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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH : MUMBAI
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POONA STREET, MASJID BUNDER (E), MUMBAI- 400 009.

From : The Assistant Registrar, CESTAT, MUMBAI.

Dated: **17/07/2019**

File No.:**-ST/85828/2014(ST/CROSS/91102/2014,)**

In the matter of :-

SAB MILLER BREWERLES PVT LTD
PLOT NO M-99 MIDC AREA WALUJ
AURANGABAD Pin Code - 431136 **(Appellant)**

Vs

CCE AURANGABAD
TOWN CENTRE N-5 CIDCOAURANGABAD Pin
Code - 431003 **(Respondent)**

I am directed to transmit herewith a certified copy of Order No. : **A/86242/2019** dated : **11/07/2019** passed by the Tribunal under section **01(5) of the Finance Act, 1994 relating to Service Tax Act, 1994.**

T Viswa Prakash,
Deputy Registrar,
Service Tax Appeal Branch
CESTAT - MUMBAI

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6.TAXONGO Pvt. Ltd.
7. Advocate/(s) / Consultant/(s) / Representative:-

V. Sridharan,
401-404, Kakad Chambers, 132, Dr. Annie Besant
Road, Worli, Mumbai - 400 018

DB-D Prepared By :-

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH – COURT NO.1

Appeal No.ST/85828/2014
ST/CO/91102/2014

[Arising out of Order-in-Original No.39/ST/COMMR/2013 dt. 27.12.2013, passed by the Commissioner of Central Excise & Service Tax, Aurangabad]

M/s SABMiller Breweries Pvt. Ltd **.....Appellant**

VERSUS

Commissioner of Service Tax, Aurangabad **.....Respondent**

Appearance:
Shri V. Sridharan, Advocate for the Appellant
Shri K.M. Mondal, Special Counsel (A.R.) for the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MR. SANJEEV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86242/2019

Date of Hearing: 15.01.2019
Date of Decision: 11.7.2019

PER: D.M. MISRA

This is an appeal filed against Order-in-Original No. 39/ST/COMMR/2013, dt.27.12.2013, passed by Commissioner Service Tax, Aurangabad.

2. Briefly stated the facts of the case are that the appellants have been engaged in the business of brewing and bottling of beer at its plant in Aurangabad. They had entered into a bottling agreement on 11.4.2007 with M/s SKOL Breweries

Ltd., (now known as SAB Miller India Limited) under which the appellant manufactured beer for SKOL affixing their brand their name but using own raw materials, man power and infrastructure and sold the said manufactured beer at the direction of SKOL to their (SKOL's) customers on payment of appropriate VAT/CST. On the basis of investigation by DGCEI, it is alleged that the appellant provided services under the category of "Business Auxiliary Services" as defined under section 65 (19) read with section 65 (105)(zzb) of the Finance Act, 1994, in view of the amendment brought to the said provision by the Finance Act, 2009, but were neither registered under the said category of taxable service nor paid service tax of Rs.23,62,70,548/- for the period from 23.9.2009 to 21.06.2012; consequently demand notice was issued to them on 24.12.2012 for recovery of the service tax not paid along with interest and penalty. On adjudication, the demand was confirmed with interest and penalty. Hence, the present appeal.

3. Learned advocate for the appellant providing a brief back ground of the present Appellant has submitted that South African Breweries (SAB) was established in the year 1895 in South Africa and Miller Brewing was a company operating in UK. In May 2002 SAB acquired Miller Brewing and thereby forming SAB Miller Plc U.K.. SABMiller later acquired "Fosters" brand. SKOL Breweries Ltd. was incorporated in India and were manufacturing beer under the brand name 'knockout', Heywards' 'Royal challenge' at its various manufacturing facility spread throughout India and selling the beer across the country

through its own marketing/dealer network. They were also having a manufacturing unit at Aurangabad.

4. The appellant has entered into a bottling/brewing agreement dated April 11, 2007, with M/s SKOL Breweries Ltd. for manufacture and bottling of beer with the brand name 'Fosters'. Elaborating the main features of the agreement, the learned Advocate for the appellant has submitted that the appellant manufactures 'Fosters Beers' as per the knowhow, specification of SKOL and the brand name "Fosters' belongs to SKOL. The purchase of raw materials, packing materials, chemicals, labels, consumables etc. for manufacturing the said bear was on account of appellant and the title, property and ownership of manufactured beer having brand name 'Fosters' vest solely with the appellant. The said manufactured beer is sold by the appellant to SKOL or buyers nominated by SKOL on outright basis at the price fixed by SKOL. The appellant receives sale price/consideration on sale of the beer from the respective buyers. As a consideration for the agreement dated 11.4.2007, the appellant pays Rs.27/- per case (of 12 bottles) to SKOL. The appellant discharges appropriate excise duty and other taxes leviable under the State Excise Act on the manufactured beer; also pays applicable Sales Tax being VAT/CST on the outright sale of the beer manufactured by them. Earlier a demand notice was issued to SKOL for the period from Sept, 2006 to March, 201 alleging that the amount of Rs.27/- per case received by them in providing taxable service under the category of Intellectual Property Right (IPR) service and alternatively under Franchise Service. However, the

said issue was decided in favour of M/s SKOL by Tribunal vide Order dated 22.1.2014 reported at 2014-TIOL-588-CESTAT-MUM.

4.1. Pursuant to the amendment to Section 65(19) of the Finance Act, 1994 in the definition of Business Auxiliary Service (BAS) w.e.f. 01.9.2009, the present demand notices were issued on 24.12.2012 to the appellant alleging that the appellant has rendered "services in relation to manufacture and processing of goods" to SKOL and accordingly liable to Service Tax under clause 65(105)(zzb) read with Section 65(19) of the Finance Act, 1994 for the period from 23.9.2009 to 24.12.2012.

4.2. It is the contention of the learned Advocate that the activities undertaken by the appellant pursuant to agreement dated 11.4.2007 amounts to manufacture and outright sale of beer to SKOL or buyers nominated by SKOL and it cannot be considered to come within the scope of the expression "in relation to production and processing of goods for or on behalf of the client" and attract Service Tax on the same. He has submitted that the appellant purchases raw materials and packing materials, labels, chemical etc. at their own cost and undertake various processes in their factory to manufacture beer. All the activities relating to manufacture of beer like, maintenance of records, supervision, bottling, transportation etc. are performed by the appellant and the ownership of the raw materials/finished goods at all stages vest with the appellant. They possessed all the requisite licenses required for

manufacture of beer, necessary infrastructure, man power, workforce, manufacturing skills, long term and short term capital etc. for manufacturing beer on their own since 1998. The supervision by SKOL to ensure quality of their product and the specification belonging to SKOL,inno manner would change the veracity of legal and factual position that the right to manufacture of the beer remains with the appellant. After manufacture of the beer, the appellant sell the same either to SKOL or to the buyers/indenters of SKOL as directed by SKOL at the price indicated by SKOL. The prices for sale of the goods are also being paid by the customers to the appellant. The appellant did not receive anything from SKOL as a consideration for providing any service and rather the appellant has been paying Rs.27/- per case(12 bottles) of Fosters beer to SKOL in terms of the agreement.

