

Read : Application dt. 25.10.2011 by M/s. Red Bull India Pvt. Ltd. holder of TIN 27140626394V.

Heard: 1. Shri Tapre, Advocate and Shri Harish Kanotra (Director, Finance) attended the hearing on dt.17.06.2014.

2. Shri Sujay Kantawala, Advocate and Shri Harish Kanotra (Director, Finance) attended the hearing on dt.23.07.2014.

PROCEEDINGS

(under section 56 (1) (e) and 56(2) of the Maharashtra Value Added Tax Act, 2002.)

No. DDQ 11/2011/Adm-3/26/ B- 3

Mumbai, dt. 6/12/2014

An application is received from M/s. Red Bull India Pvt. Ltd., having address at 1st floor, B Wing, 215 Atrium, Kanakia Spaces, Chakala, Andheri Kurla Road, Andheri (E), Mumbai-400059, requesting determination of the rate of tax on 'Red Bull Energy Drink' sold through invoice no.RE/FG/2011/RB 1220 dt.12.11.2011.

02. FACTS & CONTENTION

The written submission of the applicant is reproduced verbatim hereunder :

1. "We, M/s. Red Bull India Private Limited are engaged in marketing and trading (i.e. import and sale) of the 'Red Bull' brand energy drinks ('Energy Drinks') in India. For further distribution of Energy Drinks the distributor involved is Narang Access Private Limited (formerly known as Narang Hospitality Services Private Limited) ('NAPL'), who further sells the Energy Drink purchased from the Applicant to other distributors within a State. The applicant ... has been discharging VAT on the sale of Energy Drinks at rate of 12.5 percent under the residuary category since there is no specific entry for 'energy drinks' in the rate Schedules to the MVAT Act. Vide the MVAT Act No. XV of 2011 dated April 21, 2011 read with Trade Circular No. 7T of 2011, dated May 4, 2011 (the 'Circular'), a new entry has been introduced in Scheduled D to the MVAT Act. The new entry (Entry 13) intends to levy VAT at the rate of 20 percent upon "aerated and carbonated non alcoholic soft drinks".

Given the above, the applicant wishes to submit to your goodself their contention to determine classification of the energy drinks and determine the applicable rate of tax on the same. In view of this contentions issue, the Applicant humbly would like to submit the following:

Grounds

Trade Parlance

Energy drink is a functional food being a Proprietary Food product under the Prevention of Food Adulteration Act and Prevention of Food Adulteration Rules ("PFA Act and PFA Rules") or the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011 ("FSSAI Regulations") and is sold in India under the category of Proprietary Food which fact is also declared on its label and for which no specific standards have been laid down under the PFA Act, PFA Rules or the FSSAI Regulations. The Food Safety and Standards Authority of India (FSSAI) has also acknowledged that energy drinks need to be examined from a different standard and has constituted an expert committee for framing standards for energy drinks.

Due to their functional ingredients and composition, energy drinks distinguish themselves substantially through their properties and special benefits from regular "aerated and carbonated non-alcoholic soft drinks". Thus, energy drinks are treated as a different product catering to a distinct market segment (as compared to aerated drinks). Accordingly, this trade meaning and commercial nomenclature/character of goods material should be considered for the classification of goods from a VAT/CST perspective. This approach, referred to as the trade 'parlance theory', finds approval in a plethora of judicial precedents including the ruling of the Hon'ble Supreme court in Mauri Yeast India Private Limited v. State of UP and Mukesh Kumar Agarwal v. State of Madhya Pradesh.

Placing reliance on the trade parlance theory, the Applicant submits that Energy Drinks shall not qualify as "aerated and carbonated non alcoholic soft drinks". Also, as discussed above while the PFA Rules and FSSAI Regulations have defined standards for Carbonated water they do not have defined standards for energy drinks because of which energy drinks are being declared and sold in India under the category of Proprietary Food product as defined in the FSSAI Regulations, PFA Act and PFA Rules. Thus, it is apparent that in the general parlance "aerated and carbonated non alcoholic soft drinks" do not include 'energy drinks' and other similar proprietary food, which are considered as distinct products in the market.

International practice

A similar classification as the one under Chapter 22029090 of the ITC (HS) Code, is typically followed in the international trade for 'energy drinks' too. This is evident from the rulings HQ 960544 & NY 182695 pronounced by the 'United States International Trade Commission Rulings and Harmonized Tariff Schedule' and

classification of Energy Drinks by the Agro-Food & Veterinary Authority of Singapore.. Hence, even from the perspective of international practice, energy drinks are distinct category of food and are not classified as aerated waters which in the ITC (HS) Code, are covered under Chapter 2202 1010.

Given the above, it is humbly stated that the Applicant sells Energy Drinks that internationally are being treated distinctively from artificially sweetened water or aerated drinks on technical grounds.

2.3 Ruling of Commissioner (Appeals) deeming Energy Drinks as 'proprietary food' by Order dated October 5, 2007.

In a dispute relating to the classification of the Energy Drinks sold by the Applicant as aerated waters under Chapter heading 22021010 of the ITC (HS) Code, the Commissioner (Appeals) vide its order dated October 5, 2007 has ruled that the Energy Drinks sold by the Applicant are classifiable under Chapter heading 2202 9090 (i.e non-alcoholic beverages other than aerated/carbonated water) and not as aerated water under heading 2202 1010, since these products are distinct and are not merely 'aerated waters'. The Revenue has filed an appeal against this order of the Commissioner (Appeals) before the Customs, Excise, Service Tax Appellate Tribunal ("CESTAT"), Mumbai Bench.

From a customs duty standpoint also, classification of imports of Energy Drinks as a 'proprietary food' have been accepted by the Commissioner (Appeals) for NAPL through order dated October 5, 2007, while rejecting Revenue's plea that the energy drinks are classifiable as aerated drinks; along with further appeal to the CESTAT, the Revenue in the said matter also sought an interim relief by way of stay of operation of the order passed by the Commissioner (Appeals) but such request was out rejected by the CESTAT holding that NAPL has a reasonable case and that *prima facie* the order passed by the Commissioner (Appeals) seems meritorious. Order NoS/121/08/WZB/C-STB/C-II dated February 26, 2008 accepted the Applicant's classification of the Energy Drink as 'Proprietary Food' and granted dismissal of the differential duty.

