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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
CUSTOMS APPEAL BRANCH

Appeal No. ST/86,487/06 & ST/147, 333/2007 - CU[DB] Date 23/10/2008

Assistant Registrar
C.E.S.T.A.T. New Delhi

To :
M/S GARG PHOTO FILMS
C-27/272, KASHI ANTHALAYA COMPLEX,
LAHURABIR, VARANASI

M/S GARG PHOTO FILMS Appellant
Vs
C.C.E ALLAHABAD Respondent

I am directed to transmit herewith a certified copy of **Final order No.** ST/285-88/08 **CU[DB]** dated 22.10.08 passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(Customs Appeal Branch)

Copy to :
1. Respondent
   C.C.E ALLAHABAD
   38,M.G.MARG, CIVIL LINES, ALLAHABAD
2. Adv. / Consult
   MR.V. LAXMIKUMARAN
   B-6/10, SAFDARJUNG ENCLAVE, NEW DELHI-110029
3. S.D.R
4. J.C.D.R.
5. Bar association, CESTAT, New Delhi
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8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar (U.P.)
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. Nidheshak publications, I.P.Estate, new Delhi
11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12. Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai
13. Taxindiaonline.com Pvt.Ltd. B-XI/8183,Vasant Kunj, New Delhi - 110070
14. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
15. Office Copy
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Assistant Registrar
(Customs Appeal Branch)

17. M/s Indian Colour Lab (P) Ltd
7- Town Hall Road Udaipur (Raj)

18 CCC Jaipur

19. M/s Anurag Photo Lab (P) Ltd.
29-A Raja Parisar, M P Nagar Zone II
Bhopal.

20. M/s Anurag Colour Lab.
Adj Indian Coffee House
Near Apex Bank Market
T T Nagar, Bhopal.

21. CCC Bhopal

22. [illegible]
D-8 BDA [illegible] Adjacent [illegible]
Travels [illegible]
Bhopal - [illegible]

23. Sri Atul Gupta CS.
B-1/1015 [illegible]
New Delhi

(T)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. 1

Service Tax Appeal Nos. 86/2006, 333/07, 487/06 & 147/07

(Arising out of Order-in-Appeal Nos. 896(HKS)/ST/JPR-II/2005 dated 21.12.2005 passed by the Commissioner (Appeals-II) of Customs & Central Excise, Jaipur; 10/ST.ALL/2007 dated 22.03.2007 passed by the Commissioner (Appeals) of Customs & Central Excise, Allahabad; 71-ST/BPL/2006 14.07.2006 passed by the Commissioner (Appeals) Customs & Central Excise, Bhopal; and 85-ST/BPL/2006 28.11.2006 passed by the Commissioner (Appeals) Customs & Central Excise, Bhopal, respectively).

DATES OF HEARING : 03,04,07 & 08.04.2008
DATE OF DECISION : 22.10.2008

FOR APPROVAL AND SIGNATURE :

HON'BLE MR. JUSTICE S.N. JHA, PRESIDENT
HON'BLE MR. M. VEERAIYAN, MEMBER (TECHNICAL)

1.	Whether Press Reporters may be allowed to see the order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982 ?.	No
2.	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not ?	Yes
3.	Whether their Lordships wish to see the fair copy of the Order ?	Seen
4.	Whether Order is to be circulated to the Departmental Authorities?	Yes

(i) M/s Delux Colour Lab Pvt. Ltd. .... **Appellants**
(Rep by Sh. Atul Gupta, CS)

versus

CCE, Jaipur .... **Respondent**
(Rep. by Sh. Amit Jain & Sh A.K. Madan, DRs)

AND

(ii) M/s Garg Photo Film .... **Appellants**
(Rep by Sh. R. Ravi & Sh. Vivek Sharma, Advs.)

versus

CCE, Allahabad .... **Respondent**
(Rep. by Sh. Amit Jain & Sh A.K. Madan, DRs)

AND

(iii) M/s Anurag Photo Lab (P) Ltd. ... Appellants
(iv) M/s Anurag Colour Lab ... (Rep by Sh.Z.U. Alvi Adv.)

versus

CCE, Bhopal ... Respondent
(Rep. by Sh. Amit Jain & Sh A.K. Madan, DRs)

CORAM : HON'BLE MR. JUSTICE S.N. JHA, PRESIDENT
HON'BLE MR. M. VEERAIYAN, MEMBER (T)

ORDER NO. ST/285 to 288/08

PER JUSTICE S.N. JHA:

The dispute in these four appeals – which were heard together and are disposed of by this common order – relates to determination of the value of photography service as a taxable service for the purpose of levy of service tax under the Finance Act, 1994.

