IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.2

Service Tax Appeal No.32 of 2009

(Arising out of Order-in-Original No.CCE/BBSR-II/S.Tax/No.14-COMMISSIONER/2008 dated 26.11.2008 passed by Commissioner, Central Excise, Customs & Service Tax, Bhubaneswar.)

Commissioner of Central Excise & Service Tax, Bhubaneswar-I
(C.R. Building, Rajas Vihar, Bhubaneswar, Odisha.)

...Appellant

VERSUS

M/s.Hi-Tech Bottling Private Limited

.....Respondent

(Jayantipur, Sambalpur, Orissa.)

APPEARANCE

Shri K.Chowdhury, Authorized Representative for the Appellant (s)

NONE for the Respondent (s)

CORAM: HON'BLE SHRI SANJIV SRIVASTAVA, MEMBER(TECHNICAL)
HON'BLE SHRI P.DINESHA, MEMBER(JUDICIAL)

FINAL ORDER NO. 75408/2022

DATE OF HEARING : 27 July 2022
DATE OF DECISION : 27 July 2022

SANJIV SRIVASTAVA :

This Appeal, filed by the Revenue, is directed against Order-in-Original No.CCE/BBSR-II/S.Tax/No.14-COMMISSIONER/2008 dated 26.11.2008. By the impugned order, the Ld.Commissioner has dropped the demand issued under show cause notice C.No.(15)25/S.Tax/Adj./BBSR-II/I/2006/22072-74A dated 29.11.2007.

2. The respondents herein are engaged in carrying out the job of bottling, blending and labeling of Indian made Foreign Liquor (IMFL) in their work premises. Acting on intelligence, investigation was undertaken which culminated into issuance of show cause notice dated 27.11.2007 asking them to show cause as to why :-

1. Service Tax including Education Cess amounting to Rs.95,14,725/- (Rupees Ninety Five Lakhs Fourteen Thousand Seven Hundred Twenty Five only) should not be recovered from them under Section 73 (1) of the Finance Act, 1994.

2. Interest at the appropriate rate should not be recovered from them under Section 75 of the Finance Act, 1994.

3. Penalty should not be imposed under sections 76, 77 & 78 of the Finance Act, 1994 for contraventions of the provisions of the Finance Act, 1994 and non-observance of the prescribed formalities.

The show cause notice has been dropped as per the impugned order. Hence the Revenue is in appeal before us.

3. The matter has been listed for hearing on 28.08.2019, 05.11.2019, 14.01.2020, 18.01.2022 and on today. On most of the occasions, respondent was not present for hearing as in the case today. Accordingly, in terms of Rule 21 of CESTAT Procedure Rules, this Appeal is taken up for disposal after hearing the Appellant Revenue.

4. The entire case, as stated by Revenue in their Grounds of Appeal is follows:-

2.1 In response to the Show Cause Notice, the notice initially stated that the figures as mentioned in the Show Cause Notice were wrong and requested for further time to submit the documents. On 08.02.2008, they submitted that the process of manufacture consisting of blending, bottling, packaging of Indian made foreign liquor is covered under Section 2(f) of the Central Excise Act, 1944 and hence, it is excluded from the purview of Business Auxiliary service under Section 65(19) of the Finance Act, 1994.

2.2 On careful examination of the facts and evidences on record, the Commissioner has observed that 'Business Auxiliary Service' by definition excludes 'any activity that amounts to 'manufacture' within

