**IN THE HIGH COURT OF BOMBAY AT GOA.**

**Excise Appeal No. 31 of 2008.**

Commissioner of Central Excise, Goa-403 001 ..... Appellant.

Versus

Hindustan Coca Cala Beverages Pvt. Ltd., M/2-11, Verna Industrial Estate, Verna, Goa. ..... Respondent.

Ms. Susan Linhares, Advocate for the appellant.

Mr. V. Menezes, Advocate for the respondent.

**Coram:-F. M. REIS,**
**K. L. Wadane,JJ.**

**Date:-10th March, 2015.**

**ORAL JUDGMENT ( Per F. M. Reis, J)**

Heard Ms. Susan Linhares, learned Advocate appearing for the appellant and Mr. V. Menezes, learned Advocate appearing for the respondent.

2. The above appeal came to be admitted by an order dated 21.4.2009 on the following substantial questions of law:-

1. Whether, the service tax paid on mobile phones used by employees/staff of a manufacturing company would be eligible for cenvat credit under the Cenvat Credit Rules, 2004 ?
2. Whether, the Customs, Excise and Service Tax

Appellate Tribunal was correct in holding their the Board's Circular No.59/8/2003-ST dated 20.6.2003 specifically clarifying that service tax paid on mobile phone is not eligible for cenvat credit is in applicable under the Cenvat Credit Rules, 2004?

3. Ms. Linhares, learned counsel appearing for the appellant has pointed out that as per the circular dated 20.6.2004 at clause 2.8, mobile phones are not covered. The learned counsel has further pointed out that as the mobile phones were not covered and considering the saving clause in the Rules of 2003, the circular is still in force and, as such, even in terms of Rules of 2004, such credit is not available to the respondent. The learned counsel further points out that upon reading of the definition of the word “Input Services” Rule 2(l) are not included for the purpose of holding that such services are Input Services. The learned Counsel has thereafter taken us through the definition of the word “Output Services” at Rule 2(p) of 2004 to point out that the mobile phones have not been included therein. The learned Counsel further submits that the reason for not including mobile phones for such credit, according to her, is because mobile phones are not installed in the premises of the respondent. The learned counsel has thereafter taken us through the order passed by the Commissioner(Appeals) as well as Customs, Excise & Service

Tax Appellate Tribunal (CESTA) to point out that both the authorities have failed to examine the saving clause to come to the conclusion that the circular of the year 2003 was not applicable to the facts of the case. The learned Counsel further submitted that the substantial questions of law framed by this Court be answered in favour of the appellant.

4. On the other hand the respondent has supported the impugned order. The learned Counsel has taken us through the saving clause at Rule 16 to point out that the Rules, 2002 and the circular issued prior to the coming into force of Rules, 2004 would be applicable provided they are consistent with Rules of 2004 and there is corresponding provision in Rules of 2004. The learned Counsel further points out that the input services were not defined under 2002 Rules and as such, the question of claiming that there are any corresponding Rules in 2004 is totally misplaced. The learned Counsel further submits that even upon reading of the definition of word “Input Services” in the Rules, 2004, it appears that every activity carried out by the respondent in connection with manufacturing of the goods are entitled for the credit. The learned Counsel has thereafter taken us through the order passed by both the authorities to point out that the authorities have relied upon an order of the CESTAT to come to the conclusion that mobile phones were also included for such credit. The learned Counsel, as such,

submits that the above appeal be rejected.

5. We have considered the submissions of both the learned counsel and we have also gone through the record.

6. In order to appreciate the contentions raised by the learned counsel appearing for the appellant it would be appropriate to quote the provisions of Rules 16 of 2004 Rules. Said Rule 16 reads thus:-

> "(1) Any notification, circular, instruction, standing order, trade notice or other order issued under the CENVAT Credit Rules, 2002 or the Service Tax Credit Rules, 2002, by the Central Government, the Central Board of Excise and Customs, the Chief Commissioner of Central Excise or the Commissioner of Central Excise, and in force at the commencement of these rules, shall, to the extent it is relevant and consistent with these rules, be deemed to be valid and issued under the corresponding provisions of these rules.
>
> (2) References in any rule, notification, circular, instruction, standing order, trade notice or other order to the CENVAT Credit Rules, 2002 and any provision thereof or, as the case may be, the Service Tax Credit Rules, 2002

and any provision thereof shall, on the commencement of these rules, be construed as references to the CENVAT Credit Rules, 2004 and any corresponding provision thereof."

7. On going through the said Rules what emerges is that Rules of 2002 and any other circular as in force before coming into force of Rules 2004 and the commencement of the said Rules would be construed as reference to the Cenvat Credit Rules of 2004 and any corresponding provisions thereof. The said Rules also provide that such Rules or any circulars should be relevant and should be consistent with Rules of 2004. As rightly pointed out by Mr. Menezes, learned counsel appearing for the respondent, the word "Input Services" were not defined in the Rules of 2002. In such circumstances it cannot be said that there is any corresponding Rule in Rules of 2004 which can be said to have been saved.

8. On perusal of the order passed by the Commissioner (Appeals) we find that the Commissioner (Appeals) has rightly come to the conclusion that Rules 2002 would not be applicable to the facts of the present case. Such finding has been confirmed by the Appellate Tribunal by holding that circular of 2003 would not be applicable to defeat the credit availed of by the respondent.

9. We find no reason to interfere with the orders passed by both the Courts below.

10. For the sake of convenience we reproduce the definition of “Input Services” defined under Section 2(l) of Rules, 2004 and “Output Services” defined under Section 2(p) Rules,2004 which read as under:-

> **“Input Service” means any service**-
>
> (i) used by a provider of [output service] for providing an output service; or
>
> (ii) used by the 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 modernization, 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, accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, security, business exhibition, legal services, inward

transportation of inputs or capital goods and outward transportation upto the place of removal;

[but exclude],-

[(A) service portion in the execution of a works contract and construction services including service listed under clause (b) of Section 66E of the Finance Act(hereinafter referred as specified services) in so far as they are used for-

(a) construction or execution of works contract of a building or a civil structure or a part thereof; or

(b) laying of foundation or making of structures for support of capital goods, except for the provision of one or more of the specified services; or]

[(B) [service provided by way of renting of a motor vehicle], in so far as they relate to a motor vehicle which is not a capital goods; or

[(BA) service of general insurance business, servicing, repair and maintenance, in so far as they relate to a motor vehicle which is not a capital goods, except when used by-

(a) a manufacturer of a motor vehicle in respect of a motor vehicle manufactured by such person; or

(b) an insurance company in respect of a motor vehicle

insured or reinsured by such person; or]

(C) such as those provided in relation to outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, life insurance, health insurance and travel benefits extended to employees on vacation such as Leave or Home Travel Concession, when such services are used primarily for personal use or consumption of any employee;]

**"Output Service"** means any service provided by a provider of service located in the taxable territory but shall not include a service,-

(1) specified in section 66D of the Finance Act, or

(2) where the whole of service tax is liable to be paid by the recipient of service."

11. Considering the definition of word "Input Services" in 2(l) of the Rules of 2004, any expenditure incurred in the manufacturing activity would be entitled for credit facility. It is not disputed that the expenses of mobile phones are in connection with manufacturing process of the respondent. In such circumstances, we find that both the substantial questions of law framed by this Court are to be answered against the

appellant.

12. We find no merit in the above appeal. It stands accordingly rejected.

K. L. WADANE, J . F. M. REIS, J.

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