2. The service "provided or to be provided to a customer by photography studio or agency in relation to photography in any manner" is a taxable service under sub-clause (zb) of Clause 105 of Section 65 of the Finance Act, 1994. 'Photography Studio or Agency' has been defined in Clause 79 of Section 65 to mean, "any professional photographer or a commercial concern (now any person w.e.f 18.04.2002) engaged in the business of rendering service relating to photography". Section 67 of the Act deals with valuation of taxable services for charging service tax. As the provision stood at the relevant time prior to 18.04.2006 the value was to be computed

on the basis of gross amount charged by the service provider for the taxable service provided or to be provided by him.

3. The authorities below have held that the value of the photography service would be the gross amount charged from the customers including the cost of materials like papers, films and chemicals used in taking photographs and developing & printing films which form intrinsic part of the service and are not separable from the service rendered. The authorities below rejected the assessees' case that photography is in the nature of 'works contract' involving deemed sale of the said materials on which sales tax is payable under the relevant State enactments. The assessees have come in appeal to the Tribunal contending that they are liable to pay service tax only on the value of the service and not on the gross amount charged from the customers which includes cost of materials.

4. The decisions of the Supreme Court in **Rainbow Colour Lab vs State of Madhya Pradesh,** 2001 (134) ELT 332 (SC) and **C.K. Jidheesh vs Union of India,** 2006 (1) STR 3 (SC), amongst others, do support the case of the Revenue. However, in view of the Larger Bench decision of the Supreme Court in **Bharat Sanchar Nigam Ltd. (BSNL) vs Union of India,** (2006) 3 Supreme Court Cases 1, taking contrary view, we are of the opinion that the contention of the appellants must be accepted and the appeals allowed.

5. In **Rainbow Colour Lab** (supra) the point for consideration was whether the job rendered by a photographer in taking photographs, developing & printing films would amount to

'works contract' as contemplated in Article 366 (2A)(b) of the Constitution of India read with Section 2(n) of the M.P. General Sales Tax Act for the purpose of levy of sales tax on business turnover of the photographers. A two-Judge Bench of the Supreme Court noticed the decision of the Kerala High Court in **Bavens vs Union of India,** 1995 (97) STC 161, in which it was held :

> **"Where a photographer takes a photograph of his customer, develops the negative and supplies positive prints in the desired size to the customer, the photographer uses his own camera and his own film. The negative which is subjected to further processing belongs to the photographer and not to the customer. No basic goods are provided by the customer which are subjected to processing, etc., by the photographer so as to make the contract a works contract. There is no accretion to goods or property or the nucleus of a property which originally belonged to the customer. There is no works contract involved in this category of a photographer's activity. However modernised the camera be, the skill of the photographer is still important for getting the best results. It cannot also be treated as a sale of the photograph for the reason that it is not the intention of the customer to buy a photograph from the photographer. The photograph has no marketable value. What is expected from the photographer is his service, artistic skill and talent. If any property passes to the customer in the form of photographic paper, it is only incidental to the service contract. No portion of the turnover of a photographer relating to this category of work would be exigible to sales tax."**

and agreed with the above view of the High Court. The Supreme Court concluded as under :

> **"Thus, it is clear that unless there is sale and purchase of goods, either in fact or deemed, and which sale is primarily intended and not incidental to the contract, the State cannot impose sales-tax on a works contract simpliciter in the guise of the expanded definition found in Article 366(29A)(b) read with Section 2(n) of the State Act. On facts as we have noticed**

> **that the work done by the photographer which as held by this Court in *Kame's* case** (a decision rendered prior to the 46th Amendment), **is only in the nature of a service contract not involving any sale of goods, we are of the opinion that the stand taken by the respondent-State cannot be sustained."**

6. The issue came to be considered again before another two-Judge Bench in **C.K. Jidheesh vs Union of India**'s case (supra) in the context of challenge to a letter of the Ministry of Finance dated 09.07.2001. Therein the petitioner had also prayed for a direction to the respondents to bifurcate the gross receipts of processing of photographs into portions attributable to goods and services. Repelling the challenge, the Supreme Court observed :