4.3. The learned Advocate referring to the judgment of the Hon'ble Supreme Court in the case of *Union of India Vs. Cibatul Ltd. – 1985 (22) ELT 302 (SC)* submitted that Section 2(f) of the Central Excise Act defines 'manufacture' and 'manufacturer'. The phrase 'manufacturer' defined as 'a person who manufactures on his own account'; it also refers to 'person who employed/hired a labour'. Interpreting the terms of agreement, the Hon'ble Supreme Court in the said held that the manufacturer since manufactures the goods, in accordance with the manufacturing programme drawn jointly by buyer and seller, keeping in mind the restriction imposed by the buyer relating to specification of the goods and price at which it is to be supplied and the seller was obliged to affix buyer's trade

marks on the goods produced as per the agreement, the seller is not the manufacturer for on behalf of the buyer, but on their own account. Further, he has submitted that when the seller is in existence, having separate infrastructure, plant and machinery employed their own labour, procuring raw materials on their own, and manufactures the goods on its own behalf, the principle laid down by various judgments of the Hon'ble Supreme Court, namely *Poona Bottling Co. Ltd. Vs. UOI - 1981 (8) ELT 389 (Del)* affirmed by Hon'ble Supreme Court reported in *2003 (154) ELT A240 (SC); Parel Beverages (P) Ltd. Vs. UOI - 1982 (10) ELT 142 (Bom); Taggas Industrial Development Ltd. - 1989 (39) ELT 0151 (Tri)* affirmed by Hon'ble Supreme Court reported in *1995 (78) ELT A146 (SC) and Goa Bottling Company P. Ltd. Vs. UOI - 1987 (28) ELT 215 (Bom),* then the buyer who supplied the raw material or whose brand name was affixed on the manufactured goods, cannot be treated as manufacturer.

4.4. Referring to para 3 of the Circular 2491/2006-CX-4 dated 27.10.2008, the learned Advocate has submitted that the amendment made by the Finance Act, 2009 inthe definition of Business Auxiliary Service defined under Section 65(19) of the Finance Act, 1994, it is the manufacture of excisable goods alone was excluded from the levy of Service Tax on that activity and manufacture of non-excisable goods was not excluded from the scope of Section 65(19) of Finance Act, 1994. He has vehemently argued that para 3 of the aforesaid Circular, and the amendment brought by Finance Act, 2009 applies only to manufacture on behalf of brand owner,

however, if the manufacturer undertakes the complete processes of manufacture, even of non-excisable goods, then such activity is outside the ambit of Section 65(19) of FA,1994. The amendment to Finance Act, 1994 was to cover the case falling under para 3 of the said Circular to manufacturer on job-work basis, for and on behalf of the client, using the client's raw materials, which was escaping Service Tax as manufacturer of non-excisable goods. But, in the present case, it is the outright sale to buyers and not a case of manufacture with customer's raw material, which can be called a contract of service of client. Therefore, the amendment is not applicable to their case.

4.5. The learned Advocate further argued that the Revenue cannot re-write the contract made by the parties. In support, he has referred to the judgment of the Madras High Court in the case of CIT S. Ramal Amal (1982) 135 ITR 292. The nature of the transaction in the present case is of sale of goods and not the service per se. The intention of the parties in the present case is of manufacture and sale of the goods on outright basis. In the present case, the essence of the service contract is rendition of service from SKOL to appellant and not vice-à-versa. In support, the learned Advocate referred to the judgment in the case of Bharat Sanchar Nigam Ltd. – 2006 (3) SCC (1). It is his submission that in the present case, Revenue cannot extract contract of service from the appellant to M/s SKOL from contract of sale of beer by appellant to buyers. Further, the parties have intended for rendition of service from the appellant to SKOL and the stipulation in the contract also

does not support the allegation of the department as the consideration flows from appellant to SKOL and not from SKOL to appellant.

4.6. The learned Advocate has further submitted that the appellant manufactures and sell the entire quantity of beer directly to customers nominated by SKOL on outright basis and such sale involved transfer of ownership from appellant to the buyers against purchase order issued by the said buyer. The appellant receives consideration for such sale and the price is decided mutually by the appellant and the SKOL. Therefore, sale consideration received from nominated buyers cannot be the consideration for the contract between appellant and SKOL. Further, he has submitted that the price for sale transaction is outside the purview of Service Tax even if it is accepted that the transaction is liable to Service Tax, but in absence of any machinery provisions for determination of value of such services, the levy itself should fail. In support, the learned Advocate referred to the judgment of Hon'ble Supreme Court in the case of Commissioner of Central Excise, Vishakhapatnam Vs. Larsen & Toubro Ltd. – 2015 (39) STR 913 (SC).

4.7 Further, he has submitted that alternatively the appellant is entitled to the benefit of Notification No.12/2003-ST dated 20.6.2003. Further, the learned Advocate submits that the appellants are entitled to benefit of Notification No. 39/2009-ST dated 23.9.2009 read with Circular No. 332/17/09-TRU dated 30.10.2009. It is also submitted that the C.A. certificate produced by the appellant to fortify the fact that the value of

material component and profit share of SKOL included in Net Sale price of beer sold under contract manufacturing arrangement.

4.8 The Ld. Advocate has also submitted that the appellant had since merged with SKOL during the relevant period, therefore services rendered by the appellant to self cannot be chargeable to service tax. Elaborating his argument, learned advocate has submitted that they had filed a Scheme of Arrangement before the Hon'ble Bombay High Court in accordance with Section 391 to 394 of erstwhile Indian Companies Act, 1956 under which the brewery business of appellant shall be transferred on an going concern basis to SKOL and the appointed date was mentioned as 31.3.2009 in the Arrangement scheme. The said scheme was sanctioned by the Hon'ble High Court on 29.03.2012. Consequently, the resulting company applied for change of name under Section 21 of the Companies Act, 1994 from its old name SKOL Breweries Ltd. to SABMiller India Ltd. asthe said section 21 of the Act, *inter alia,* requires obtaining a fresh certificate of incorporation in new name. Therefore, the resulting company obtained fresh certificate of incorporation in the new name on 22.6.2012. It is his contention that since the arrangement has been sanctioned by the Hon'ble Bombay High Court w.e.f. the appointed date i.e. close of business as of March 31, 2009, therefore, the reason given by the adjudicating authority observing the change of name dated i.e. 22.6.2012 as the material date for considering the merger is incorrect. In support, the learned Advocate placed reliance on the judgment

in the case of *Marshall Sons & Co. (India) Ltd. Vs. ITO - (197) 2 SCC (302), CST Vs. ITC Hotels Ltd. - 2012 (27) STR 145 (Tri-Del), CIT Vs. Swastik Rubber Products Ltd. - (1983) 140 ITR 304 (Bom)*.