2.4 Differentiation between the Energy Drinks and aerated/mineral waters has also been approved by the Division Bench of Madras High Court.

In a Writ Appeal filed by NAPL challenging the action of testing Energy drinks on the standards for Carbonated Water under the PFA Act and Rules, the Hon'ble Madras High Court has by its order dated December 20, 2005 recorded that energy drinks are a distinct category of food and cannot be treated as Carbonated Water. We reproduce hereunder the relevant extract of the judgment.

"There is no dispute that the Central Food Laboratory, Mysore has treated the Petitioner's product as one falling under the category of "Non-Alcoholic Aerated/Carbonated Water" and on that basis, the analyst has opined that the sample does not conform to the standards laid down for "Non-Alcoholic Beverages" under the PFA Act, 1954 and Rules thereof. The certificates are annexed at pages 1 and 2 in the typed-set orders.

It is clearly seen that the 2nd Respondent has accepted that the Petitioners' product falls under the category of "Proprietary Food Item" and does not fall under the category of "Non-Alcoholic Aerated/Carbonated Water". This position is also fairly conceded by the learned Additional Solicitor General. In this view of the matter, the certificates issued by the Central Food Laboratory, Mysore dated 10.1.2005 and by the Port Health Organization dated 13.1.2005 as well as the show cause notice dated 1.2.2005 are set aside".

Bursuant to the order of the Madras High Court, it is an admitted position that Energy Drinks are Proprietary Food constituting unique components and cannot be loosely classified or termed as aerated or carbonated waters' and for this reason the regulations applicable on such aerated or carbonated drinks cannot be automatically made applicable to 'energy drinks'.

Thus in the technical parlance both these products (i.e. non-alcoholic carbonated/ aerated drinks and energy drinks) are considered distinct and are not inter-changeable, considering the highly variant components in the product.

2.5 Clarification by Directorate General of Foreign Trade ('DGFT')

A clarification has been provided through letter dated April 8, 2003 by the DGFT under the Ministry of Commerce & Industry, Government of India on a representation which had been made by NAPL, on behalf of the Applicant on the classification of the 'energy drinks'. The clarification approves the classification of Energy Drinks under Chapter 2202 9090 ('others') as opposed to 2202 1010 ('aerated waters'). The relevant extract has been enlisted herein below:

"The committee has decided to classify the item 'Red Bull Energy Drink-non alcoholic' under ITC(HS) Code No. 2202 90 90 and will be importable as per the conditions in the chapter notes of chapter-22 in the ITC(HS) Classification 2002-2007. " It was also pointed out that the clarification issued shall be subject to the condition that the requisite certificate from the competent Health Authority may be obtained to ensure compliance.

2.6 Categorization as Proprietary Food and Framing of distinct standards for Energy Drinks

As discussed above, Energy Drink is a Proprietary Food product under the FSSAI Regulations, PFA Act and PFA Rules and is sold in India under the category of Proprietary Food which fact is also declared on its label and for which no specific standards have been laid down under the FSSAI Regulations, PFA Act and PFA Rules. Rule 2.12 of the FSSAI Regulations defines Proprietary Food products as under:-

2.12: Proprietary Food

2.12.1

1) Proprietary food means a food that has not been standardized under these regulations

2) In addition to the provisions including labelling requirements specified under these regulations, the proprietary foods shall also conform to the following requirements, namely:-

(i) the name describing as clearly as possible, the nature or composition of food and/or category of the food under which it falls in these regulations shall be mentioned on the label.

(ii) the proprietary food product shall comply with all other regulatory provisions specified in these regulations and in Appendices A & B.

The Label of the Red Bull Energy Drink reads as "PROPRIETARY FOOD NON ALCOHOLIC". The ingredients are listed as; water, sucrose, glucose, acidity regulators, carbon dioxide, acidifier (citric acid), Taurine, Caffeine, Glucuronolactone, inositol, vitamins, flavors, colour, contains permitted natural colours and natural and artificial flavours.

Regulation 2.10.6 of the FSSAI Regulations lays down standards for Carbonated water. Energy drinks, as explained above, due to their unique ingredients and composition do not fit with the classification of aerated soft drinks. However, energy drinks are not (yet) standardized under the FSSAI Regulations and presently the FSSAI is framing standards for energy drinks.

As discussed above while the FSSAI Regulations have defined standards for Carbonated Water, there are no defined standards for energy drinks. This is why energy drinks are currently being declared and sold in India under the category of Proprietary Food product as defined in the PFA Act and PFA Rules. The fact that Energy Drinks are distinct from Carbonated Water has also been recorded by the Madras High Court in its order of December 20, 2005.

Thus, from the foregoing, it is apparent that the energy drinks, are not 'aerated and carbonated non-alcoholic soft drinks' either in trade parlance or under food laws including PFA Act and Rules wherein it has been classified as Proprietary food. The energy drinks, therefore are a different product catering to a distinct market segment (as compared to aerated drinks).

Due to the fact, that energy drinks cannot be classified under the Carbonated Water, the Food Safety and Standards Authority of India (FSSAI) is currently drafting a set of standards applicable to Energy Drinks which clearly evidence that standard of Carbonated Water cannot be applied for Energy Drinks. The FSSAI has constituted an expert group for the purpose of framing standards for Energy Drinks and consultations with stakeholders have also been carried out. The Draft Regulations of Food Safety and Standards Authority of India, dated 7 June, 2010 states that "Energy drinks are non-alcoholic beverages containing caffeine, guarana, glucuronolactone, taurine, ginseng, inositol, carnitine, B-Vitamins etc. as main ingredients that act as stimulants.