the meaning of clause (f) of Section 2 of the Central Excise Act, 1944' from its ambit. The production of alcoholic beverages, which qualifies to be a process amounting to 'manufacture' within the meaning of section 2(f), when read with the relevant judicial pronouncements, because a new product, with a distinct name, character or use; and capable of being marketed emerges. Further the Director of the said company in his statement has confessed that they manufacture and sell IMFL on behalf of their client and receive manufacturing charges from them. Their client gets the differential amount between sale proceeds and expenses incurred from manufacture. The company raised bills of different charges/expenses such as bottling charges, manufacturing charges etc. incurred by them for production of IMFL on behalf of their clients and had been paid also. The alcoholic beverages are sold by them as per directions of JIL & CML. They receive consideration i.e. job charges for undertaking the manufacturing activity on job work basis. The adjudicating authority has observed that as per Board's Circular No.249/1/2006-CX.4 dated 27.10.2008 the whole process would amount to 'manufacture' within the meaning of section 2(f) of the Central Excise Act, 1944 even though, IMFL, a non-excisable product is emerging finally. As such the service of production rendered by M/s. Hi-Tech Bottling Pvt.Ltd. for manufacturing of IMFL in the instant case, is covered under the exclusion clause of section 65(19) of the Finance Act, 1994 and cannot be subject to levy under 'Business Auxiliary Service'. Accordingly, he dropped the demand of Service Tax on the activities carried out by M/s Hi-tech Bottlign Pvt.Ltd.

3.0 The Committee, after due consideration of the facts and figures of the said order, has, interalia, observed that the adjudicating authority has erred in holding that the activity of blending, bottling, labeling etc. of Indian Made Foreign Liquor (hereinafter referred to as 'IMFL') by the notice, amounted to manufacture as defined under Section 2(f) of the Central Excise Act, 1944 and consequently dropping the entire demand, on the following grounds.

3.1: As per Section 65(19) of the Finance Act, 1994, to quote "*business auxiliary service" means any service in relation to, - …….. (v) production or processing of goods for, or on behalf of, the client; …….but does not include …… Any activity that amounts*

to "manufacture" within the meaning of clause (f) of Section 2 of the Central Excise Act, 1994, to unquote. In other words, if the activity of production or processing of goods for, or on behalf of the client, does not amount to manufacture within the meaning of Section 2(f) of the Central Excise Act, 1944, then such activity is eligible to Service Tax under the category of 'Business Auxiliary Service'.

3.2: At para 8 of the Order-in-Original, the Commissioner has erred in observing that to quote "it is apparent on the face of the records that all the processes required for production of IMFL are being carried out by the notice" to unquote, to the extent that in the instant case, the notice carried out only the activities of blending, bottling & labeling and not all the processes.

3.3: While deciding the case in favour of the notice, though the Commissioner has solely relied upon the Board's letter F.No.249/1/2006/CX.4 dated 27.10.08, he has overlooked para 3.3. of the letter, wherein it is clearly mentioned that in case of the activity undertaken by the Contract Bottling Unit (in this case, the notice) falls short of the complete process of manufacture (such as activity of 'packing' or 'labeling' along) then such activity would fall within the ambit of 'Business Auxiliary Service' and would be charged to Service Tax. In view of the said explanation, since the notice did not carry out all the processes, or in other words, the complete process of manufacture of IMFL was not carried out by the notice, he was liable to pay Service Tax process of manufacture of IMFL was not carried out by the notice, he was liable to pay Service Tax under the category of 'Business Auxiliary Service'.

3.4: Since the activity of 'blending, bottling, labeling etc. of IMFL, by the notice, did not amount to manufacture within the meaning of Section 2(f) of the C E Act, 1994, the same was rightly classifiable under the category of 'Business Auxiliary Service' and the notice was liable to pay Service Tax on the amount received for rendering such service to another person. In the case of M/s. Daurala Sugar Works, involving similar facts, the adjudicating authority decided the matter holding that the impugned activity of blending and bottling, falls under the ambit of 'Business Auxiliary Service'. The appeal preferred by the party in the said case is pending before the CESTAT, Principal Bench

[2008 (12) STR.383 (Tri-Del.)]. So, as the matter is sub-judice, the Order-in-Original needs to be challenged.

