CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>ALLAHABAD</u>

REGIONAL BENCH - COURT No. I

Service Tax Appeal No.70543 of 2018

(Arising out of Order-in-Appeal No.159/ST/Alld/2018 dated 17/03/2018 passed by Commissioner (Appeals) Central Excise & CGST, Allahabad)

M/s Kashi Hospital, **.....Appellant**

(N-7/2A-10-2, Bhikharipur,
Near Hydle Gate, Varanasi-221005)

VERSUS

Commissioner of Central Excise &

CGST, Varanasi **....Respondent**

(38, M.G. Marg Civil Lines, Allahabad)

APPEARANCE:

Shri Om Prakash Shukla, Advocate for the Appellant
Shri Manish Raj, Authorised Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70214/2024

DATE OF HEARING : 02 May, 2024
DATE OF DECISION : 02 May, 2024

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No.159/ST/Alld/2018 dated 17/03/2018 passed by Commissioner (Appeals) Central Excise & CGST, Allahabad. In the appeal filed by the department, Commissioner (Appeals) while enhancing the demand has observed as follows:-

"4.2 I find that the claim of the respondent, that they were eligible for deduction of cost of medicines, as per the Notification No. 12/2003-ST dated 20.06.2003, incurred for providing health services, is not legally sustainable, as the medicines were consumed for providing the health services, there is no documentary proof of sale of

medicines and the Hon'ble Larger Bench of the CESTAT in the case of M/s Aggarwal Colour Advance Photo System vs. CCE, Bhopal reported as 2011 (23) S.T.R. 608 (Tri.-LB), on this issue, in the context of photography service, held, inter alia, as under:

> *Valuation (Service Tax) - Photography - Papers, consumables and chemicals used to bring photograph into existence - Recipient of photograph does not go to buy these items, does not make separate payments for them. He only expects photograph - In that view, fact that Notification No No. 12/2003-S.T. granted exemption of value of goods/materials used in production of photograph found to be immaterial, and value of photograph held to include all elements used to bring it to deliverable state - Service tax found to be leviable on gross value of photographic service, and more so as it is not a composite contract of sale of goods and service - In that view, Supreme Court decision in Surabhi Color Lab followed in Technical Color Lab departed from as it was found to be based purely on incorrect clarification issued by officer of CBEC, which furthermore, could not be relied on in law - Apex Court decision in C.K. Jidheesh [2006 (1)_S.T.R. 3 (S.C.)] followed, especially as several High Courts had given similar opinions - Section 67 of Finance Act, 1994. [paras 21, 23)*
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> *Valuation (Service Tax) - Consideration for services - Agreement between parties to deal with it - HELD: Such agreement does not affect incidence of Service tax - It is insignificant in law as to the manner recipient and provider of taxable services mutually arrange their affairs for their benefit 17) to deal with consideration - Section 67 of Finance Act, 1994 [para-17]*

> *Valuation (Service Tax) - Cost to make services reach consumer All of them are includible in valuation of services, since Service tax is destination based consumption tax - Section 67 of Finance Act, 1994. (para 17]*
>
> *Exemption (Service Tax) Photograph Goods/materials sold by service provider (photographer) to recipient - HELD: Term 'sold' in Notification No. 12/2003 -S.T. , has to be read with 'sale' in Central Excise Act, 1944-It does not include 'deemed sale' - in that view, only value of goods/materials sold separately by service provider (photographer) are covered by Notification ibid Burden to prove such sale, value of goods/materials with specific documents, and fulfillment of condition of notification that credit of duty has not been availed, is on assessee. [paras 17, 18, 19, 22]*

4.2.1 Similar view has also been taken by the Hon'ble CESTAT in the cases of Mackintosh Burn Ltd. vs. Commissioner of Service Tax, Kolkata 2010 (19) S.T.R. 682 (Tri.- Kolkata), Adore Fontech Ltd. vs. CCE, Nagpur 2014 (36) S.T.R. 146 (Tri- Mumbai) and CCE, Aurangabad vs. New Hindutant Rubber Works 2015 (37) S.T.R. 120 (Tri.- Mumbai).