2.7 Summary

In summary, the following references are relevant for this purpose:

- The Circular intends to levy 20 percent VAT on aerated and carbonated soft drinks and in common trade parlance 'energy drinks' do not qualify as 'aerated and carbonated non alcoholic soft drinks'.
- From a customs duty standpoint also, classification of imports of Energy Drinks as a 'proprietary food' have been accepted by the Commissioner (Appeals) for NAPL through order dated October 5, 2007, while rejecting Revenue's plea that the energy drinks are classifiable as aerated drinks;
- Classification of 'energy drinks' as distinct products finds acceptance in international trade practice; Differentiation between the Energy Drinks and 'aerated waters' has been recorded by the Division Bench of Madras High Court in its aforementioned dated December 20, 2005;
- As opposed to Carbonated Water which have specified standards under the FSSAI Regulations, energy drinks are classified as Proprietary Food under the FSSAI Regulations and FSSAI is presently framing standards for energy drinks, which contain additional ingredients such as caffeine, guarana, glucuronolactone, taurine, ginseng, etc.

3. Clarification sought/queries for determination

Given the above, the applicant requests your goodself to clarify that energy drinks will continue to be a subject matter of the residual entry for purposes of the VAT laws attracting VAT at 12.5 percent as opposed to 20 percent on the 'aerated and carbonated non alcoholic soft drinks', which is in consonance with the Applicant's stated approach to classification and has been reasonably done so. Based on all the aforesaid precedents/statements we humbly request you to provide the following clarification and respond to our queries at the earliest.

However, notwithstanding the above contentions, this application has been filed before your goodself, to seek clarity about the legal position and to get the issue determined, as per law.

4. Prospective effect

Notwithstanding any grounds contradicting a determination if your goodself comes to the conclusion that energy drinks are covered in under the new Entry 13 in Schedule D levying VAT at the rate of 20 percent on "aerated and carbonated non-alcoholic soft drinks", then it is prayed to grant prospective effect to the said order, so as to protect the Applicant's liability till date of such order under Section 56(2) of the MVAT Act. Based on the contention above, it is evident that the Applicant is not covered by the above Entry 13. No guidelines about scope of above the new Entry 13 are available so far. Under above circumstances, under bonafide belief, we do not consider the energy drinks to be covered under Entry 13 of Schedule D of the MVAT Act. Therefore, if at all, we are held as covered by the aforesaid Entry, we pray for prospective effect. Such prospective effect should also be made applicable to all dealers engaged in purchase/sale of Red Bull Energy drinks under the powers granted in Section 56(2) of the MVAT Act."

03. HEARING

Shri Tapre, Advocate and Shri Harish Kanotra (Director, Finance) attended the hearing on

dt.17.06.2014. It is stated that the issue under dispute is whether the impugned product is covered under schedule entry D-13 inserted w.e.f 1.5.2011 or under entry E-1. It is the contention that the product is covered by E-1 for reasons. Since it is claimed that the product is not covered under entry D-13 which reads- "*Aerated and Carbonated non-alcoholic beverage whether or not containing sugar or other sweetening matter or flavour or any other additive*", it was enquired whether the product is not an aerated or carbonated non-alcoholic beverage? It was submitted thus :

"The product is not an aerated or carbonated non-alcoholic beverage for reasons thus:-

1. *Basic ingredients of aerated and carbonated non-alcoholic beverage & Red bull are different. Red bull contains sucrose, taurine, vitamins etc. for energy, metabolism increase which is not the case in aerated and carbonated non-alcoholic beverage.*
2. *Classification under Custom Act-Energy drink is classified in heading 22029090 whereas aerated water is classified under 22021000.*
3. *Carbon dioxide use, as far as Red bull is concerned, is to increase the life of the product. The product has a shelf-life of 2 years from the date of manufacturing whereas other products' life is 6 months.*
4. *There are restrictions as to the consumption of Red bull - not more than 2 cans per day - not for children, pregnant/lactating mothers and persons sensitive to caffeine. There are no restrictions as to the other products falling under the entry D-13."*

The applicant's attention was invited to the decision of the Hon. Madras High Court in the applicant's own case wherein the Senior Counsel accepted that "*the Energy drink of the appellant was only a carbonated water impregnated with carbon di-oxide*". Hence, it was brought to their notice that the Maharashtra Value Added Tax Act, 2002 (MVAT Act, 2002), has a specific entry for 'aerated and carbonated non-alcoholic beverages'. To this, it was argued that the impugned product though containing carbon di-oxide does not fit into that entry as the function of carbon di-oxide in Red Bull is different than other products. A prayer for prospective effect is made. The applicant was asked to submit the authoritative definition of aerated and carbonated drinks to which a time of one week was requested to produce the details.

A re-hearing in the matter was requested and therefore, held on dt.23.07.2014 when Shri Sujay Kantawala, Advocate and Shri Harish Kanotra (Director, Finance) attended. It was contended that a written submission in the matter has been tendered through the Advocate's letter of dt.01.07.2014. The same reads thus :

“History:-

In 1976 Chaleo Yoovidhya introduced a drink called Krating Daeng in Thailand, which means 'red gaur' in English. It was inspired by the tonic Lipovitan, whose prim ingredient is taurine, and was popular amongst Thai truck drivers and labourers. After visiting Thailand in 1982 Dietrich Mateschitz had discovered that Krating Daeng help cure his jet lag. In 1984 Mateschitz co-founded Red Bull GmbH with Yoovidhay and turned into a global brand.

Ingredients:-

The primary ingredients of Red Bull drink (of a 250 ml can) include the following;

- a) *Taurine (400Mg): It is a normal and major constituent of the human body. Taurine is a conditionally essential amino acid and is contained in food articles such as fish or poultry.*
- b) *Glucuronolactone(24 Mg): It is a carbohydrate occurring naturally in the human body where it is produced from glucose. Glucuronolactone is also present in different articles such as grain or red wine.*
- c) *Caffeine (32 Mg): It is known for its stimulating, it improves mental and physical performance. The caffeine content in Red Bull Energy Drink corresponds to one average cup of coffee.*
- d) *Inositol (20 Mg): It is a building block of cell membrane and is classified as a member of the Vitamin B complex. The human body maintains a high internal store of inositol.*
- e) *B Vitamins (6.2 Mg): They play a key role in the energy metabolism (build up and breakdown of carbohydrates, fats and proteins)*

f) Sucrose and Glucose: Both these are sources of energy.