> **"11. There is one further difficulty in the way of the Petitioner. This Court has, in the case of *Rainbow Colour Lab & Anr.* v. *State of M. P. & Ors* reported in (2000) 2 SCC 385, held that contracts of the type entered into by persons like the Petitioner are nothing else but service contracts pure and simple. It is held that in such contracts there is no element of sale of goods. This Judgment is binding on this Court. In view of this Judgment, the question of directing the Respondent to bifurcate the receipts into an element of goods and the element of service cannot and does not arise. We see no substance in the contention that facts in *Rainbow Colour Labs* case were different inasmuch as in that case the Court was dealing with a case where photographers take photographs, develop them and then give the photos to the customer. In our view, the ratio of *Rainbow Colour Lab's* case also applies to cases like the present"**

7. It is relevant to mention here that in support of the petitioner's case in **C.K. Jidheesh**'s case (supra), reliance was placed on the observations by a three-Judge Bench of the Court in the case of **Associated Cement Companies Ltd. vs Commissioner**

of Customs, (2001) 4 SCC 593, doubting the correctness of the decision in **Rainbow Colour Lab**'s case (supra). It was observed in that case, "the conclusion arrived at in **Rainbow Colour Lab,** in our opinion, runs counter to the express provision contained in Article 366 (29A) as also of the Constitution Bench decision of this Court in **Builders' Association of India vs Union of India,** (1989) 2 Supreme Court Cases 645". A submission was made that in view of these observations, the judgment in **Rainbow Colour Lab** case must be deemed to have been over-ruled or in any event required to be reconsidered by a Larger Bench. The plea was rejected in these words –

> **"We are unable to accept this submission. In *Associated Cement Companies*' case, the question was whether or not custom duty could be levied on drawings, designs, diskettes, manuals etc. The argument there was that these were intangible properties and not goods as defined in Section 2(22) of the Customs Act. The question of levy of service tax did not arise in that case. The observations relied upon are mere passing observations and do not overrule *Rainbow Colour Lab's* case. Even otherwise, the questions raised in this Petition are fully covered and answered by the decision of the Kerala High Court, which we confirm as laying down the correct law."**

8. The Supreme Court in **BSNL** case (supra) decided by a Larger Bench of three Judges took a different view. Instead of referring to the relevant findings – which may not be adequate to convey the point and the underlying logic – it would be appropriate to extract the relevant parts of the judgment in *extenso* as under :

> **"41. Sub-clause (a) covers a situation where the consensual element is lacking. This normally takes place in an involuntary**

sale. Sub-clause (b) covers cases relating to works contracts. This was the particular fact situation which the Court was faced with in *Gannon Dunkerley* and which the Court had held was not a sale. The effect in law of a transfer of property in goods involved in the execution of the works contract was by this amendment deemed to be a sale. To that extent the decision in *Gannon Dunkerley* was directly overcome. Sub-clause (c) deals with hire purchase where the title to the goods is not transferred. Yet by fiction of law, it is treated as a sale. Similarly the title to the goods under sub-clause (d) remains with the transferor who only transfers the right to use the goods to the purchaser. In other words, contrary to *A.V. Meiyappan's* decision a lease of a negative print of a picture would be a sale. Sub-clause (e) covers cases which in law may not have amounted to sale because the member of an incorporated association would have in a sense begun both the supplier and the recipient of the supply of goods. Now such transactions are deemed sales. Sub-clause (f) pertains to contracts which had been held not to amount to sale in *State of Punjab* v. *M/s. Associated Hotels of India Ltd.* (supra). That decision has by this clause been effectively legislatively invalidated.

42. All the sub-clauses of Article 366(29A) serve to bring transactions where one or more of the essential ingredients of a sale as defined in the Sale of Goods Act, 1930 are absent, within the ambit of purchase and sales for the purposes of levy of sales tax. To this extent only is the principle enunciated in *Gannon Dunkerly* Limited (sic modified). The amendment especially allows specific composite contracts viz. works contracts [sub-clause (b)]; hire purchase contracts [sub-clause (c)], catering contracts [sub-clause (e)] by legal fiction to be divisible contracts where the sale element could be isolated and be subjected to sales tax.