4.9. Learned Advocate has also submitted that the demand notice is barred by limitation as there is no suppression of facts inasmuch as the details pertaining to contract of manufacturing agreement were placed before the Department in the year 2007 and the Department had issued as how cause cum demand notice for the period from Sept, 2006 to March, 2010 on SKOL demanding Service Tax on the total amount received @ Rs.27/- per case under the category of IPR service and alternatively under the 'Franchise Service'. The demand was issued to SKOL alleging that being brand name owner, they were rendering Intellectual Property Right (IPR) Service to the manufacturer-Appellant. Thus, the Department has been aware of the entire facts relating to manufacture of beer by the appellant as per the agreement between the appellant and M/s SKOL. The Department has now issued the show cause notice to the appellant, pursuant to the amendment to the meaning of Business Auxiliary Service, with effect from01.9.2009.Besides, through the letters dated 9.9.2010, 18.4.2011 and 30.5.2011, the appellant has provided the details of contract of manufacturing arrangement, labour bills etc., hence the Department all along was aware of the fact that the appellant is in agreement with SKOL for manufacture of beer. Besides, since the issue involved is a question of interpretation of law,

neither extended period of limitation can be invoked nor penalty is liable to be imposed on the appellant.

5. Per Contra, the learned Special Counsel Mr. K. M. Mondal for the Revenue has submitted that by the Finance Act 2009, the definition of Business Auxiliary Service has been amended and thereafter the Board had issued instruction on 06.7.2009 clarifying the scope and effect of amendment brought into force. In para 3.1 of the said clarification, it has been clearly mentioned that the activity undertaken, if resulted in the manufacture of excisable goods, then it falls outside the scope of the levy of Service Tax under Business Auxiliary Service, but in the event the resultant product in non-excisable goods, then Service Tax would be attracted. He has submitted that Chapter Note 4 of Chapter 22 of Central Excise Tariff Act, 1985, does not cover alcohol/liquors for home consumption. After the aforesaid amendment, the Central Govt. has issued a Notification No. 39/2009-Service Tax dated 23.9.2009 laying down that exemption from Service Tax that would be available subject to the conditions mentioned there under. Further, he has submitted that further clarification was issued on 30.10.2009 stating that Service Tax would be payable by the service providers on the bottling/job charges, distribution cost and other reimbursable expenses. So far as inputs i.e. raw materials and packing materials are concerned, the exemption Notification No. 39/2009-ST would be available to the service provider provided, however, there should be documentary proof specifically indicating value of these inputs. Thus, the Service Tax has been imposed only on the value of service

provided by the contract bottling unit and does not tax the product and manufacture of alcohol beer. The value of raw materials and packing materials are not considered as elements for computing Service Tax under the said Notification. Besides statutory levy like, state excise duty, VAT, etc. are excluded while computing the taxable value for levy of Service Tax. Thus, it is only on the actual value of the service provided by the job workers has been considered for the purpose of Service Tax.

5.1 Referring to the bottling/brewing agreement between the appellant and SKOL dated 11.4.2011, the learned Spl. Counsel has submitted that various services in relation to production and processing of alcoholic beverages, to SKOL has been provided. It is his contention that all these services are clearly in relation to production and processing of alcoholic beverages, therefore, satisfies the amended definition of Business Auxiliary Service, accordingly, taxable under Section 65(105)(zzb) read with Section 65(19) of the Finance Act, 1994.

5.2 Further, he has submitted that Service Tax is levied on the taxable service falling under the category of Business Auxiliary Service provided by any person in relation to production and processing of goods for or on behalf of the client and not on the manufacture of alcoholic beverages itself. He has argued that Section 65(19) of the Finance Act, 1994 while defining Business Auxiliary Service has mentioned the words "services in relation to" and further at sub-clause (v),

"production and processing of goods for and on behalf of client". In addition to this, the exclusion clause has amended and excludes the activity that amounts to manufacture of excisable goods from the purview of said service, wherein the 'manufacture' has the meaning assigned to clause (f) of Section 2 of the Central Excise Act, 1944 and excisable goods has the same meaning assigned to it under clause (d) of Section 2 of the said Act. The service element came into existence when the activities are performed for and on behalf of client for consideration and thus, from the wording of Section 65(19), it is clear that intention of the legislature is not to levy tax on the manufacture of beverages', but the services rendered in relation to production and processing of said goods for and on behalf of client.

5.3 He has further submitted that in the present case the appellant has been providing various services/facilities to SKOL like, providing storage space for material, packaging materials and finished products; maintaining accounts with regard to the raw materials, packaging materials, and finished goods; providing transportation, in war and out for handling of the raw materials, packaging materials and finished products; providing laboratory facilities, equipment and office space; providing manpower for carrying out the work of SKOL. It is his contention that all these above activities combine with the actual brewing and bottling activity are the entire scope of the work carried out by the appellant for and on behalf of SKOL. Thus, it is clear that the appellant had provided services in

relation to production or processing of goods for and on behalf of SKOL. Therefore the services provided by appellant to SKOL is clearly 'business auxiliary service'. Further, he has submitted that on a plain reading of section 65 (19) of the Finance act 1994, it is quite clear that service tax is not levied on the manufacture of alcoholic beverages, it is levied on the services provided in relation to such manufacture/processing carried out by the service provider for or on behalf of its client. Therefore, the contention of the appellant that service tax which is sought to be levied is nothing but tax on manufacture of goods or sale of goods is totally incorrect.

5.4 The Ld. special counsel further submitted that the appellants rendering services in relation to the manufacture or processing of non-excisable goods for or on behalf of SKOL. As per the amended definition of business auxiliary service, taxes not levied when any person undertakes manufacturing of alcoholic beverages on his own account. It is levied only when services are provided in relation to production or processing of goods for or on behalf of clients. It is to be noted that service tax is being levied on the service provided and not on manufacture or sale of alcoholic beverages. Therefore it is incorrect to say that the activities undertaken by the appellant amount the manufacture and outright sale of beer. Under the agreement, the appellant has no option to effect any outright sale of the branded beer to any person of its choice. Entire production has to be sold to SKOL or to its indenters or other person as may be determined and at the price communicated

by SKOL on payment of state excise duty or VAT which would be reimbursed to it by SKOL.

5.5 He has further submitted that as per the 'bottling/brewing agreement, the appellant is just a service provider (i.e. job worker of SKOL). It has paid the job charges i.e. service charges by SKOL, who are brand owner and who have proprietary right over the goods. As per clause 2.8 of the agreement, the appellant will manufacture and supply the beer as may be determined by SKOL from time to time. As per clause 2.9 the appellant shall supply the branded beer to SKOL or to the indenters or other persons as may be determined by SKOL. As per clause 3.3, the sale of SKOL beer shall be made according to dispatch instruction issued by SKOL or its nominated indenters and that invoices shall be raised by the appellant at the prices communicated by SKOL from time to time. As per clause 3.1, out of the sale proceeds collected from the buyers the appellant will pay SKOL the net proceeds of Rs. 27/- per case of 12 bottles of 650 ML and 24 bottles of the 330 ML. The balance would be retained by appellant as service charges which would cover manufacturing cost and manufacturing profit.