The abovementioned ingredients, it is submitted, are not mere flavouring or sweetening agents which are added to water. Each of the above ingredients as described play a role in giving Red Bull Energy Drink its essential character of a performance enhancer or energy booster. Aerated and Carbonated drinks do not contain all or part of the above ingredients, let alone in functional quantity to prove enhanced effects on consumption.

A Can of Red Bull contains high levels of Sugar (Glucose Sugar). Caffeine, Niacin (another name for Vitamin B3), Taurine (an Amino Acid for athletic performance). Red Bull also contains Glucuronol Actone, a substance that is said to increase the sense of wellbeing. Red Bull has a warning on every can and is not recommended for children, pregnant or lactating mothers and persons sensitive to high doses of caffeine. Use not more than 2 cans a day as clearly printed on the can. B Complex Vitamins B6 and B12 in this combination reduce tiredness and fatigue which clearly means that Red Bull is a specific proprietary Food designed for athletic performance. The price is also three times higher than a normal carbonated and sweetened beverage which is normally consumed by children in large amounts.

The product 'Red Bull Energy Drink' is imported by the applicant from foreign countries and the Custom Department clears the goods under Tariff item 2202.9090 under the residuary heading: "Other" of Beverages, Spirit and Vinegar. According to the applicant "Red Bull Energy Drink" is a proprietary food item typically meaning that it is manufactured and sold by the applicant. The proprietary foods have many ingredients which provide it certain essential characteristics. The Tariff heading under the Customs Tariff Act is as under:

Tariff Item	Description of goods
2202	Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured, and other non-alcoholic beverages, not including fruit or vegetable juices of heading 2009
220210	<ul style="list-style-type: none"> - Waters including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured: --- Aerated waters --- Lemonade --- Other;
2202 10 10	- Other;
2202 10 20	--- Soya milk drinks, whether or not sweetened or flavoured
2202 10 90	--- Fruit pulp or fruit juice based drinks
2202 90	--- Beverages containing milk
2202 90 10	--- Other
2202 90 20	
2202 90 30	
2202 90 90	

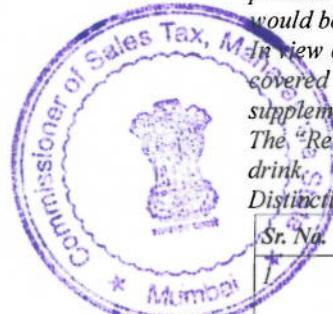
The "Red Bull Energy Drink" is nourishment food and food supplement which increases performance, concentration and reaction speed, improve vigilance, stimulate metabolism and make one free more energetic to overall well beings and contains various vitamins. The mere purpose of a Residuary Entry E-1, has to be given some purposeful meaning. The legislature in his wisdom has kept a residuary entry for the specific purposes of covering Energy Drinks like the product in question, which do not stand covered by Entry D-13. The carving out and maintaining of a residuary entry would be rendered otiose.

In view of above peculiar facts it is submitted that the "Red Bull Energy Drink" is nothing but food in liquid form not covered by Entry D-13 of the schedule appended to the Act. Prima facie it can be said to be in the nature of food supplement in the liquid form.

The "Red Bull Energy Drink" contains carbon dioxide (Co2), that itself does not mean that it is aerated and carbonated drink.

Distinction between Aerated and Carbonated non-alcoholic beverages and Red Bull Energy Drink is as under:

Sr. No.	Aerated/Carbonated Beverages	Red Bull Energy Drink
1	Basic ingredients are water, sugar, vitamin, Co2, may be concentrated fruit pulp etc.	Water sucrose, glucose, acidity regular, acidifier, taurine, caffeine, glucose, nalactone, inositol, vitamin permitted nature colour or artificial flavours. Caffeine is added to energy drinks ostensibly to increase mental performance
2	In carbonated beverages Co2 is used for taste.	In Red Bull Energy Drink Co2 is a preservative and used for extending the life of drink.
3	The maximum life of the product is within six month from the date of manufacture.	The Red Bull Energy food the maximum life is 24 months from the date of manufacturing.
4	The Co2 gets immediately fizzled out upon opening of the bottle/can.	The Co2 never fizzles out upon opening of can of Red Bull Energy Drink.
5	The beverages can be consumed by any person of any age.	There is restriction for use of the product and the same is not be used by children and pregnant women.
6	Under the provision of FSSAI the product comes under the Heading of Carbonated Water. Caffeine level allowed not exceeding 145 Ppm	Under the Draft Notification of FSSAI Energy Drink comes under the Heading "Caffeinated Beverages". Caffeine level allowed not exceeding 320 Ppm
7	Aerated and carbonated beverages are classified by Custom Department under CTA Act, Tariff Heading 2202.1010 as aerated waters	Red Bull Energy Drink is non-alcoholic liquid food drink classified under the residuary Tariff heading 2202.9090 as "Other".



8	<i>In common parlance treated as non-alcoholic, soft drink/beverages.</i>	<i>In common parlance the product is treated by the person who are using as 'energy food' (Common parlance certificate attached)</i>
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Technical aspects of aeration and carbonation

The process of manufacturing soft drinks/ non-alcoholic beverages ('soft drinks') is complex and elaborate. Globally, there are certain regulatory standards which have to be followed by soft drink manufacturers. These standards are, *inter alia*, in relation to allowable levels of dissolved solids, alkalinity, chlorides, sulphates, iron aluminium etc.

Typically, the following processes are followed for producing soft drinks:

- a) Clarifying the water
- b) Filtering, sterilising, dechlorinating
- c) Mixing the ingredients – sugar, preservative, flavours etc.
- d) Carbonating the water.
- e) Filling, bottling and packaging.

The processes (a)&(b) are more akin to aeration processes, while only process (d) is similar to carbonation. The technical aspects of aeration and carbonation are explained below.