43. *Gannon Dunkerley* survived the Forty-sixth Constitutional Amendment in two respects. First with regard to the definition of 'sale' for the purposes of the Constitution in general and for the purposes of Entry 54 of List II in particular except to the extent that the clauses in Art. 366(29A) operate. By introducing separate categories of 'deemed sales', the meaning of the word 'goods' was not altered. Thus the definitions of the composite elements of a sale such as intention of the parties,

goods, delivery etc. would continue to be defined according to known legal connotations. This does not mean that the content of the concepts remain static. The Courts must move with the times. But the Forty-sixth Amendment does not give a licence, for example, to assume that a transaction is a sale and then to look around for what could be the goods. The word "goods" has not been altered by the Forty-sixth Amendment. That ingredient of a sale continues to have the same definition. The second respect in which *Gannon Dunkerley* has survived is with reference to the dominant nature test to be applied to a composite transaction not covered by Article 366(29A). Transactions which are mutant sales are limited to the clauses of Article 366(29A). All other transactions would have to qualify as sales within the meaning of Sales of Goods Act, 1930 for the purpose of levy of sales tax.

44. Of all the different kinds of composite transactions the drafters of the Forty-sixth Amendment chose three specific situations, a works contract, a hire purchase contract and a catering contract to bring within the fiction of a deemed sale. Of these three, the first and third involve a kind of service and sale at the same time. Apart from these two cases where splitting of the service and supply has been Constitutionally permitted in sub-clauses (b) and (f) of Clause (29A) of Art. 366, there is no other service which has been permitted to be so split. For example, the sub-clauses of Art. 366(29A) do not cover hospital services. Therefore, if during the treatment of a patient in a hospital, he or she is given a pill, can the sales tax authorities tax the transaction as a sale? Doctors, lawyers and other professionals render service in the course of which can it be said that there is a sale of goods when a doctor writes out and hands over a prescription or a lawyer drafts a document and delivers it to his/her client? Strictly speaking with the payment of fees, consideration does pass from the patient or client to the doctor or lawyer for the documents in both cases.

45. The reason why these services do not involve a sale for the purposes of Entry 54 of List II is, as we see it, for reasons ultimately attributable to the principles enunciated in *Gannon Dunkerley's* case, namely, if there is an instrument of contract which may be composite in form in any case other than the exceptions in Article 366(29-A), unless the transaction in truth represents two distinct and separate contracts and is

discernible as such, then the State would not have the power to separate the agreement to sell from the agreement to render service, and impose tax on the sale. The test therefore for composite contracts other than those mentioned in Article 366 (29A) continues to be: Did the parties have in mind or intend separate rights arising out of the sale of goods? If there was no such intention there is no sale even if the contract could be disintegrated. The test for deciding whether a contract falls into one category or the other is to as what is "the substance of the contract". We will, for the want of a better phrase, call this the dominant nature test.

46. In *Rainbow Colour Lab & Anr.* v. *State of M.P.*, the question involved was whether the job rendered by the photographer in taking photographs, developing and printing films would amount to a "work contract" as contemplated under Article 366(29A)(b) of the Constitution read with Section 2(n) of the M.P. General Sales Tax Act for the purpose of levy of sales tax on the business turnover of the photographers.

47. The Court answered the questions in the negative because, according to the Court: : (SCC pp.388-89 & 391, paras 11 & 15)

> "Prior to the amendment of Article 366, in view of the judgment of this Court in *State of Madras* v. *Gannon Dunkerley & Co. (Madras) Ltd.* the States could not levy sales tax on sale of goods involved in a works contract because the contract was indivisible. All that has happened in law after the Forty-sixth Amendment and the judgment of this Court in *Builders*' case is that it is now open to the States to divide the works contract into two separate contracts by a legal fiction : (i) contract for sale of goods involved in the said works contract, and (ii) for supply of labour and service. This division of contract under the amended law can be made only if the works contract involved a dominant intention to transfer the property in goods and not in contracts where the transfer in property takes place as an incident of contract of service.......... What is pertinent to ascertain in this connection is what was the dominant intention of the contract......
>
> ....On facts as we have noticed that the work done by the photographer which as held by this Court in *STO* v. *B.C. Kame* is only in the nature of a service contract not involving any sale of goods, we are of the opinion that the stand taken by the respondent State cannot be sustained".