4.3 Since there is no documentary proof, such as, bills etc. showing sale of the medicines which were actually consumed in providing the health services, I, therefore, find that the respondent are not eligible for deduction for cost of medicines from the taxable value, as per Notification No. 12/2003-ST dated 20.06.2003. Further, it is observed that in the case laws cited by the respondent in their support, the benefit of the Notification No. 12/2003-ST dated 20.06.2003 was not under dispute and in fact, these case laws mainly relate to composite *contracts involving works contract service and free supply of materials by the service recipients and most of them have already been discussed by the Hon'ble Larger Bench in the case of Aggarwal Colour Advance Photo System vs. CCE, Bhopal mentioned in Para 4.2 above. Thus, I find that these case laws cannot be applied to this case and as such, there is merit in the present appeal of the Department.*

4.4 Thus, I find that the respondent are liable to pay Service Tax (including Cesses) on the deduction of amount of Rs. 72,22,594/- (in lieu of the cost of medicines), alongwith interest, allowed by the Adjudicating Authority from the taxable value. Since they had not collected Service Tax from the service recipients on this amount, they are eligible for the cum-tax benefit under Section 67(2) of the Act, in respect of this amount. Thus, after taking into consideration that the Adjudicating Authority had wrongly allowed the benefit of the Notification No. 12/2003-ST dated 20.06.2003, 1 find that the Service Tax liability of the respondent for the impugned period, is Rs.7,49,474/-."

2. We have heard Shri Om Prakash Shukla, Advocate for the appellant and Shri Manish raj Authorized Representative for the revenue.

3. We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4. The decision of larger bench relied upon by the Commissioner (Appeals) in the case of M/s Aggarwal Colour Advance Photo System has been set aside by the Hon'ble Madhya Pradesh High Court vide its order dated 13.03.2020 in CEA No 1-3/2013. The relevant text of the said decision is reproduced below:

"This judgment shall govern the disposal of CEA No.1/2013, CEA No.2/2013 and CEA No.3/2013 preferred by the appellants under Section 35G of the Central Excise Act, 1944 (hereinafter referred to as "the Act") against the common order dated 07.06.2012 passed by the Custom, Excise and

Service Tax Appellate Tribunal, New Delhi (for short "the Tribunal") in Service Tax Appeal Nos.301/2006, 303/2006 and 302/2006 respectively, as common questions are involved therein and moreover, these appeals were admitted vide order dated 08.03.2012 on the common substantial questions of law, which read, thus:-

> *"1. Whether, while providing photography service whether the use of the paper upon which an image is printed using certain consumables and chemicals, being incidental to the provision of service, amount to sale of goods in terms of Article 366(29A)(b) of the Constitution and whether value of photography service shall be determined in isolation of cost of such goods?*
>
> *2. Whether the term 'sale' appearing in exemption Notification No.12/03-ST dated 20.06.2003, is to be given the same meaning as given by Section 2(h) of the Central Excise Act, 1944, read with Section 65(121) of the Finance Act, 1994 or this term would also include the deemed "sale" as defined by Article 366(29A)(b) of the Constitution?*

However, for the convenience sake, the facts are being extracted from CEA No.1/2013.

4. The order of the Commissioner (Appeals), thereafter, was assailed by the appellant by filing second appeal before the Tribunal on the ground that the law laid down in C.K. Jidheesh vs. Union of India (2005) 13 SCC 37, was overruled by the Larger Bench of the Apex Court in Bharat Sanchar Nigam Limited vs. Union of India and others, (2006) 3 SCC 1 wherein it was held that service tax can only be levied on the service portion and not on the cost of material. The Tribunal vide order dated 25.05.2010 (Annexure A4) referred the matter to a Larger Bench by framing certain questions including the questions which are involved in this batch of appeals. The crux of the issues was: whether for the purpose of Section 67 of the Finance Act, the value of service provided in relation to photography would be the "gross amount charged" including *the cost of material, goods used/consumed minus the cost of unexposed film. The Larger Bench of the Tribunal answered the questions against the appellant vide order dated 11.08.2011 (Annexure A-5) and held that unless documentary proof indicating the value of goods and material is submitted, the benefit of the Notification would not be available to the assessee. The burden of proof was on the assessee to establish the value of the goods and material. The Larger Bench while answering the questions referred to it, came to the conclusion that the gross value of service rendered is liable to service tax, as no amount is paid separately for photography service and the goods used and consumed in providing such taxable service. The relevant findings read as under:-*