Aeration:

- In simple terms, aeration is the intimate exposure of water and air for purification purposes. This process involves thorough mixing of air and water so that certain desired reactions are facilitated between the components of air and water. More often than not, aeration is used to treat tastes, odours and help remove minerals such as iron, manganese, carbon dioxide etc. from water. Aeration process is, thus, primarily used for purifying water, and is also used in waste water treatment applications.
- Commonly, aeration removes or modifies the constituents of water by employing two methods - scrubbing action and oxidation. Scrubbing action is achieved by creating turbulence on mixing water and air together under certain conditions. This action physically removes the dissolved gases from water and allows them to escape into the surrounding air.
- The other process of aeration is oxidation which purifies the water. In layman language, oxidation is the addition of oxygen, removal of hydrogen, or electrons from an element or a compound. When air is mixed with water, certain impurities such as iron and manganese, become oxidized. After oxidation, they form chemical compounds called oxides which are insoluble in water. As a result, the soluble impurities become insoluble and therefore get suspended in the water. The suspended material is then easily removable by using simple techniques or treatment through filtration.
- Apart from the two processes described above, there are several other methods to aerate water, but all involve passing water through air. In such methods also, water is exposed to air by spraying or by distributing it in such a way that small particles of water come in contact with the air. Water can also be aerated by pumping large volumes of air through the water.

Carbonation

Unlike aeration, which does not use a specific gas, carbonation is the process of dissolving a specific quantity of a carbonic gas such as carbon dioxide (CO_2) in to different liquids such as wine, soft drinks etc. to obtain a carbonated final product. Carbonation is the pivotal process in the preparation of many soft drinks and some types of mineral waters (eg sparkling water, soda).

Accordingly, a carbonated beverage, generally, has following ingredients:

- a) Water: The water must be treated to remove four types of contaminants, ie organic material, organic compounds, microbiological contamination and particulate matter.
- b) Sweeteners: The sweeteners used may be either nutritive or non-nutritive.
- c) Acidulants: Acidulants give the beverage a tart or sour flavour. The primary carbonated beverage acidulants are phosphoric acid and citric acid. Other acidulants include ascorbic, tartaric, malic and adipic acid.
- d) Preservatives: Generally, carbonation and acid content in cola usually act as adequate preservation. Other preservatives include benzoate or sorbate salts.
- e) Carbon Dioxide: CO_2 provides soft drinks with a pungent taste, acidic bite and sparkling fizz. It also acts as a preservative against yeast, mold and bacteria. CO_2 used in the preparation of soft drinks is food grade and free of impurities that may affect the taste and odour of the final product. Carbonation can be measured in terms of volumes of CO_2 dissolved in one litre of beverage at a standard temperature and pressure.
- f) Colorants: Colorants are used in beverages to provide additional sensory appeal. Carbonated beverage may contain some natural colour from the use of natural flavours or juices but generally require additional colorants such as caramel or other artificial colours.
- g) Flavours: Flavour is the most important attribute of a carbonated beverage. The majority of flavours used in carbonated beverages are derived from natural sources. Few of such flavours are:
 1. Caffeine – In this regard, it may be noted that if the caffeine content is more than 320 mg/l, the FSSAI labelling requirement is to treat the product as a caffeinated beverage; if lower, the item is treated as non-alcoholic carbonated beverages.
 2. Essential Oils
 3. Juice-based flavours
 4. Oleo resins
 5. Alcoholic solutions or extracts
 6. Concentrates



Given the above ingredients, it is indicative that specific ingredients of Red Bull which have rejuvenation properties of an energy drink are not present, eggurara, glucuronolactone, taurine, ginseng, inositol, carnitine, B-Vitamins etc. The Food Safety Standard Authority of India (Ministry of Health and Family Welfare (FSSAI) in its provisional product approval letter dated 1st June 2012 has clarified the Red Bull Energy Drink as caffeinated beverages. Copy of the same is enclosed herewith for your honour's perusals and the same stands renewed from time to time. As already submitted FSSAI has made separate aeration policy and hence the Tax being paid by my clients are appropriate under the proper heading.

My clients also rely on the definition of "Beverages non-alcoholic – carbonated" published by The Gazette of India – Extraordinary.

Reliance is also placed on the decision of the CESTAT, Mumbai the final fact finding authority under the Customs Act, passed on 26.06.2014, wherein Red Bull Energy Drink is held to be classifiable under the residuary of Customs Tariff Heading as "Others".

Reliance is placed on the Order No.308/CDVAT/2012/55 dated 09.07.2012, wherein the Commissioner, VAT in the Applicant's case itself has held that Energy Drinks are Proprietary Foods and has to be classified under section 4(1)(e) of the Act and the taxable rate would be 12.5%.

Reliance is also placed on order dated 29.11.2013 passed by Asstt. Commercial Tax Officer, Margao Ward has held that the product of the Applicant is classifiable under the residuary schedule entry attracting tax @ 12.5%, with a detailed reasoned order, which also asserts the case of the Applicant i.e. my client.

Reliance is also placed on the European Union ruling in case of Red Bull, holds that the ingredients such as taurine, caffeine and vitamins are not regarded as flavouring agents and the Export facilitation Committee of DGFT, Opinion dated 08.04.2003 which supports the case of my client's.

Reliance is also placed on Clarification No.CLR.CR.236/2010-11 dated 01.3.2011 issued under KVAT Act,2003, which recognizes Energy Drinks at Sr. No.17 and applicable Tax rate on the same has been mentioned @ 13.5%.

Thus on the basis of above distinction it can be said that the aerated/carbonated non-alcoholic drinks are different and distinct from Red Bull Energy Drink. Therefore they are not governed by Entry 13 of Schedule D appended to MVAT Act, 2002

Therefore, my clients submit that;

1. Under the Sales Tax statute the entries in the schedule are to be construed not as technical or botanical point of view but as understood in common parlance. If any words are not defined under the Act and being a word of everyday use it must be construed in its popular sense meaning that the sense which the people conversant with the subject matter with which the statute is dealing would attribute to it. My clients rely on the decision of Hon'ble Supreme Court in the matter of Ramavtar Budhiprasad V. Sales Tax Officer, Akola (12 STC 286 S.C.)
2. My clients also rely on the decision of Hon'ble Bombay High Court in Commissioner of Sales Tax, Maharashtra State v. Labela Products (59 STC 221) wherein the Hon'ble Bombay High Court has observed as under; "The Entries in a schedule to Sales Tax Act must be interpreted in the light of current conditions".
3. There are plethora of decision which can be cited on an interpretation of Schedule Entries wherein common parlance test has been given a priority over the aerated, scientific, laboratory or dictionary meaning. In the present case we have already submitted the evidences for applying theory of common parlance.
4. In the Mayuri Yeast India Pvt. Ltd. V. State of UP (14 VST 259). The Hon'ble Supreme Court also approved and followed the principles of common parlance theory.