5.6. Responding to the argument of the appellants that there is no valuation mechanism for ascertaining the value of beer manufactured on job work basis, learned special counsel has submitted that section 67 of the Finance Act, 1994 read with Service Tax (Determination of value) Rules, 2006 provides for

determination of value of taxable service for charging service tax. Notification No. 39/2009-ST dated 23/9/2009 and the clarification issued by the board dated 30/10/2009 provide for the method of determination of taxable value for the services rendered by any person in relation to production or processing of alcoholic beverages for or on behalf of the client. He has contended that the notification cannot create a liability, on the contrary it reduces the burden of incidence of tax on the value of inputs, subject to certain conditions.

5.7 Further, rebutting the argument that the date of merger of brewing business of the appellant with M/s SKOL Breweries Ltd. was 31/3/2009 and not 29/3/2019, the Ld. Special counsel has urged that a combined reading of the meaning of 'appointed date', 'effective date', clause 2 which provides for date of coming into effect, clause 9.5, clause 9.8 and clause 16 which provides that the scheme is conditional, would indicate that merger becomes effective only upon fulfillment of all the conditions as per clause 16 of the scheme of arrangement. It is clear from the records that after approval of the scheme by the Hon'ble High Court, certificate of incorporation was obtained from the Registrar of Companies on 22/6/2012. Therefore the effective date of merger would be 22/6/2012 and not 31/3/2009 as claimed by the appellant. Thus it follows that the appellant had functioned independently till 21/6/2012 and provided services to SKOL in relation to production or processing of alcoholic beverages. In support he has referred to the judgment of Hon'ble Patna High Court in the case of Tata

iron and steel Co Ltd Vs. Presiding officer and others (2001) IIILLJ 66 Pat., Tribunal in the case of Technocraft Industries India Ltd Vs CCE Mumbai 2000(120) ELT 106 (T), CCE Chandigarh Vs Nahar Industries Pvt. Ltd. 2009 (236) ELT 206 (T), Marigo Paints Ltd Vs CCE Vadodara 2014(308) ELT 421 (T),and Hon'ble Gujarat High Court in the case Indus Tower Ltd Vs State of Gujarat 2017-TIOL-1845-HC-AHM-VAT.

5.8 On the issue of limitation, the Ld. Special counsel has submitted that the appellant though provided services under the taxable category of Business auxiliary service to its client, it did not take registration under the said category and failed to declare that the facts to the Department. Thus, non-declaration of the said facts tantamounts to suppression of facts. Further he has contended that the amendment to the definition of business auxiliary service was from 1/9/2009 by the Finance Act,1994 and the appellant was aware that its activities under the bottling/brewing agreement dated 11/4/2007 with SKOL are clearly covered by the definition of Business auxiliary service under section 65(19) of the Finance Act, 1994. For the said reason the appellant filed a writ petition No.6851 of 2013 before Hon'ble Bombay High Court challenging its constitutional validity. Therefore it cannot be acceptable that under a bonafide belief the appellant carried out manufacture and sale of beer for and on behalf of SKOL. Further he has contended that the argument that the department was aware of the details of the contract of manufacturing agreement dt.11.4.2007 hence extended period limitation cannot be made

applicable, does not obliterate the act of suppression of fact as held by Hon'ble Gujarat High Court in the case of CCE, Surat-I Vs. Neminath Fabrics Ltd. - 2010 (256) ELT 369 (Guj). Hence, demand with interest have rightly conformed and appropriate penalties imposed by the adjudicating authority.

6. Heard both sides at length and perused the records.

7. The issues involved in the present appeal for determination are whether:

(i) the Appellants(formerly known as M/s Fosters India Pvt. Ltd.), who manufactured beer, affixed with the Brand name "Fosters" of M/s SKOL Breweries Ltd. and sold under their instruction as per Bottling/Brewing agreement dt.11.4.2007, rendered services under the taxable category of "Business Auxiliary Services"(BAS) and the Computation of the demand is correct;

(ii) The merger/amalgamation of Appellant Company with M/s SKOL Breweries Ltd. be taken as the appointed date i.e. 31.3.2009 as per the scheme of amalgamation or 21.06.2012, when the certified copy of the order of High Court sanctioning the scheme was filed with Registrar of Companies, Mumbai, thereby, service rendered to self, for the disputed period, hence no tax is payable;

(iii) the demand is barred by limitation.

8. By virtue of an agreement between the Appellant and M/s SKOL Breweries Ltd dt.11.04.2007, made effective from 12.09.2006, the Appellant agreed to manufacture beer, bearing the brand name owned by M/s SKOL, and clear/sale the same in the local market to the customers/indenters of M/s SKOL Ltd. or supply the same to M/s SKOL itself. The sale proceeds are retained by the Appellant but were required to pay Rs.27/- per case of 12 bottles of beers as per the agreement to M/s SKOL. The department confirmed service tax on the entire sale proceeds received by the Appellant on sell of the said beer.

9. The Revenue alleged that the Appellants had provided taxable service under the category of "Business Auxiliary Service", as amended w.e.f 01.9.2009 particularly under clause (v) i.e. production or processing of goods for, or on behalf of the client, hence liable to service tax.

10. The Appellants in a simpler way, responded to the said argument stating that even though under the bottling agreement, the Appellant is required to manufacture and sell the beer affixing/using brand name of M/s SKOL Breweries Ltd., but the entire transaction is only that of a sale transaction with the customers under a separate contract and no service of 'production or processing of goods for, or on behalf of the client' has been provided to M/s SKOL Breweries Ltd, since the goods were manufactured out of their own raw material, using their own infrastructure, and the consideration is paid by them to M/s SKOL Breweries Ltd. for using their Brand name, and no consideration was flowing from M/s SKOL Breweries Ltd. for the

said service. In any case the demand of service tax cannot be confirmed on the sale price of the branded beer to the customer.

11. Before proceeding further, it is necessary to read the relevant provisions of the Finance Act, 1994 i.e. the definition of Business Auxiliary Services (BAS) as contained in Sec.65(19) of the said Act prior to and after 01.09.2009.

Before 01.9.2009

[(19) "business auxiliary service" means any service in relation to, —

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) promotion or marketing of service provided by the client; or

[* * * *]

(iii) any customer care service provided on behalf of the client; or

(iv) procurement of goods or services, which are inputs for the client; or

[*Explanation*. — For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client;]

[(v) production or processing of goods for, or on behalf of, the client;]

(vi) provision of service on behalf of the client; or

(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision, and includes services as a commission agent, [but does not include any information technology service and any activity that amounts to "manufacture" within the meaning of clause (f) of Section 2 of the Central Excise Act,1944.

[*Explanation*. — For the removal of doubts, it is hereby declared that for the purposes of this clause, —

(a) "commission agent" means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person —

(i) deals with goods or services or documents of title to such goods or services; or

(ii) collects payment of sale price of such goods or services; or

(iii) guarantees for collection or payment for such goods or services; or

(iv) undertakes any activities relating to such sale or purchase of such goods or services;

.....

After 01.9.2009

[(19) "business auxiliary service" means any service in relation to, —

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) promotion or marketing of service provided by the client; or

[* * * *]

(iii) any customer care service provided on behalf of the client; or

(iv) procurement of goods or services, which are inputs for the client; or

[*Explanation*. — For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client;]

[(v) production or processing of goods for, or on behalf of, the client;]

(vi) provision of service on behalf of the client; or

(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision, and includes services as a commission agent, [but does not include any activity that amounts to manufacture of excisable goods].

