IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO. 91 OF 2015
WITH
CENTRAL EXCISE APPEAL NO. 92 OF 2015
WITH
CENTRAL EXCISE APPEAL NO. 100 OF 2015

The Commissioner Central Excise and Service TAx, Kolhapur Commissionerate	}	**Appellant**
versus		
M/s. Karan Agencies, Camp: M/s. The Kolhapur Sugar Mills Ltd.	}	**Respondents**

Mr. Jitendra B. Mishra for the Appellant.

Mr. V. Sridharan-Senior Advocate with Mr. Prakash Shah and Mr. Jas Sanghavi i/b. M/s. PDS Legal for the Respondents.

CORAM :- S. C. DHARMADHIKARI &
B. P. COLABAWALLA, JJ.

DATED :- NOVEMBER 23, 2015

P.C. :-

This Appeal by the Revenue challenges the order passed by the Customs, Excise and service Tax Appellate Tribunal, West Zonal Bench dated 9th June, 2014 (CEXA/91/2015).

2) The Revenue submits that the following substantial question of law would arise for determination of this Court:-

"Whether on the basis of facts and circumstances of the case, the activity conducted by the Respondent is taxable under the

> category of 'Business Support Service' especially when the Respondent has received a sizable amount under the name and guise of "Conducting Charges" against the activities?"

3) The Revenue states that the Assessee had entered into an contract with M/s. Kolhapur Sugar Mills Ltd. (for short 'M/s. KSM') for manufacturing and sale of liquor in the name of M/s. KSM. The plant and machinery is owned by M/s. KSM, who allowed to use the entire infrastructure by the Respondent for a consideration of Rs.30 lacs per annum. The Respondent conducted entire business of manufacture of liquor, its sale and even effected the recovery of the sale proceeds in the name of M/s. KSM. The books of account were maintained in the name of M/s. KSM and sale proceeds were also credited to the account of M/s. KSM. At the end of each financial year, after settlement of accounts, the balance in Profit and Loss Account was paid by M/s. KSM to the Respondent after retaining an amount of Rs.30 lacs being the consideration agreed against use of infrastructure. Such amount is termed as "conducting charges" in the books of account. The agreement is dated 23rd February, 1999 and a copy of the same is at Annexure 'A' to the memo of Appeal.

4) The case of the Revenue is that the Respondent Assessee was conducting entire business for and on behalf of M/s.KSM. It had received an amount of Rs.6,89,53,366/- from

M/s. KSM against conducting charges towards the activities done by them during the financial year 2011-12. The Revenue contends that managing or conducting of such business is providing taxable service under the category of 'Business Support Service' classifiable under section 65(104c) of the Finance Act, 1994.

5) Since the Assessee did not register itself for payment of service tax nor it paid any service tax on the conducting charges, a show cause notice was issued demanding service tax of Rs.71,02,197/-. The proposal for recovery of interest under section 75 of the Finance Act, 1994 and with imposition of penalties was also made. Annexure 'B' is copy of the show cause notice.

6) The Respondent Assessee, on receipt of this notice, filed a reply denying the allegations and urging that it cannot be held liable to pay any service tax. The adjudicating authority did not accept this explanation and passed an order-in-original dated 20th December, 2013 holding that the services provided by the Respondent merit taxability under the category referred above. It confirmed the demand along with interest and penalties were also imposed. Annexure 'D' is the copy of this order-in-original.

7) Aggrieved and dissatisfied with this order, the Assessee preferred an Appeal raising several grounds. It urged that the activity of managing the business is not taxable under the above category. That only services provided by the provider to a client will fall in 'business support service', where the principal activity is undertaken by the client. M/s. KSM was not performing any activity and the services provided by the Assessee, therefore, would not be taxable. The nature of the arrangement, therefore, cannot be termed as a service and in any event, falling under the above category.

8) By the impugned order, the appeal has been allowed accepting these contentions. The Tribunal holds that there is no evidence on record to suggest that the Assesee had received any amount from M/s. KSM. The Tribunal held that the activities of manufacturing and sale of liquor are conducted by the Assessee. The business support service covers only the services of supporting nature to main activity. Here, the main activity itself has been conducted and in these circumstances, the amount is not liable to be recovered. Pertinently, M/s. KSM paid service tax under the category of franchise services regularly and that is why the sum as demanded was not payable by the Assessee.