> *"21. Service tax law is not the law relating to commodity taxation. The Notification in question issued under that law seeks to achieve that end by exempting value of goods sold while providing taxable service. There is no doubt that papers, consumables and chemicals are used and consumed to bring photographs into existence. It is also quite true that no service recipient goes to a photography service provider to buy paper, chemicals and other photography materials. What the service recipient expects from the photography service provider is the photograph. No consideration is paid separately for photography service and the goods used and consumed in providing such taxable service. Value of photography service includes all elements bringing that to the deliverable stage. Consumables and chemicals used for providing such service disappear when the photograph emerges. The Hon'ble Supreme Court in C.K. Jidheesh's case (supra) has upheld levy of service tax on gross value in respect of photographic service after noting in paragraph 14 that in case of photographic service, it is a contract of service pure and simple and not a composite contract of sale of goods and service. It has also endorsed the decision of Hon'ble Kerala High Court in Kerala Colour Lab's case*

(supra). On the other hand, the decision of Hon'ble Supreme Court in the case of CCE vs. Surabhi Colour Lab (Civil Appeal No.263/2008, decided on 23.4.2009) has been rendered remanding the matter purely on the basis of an incorrect clarification issued by an officer of the Board, subsequently withdrawn. The decision of the Hon'ble Supreme Court in the case of CC&CE vs. Technica Colour Lab (Civil Appeal No.7060 of 2009) dated 21.7.2009 merely follows that of Surabhi Colour Lab (supra). Under the circumstances, we are bound to follow the ratio of Hon'ble Supreme Court's judgment in the case of C.K. Jidheesh (supra). As pointed out by the Ld. D.R., several Hon'ble High Courts have held that there is no sale or deemed sale of goods and material such as paper, chemical etc., in photographic service and hence disapproved levy of sales tax on part of the gross value of photographic service (vide Amar Kumar Birley v. State of Bihar (CWJ Case No.3932 of 1992) – Patna High Court, Studio Sujata v. CST – Orissa High Court, V.V. Jha v. State of Megahalaya – Gauhati High Court etc.). In Rainbow Colour Lab vs. State of M.P. (2000) 2 SCC 385, the Hon'ble Supreme Court has also taken the same view. As rightly pointed out by the ld. DR, the obiter contained in Bharat Sanchar Nigam Ltd (supra) does not overrule either C.K. Jidheesh (supra) or Rainbow Colour Lab (supra)."

Ultimately, in respect of the questions referred to it, the Larger Bench held, thus:-

"22. Hence, our answers to the two questions referred to in paragraph 3 above are as follows:-

(i) For the purpose of section 67 of the Finance Act, 1994, the value of service in relation to photography would be the gross amount charged including cost of goods and material used and consumed in the course of rendering such service. The cost of unexposed film etc., would stand excluded in terms of Explanation to section 67 if sold to the client.

(ii) The value of other goods and material, if sold separately would be excluded under exemption Notification No.12/2003 and the term 'sold' appearing thereunder has to be interpreted using the definition of 'sale' in the Central Excise Act, 1944 and not as per the meaning of deemed sale under Article 366(29A)(b) of the Constitution."

23. On the aforesaid analysis of the legal position it can be said that determination of value of taxable service of photography depends on the facts and circumstances of each case as the Finance Act, 1994 does not intend taxation of goods and materials sold in the course of providing all the taxable services."

In view whereof, the appeal of the appellant was also dismissed vide impugned order dated 07.06.2012 (Annexure A-6), however, the penalty was set aside. In this manner, the present appeals have been preferred by the appellants.