5. From the definition of 'Business Auxiliary Service' as contained in Section 65/95 of the Finance Act, 1994 as amended any process which amounts to manufacture in terms of Section 2(f) of Central Excise Act has been excluded from the definition of 'Business Auxiliary Service'. The Ld.Commissioner has in his order relied upon Circular dated 27.10.2008 issued by Central Board of Excise & Customs stating as follows:-

01. Brief Background

Issues relating to taxable services provided during the course of production of alcoholic beverages (such as Indian Made Foreign Liquors, Branded Country liquors and similar products) are matters of dispute for a considerable period. In this regard, a draft Circular F.No. 249/1/2006-CX.9, dated November, 2006 [2006 (4) S.T.R. C7] (on applicability of service tax on taxable services provided in certain cases during the course of production of alcoholic beverages) was placed on the official website for eliciting responses from the stakeholders. The responses received from various stakeholders were carefully examined. It was noticed that in certain cases such alcoholic beverages are produced by the distillers who also own the brand names affixed on such beverages. Such beverages are cleared on payment of State Excise Duty and there are no known disputes as regards the liability to pay service tax. In other cases, the owners of the brand name and the manufacturers may be two different entities and issues have been raised regarding provision of taxable services in such situations. There are several types of arrangements between the brand owners and the maker of the alcoholic beverages, which are as follows.

2. The Brand Licensing Arrangement

2.1 Many alcoholic beverages bear brand names. The Brand Owners (herein after called the BO), which includes Indian subsidiaries of

International brand owners, hold the intellectual property rights over such brand names. The Licences (who holds the licence by the State government to manufacture such alcoholic beverages) manufactures alcoholic beverages under authority to use such brand name granted by the BO. The BO may also provide technical staff/assistance to maintain required quality. The alcoholic beverages, so manufactured are directly sold (after paying State excise duty) by licencee/manufacturer. Property, risk and reward of the products so manufactured rest with the licencee/manufacturer and not with the BO, who is paid an agreed sum for grant of permission to use such brand name and the technical know how. In such cases the BO provides taxable service, namely 'Intellectual Property Service' to the licencee/manufacturer. The tax is chargeable on the gross amount charged by the BO from the licencee/manufacturer.

3. <u>Contract Manufacturing Arrangement</u>

Under such arrangement the BO gets alcoholic beverages 3.1 manufactured by the licencee/manufacturer, the latter holding the required State Licences for manufacture of the alcoholic beverages. In trade, such licencees/ manufacturers are called the Contract Bottling Units or CBUs. The cost of raw materials (and in some cases, even capital goods) and other expenses are either paid by the BO or reimbursed by the BO. Statutory levies (i.e. State Excise Duty) are also reimbursed to the CBU by the BO. The alcoholic beverages are sold by or as per the directions of the BO and profit or loss on account of manufacturing and sale of alcoholic beverages is entirely on account of BO, who thus holds the property, risk and reward of the products. The CBU receives consideration (i.e. job charges) for undertaking the manufacturing activity on job work basis. There is no doubt that under such an arrangement, CBU is a service provider providing services to BO. A doubt has arisen, whether or not the CBU provides a taxable service namely the Business Auxiliary Service (BAS) to BO. This taxable service includes 'any service provided or to be provided in relation to production or processing of goods for, or on behalf of, the client'. This taxable service however, by definition excludes 'any activity that amounts to "manufacture" within the meaning of clause

(f) of Section 2 of the Central Excise Act, 1944 from its ambit. The issue in dispute is whether such activity would be hit by the exclusion clause mentioned above.

3.2 In the draft circular dated November, 2006, it was mentioned that as alcoholic beverages are not covered under central excise law, the production of beverages would not fall within the meaning of manufacture within the meaning of clause (f) of Section 2 of the Central Excise Act. Thus, the exclusion clause would not apply to production of non-excisable goods, resulting in its coverage under Business Auxiliary Service (BAS). However, the matter was re-examined in detail by the Board after receipt of the responses and it has now been concluded that the exclusion would be applicable in the instant case for the following reasons :

(a) Plain reading of Section 3 of the Central Excise Act, 1944 shows that for levy and collection of central excise duty, the following conditions must be satisfied;

- *The process undertaken must amount to manufacture as defined under Section 2(f); and*
- *The result of such process should be emergence of excisable goods, which as per Section 2(d) are the goods specified in the First and the Second schedule of the Central Excise Tariff Act, 1985 as being subjected to duty of excise.*