9) It is the correctness of this finding and conclusion which is assailed in this Appeal and Mr. Mishra appearing for the Revenue submits that the Appeal raises substantial question of law. He has invited our attention to the definition of the term taxable service as appearing in section 65 of the Finance Act, 1994. Mr. Mishra would submit that the taxable service in this case is business support service. It is any service and which is provided within the meaning of the said definition which is taxable. Mr. Mishra has submitted that section 65(104c) refers to support services of business or commerce. This provision has been inserted by Finance Act, 2006 with effect from 1st May, 2006. These are services provided in relation to business or commerce and includes evaluation of prospective customers, telemarketing, processing of purchase orders and fulfillment services, information and tracking of delivery schedules. Pertinently Mr.Mishra would rely upon the words "managing distribution and logistics, operational or administrative assistance in any manner and infrastructural support services". He would rely upon the explanation below this clause (104c) of section 65. Mr. Mishra would submit that the nomenclature of conducting agreement assigned to the transaction or deal in question is not decisive or conclusive. In the garb of the same, these support services have been provided and therefore, the

service tax was payable. He would submit that the order-in-original therefore should not have been interfered with. The finding and conclusion of the Tribunal is erroneous. The Tribunal's order is vitiated by non application of mind and error of law apparent on the face of the record. Therefore, this Appeal be admitted.

10) On the other hand, Mr. Sridharan, learned Senior Counsel appearing for the Assessee invites our attention to the agreement, copy of which is at Annexure 'A'. He submits that the owner of the entire infrastructure is M/s. KSM. The Assessee Respondent is a conductor. The owner, amongst various businesses, is owning and operating a distillery division under various licences granted by the Government of India and Government of Maharashtra. Due to commercial needs and reorganisation of business, the management of the owner considered it advisable to allow its distillery division to be run in its name by an experienced party on a fixed return basis. The owner agreed to allow the conductor to conduct the owner's business of manufacturing and selling of the products in the owner's distillery under the owner's licences on the terms and conditions mentioned and mutually agreed between the parties. Mr. Sridharan submits that the fixed fees and charges of Rs.30

lacs for the use of infrastructure were to be paid. The balance and over and above this sum would be the income generated from this arrangement by the conductor Assessee and that was to be retained in terms of this agreement. Such an agreement, therefore, does not give rise to any service particularly as defined in the clause. He would submit that the finding of fact is based on the materials produced. The Tribunal has concluded that there is no evidence that the Assessee received any sum from M/s. KSM. Hence, he would support the order of the Tribunal.

11) The Tribunal had before it the Appeal of the Respondent Assessee. That was directed against the order-in-original. The order-in-original proceeds on the footing that the Assessee's contention that it had not provided any service to M/s.KSM has no merit. The Assessee conveniently ignores the fact that the entire business i.e. purchase and sale were to be made in the name of M/s. KSM. M/s. KSM was doing work of accounting and the entire sale proceeds were initially credited in the account of M/s. KSM. The expenses were debited to M/s. KSM to arrive at the profit. Thus, it is not M/s. KSM which was providing any services, but it is the Assessee who was assisting M/s. KSM in terms of the agreement. Similarly, M/s. KSM obtained registration of franchise service provider and paying

service tax would not relieve the Assessee from the charges that are required to be paid. One issue cannot be confused with another.

12) The Tribunal, in this case, referred to the facts and hold that the demand for the previous period was also confirmed on the same ground. That order was subject matter of Appeal Nos. ST/595/2012 and ST/86405/2013. The Tribunal, vide order dated 20th May, 2014, set aside the demands. The case before it and arising out of the order-in-original impugned by the Assessee was identical and therefore it allowed the Appeal.

13) In that main order, the Tribunal held that it has gone through the agreement. Under the agreement, the Assessee agreed to pay to M/s. KSM an amount of Rs.30 lacs towards use of infrastructure for manufacture of liquor. As per clause 2 of the agreement, all profits and losses in respect of the manufacturing and sale of the products in the distillery division are on account of the Respondent Assessee. The Respondent Assessee had actually taken over the distillery unit of M/s. KSM. It undertook the manufacturing activity as well as sale of products. There was no evidence on record to show that the Assessee had received any amount from M/s. KSM for providing any service in relation to the business.

14) It is in that light and in facts peculiar to the case of the present Assessee that the Tribunal concluded that clause (104c) of the substantive provision, namely, section 65 will not be attracted and is not applicable. In addition to this reason, the Tribunal concluded that on the same agreement for the same period, the Revenue directed M/s. KSM to pay service tax under the category of franchise service. M/s. KSM is paying service tax under the category franchise service regularly and this fact is not in dispute. It is in these circumstances that the Tribunal set aside the order-in-original.

15) Upon a reading of the Tribunal's order, we find that the same is essentially based on the clauses of the conducting agreement. It is the conducting agreement which has been referred extensively. Its clauses have been read together and harmoniously to conclude that the arrangement or deal in the present case is of such nature that M/s. KSM's distillery unit is taken over for conducting and managing by the Assessee. The Assessee is therefore responsible for any profits being generated or losses sustained. The nature of the transaction therefore would not fall within the meaning of support services for business or commerce. The conducting of the running business and its management and administration is therefore the basis of the

finding. We are of the opinion that such factual findings and which are consistent with the materials placed on record cannot be termed as perverse or vitiated by any error of law apparent on the face of the record. Any larger issue or controversy, therefore, need not be considered. Once the conclusion is reached as above, then, the Appeals do not raise any substantial question of law. They are accordingly dismissed.

(B.P.COLABAWALLA, J.) **(S.C.DHARMADHIKARI, J.)**