48. This conclusion was doubted in *Associated Cement Companies Ltd.* v. *Commissioner of Customs* saying : (SCC p. 609 para 26)

> "The conclusion arrived at in *Rainbow Colour Lab*, in our opinion, runs counter to the express provision contained in Article 366(29-A) as also of the Constitution Bench decision of this Court in *Builders Assn. of India* v. *Union of India*".

49. We agree. After the Forty-sixth Amendment, the sale element of those contracts which are covered by the six sub-clauses of Clause (29A) of Article 366 are separable and may be subjected to sales tax by the States under Entry 54 of List II and there is no question of the dominant nature test applying. Therefore when in 2005, *C.K. Jidheesh* v. *Union of India* held that the aforesaid observations in *Associated Cement* were merely obiter and that *Rainbow Colour Lab* was still good law, it was not correct. It is necessary to note that *Associated Cement* did not say that in all cases of composite transactions the Forty-sixth Amendment would apply."

9. In view of the above categoric and emphatic declaration of law by a Larger Bench impliedly holding that the decisions in **Rainbow Colour Lab** case (supra) and **C.K. Jidheesh** case (supra), were not correct in view of the relevant clauses of (29-A) of Article 366 of the Constitution, and that the sale element of contract is separable which may be subjected to sales tax by the States, the impugned decisions of the lower authorities in these appeals cannot be said in accordance with law.

10. It was submitted on behalf of the Revenue that the **BSNL** case was decided in the context of levy of sales tax whereas **Kerala Colour Lab Association** and **C.K. Jidheesh** are direct decisions in the context of service tax. It was submitted that **C.K. Jidheesh** judgment can be considered in two parts, namely, affirmation of the decision of the Kerala High Court and the view expressed in **Rainbow**

Colour Lab case. Even if the observations made in relation to **Rainbow Colour Lab** case are found to be under cloud in view of the observations in **BSNL**, the former part – reaffirming the decision in **Kerala Colour Lab Association,** remains intact and binding. It was pointed out that in **C.K. Jidheesh** case, the Supreme Court noticed, with approval, the decision of the Kerala High Court in **Kerala Colour Lab. Association vs UOI,** 2003 (156) ELT 17 (Ker.). Heavy reliance was placed on the said decision of the Kerala High Court and it was stated that decision was upheld by the Supreme Court in SLP (Civil) No. 11614 of 2002 and SLP (Civil) CC 6811 of 2002.

11. In **BSNL** case the principal question was whether providing mobile phone connections by the service providers partakes the character of sale on which States could levy sales tax. While according to the States it also amounted to 'sale' on which sales tax could be levied, the service providers/petitioners contended that the transaction was merely a service and the Union Government alone was competent to levy tax thereon. The decision was thus no doubt rendered in the context of leviability of sales tax on portion of the activity or transaction, but from the extracted portions of the judgment, it is amply clear that the Supreme Court went into the entire gamut of 'deemed sale' in the context of Article 366(29A) of the Constitution of India. The Supreme Court found that out of various composite transactions envisaged in different sub-clauses of clause 29-A; *' works contract', 'hire purchase contract' and 'catering contract'*- covered by sub-clauses (b), (c) & (f) of clause (29A) - involve the fiction of deemed sale, and out of these three, works

contract and catering contract involve the elements of service and sale at the same time (see para 44 of the judgment above).

12. It would thus appear that the decision in **BSNL** case lays down the law that works contract (and also catering contract) involves the element of both sale and service contract and that the service and sale elements can be split up. That being so, we do not find any merit in the submission of the Revenue that the decision in **BSNL** case cannot be treated as an authority on the issue of service tax. If the photography service is a 'works contract', it would follow that it involves the element of both sale and service, and the sale portion of the activity or transaction cannot be included in the taxable value of service. There cannot be any doubt, in view of sub-clause (b) of clause (29-A) of Article 366, that deemed sale of the materials takes place in the rendering of photography service and, therefore, the value of the materials cannot be included while computing the value of the service. 'Sale' and 'Service' can not stand in the same box. Sale cannot be treated as service and vice versa.