10. In view of the aforesaid factual background, a moot question before the learned Authorities below was: as to whether the appellant-assessee was entitled to the benefit of Notification No.12/2003-ST dated 20.06.2003. In order to appreciate the said controversy, it would be expedient to reproduce the relevant portion of the circular, which reads as under:-

"Notification No.12/2003-ST, dated 20-6-2003. –

In exercise of the powers conferred by section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts so much of the value of all the taxable services, as is equal to the value of goods and materials sold by the service provider to the recipient of service, from the service tax leviable thereon under Section 66 of the said Act, subject to condition that there is documentary proof specifically indicating the value of the said goods and materials.

Provided that the said exemption shall apply only in such cases where-

(a) no credit of duty paid on such goods and materials sold, has been taken under the provisions of the Cenvat Credit Rules, 2004; or

(b) where such credit has been taken by the service provider on such goods and materials, such service provider has paid the amount equal to such credit availed before the sale of such goods and materials."

Perhaps there had been some representation from Punjab Color Lab Association, Jalandhar and thereafter, clarification was sought by certain photographic associations whether the value of materials consumed during the provision of service by the service provider for rendering the service is also excludable from the value of taxable service. Thereupon, a clarificatory circular MF(DR) F No.233/2/2003-CX dated 3.3.2006 was issued, which reads, thus:-

"3. The matter has been examined by the Board. The intention of the Notification No.12/2003-ST dated 20.6.2003 is to provide exemption only to the value of goods and material sold subject to documentary evidence of such sale being available. Therefore, in case, the goods are consumed during the provision of service and are not available for sale, the provision of the said notification would not be applicable. Therefore, in supersession of clarification to contrary, it is clarified that goods consumed during the provision of service, that are not available for sale, by the service provider would not be entitled to benefit under Notification No.12/2003-ST dated 20.6.2003."

12. There is no dispute to the proposition that the Notification does not override the statutory provision and hence, it is required to be seen as to whether the conclusion drawn by the Tribunal that term 'sold' appearing in Notification has to be interpreted using the definition of 'sale' in the Central Excise Act, 1944 and not as per the meaning of "deemed sale" under Article 366(29A)(b) of the Constitution, is correct or not.

13. From the aforesaid discussion, it would emerge that the crux of the substantial question of law No.1 which has arisen for consideration is: "whether for the purposes of service tax the value of photography service can be determined separately from the value of certain consumables and chemicals which are used on the paper for printing the image and whether such printed photograph can be said to be a sale of goods in terms of Article 366(29A)(b) of the Constitution". In this regard, before considering the first limb of the contention of learned counsel for the appellants that in view of amended Article 366(29A) of the Constitution, the material and consumables used in photography will qualify as sale, it would be apt to refer to relevant clauses of the definition clause as contained in Article 366(29A) of the Constitution and other enactments, which read as under:-

> *"366. (29-A) 'tax on the sale or purchase of goods' includes –*
>
> *(a) *** *** ****
>
> *(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;*
>
> **** *** ***"*

The aforesaid definition of "sale" has been adopted by the M.P. VAT Act, 2002. Sub-clause (ii) of Section 2(u) of the said Act, which is relevant for the purposes of present controversy, is reproduced as under:-

> *"2(u) "Sale" with all its grammatical variations and cognate expressions means any transfer of property in goods for cash or deferred payment or for other valuable consideration and includes–*
>
> **** *** ****
>
> *ii. a transfer of property in goods whether as goods or in some other form, involved in the execution of works contract;*
>
> **** *** ****

Section 2(h) of the Central Excise Act, 1944 defines "sale" and "purchase" as any transfer of possession for consideration by one person to another. Section 2(h) of the Act is reproduced as under:-

"2(h) "sale" and "purchase", with their grammatical variations and cognate expressions, mean any transfer of the possession of goods by one person to another in the ordinary course of trade or business for cash or deferred payment or other valuable consideration;"