[*Explanation*. — For the removal of doubts, it is hereby declared that for the purposes of this clause, —

(a) "commission agent" means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person —

(i) deals with goods or services or documents of title to such goods or services; or

(ii) collects payment of sale price of such goods or services; or

(iii) guarantees for collection or payment for such goods or services; or

(iv) undertakes any activities relating to such sale or purchase of such goods or services;

[(b) "excisable goods" has the meaning assigned to it in clause (d) of section 2 of the Central Excise Act, 1944 (1 of 1944);

(c) "manufacture" has the meaning assigned to it in clause (f) of section 2 of the Central

12. The change that has been brought into the definition of the BAS w.e.f. 01.9.2009 is the nerve chord of dispute. In the previous definition the exclusion clause was expressed as:

"[but does not include any information technology service and any activity that amounts to "manufacture" within the meaning of clause (f) of Section 2 of the Central Excise Act,1944."

13. The amendment to the said clause reads as:

"but does not include any activity that amounts to manufacture of excisable goods.

14. And the meaning of "manufacture" and "excisable goods" mentioned under the said clause reads as:

"(b) "excisable goods" has the meaning assigned to it in clause (d) of section 2 of the Central Excise Act, 1944 (1 of 1944);

(c) "manufacture" has the meaning assigned to it in clause (f) of section 2 of the Central Excise Act, 1944 (1 of 1944)."

15. Now, Reading both the provisions in juxtaposition prevailing prior to 1/9/2009 and thereafter, it can be noticed that in the earlier provision it was prescribed that any activity that amounts to manufacture within the meaning of section 2(f) of Central excise Act, 1944 be excluded from the scope of the said definition. It did not prescribe the resultant of such activity whether excisable goods or otherwise, but, by implication, it is to be understood that goods which fall within the purview of the Central Excise Tariff Act,1985 were only covered there under the exclusion clause. In the amended provision, after 1/9/2009, it is stipulated that to fall within the exclusion clause, not only the activity should be 'manufacture'

within the scope of section 2(f) of Central Excise Act, but the resultant should also be an 'excisable goods'. The meaning of 'manufacture' is retained as was assigned earlier however, the meaning of 'excisable goods' has been prescribed under the new provision.

16. The revenue's contention is that the mischief in the earlier provision which excluded the activity of 'manufacture', applicable both to excisable goods as well as non-excisable goods, in the amended provision has been removed as the exclusion clause restricted only to 'excisable goods' as defined under section 2 (d) of Central Excise Act, 1944. In other words, even if the activity carried out has resulted into 'manufacture' of non-excisable goods, such activity, even if satisfies the tests laid down in ascertaining whether a process or series of processes results into emergence of a product having different name, character, use, etc., and thus become 'manufacture', still it would fall under the category of 'Business auxiliary service', and leviable to service tax. The said argument of the revenue is in line with the circular issued by the board after amendment, the relevant portion reads as under:

Government of India
Ministry of Finance
Department of Revenue
Tax Research Unit
***

D.O.F. No.334/13/2009-TRU
New Delhi, 6th July, 2009

Dear Chief Commissioner/Director General/Commissioner,

The Finance Minister has introduced the Finance (No. 2) Bill, 2009 in the Lok Sabha on the 6th of July, 2009. Clause 112 of the Finance (No. 2) Bill, 2009 covers all the changes relating to Chapter V of Finance Act, 1994. Changes are also being proposed in the provisions of the, -

xxxxxx

3. **Alteration in the scope of existing taxable services :**
The following alteration/modifications have been done in the existing taxable services. These changes would come into effect from a date to be notified after the enactment of the Finance (No. 2) Bill, 2009.

3.1 ***Modification in Business Auxiliary Service (BAS) [section 65(19)]***

It may be recalled that production or processing of goods for or on behalf of a client falls within the purview of this service. However, if any such activity amounts to manufacture within the meaning of section 2(f) of the Central Excise Act, the same is excluded from its purview. This exclusion has been modified to state that it would apply only if the activity results in manufacture of 'excisable goods'. Both the words/phrases i.e. 'manufacture' and 'excisable goods' would have the same meaning as defined under the Central Excise Act. The impact of this change would be that even if a process of manufacture is undertaken for the client, but the resultant product does not fall under the category of excisable goods, such as alcoholic beverages, the service tax would be attracted. Certain other goods which would also fall under BAS on account of the proposed change would be kept outside the tax net by way of exemption notification, to be issued at the appropriate time."

17. We find merit in the argument of the revenue. After the amendment to the definition of Business Auxiliary Service with effect from 1/9/2009, the activity of manufacture of non-excisable goods, that is alcoholic beverages, would fall within the scope of Business Auxiliary Service. This receives support from the judgment of Hon'ble Delhi High Court where under the constitutional vires of levy of service tax on the activity of brewing/bottling undertaken by the independent bottling/brewing Manufacturers of alcoholic beverages for their clients, has been held to be constitutionally valid. Therefore, it can safely be concluded that the activity of manufacture of alcoholic beverages, being not an excisable goods, accordingly, does not fall within the exclusion clause of the amended definition of Business Auxiliary Services. Consequently, the CBEC Circular No. 249/1/2006-CX-4 dt.27.10.2008 issued clarifying the applicability of un-amended definition of Business

Auxiliary Service, hence is not relevant to the facts of the present case.

18. The next vital argument advanced on behalf of the appellant is that the activity undertaken by them does not come within the scope of the clause (v), that is,

"(v) production or processing of goods for, or on behalf of, the client;"

19. It is their contention that the beer is manufactured by them using their own raw materials, manpower, infrastructure and it is sold by them against consideration to the buyers under a separate contract, on payment of appropriate sales tax/VAT, hence, the production and manufacture of beer is on their own account and not for or on behalf of M/s SKOL, merely because of the fact that they affix the brand name belonging to M/SKOL. In support of their argument, they heavily relied upon the judgment of the Hon'ble Supreme Court in Cibatul Ltd.'s case, Delhi High Court judgment in Poona Bottling Co. Ltd.'s case, later upheld by the Hon'ble Supreme Court and other case laws on similar line.

20. In order to examine the said contention, it is quite essential to analyze the arrangement/agreement between the Appellant and M/s SKOL through the agreement dt.11.04.2007; the relevant conditions/stipulations reads as under:-

BOTTLING /BREWING AGREEMENT

This Agreement ("this Agreement") is entered into on this eleventh day of April 2007 with retrospective effect from the twelfth day of September 2006 BY AND BETWEEN

SKOL BREWERIES LIMITED, a company incorporated under the provision of Companies Act, 1956, having its corporate office at Jalahalli Camp Road, Yeshwanthpur, Bangalore 560 022 (hereinafter referred to as "Skol" which expression shall, unless it be repugnant to the context or meaning thereof, be deemed to mean and include its successors and assigns) of the ONE PART.