13. The decision of the Kerala High Court in **Kerala Colour Lab. Association** (supra) undoubtedly supports the case of the Revenue. It is also true that two SLPs arising from the decision were dismissed by the Supreme Court. However, it is well settled that the summary rejection of SLPs does not tentamount to affirmation of the decision of the High Court on merit; it simply means that the Supreme Court declined to interfere with the order. Even though, the decision was noticed with approval in **C.K. Jidheesh;** as already noticed above, the decision in **C.K. Jidheesh** having been held to be "not

correct" by the Larger Bench in **BSNL**'s case, vide para 49 of the judgment (supra), it is clear that no reliance can be placed on **Kerala Colour Lab. Association** or **C.K. Jidheesh.**

14. Apart from the decisions, noticed above, reference was made to a large number of cases by either party in support of their respective contentions. While on behalf of the appellants, reference was made to **Tvl. R. Mini Color Lab vs The Tamil Nadu Taxation, Special Tribunal, The Sales Tax Appellate Tribunal,** reported in MANU/TN/8854/2007; **Magic Creative Pvt. Ltd. vs CCT,** 2008-TIOL-04-SC-VAT; **Shilpa Colour Lab vs CCE, Calicut,** 2007 (5) STR 423; **Digi Studio vs CCE, Calicut,** 2008 (10) STR 31; **CCE vs Crystal Colour Lab,** 2008 (10) STR 26; **Adlabs vs Commissioner,** 2006 (2) STR 121; **Kunhayammed vs State of Kerala,** 2001 (129) ELT 11 (SC); **Gujarat Ambuja Cements Ltd. vs Union of India,** (2005) 4 SCC 214,218; and **Suchitra Components vs CCE,** 2007 (208) ELT 321 (SC).

15. On behalf of the Revenue, reliance was placed on **Laxmi Color (P) Ltd. vs Commissioner of Central Excise, Jaipur-II,** 2006 (3) STR 363 (T-Del.); **Delux Colour Lab. Pvt. Ltd. vs Commissioner of Central Excise, Jaipur,** 2005 (4) STR 152 (T-Del.); **Panchsheel Colour Lab. Vs Commissioner of Central Excise, Raipur,** 2006 (4) STR 320 (T-Del.); **Delhi Studio Colour Lab vs Union of India,** 2007 (5) STR 184 (P&H); **Commissioner of Central Excise & Customs vs Larsen & Toubro Ltd.**, 2006 (4) STT 12 (CESTAT-MUM); **Hari Khemu Gawali vs The Deputy**

Commissioner of Police, Bombay, (1956) SCR 506 – page 524; **CCE, Pune vs Dai Ichi Karkaria Ltd.,** 1999 (112) ELT 353 (SC).

16. The pronouncement of law by the Supreme Court is binding on all Courts and authorities under Article 141 of the Constitution of India. Any decision of the High Court or the Tribunal or even the Supreme Court of lesser Bench strength has to be understood, read down (if necessary) and applied in the light of the binding precedents of the Supreme Court. As observed above, the dispute involved in these appeals is covered by the decision in **BSNL** case and, therefore, it is not necessary to make comments on the various decisions cited by the parties, referred to above. We are of the view that in the light of the law laid down by the Supreme Court in **BSNL** case, the matter has to be reconsidered *de novo* by the authorities below.

17. One issue which we may deal with relates to limitation. According to the appellant, the impugned demands have been confirmed invoking the extended period of limitation, but as the appellants did not commit any fraudulent act nor suppressed any information from the Department muchless with intention to evade the service tax, the non-payment, if any, by reason of non-inclusion of the value of the sale portion of the contract, that is, the non-disclosure of the gross total amount including the value of the materials, was on account of bonafide belief that service tax liability relates to the service part of the contract which has already been discharged by the appellants as per Notification No. 12/2003-ST. The case of the Revenue, on the point of limitation, on the other hand, is that the non-

inclusion of the value of photography materials in the value of the taxable service was deliberate with intent to evade service tax. In view of our conclusion on the main dispute as to inclusion of the value of materials in the total value of taxable service in favour of the appellants, it is clear that non-inclusion of value of materials being in accordance with law, the extended period of limitation cannot be invoked, and the question of limitation too has to be reconsidered while considering the appellants' case.

18. In the result, the orders impugned in these appeals are set aside and the matters are sent back to the original authority for *de novo* consideration in accordance with law. The appeals are accordingly allowed. .

(Pronounced in the open Court on the [illegible] day of October, 2008)

(JUSTICE S.N. JHA)
PRESIDENT

(M. Veeraiyan)
Technical Member

Golay