A useful reference can also be made to the following ruling of various States.

1. The Hon'ble Supreme Court while dealing with classification of the products under entry of schedule appended to Excise Act in the matter of Alpine Industries V. Collector of Central Excise laid down the principle which reads as under:
*It is well established that in interpreting entries in taxation statute like the Excise Act, where the primary object is to raise revenue and for the purpose various products are differently classified the entries are not to be understood in their scientific and technical meaning. The terms and expression used in the tariff have to be understood by their popular meaning that is the meaning that is attached to them by those using the product".
2. Burden to prove that product fall within a particular tariff items is on the revenue. It is settled law that the onus or burden to show that product falls within a particular tariff item is always on department. Kindly refer decision of Hon'ble Supreme Court in the matter of Commissioner of Central Excise V. Sharma Chemical Works (132 STC 251 S.C.).
3. The carbonated/aerated is a process come out to give fizzy/effervescence effect to a beverages and this solely cannot be the basis for determining classification the classification has to be based on ingredient or nature of product and understanding of a common person dealing in same. In this respect a reference can be made to the decision of Hon'ble Supreme Court in case of CCE Vs. Parle Agro Pvt. Ltd. 2008 (226) ELF 194 (Tri. - Del.); 2010 (254) ELF A13 (Supreme Court) wherein the classification of the well-known product, Appy Fizz was under dispute. The Central Excise authorities ('appellant') sought to classify the said product under sub-heading "2202 10 10 – Aerated waters" of the Central Excise Tariff ('Tariff') only because the item had undergone process of aeration/carbonation as was an 'aerated/carbonated' item, whereas Parle Agro Pvt. Ltd. ('respondent'), wanted to classify Appy Fizz as a 'fruit drink/juice'. Given this, respondent contended that Appy Fizz were classified under the specific heading of sub-heading "2202 90 20 – Fruit pulp or fruit juices based drink" of the Tariff as it was certified to have a fruit content. The Customs Excise Service Tax Appellate Tribunal ("CESTAT") and the Supreme Court upheld the classification of Appy Fizz as "Fruit pulp or fruit juices based drink", inspite of being aerated, by holding that since there was no dispute about the content of the product (containing 23% of apple juice), the drinks based

on fruit juice were specifically classifiable separately. The relevant portion of the said decision is also reproduced below:

“.... The Revenue relied upon HSN Explanatory Notes of Chapter 22. We find that our tariff is not fully aligned with the HSN Explanatory Notes. In the HSN Explanatory Notices there are two sub-headings under Heading No.2202 one is “water including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured” and second is in respect of others. Whereas Central Excise Tariff under Sub-heading No.2202 there are specific headings in respect of soya milk, drinks etc. As per the Central Excise Tariff, the waters; including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured are classifiable under sub-heading No.2202.10. The drinks based on fruit juice are specifically classifiable under Heading No.22029020 of the Tariff. In the present case, there is no dispute regarding the contents of the product. Revenue is not disputing the certificate given by the Ministry of Food and Processing Industries, New Delhi rather they are relying it in the ground of appeal, and as per the certificate, the product in question contains 23% of appeal juice, therefore, we find no infirmity in the impugned order.... The appeal is dismissed”.

4. Thus, Appy Fizz was qualified as “fruit juices” based on the ingredients or contents and not based on the singular fact that the drink was manufactured through an aeration/carbonation process.
5. It is further submitted that even alcoholic drinks (beer, wine or champagne) are manufactured through a process of aeration/carbonation. In spite of this, they are not classified under “Aerated Drinks” but are classified under “Liquor (Foreign and Indian Made Foreign Liquor)” or “Country liquor” under the Fourth Schedule D.”

04. OBSERVATIONS

I have gone through the facts of the case. The product for determination is referred to by the applicant as 'Red Bull Energy Drink'. It is the contention of the applicant that the product is covered by the residuary schedule entry E-1 of the Maharashtra Value Added Tax Act,2002 (MVAT Act). And most importantly, it has been relentlessly canvassed by the applicant through exhaustive submission that the impugned product is not covered by the schedule entry D-13 which reads thus : *“Aerated and Carbonated non-alcoholic beverages whether or not containing sugar or other sweetening matter or flavour or any other additives.”*. Even as I reproduce the aforesaid entry, the immediate reflection is that the entry makes no reference to any referential legislation. This I observe as the applicant has devoted paragraphs upon paragraphs to make a point that the classification under the Central Excise statute would nail it conclusively that the impugned product is not covered by the entry D-13. Since the applicant has not laid claim to any other entry except the residuary schedule entry E-1, I would examine the applicant's insistent claim that the impugned product is not covered by the entry D-13. The requirement for coverage under the entry D-13 is that the product should be aerated and carbonated and above all, a non-alcoholic beverage. The product may or may not contain sugar or other sweetening matter or flavour or any other additives. With this understanding, I take a look at the impugned product thus :

➤ The product packing mentions thus -

- Ingredients : water, sucrose, glucose, citric acid, carbon dioxide, taurine, sodium citrates, magnesium carbonate, caffeine, glucuronolactone, inositol, vitamins, phosphoric acid, flavours (natural and artificial)
- Specially developed for times of increased mental and physical exertion. Increases performance
- Increases concentration and reaction speed
- Improves mental alertness
- Stimulates metabolism
- Contains caffeine
- With Taurine. Vitalizes body and mind

As can be seen from the ingredients, the impugned product is non-alcoholic. The can i.e the packing containing the drink bears thereon the following words - *Vitalizes body and mind*. The

product is described as containing ingredients for refreshing such as - *Caffeine - It is known for its stimulating..... The caffeine content in Red Bull Energy Drink corresponds to one average cup of coffee.* The present product claims to have a stimulating and energizing effect. The product is available across the counter. It is not required to be taken after consulting an expert or a qualified healthcare professional or seeking advice of a physician. It is not to be consumed for achieving athletic features or desired results such as weight gain/loss, body-building, tissue repair, etc. With ingredients bringing about an energizing or refreshing effect, the impugned product appears to be a stimulant or refreshing drink. The applicant doesn't dispute the product being a non-alcoholic beverage. What is disputed is the word 'carbonated' as appearing in the impugned entry. Thus, I proceed ahead with the understanding, and which isn't denied by the applicant, that the impugned product is a non-alcoholic beverage.