AND

FOSTERS INDIA PRIVATE LIMITED, a company incorporated under the provisions of the Companies Act, 1956 and having its registered office at Plot No.99, MIDC, Waluj, Aurangabad 431 136 (hereinafter referred to as FIPL which expression shall unless repugnant to the context or meaning thereof, be deemed to mean and include its successor or successors and buyer / buyers and permitted assigns) of the OTHER PART.

RECITALS

A. FIPL is a company engaged in the business of manufacturing beer and possesses necessary and adequate facilities for manufacturing and bottling of beer and for this purpose own and operates a brewery at Plot No.I99, MIDC, Waluj, Aurangabad 431 136 under a valid and effective license from the State of Maharashtra.

B. Skol is a company also engaged in the business of manufacturing beer. Accordingly, the parties are desirous of entering into a contract manufacturing and sale arrangement for the production and sale of Skol Beer of the quality and quantity as prescribed by Skolwhich FIPL agrees to produce, bottle and dispatch to Skol and/or to its indenters to the complete satisfaction of Skol in accordance with the provisions thereof.

C. The parties have agreed mutually on the terms and conditions of the above arrangement and wish to reduce the same into writing.

NOW THIS AGREEMENT WITHNESSETH AS UNDER:

1. DEFINITIONS

In this Agreement (including the Recitals) the following words and phrases shall, unless the context requires otherwise, have the following meanings –

1.1	Agreement	Means this Agreement and any amendments, modifications, supplements, restatements, or notations thereto or thereof, as applicable.
1.2	Brewery	Means the brewing plant of FIPL situated at Plot No.99, MDIC, Waluj, Aurangabad 431 136 where Skol beer shall be manufactured in accordance with the provisions of this Agreement.
1.3	Effective date	Means 12 September 2006

1.4	Formulae	Means all relevant information, data and material not otherwise generally known relating to manufacture of Skol beer and include characteristics, selection, judgment of properties and data relating to materials for the manufacture of Skol beer processes, techniques and methods used or useful in the production of Skol beer, owned and/or developed by Skol and disclosed to FIPL hereunder.
1.5	Indenters	Has the meaning assigned to it in Clause 2.9
1.6	Person	Includes bodies corporate, individuals, firms, partnerships and any other body of persons whether incorporated or not.
1.7	Specifications	Means the specifications for the composition, process procedures, standards of quality, packaging, storing and presentation of Skol Beer, including all information relating to raw materials, ingredients, chemicals and Formulae used in connection with the brewing of Skol Beer, methods, processes, procedures, recipes, secrets, operating manuals, knowledge and any general and technical information relating to brewing and dealing with the Skol Beer which Skol notifies to FIPL from time to time, including any changes Skol may make at its absolute discretion;
1.8	SKOL Beer	Means goods manufactured under the Trade Marks belonging to Skol.

2. GENERAL OBLIGATION

2.1 Subject to the terms and conditions herein FIPL shall brew and bottle at the Brewery such brands of Skol Beer as specified by Skol from time to time, and transport, supply and sell them in accordance with the directions and instructions given by Skol including as regards which Sates they should be transported, supplied and sold in and the manner and pricing thereof.

2.2 Further, the customers to which, and the price at which the Skol Beer manufactured and bottled by FIPL are to be supplied and sold shall be determined at the sole discretion of Skol, and the same shall be final and binding on FIPL.

2.3 FIPL shall not advertise, market or promote Skol Beer.

2.4 FIPL agrees to manufacture the quality of Skol Beer as per the Specifications laid down by Skol. In the event that the quality of the Skol Beer manufactured by FIPL does not conform to the Specifications, the same shall be deemed to be a material breach of this Agreement by FIPL.

2.5 FIPL will obtain at its cost all raw materials, packing materials, labels and chemicals and consumables required conforming to specifications, quality and terms as specified in writing by Skol.

2.6 FIPL shall immediately set aside storage space to store all raw materials, packing materials and chemicals and consumables to be used for manufacturing Skol Beer and keep and maintain adequate records and provide complete and accurate information on stocks of raw materials, packing material and chemicals and consumables on a weekly basis and in any event upon such request being made by Skol.

2.7 FIPL shall permit Skol's technical representatives ("Skol Representatives") to enter its premises who shall from time to time supervise the manufacture of Skol Beer at the Brewery. FIPL shall, free of charge, provide suitable office accommodation and laboratory chemicals equipment/s etc, and facilities to the satisfaction of Skol for the Skol Representative to be deputed at the Brewery for supervision as deemed fit by Skol.

The presence of the Skol Representative shall not absolve FIPL of its responsibility to manufacture Skol Beer according to the Specifications. FIPL shall solely be responsible for maintaining appropriate quality standards of Skol Beer and packaging as per relevant applicable laws. In the event of any claims or complaints being made by any third party in relation to the quality of Skol Beer or packaging, of the Skol Beer manufactured and bottled by FIPL under this Agreement, FIPL, shall, at its cost, arrange to collect such stocks (after getting necessary excise and other permissions), and drain the same in the presence of Skol Representative. In any event, FIPL shall indemnify Skol against all claims, processing, losses damages, charges expenses etc., if any, which may be made against or suffered by Skol with respect to the Skol Beer manufactured by FIPL. Further, FIPL shall also be liable to bear all costs, claims or losses arising on account of any information delay or loss in production or deterioration in the quality of the Skol Beer manufactured by FIPL, due to machinery breakdown or any other reason.

2.8 FIPL agrees to manufacture and make available and supply, the Skol Beer as may be determined by Skol

from time to time. The quantities are subject to a variation of plus or minus 10% (ten percent).

2.9 FIPL shall supply/invoice by sale, the Skol Beer to Skol or to the Indenters or other persons in any territory, as Skol may determine, holding necessary permits/ licences under the relevant excise laws or other applicable regulations to purchase/deal in Skol Beer (the said Persons hereinafter collectively called "Indenters") as Skol may from time to time direct.

2.10 FIPL agrees that it will comply with all the environmental laws, directives, rules and regulations and legal requirements as required by the Maharashtra Pollution Control Board.

2.11 FIPL shall ensure that the plant is in proper running condition for continuous operations at all times. FIPL shall ensure payments to the state electricity board and other local authorities as per due dates to avoid any disruption in the smooth operation of the Brewery and production of Skol Beer. FIPL has assured Skol that it has the necessary infrastructure and manpower to implement the provisions of this Agreement.

2.12 FIPL and Skol shall respectively comply with all the laws and statutory rules and regulations relating to manufacture and sale of Skol Beer.

2.13 FIPL hereby agrees that it will not enter into any contracts with any companies manufacturing and marketing brands owned by United Breweries, Asia Pacific Breweries, Inbev, Carisberg or Scottish and Newcastle or any other multinational or local brewer.

2.14 All expenses including diesel, furnace oil, water, bought out power, stores and spares for plant and machinery maintenance (including effluent and water treatment) utility consumables, workers remuneration, fixed overheads, local licenses fees, taxes and other statutory levies to be incurred under this arrangement shall be borne by FIPL. Provided that all statutory taxes and levies relating to the transport and sale of Skol Beer shall be borne by Skol as described in Clause 3.2; for the avoidance of doubt, skol shall not bear the cost of the annual brewery licence fees and other statutory taxes and levies that are for the account of FIPL.