Therefore, 'manufacture' and 'excisable goods' are two independent concepts and that it is not necessary that a process amounting to manufacture within the meaning of Section 2(f) should always result in emergence of an excisable goods and vice versa. Whether a process would amount to manufacture within the meaning of Section 2(f) has to be seen independently, based on the criteria evolved through various judgments of the Apex Court. There may be a case, when a process may amount to manufacture under Section 2(f) but it may not result in emergence of an excisable product. If that be so, then the exclusion clause under BAS, which refers only to the activity amounting to manufacture within the meaning of Section 2(f), would still apply to such processes, whether or not the resultant product are

excisable goods. Such is the case of production of alcoholic beverages, which qualifies to be a process amounting to manufacture within the meaning of Section 2(f), when read with the relevant judicial pronouncements, because a new product, with a distinct name, character or use; and capable of being marketable, emerges; and

(b) In the instant case the exclusion provision under the definition of Business Auxiliary Service (under the Finance Act, 1994) makes a reference to a definition of the word 'manufacture') figuring under another Act (i.e. The Central Excise Act, 1944). ***It is a settled law that when a definition from an Act is transposed into another Act, it is as if the said definition is physically written into the borrowing Act without any reference to the context of such definition in the Act from which it is being borrowed. It is the words of that definition, which is imported into the borrowing Act and not the scope of the first Act and the context in which such definition is used in the first Act. Admittedly the scope of the two Acts would be distinct and if the definition is borrowed from the first Act into the second Act having different scope, the same would get disturbed/distorted if the context and scope of the earlier Act is also imported. Thus just because Central Excise Act does not extend to the manufacture or production of alcoholic beverages meant for human consumption, it cannot be said that the term 'manufacture' used in Business Auxiliary Service would also not cover the process of making the said product, namely alcoholic beverages.***

3.3 ***In view of the foregoing, it was decided that if the CBU undertakes complete process of manufacture of alcoholic beverage under the 'contract bottling arrangement' as described above then such activity would not fall under the taxable service, namely the BAS.*** *However, in case the activity undertaken by the CBU falls short of the definition of manufacture (such as activity of 'packing' or 'labelling' alone) then such activity would fall within its ambit and would be charged to service tax.*

4. Lease Arrangement

4.1 Under such agreement the distillery of the lessor is taken on lease by the lessee (who has the licence to produce alcoholic beverages and may be the brand owner) who pays rent for the same. In such a case the rent collected by the lessor/distillery owner is chargeable to service tax under 'renting of immovable property service'.

5. Conclusion

5.1 The view expressed in draft Circular F.No. 249/1/2006-CX.9, dated November, 2006 stands modified as above. As there can be different types of arrangements between the contracting parties, the field officers should carefully examine the nature of such arrangement and decide the pending cases accordingly."

6. Since in view of the Circular Ld.Commissioner has held that the processes undertaken would not amount to a taxable service under the category of 'Business Auxiliary Service'. In para 9 (b) after examining the agreements entered by the Appellant with the prime manufacturer, Ld.Commissioner has observed as follows:-

9(b) Agreement dated 15.06.2003 entered between HTB and CML

Shows clearly that HTB has provided services viz. 'production of gods for and on behalf of their clients', Sri Arbind Kumar Jaiswal, Director of HTB in his statement dated 08.09.206, recorded under summon proceedings has replied against question No.6 and 7 that they manufacture and sale IMFL on behalf of JIL and CML and use to receive manufacturing charges from them. In response to question No.15 he has further replied that the client gets the differential amount between sale proceeds and expenses incurred for manufacture. They have acted through out under instruction and vigil of the service receivers for production of IMFL. HTB has no control over prices of IMFL products which is determined by the clients who are actual owner of the IMFL products. HTB has raised bills of different charges/expenses such as bottling charges, manufacturing charges etc. incurred by them for production of IMFL on behalf of clients and have been paid also.

7. We do not find any reason to differ with the conclusions arrived at by the Ld.Commissioner. Nothing has been stated by the Revenue while filing this Appeal before us.

Appeal, filed by the Revenue, is accordingly dismissed.

(pronounced in the open Court.)

Sd/
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

Sd/
(P. DINESHA)
MEMBER (JUDICIAL)

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