From the ingredients reproduced above, it can be seen that carbon dioxide is one of the ingredients of the impugned product. The applicant, too, is not denying its presence. And this fact has been admitted even before the Hon. Madras High Court in the applicant's own case (W.A.No.1778 of 2009 & M.P.Nos.1 and 2 of 2009 decided on dt.26.02.2010) wherein the Senior Counsel accepted that ".....the Energy drink of the appellant was only a carbonated water impregnated with carbon di-oxide". Now we see that the drink is carbonated as well. Therefore, the product is a carbonated non-alcoholic beverage. However, I find that the applicant is trying to put forth a point that there is a difference in the carbonation as is done for the impugned product when compared to the carbonation as in other carbonated non-alcoholic beverages. Thus, the dispute is with regard to the words 'carbonated' as appearing in the impugned entry. I would deal with this argument thus -



A carbonated beverage is one which has been charged up with carbon dioxide gas. In the instant case, I find that though the applicant admits to the impugned product being carbonated, it is sought to provide a distinction as to the carbonation as occurring in the impugned product and as appearing in other non-alcoholic beverages. The applicant states that in carbonated beverages, carbon dioxide is used for taste whereas in Red Bull Energy Drink, it is used as a preservative for extending the life of the drink. When I examine the impugned schedule entry, I find that it does not require me to enter into any exercise of ascertaining the use to which the carbonation of the non-alcoholic beverage may lead to. It suffices to ensure whether the product being tested for inclusion therein is a carbonated non-alcoholic beverage. When the applicant states that the impugned product is carbonated, not for fizz but for a longer shelf life, the point to be taken note of is that the product is carbonated. All the other points as to for what reasons then become irrelevant. The argument, therefore, fails to make a point. Further, in one of the evidences tendered by the applicant to dispute categorization under this category for Sales Tax purposes, namely an order under the European Union Customs Tariff classification, the description of the product 'Red

'Bull' is given thus - '*Intensive yellow, clear, carbonated, non-alcoholic beverage consisting of water, carbonic acid, saccharose, glucose, caffeine, taurine, citric acid as acidifying agent, with added vitamins, flavouring agent and colouring agent; does not contain products of positions 0401 to 0404 and no fat from products of positions 0401 to 0404; contains sugar.*' I have come across yet another ruling dt.30.03.2004 under the United States International Trade Commission Rulings and Harmonized Tariff Schedule about the classification of Red Bull drinks from Austria. The order states that the descriptive literature submitted with the request for classification states thus -

'.....The subject merchandise is "Red Bull" beverage, which is described as a carbonated energy soft drink....This product is said to be composed of carbonated water, sucrose, glucose, taurine, glucoronolactone, caffeine, inositol, pantothenic acid, citric acid, and a small variety of vitamins and flavors.....Item RB2746 is the sugar-free variety.... is said to consist of carbonated water, taurine, glucoronolactone, caffeine, inositol, aspartame, acesulfame K, nicotinamide, pantothenic acid, and a small variety of vitamins, colors, and flavors.....'

Thus, the above descriptions further confirm that the impugned product is carbonated.

The other argument which the applicant insists upon is that the impugned product is an Energy drink and not a carbonated non-alcoholic beverage. Yes, I do find the category of 'Energy drinks' being brought into existence by the advertisement media. But does that mean that energy drinks aren't beverages? The applicant answers this question. The website of Red Bull advertises the product as '*Red Bull Energy Drink is a functional beverage, containing the following high quality ingredients:.....*'. Even a copy of the Minutes of the Food Safety and Standards Authority of India (FSSAI) which has been submitted by the applicant begins with the words - '*Energy drinks are non-alcoholic beverages.....*'. One of the issues of concern as identified in these Minutes, as needing consideration while starting a process of developing standards for energy drinks, is the name 'energy drink'. It is captured thus - "*.....the name of 'energy drink' tends to create an impression that taking energy is required to boost energy. A suggested alternative which has been adopted by Australian New Zealand Food Authority is to call it 'caffeinated beverage'.*". The applicant has argued that energy drinks are not (yet) standardized under the FSSAI Regulations. But we have seen the Minutes of FSSAI which begin with the statement that Energy drinks are non-alcoholic beverages. Energy drinks could be a sub-classification but non-formulation of standards doesn't rob the impugned product of its parent classification under 'non-alcoholic beverages'. What all this suggests is that the labelling as 'Energy drinks' does neither take these drinks out of the general category of 'non-alcoholic beverages' nor do they cease to be 'non-alcoholic beverages'.

Thus, we see that the product is admitted to -

- i. being a beverage
- ii. being non-alcoholic
- iii. being carbonated

If the position is so then I fail to understand as to what prevents the product from being classified as an 'aerated and carbonated non-alcoholic beverage' as is understood for the purposes

of the impugned schedule entry. I see no point in deliberating any further on this issue. Therefore, the reliance of the applicant on Certificates stating that the impugned product is understood differently and not as non-alcoholic carbonated beverages does not serve any good purpose. The present product being a carbonated non-alcoholic beverage befits classification under the schedule entry D-13.