2.15 Skol shall be responsible to apply for label registration in respect of Skol Beer manufactured by it under this Agreement and obtain the same. The registration feefor labels shall be borne by Skol.

2.16 Skol shall provide FIPL the Specifications to manufacture and sell Skol Beer solely for the limited purpose of manufacturing such products to be supplied as per the

directions of Skol in terms of this Agreement.

2.17 Skol shall depute Skol Representatives and/or other technical personnel at its cost who shall be competent to supervise the whole process of manufacturing, bottling, dispatch and/or other related works and who shall from time to time supervise the manufacture of Skol Beer at the Brewery covered under this Agreement.

2.18 Skol shall inform FIPL in writing the name of the Skol Representatives/technical personnel to be deputed by Skol from time to time as mentioned above prior to such deputation and FIPL undertakes and assures all co-operation, assistance and access to all such departments for this purpose of such supervision.

2.19 Skol shall be responsible for sending excise duty paid import/bond permits to FIPL to enable FIPL to dispatch Skol Beer to Skol or the indenters as the case may be. Wherever necessary, Skol shall be responsible for obtaining the verification certificates and/or other evidences from the excise authorities with regard to the dispatches of Skol Beer and furnish the same to FIPL.

2.20 Skol shall be free to resell or direct the sale to the indenters of Skol Beer on such terms and conditions as Skol may determine in its sole discretion.

2.21 Skol will provide detailed Specifications for each brand or product comprising Skol Beer to be manufactured by FIPL, Skol shall consult with FIPL the production schedule for different brands/products of Skol Beer, at periodic meetings and the production plan of FIPL shall be drawn in advance for the succeeding month, atleast15 (fifteen) days before the beginning of such succeeding month, which plan shall not be modified without the prior approval of Skol.

2.22 Any deduction in Indenters on supply of Skol Beer will be to the account of Skol.

2.23 FIPL hereby confirms represents and warrants that there are no legal or contractual impediments to enter into contracts for the manufacture of Skol Beer by FIPL and generally give effect to the terms and conditions of the Agreement by Skol and FIPL.

2.24 FIPL, on a request from Skol, shall produce and make available any additional quantities as may be agreed upon.

2.25 FIPL is further obligated to ensure that packaging, including body labels, back labels, foils, etc, shall be in accordance with directions given by Skol, from time to time and that the Skol Beer shall be bottled in universally acceptable beer bottles or as may be

specified by Skol.

3. **PRICES**

3.1 Skol and FIPL shall, from time to time, agree on the sale price of a Beer case of 12 (twelve) bottles of 650 ml and 24 (twenty four) bottles of 330 ml each of Skol Beer (a "Case") manufactured by FIPL in terms of and in accordance with this Agreement. Out of sale proceeds collected from the indenters, FIPL will pay Skol the net proceeds of Rs.27/- (Rupees Twenty Seven only) per case.

3.2 The net proceeds shall be exclusive of local excise duty, sales tax, export pass fee, octroi, freight, breakages, transit insurance and any other statutory taxes and levies. FIPL shall be responsible for the remittance of all taxes, duties and other levies and indemnify Skol against any liabilities arising thereof. FIPL also agrees to pass on the concessions/exemptions on taxes or duties and levies to Skol as long as such benefits are made available to them.

3.3 The Parties agree that the sale of Skol Beer shall be made according to dispatch instructions issued by Skolor its nominated indenters. The invoices shall be raised by FIPL at the prices communicated by Skol to them periodically in writing. Notwithstanding anything to the contrary, it is clarified that FIPL shall not be entitled to receive any amounts other than those expressly set out herein and any other realizations from sale of Skol Beer shall be remitted to Skol's account.

.....

21. On a quick analysis of the aforesaid stipulations, reveals that the object and purpose of the agreement is clearly mentioned in clause (B) of the Recitals; the intention of the parties is to enter into a contract of manufacturing and sale arrangement for the production and sale of SKOL beer as per the quality and quantity prescribed by M/S SKOL and the appellant accepts to produce, bottle and dispatch the beer to Skol and/or to its indenters. Under the general obligations, it is clear from clause 2.1 that the appellant is required to brew and bottle at their Brewery the Skol brand beer and supply/sale the

same in accordance with the directions and instructions of Skol; clause 2.2 stipulates that the price at which the beer are to be supplied and sold be determined by Skol; clause 2.3 states that the appellant shall not advertise, market or promote Skol beer; clause 2.4 mentioned that if the quality of the Skol beer manufactured by appellant does not conform to the specification then it shall be treated as breach of agreement; clause 2.5 stipulates that the appellant will obtain at its cost all the materials packing materials levels chemicals renewables in accordance with the specifications as specified by Skol; clause 2.6 requires the appellant to maintain adequate records and provide complete and accurate information on stocks of raw materials, consumables etc. on weekly basis; close 2.7 prescribes that the technical representatives of M/s Skol be allowed to supervise the manufacture of beer at the Brewery and the appellant shall provide suitable office accommodation and laboratory chemicals equipment etc. free of charge; clause 2.9 stipulates that the appellants shall supply/invoice by said to Skol or to the indenters or other persons as may be determined by Skol; clause 2.11 stipulates that the plant is in proper running condition for continuous operations at all times and appellant shall ensure payment of all dues to the local Electricity Board and other authorities to avoid disruption of production; clause 2.14 stipulates that all expenses namely, diesel, furnace oil, water, power, stores and spares for plant and machinery, consumables, workers remuneration, fixed overheads local licenses fees, taxes and other statutory levies shall be borne by the appellant; under clause 3.1 SKOL and

appellant shall agree on the sale price of a beer case of 12 bottles of 650ml. and 24 bottles of 330ml and out of the sale proceeds collected from the indenters, the appellant will pay Skol the net proceeds of ₹ 27 per case; clause 3.2 stipulates that the net proceeds shall be exclusive of excise duty, sales tax octroi, freight, breakages, transit insurance etc.; clause 3.3 states that sale of beer be made according to dispatch instructions issued by Skol or its indenters, the invoices shall be raised by appellant at the prices communicated by Skol to them chronically, the appellants shall not be entitled to receive any amount other than expressly set out and any other realization from sale of Skol beer shall be remitted to Skol's account.

22. In nut shell, the Appellant was to procure raw materials, packing materials, lables, chemicals, consumables, manufacture using its own infrastructure, manpower in accordance with the specifications and standards, affix the brand name "Fosters" under the strict supervision of M/s Skol Brewery Ltd., maintain the quality and standard; the price of the branded beer would be determined by M/s Skol Brewery Ltd and the goods were to be sold only under the instructions of M/s Skol Brewery Ltd to the customers/indenters as may be directed.

