate rentals is not sustainable for the following reasons:

> (i) crate rental has been collected by various bottling units across India while selling the beverages as a consideration towards transfer of right to use (deemed sale) and such rental was liable to VAT/CST (sales tax). Transfer of Right to use was held to be liable to VAT/Sales tax by the Hon'ble *Andhra Pradesh High Court in W.P. No. 25588 of 2007 in the case of Hindustan Coca Cola Beverages Pvt. Ltd. v. State of Andhra Pradesh W.P. Nos. 21115 of 2005, 856 of 2006 and 25588 of 2007.*
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> (ii) The department has accepted that the said charges cannot be taxed under service tax in case of other bottling units in West Bengal namely in the case of *M/s. Diamond Beverage Private Limited (OIO No. 33-34/COMMR/ST-II/KOL/2017-18 dated 22nd December 2017)* as accepted by the Committee of Chief Commissioners also vide letter dated 16th April 2018.

3.1 He further relied on the following judgments which have held that Rental on glass bottles and crate cannot be subjected to service tax:

*(a) HINDUSTAN COCA COLA BEVERAGES PVT. LTD. Versus COMMR. OF S.T., DELHI [2016 (42) S.T.R. 696 (Tri. - Del.)] = **2015-TIOL-2899-CESTAT-DEL***

(b) COMMISSIONER OF C. EX. & S.T., LUCKNOW Versus BRINDAVAN BOTTLERS LTD. [2019 (27) G.S.T.L. 354 (Tri. - All.)]

3.2 The learned Chartered Accountant has also produced copies of tax invoice which clearly shows that the Appellant has charged VAT on such rentals and also produced copies of VAT assessment orders for the relevant years wherein department has accepted the said fact that such rentals would be liable to VAT under the VAT laws being in the nature of deemed sales.

It is his submission that the demand is also barred by limitation as the demand covers the period from 2011-12 to 2014-15 whereas the SCN was issued on 14th August 2017 much after the expiry of five years. He further submits that the spot memo was issued in 2014 whereas the SCN was issued in 2017 and thus the question of invoking extended period of limitation does not arise as the department was fully aware of the facts of the case of the Appellant and hence, no penalty is imposable.

4. The learned Authorized Representative appearing on behalf of the respondent department, agreed that the Committee of Chief Commissioners have accepted the order in case of other assessees.

5. Heard both sides and perused the appeal records.

6. In the instant case, it is seen that the Adjudicating Authority has confirmed service tax demand on glass bottles and crate rentals under Supply of tangible goods service.It is the case of the department that the said rental charges are in the nature of supply of tangible goods service as the effective control and possession of such crates and glass bottles are not transferred by the Appellant to the customers, though it is not disputed that the Appellant Company has paid VAT on the same and has been all along assessed by the VAT authorities for such levy of VAT under the deemed sales clause.

The Appellant has contended that the supply of glass bottles and crates amounted to deemed sale, which was liable to VAT/sales tax as the effective control and possession of the goods were transferred by the Appellant. It is seen that CGST & CX, Kolkata South Commissionerate, vide Order-in-Original 33-34/COMMR/STII/ KOL/2017-18 dated 22nd December 2017 has dropped the demand on the same issue for another assessee and the same has been accepted by the Revenue as well. Further, the issue is settled by the judgment of the Hon'ble Andhra Pradesh High Court in the *Writ Petitions No. 21115/2005, No. 856/2006 and No. 25588/2007,* where it was held that such crate rentals would be liable to VAT/Sales tax on the ground that it amounted to deemed sale of crates inasmuch as there was transfer of right to use with effective control and possession of crates. It is trite that the transactions which are deemed sales cannot be liable to service tax. Also, it is seen from the order of the learned Adjudicating authority that he has not at all considered the submissions of the Appellant as regards payment of VAT on the said rentals.

6.1 Further, when the aerated beverages are supplied by the Appellant to its customers, the possession as well as effective control of the said bottles along with crates in which they are supplied to keep them free from spillage and breakage, is also passed by the Appellant assessee as the Appellant cannot govern the action of its customers as to

how the customers would deal with such crates and bottles once supplied. The definition of supply of tangible goods is as follows:-

> *"Taxable services means any service provided or to be provided to any person, by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use, without transferring right of possession and the effective control of such machinery, equipment and appliances"*

From the above definition, when there is supply of use of goods without transferring right of possession and effective control of the equipment, the same would fall within the category of supply of tangible goods service. However, in the instant case of the appellant, the entire goods are handed over to the customer who gets the effective possession as well as control to use the goods. Hence, the observation of the Ld. Adjudicating authority that the control and possession has not been passed is not justified and hence is liable to be rejected. Further, we find that the decision of this Tribunal in the case o*f (a) HINDUSTAN COCA COLA BEVERAGES PVT. LTD. Versus COMMR. OF S.T., DELHI 2016 (42) S.T.R. 696 (Tri. - Del.) =* ***2015-TIOL-2899-CESTAT-DEL*** squarely covers the issue at hand.

6.2 Further, on perusal of records, we find that the demand has been raised for the period 2011-12 in 2017 onwards whereas the spot memo was issued by the Department in 2014 itself. No explanation has been furthered by the Department in respect of such gross delay in proceeding with the matter. Therefore, we find that invocation of the extended period of limitation is not justified.

7. 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 glass bottles and crate rentals cannot be sustained both on merits and on limitation and is accordingly set aside. Since demand of service tax is set aside, penalty and interest are also not sustainable.

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

(Order pronounced in the open court on 12.11.2020)