19. In view of the law laid down by the Apex Court in M/s Pro. Lab's case (supra), it can be safely held that photography service, which has both the elements of goods and services is covered under works contract. Thus, in a works contract which involves transfer of property, the provisions as contained in Article 366(29A) of the Constitution are attracted. Therefore, in the light of sub-clause (b) of Clause (29A) of Article 366 of the Constitution, in execution of a works contract when there is transfer of property even in some other form than in goods, the tax on such sale or purchase of goods is leviable. In this view of the matter, after the 46th Amendment, there is no question of dominant nature test applying in photography service and the works contract, which is covered by Clause (29A) of Article 366 of the Constitution where the element of goods can be separated, such contracts can be subjected to sales tax by the States under Entry 54 of List II of Schedule II. Once that is so, value of photographic paper and consumables cannot be included in the value of photography service for the purposes of imposition of service tax. Thus, in the light of the judgment of the Apex Court in M/s Pro Lab (supra), wherein it is held that part of processing and supplying of photographs, photo prints and negatives, which have "goods" component exigible to sales tax is constitutionally valid, it is held that value of photography service has to be determined in isolation of cost of goods such as photography paper, consumables and chemicals with which *image is printed, negatives and other material which has "goods" component liable to sales tax. Accordingly, the substantial question of law No.1 is answered in favour of the assessee and against the Revenue.*

20. Having answered the substantial question of law No.1 in favour of the assessee, the substantial question of law No.2, which already stands concluded while dealing with the question of law No.1, is also answered in favour of the assessee and it is held that the term 'sale' appearing in exemption Notification No.12/03-ST dated 20.06.2003 would also include "deemed sale" as defined by Article 366(29A)(b) of the Constitution.

21. For the reasons stated hereinabove, the impugned orders are set aside and the present appeals stand allowed. ..."

5. From the decision of Hon'ble High Court it is quite evident that the benefit of exemption under Notification No 12/2003-ST cannot be denied just for the reason that the value of goods consumed in providing the taxable services is not separately indicated in the invoice, or no separate invoice for the sale of such goods have been made. The appellant hospital admittedly consuming the medicines and other consumables for providing the health services to its client. The only reason recorded in the impugned order for denying the said benefit is non production of sale bills showing sale of the medicines which were actually consumed in providing the health services. Commissioner (Appeal) has based his order on decision of larger bench of tribunal referred above. However as this decision has been set aside by the Hon'ble High Court reliance placed on the said decision cannot be upheld. No other grounds have been stated by the Commissioner (Appeals) in the impugned order for enhancing the demand.

6. Adjudicating authority has clearly recorded following finding in the order in original:-

> *"37. As regards the deduction of amount incurred on medicine, the party contested that the medicines provided to beneficiaries covered under RSBY scheme of Health*

services cannot be subjected to service tax in view of the exemption granted vide notification No.12/2003-ST dated 20.06.2003 in respect of the value of the goods and materials sold by service provider to the recipient of the service.

38. In this regard I find that party has submitted value of the medicines supplied to the beneficiaries of RSBY health scheme. The chart has been prepared by party on the basis of on line billing sent to the ICICI Lombard for charging the total amount payable in respect of each and every beneficiary patient with their unique I.D.no. The amount charged furnishes the break up figures for the cost of medicines, nursing charges, anesthesia charges, O.T. consumables, investigation charges, bed charges etc. On line patient wise billing, is a voluminous document in the form of hard copy. The total value of the medicines provided to the RSBY beneficiaries, during the period 1.07.2010 to 31.03.2011 is Rs.72,22,564.00 as per the chart furnished by the party. I am of the opinion that the cost of medicine is excludible from the total amount of receipt. Medicines supplied to the beneficiaries will have to be purchased first by hospitals and only then it can be made available to the patient. In other words medicines are arranged /purchased by hospitals for handing over them to the patients for treatment under RSBY health scheme. In view of this the cost of medicines cannot be included in the value for charging the service tax in terms of the exemption available under Notifn. No. 12/2003-ST dated 20.06.2003. In view of the above, I hold that the amount incurred by the party on medicines should be deducted from the gross amount received by them from the insurance companies to arrive at the taxable amount and the entire amount received by them from the insurance companies would form consideration for providing taxable service. Accordingly, taxable receipt of *the party after deduction of cost of medicine have been recalculated which is as under;*

Gross taxable receipt:- Rs. 90,25,918.00

Less cost of medicine:- Rs. 72,22,594/-

Service Part:-18,03,324/-."

7. Accordingly, the impugned order is set aside, Order-in-Original passed by Deputy Commissioner has been restored.

8. Appeal is allowed.

(Dictated and pronounced in open court)

Sd/-

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

akp