23. The Revenue's contention is that the condition of arrangement between the Appellant M/s Skol Brewery Ltd. is that of production of goods for, or on behalf of M/s Skol Brewery Ltd/. In rebuttal the contention of the learned

Advocate for the Appellant referring to the judgment of Hon'ble Supreme Court in Cibatul Ltd's case (supra), is that the buyer in the said case could not be designated as a 'manufacturer' of the goods for and on behalf of the seller merely because the same were manufactured bearing brand name of the seller-supplier and out of raw materials and joint manufacturing programme drawn by the buyer and the seller.

24. In the said case the facts in brief are that M/s Cibatul Ltd (the seller) had entered into an agreement with M/s Ciba Geigy of India Ltd.(the buyer) on 24.07.1971 under which the products, namely, UF resins and MF resins were to be manufactured by the seller in accordance with the manufacturing programme drawn up jointly by seller and the buyer. The Resins were to be manufactured in accordance with the restrictions and specifications constituting buyer's standards and they were supplied at the prices agreed upon between the sellers and the buyers from time to time. The buyer was entitled to test a sample of each batch of these goods and it was only after approval by the buyers the goods were released for sale to the buyers. The buyer, who obtained trademarks from its foreign company, authorised the seller to affix the trade mark and the seller was to do so "as an agent" for and on behalf of the buyer and not on his own account. The Respondents M/s Cibatul Limited filed price list declaring the wholesale prices of the manufactured goods. The Assistant Collector revised the wholesale prices upward on the basis of wholesale prices at which the buyer sold the products in the market. The question before Hon'ble Supreme Court was

whether the wholesale price of the goods at which it was sold by the seller to the buyer for assessment or the price at which the buyer sold the goods in wholesale in the market be adopted for the purpose of assessment. In these circumstances, the Hon'ble Supreme Court has held that the goods were manufactured by the seller M/s Cibatul Ltd. on his own account and not on behalf of the buyer, hence, the whole sale price at which it was cleared/sold to the buyer M/s Ciba Geigy Ltd. be relevant for excise duty purpose.

25. In Poona Bottling's case, the petitioner was manufacturing and bottling of soft drinks like Gold Spot, Limca, Thumsup etc. They are registered with the Central Excise Department for the purpose of manufacturing the said soft drinks and installed the bottling plant by an investment of about Rs.40 lakhs. For the manufacturing of soft drinks it has to be purchase numerous articles such as bottles, crown corks, sugar, citric acid etc. Besides these, it also purchased essence from M/s Parle under franchise agreement dt.25.07.1977 and 27.02.1978. The issue was whether because of franchise agreement between the petitioner and M/s Parle, it would be construed that the petitioner deemed to have been manufacturing the soft drinks for and on behalf of M/s Parle. By virtue of notification number 211/77 dt.4.7.1977 a manufacturer of aerated waters allowed partial exemption from duty, not exceeding fifty lakh bottles for home consumption by or on behalf of a manufacturer from one or more factories during any financial year subsequent to 1977-78 and for such clearances not exceeding thirty seven lakh bottles

during the period commencing from July 4 1977 and ending till 31 March 1978.Analyzing the franchise agreement and the provisions of Contract Act, the Hon'ble High Court has held that the petitioner are the manufacturers of soft drinks and not M/s Parle who was not issued with notice for exceeding the prescribed limit for allowing the exemption from excise duty.

26. We do not find relevance of the principle laid down in the aforesaid judgments, inasmuch as the question involved in these cases for determination as to who was the manufacturer within the provisions of Central Excise Act for the propose of valuation in Cibatul Ltd.'s case and eligibility of exemption Notification in Poona Bottling Ltd.'s case. In the present case, the levy is on rendering of services, in contrast to the aforesaid cases, where the taxable event is on the manufacture of goods and liability to discharge the duty is on the manufacturer of goods. Further, the question in the instant case is neither the assessment of beer, nor who is the manufacturer, but it is the service rendered by the Appellant in the production of the beer to cater to the marketing needs of M/s SKOL. Therefore, the ratio laid down in the aforesaid judgments cannot be made applicable to the present case.

27. It is the contention of the Appellant that in any service, consideration flows from the service receiver to the service provider, whereas in the present case, the appellants paid Rs.27/- per case of twelve bottles to M/s Skol, hence, it is not a service. At the first blush the argument sounds quite attractive but on deeper analysis will not be sustainable. The

arrangement/agreement for manufacture and sale of branded alcoholic beverages between the appellant and M/s Skol is a complex one; even though the appellant is authorised to sale the manufactured branded beer in the local market, but the customers/indenters are as per the instruction of M/s Skol; the sale price is fixed by M/s Skol after mutual consultation. Thus it is not a simple provision of service agreement, where under, the service is flown from appellant to M/s Skol and the consideration is received against the service rendered. It is the argument advanced on behalf of the revenue that the service charges are adjusted against the sale price, and the balance amount returned to the service receiver out of the sale proceeds of manufactured branded beer for and on behalf M/s SKOL. Thus in determining the taxable value, in the present circumstances, Notification 39/2009 dt. 23.9.2009 has been issued, allowing deductions on the value of inputs used in the manufacture/processing of alcoholic beverages, subject to the conditions laid down there under. The said Notification reads as:

> **Business Auxiliary Services — Exemption to value of inputs used for providing taxable service during manufacture/processing of alcoholic beverages**
>
> In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the Finance Act), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable service specified in sub-clause (zzb) of clause 105 of section 65 of the Finance Act, provided by a person (hereinafter called the 'service provider') to any other person (hereinafter called the 'service receiver') during the course of manufacture or processing of alcoholic beverages by the service provider, for or on behalf of the service receiver, from so much of value which is equivalent to the value of inputs, excluding capital goods, used for providing the same service, subject to the following conditions, namely :-

(a) that no Cenvat credit has been taken under the provisions of the Cenvat Credit Rules, 2004;

(b) that there is documentary proof specifically indicating the value of such inputs; and

(c) where the service provider also manufactures or processes alcoholic beverages, on his or her own account or in a manner or under an arrangement other than as mentioned aforesaid, he or she shall maintain separate accounts of receipt, production, inventory, despatches of goods as well as financial transactions relating thereto.

2. This notification shall come into force on the date of publication in the Gazette of India.

Explanation.- For the purposes of this notification, the words or phrase 'input', or as the case may be, 'capital goods' shall have the meaning as is assigned to them under rule 2 of the Cenvat Credit Rules, 2004.

[Notification No. 39/2009-S.T., dated 23-9-2009]

Therefore, the value of the services needs to be determined keeping in mind the aforesaid notification and the principles of valuation prescribed under Section 67 of the Finance Act and the Valuation Rules, 2006. The Adjudicating authority has erred in adopting the sale price of the Appellant.

28. The next issue for determination is the date of amalgamation/ transfer of the Appellant's brewery unit with M/s Skol Breweries Ltd. In the scheme of arrangement as per Section 391 to 394 of the Companies Act, 1956 for amalgamation of the Appellant's brewery division with M/s Skol Breweries Ltd., the appointed date and the effective date have been defined under Clause 1.1 (b) & (f) of the said scheme, respectively, as follows:-

(b) "**Appointed Date**" means the close of business hour on 31st March 2009 or such other date as may be fixed by the High Court of Judicature at Bombay, or by such other authority having jurisdiction under law.