I would now deal with the argument as regards classification under Central Excise being not under 'carbonated non-alcoholic beverage'. I find that the applicant has untiringly invited attention to the position as appearing under the Central Excise statute. I have reproduced the schedule entry D-13 earlier. The entry has not been made referential to the position as appearing under the Central Excise Tariff. The product is non-alcoholic and we have seen above that, the applicant himself admits the so called 'Energy Drink' to be a beverage and further also, to it being carbonated. With this information, it wouldn't be prudent to go around ascertaining the classification under Central Excise. Further, I have seen the decisions cited by the applicant and all these are about the dispute as to the classification as mineral water and aerated water. At no point of time, has it been disputed in the judgments that the impugned product is not an 'non-alcoholic beverage'. I have perused the decision dt.27.06.2014 of the Customs, Excise and Service Tax Appellate Tribunal in Appeal No. C/33/08 in the case of Narang Hospitality Services Private Limited. The ruling was that the impugned product was known as energy drink other than mineral water and aerated water. Thus, the disputes under the Customs or Excise statutes were never on the point that the impugned product is not a non-alcoholic beverage. Therefore, I am not inclined to comment on any evidence and judgments submitted by the applicant with regard to the classification under Central Excise. The same also applies to the Certificates submitted by the applicant. In the order No.F.No.S/49-26/07 CL (JNCH) by the Commissioner of Customs(Appeals), with regard to the import of 'Red Bull Energy Drink' by Narang Hospitality Services Private Limited, it is noted that - *the appellant maintain that their product was not an aerated drink but an energy drink, a non-alcoholic functional beverage.* The judgment of the Hon. Madras High Court of dt.20.11.2005 cited by the applicant pertains to the provisions under the Prevention of Adulteration Act. We have seen that the impugned product is a 'non-alcoholic beverage' and the product is carbonated, as well. With facts as clear as these, there seems no apparent reason for the applicant to dispute the classification under the category 'non-alcoholic carbonated beverage'. The Sales Tax statute has identified the category of 'non-alcoholic carbonated beverage' and placed it under the schedule entry D-13. It doesn't make any differentiation as to energy drinks and others. To put it otherwise, entry D-13 doesn't exclude 'energy drinks' from its scope.

Having seen thus, I have to observe that the impugned products do not merit classification under the residuary schedule entry E-1 of the MVAT Act,2002 but would fall under the schedule entry D-13 which has been specifically crafted for items of such nature as 'non-alcoholic

carbonated beverages'.

05. While deliberating above, I have, at appropriate junctures, dealt with the arguments of the applicant against coverage under the schedule entry D-13 of the MVAT Act,2002. Certain other arguments are seen thus -

I have perused the copy of the Gazette of India, given by the applicant, which at Sr. no.2.10.6 thereof, is about 'Beverages non-alcoholic-carbonated'. However, a perusal of the same explains that it provides the definition of 'carbonated water' and not carbonated beverages. By the Draft Regulations of 2013 to amend the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011, 'caffeinated beverages' have been introduced as a category under 'Water-based non alcoholic flavoured drinks'. Thus again, it's seen that the dispute under FSSAI was never that the product is not a non-alcoholic beverage.

The applicant has given copies of international rulings wherein the products 'Boost nutritional Energy Drink' and 'Suppligen Energy Drink' have been held to be classified as 'other nonalcoholic beverage' in subheading 2202.9090 of the United States Harmonized Tariff Schedule. These rulings and the classification just affirm the fact that energy drinks are beverages. Therefore being non-alcoholic and carbonated as well, are appropriately classified for taxation purposes under the schedule entry for non-alcoholic carbonated beverages under the MVAT Act,2002.

The applicant has placed reliance on decisions passed under other statutes. With regard to the same, I would take help of the case cited by the applicant to prove my point. The Hon. Supreme Court in M/s. Mayuri Yeast India Pvt. Ltd.(2008-(005)-SCC -0680 -SC) has very categorically observed that *if in other Acts or Circulars, an item has been classified under a particular category then the same should be held to be wholly irrelevant for the purpose of interpretation of an 'Entry' in a fiscal statute which must be interpreted on its own*. The Hon. Court's observation would be clear when we see that the reliance placed by the applicant on the ruling of the Commissioner, Delhi VAT is not proper for the precise reason that the schedule entry under the Delhi Value Added Tax Act, 2004 and that for the purposes of the MVAT Act,2002 are not comparable. The schedule entry under Delhi VAT reads 'aerated drinks' whereas the entry for the purposes of the MVAT Act,2002 reads '*Aerated and Carbonated non-alcoholic beverages whether or not containing sugar or other sweetening matter or flavour or any other additives*'.

As regards reliance on decisions for common parlance, I have to state that I have placed reliance on the very information, rather facts of the product (functional non-alcoholic beverage, carbonated) as submitted by the applicant.

In view of all above, I have to conclude the discussion by observing that the observations in the concluding portion of para no.04 stand reiterated.

06. PROSPECTIVE EFFECT

The applicant has prayed for prospective effect to the determinations order if the contention as tendered is not accepted. As is always the case, while evaluating the request for prospective effect, the possibility of any kind of statutory mis-guidance or mis-interpretation or ambiguity of attending provisions have to be ascertained. No such circumstances exist in the present case. The applicant was/is aware that the impugned product is a non-alcoholic beverage. As to the point about 'carbonated', that the beverage is carbonated, the applicant was well aware of. Only that the carbonation was for reasons best known to the applicant, a point decided by the applicant to his benefit. I say this as the schedule entry, in plain words, covers carbonated non-alcoholic beverages. Therefore, there should not have been any reasons to go beyond the reasons for carbonation. That the impugned product was carbonated should have sufficed to understand that the applicable schedule entry is D-13 of the MVAT Act,2002. Further, reliance on judgments in other statutes was weak, in the first place, for absence of parallel provisions thereunder as obtaining under the MVAT Act,2002. In view thereof, I find no merit in the request placed by the applicant.



07.

In view of the deliberations held hereinabove, it is determined thus -

ORDER

(under section 56 (1) (e) and 56(2) of the Maharashtra Value Added Tax Act, 2002.)

No. DDQ 11/2011/Adm-3/26/ B- 3

Mumbai, dt. 6/12/2014

1. The rate of tax on 'Red Bull Energy Drink' sold through invoice no.RE/FG/2011/RB 1220 dt.12.11.2011 is 20% being a 'non-alcoholic carbonated beverage' as understood for the purposes of the schedule entry D-13 of the MVAT Act,2002.
2. The request for prospective effect is rejected.



6/12/14 ..
(DR. NITIN KAREER)

COMMISSIONER OF SALES TAX,
MAHARASHTRA STATE, MUMBAI