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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/128, 345-46 /2006 - CU[DB] Date 14/01/2009
ST/137/07

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

To :
THE COMMISSIONER, CUSTOMS AND CENTRAL
EXCISE, RAIPUR
CENTRAL EXCISE BHAWAN, TIKRAPARA RAIPUR
(C.G)
THE COMMISSIONER, CUSTOMS AND CENTRAL EXCISE, RAIPUR — Appellant

Vs

M/S AJANTA COLOR LABS — Respondent

I am directed to transmit herewith a certified copy of **Final order No.** ST/24-27/09 **CU[DB]** dated 19.12.08 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
   M/S AJANTA COLOR LABS
   3/13, AKASH GANGA COMPLEX, BHILAI (C.G)
2. Adv. / Consult
   MR.K.K ANAND
   A-5,BASEMENT,LAJPAT NAGAR-III NEW DELHI-24
3. S.D.R
4. J.C.D.R.
5. Bar association. CESTAT. New Delhi
6. M/s. Deeparchi Publications. M-93. Marg. 46. Saket. New Delhi 110017
7. M/s Centax Publictions (P) Ltd.. 1512-B. Bhishm Pitamah marg. Opp. ICICI Bank of Defence Colony. New - 3
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
16. Guard file

Assistant Registrar
(Customs Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. III
Service Tax Appeal Nos. 128, 345-346 of 2006 with ST/137 of 2007

[Appeal Nos. 128 and 345 of 2006 arising out of the Order-in-Appeal No. 10/ST/RPR-II/2006 dated 24/02/2006, appeal No. 346 of 2006 against Order-in-Appeal No. 3/ST/RPR-II/2005 dated 27/12/2005 all are passed by the Commissioner (Appeals), Customs & Central Excise, Raipur and appeal No. 137/07 against Revision Order No. Commr./RPR/ST/92/2006 dated 21/12/2006 passed by the Commissioner of Central Excise, Raipur.]

For Approval and signature :
Hon'ble Mr. P.K. Das, Member (Judicial)
Hon'ble Mr. Rakesh Kumar, 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? :
2. Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? :
3. Whether their Lordships wish to see the fair copy of the order? :
4. Whether order is to be circulated to the Department Authorities? : Yes

CCE, Raipur — Appellant

Versus

M/s Ajanta Color Labs — Respondent

Vice-Versa

Appearance

Shri Fateh Singh, Authorized Representative (DR) – for the appellant.

Shri Hemant Bajaj, Advocate – for the Respondent.

CORAM: **Hon'ble Shri P.K. Das, Member (Judicial)**
Hon'ble Sh. Rakesh Kumar, Member (Technical)

DATE OF HEARING : 19/12/2008.

Final Order No. ST/24-27/09 Dated : ____________

Per. P.K. Das :-

Heard both sides and perused the records.

2. The assessee is engaged in developing of exposed photographic films and making prints, thereof. There is a demand of tax of Rs. 1,05,415.00 and penalty of equal amount by order-in-original dated 30th December 2005. Commissioner (Appeals) reduced the penalty to Rs. 5,000.00. Assessee filed appeal No. ST/345 of 2006 against the said order-in-appeal. Revenue filed appeal No. ST/128 of 2006 for imposition of penalty of equal amount.

3. Another demand of tax of Rs. 5,98,000.00 (Rupees Five Lakh Ninety Eight Thousand only) and penalty of Rs. 25,000.00 (Rupees Twenty Five Thousand only) under Section 76 vide order-in-original dated 27th January 2005. Assessee filed appeal before the Commissioner (Appeals), which was rejected. The

assessee filed appeal No. ST/346 of 2006 against the said order-in-appeal. In the meantime, Commissioner of Central Excise revised the Order-in-original dated 27th January 2005 and enhanced the penalty to Rs. 100.00 per day under Section 76. Assessee filed appeal No. ST/137/07 against the revision order.

4. After hearing both the sides and on perusal of the records, we find the main contention of the appellants that the cost of photographic paper and chemical would not be included in taxable value and they are eligible to get the benefit of Notification No. 12 of 2003-ST dated 20th June 2003. The learned advocate submits that the Tribunal in the case of Deluxe Colour Lab Pvt. Ltd. vs. CCE, Jaipur vide Final order No. ST/285-288 of 2008 dated 22nd October 2008, held that photography service is works contract involving both sale and service and sale position cannot be subject to service tax. It is seen that the Tribunal in the case of M/s Jain Brothers and another vs. CCE, Bhopal vide final order No. ST/401-402 of 2008 dated 25th November 2008 following the decision of Deluxe Colour Lab. P. Ltd. (supra) remanded the matter with certain directions. The relevant portion of the decision in the case of M/s Jain Brothers (supra) is reproduced below :-

> "3. We have carefully considered the submissions from both the sides. The issue has already been decided by the

Tribunal in the case of Deluxe Color Lab. (P) Ltd. (supra). In this regard, relevant portions from the said order is reproduced below :-

> "12. It would thus appear that the decision is 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' cannot stand in the same box. Sale cannot be treated as service and vice versa.
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> xxx xxx xxx xxx xxx
>
> 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 much less 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."

4. In view of the above, we allow the appeals on merit and hold that the portion of value relating to sale is not to be included for levy of service tax. The question of applying extended period of limitation and imposition of penalties does not arise. As the authorities below have gone on the understanding that the entire value of both service and sale has to be taxed and have not gone into the correctness of the quantum of abatement towards value of goods sold, we feel that it would be appropriate to remand the matter to the original authority to the limited purpose of determining the valuation in terms of the above decision and consequent demand of differential tax, if any, as per the said decision."

5. Respectfully following the above decisions, we allow the appeals for the assessee on merits and hold that the portion of the value relating to photography materials would not be included in the levy of service tax. It is a case of interpretation of the statutes and, therefore, extended period of limitation and imposition of penalties would not warrant. As such, we direct the Adjudicating

Authority to re-determine the quantum of tax for normal period of limitation following the decision of the Tribunal in the case of Deluxe Colour Lab Pvt. Ltd. (supra). Penalties are set aside. Appeal No. ST-128/07 filed by Revenue is rejected. Revised order passed by the Commissioner is set aside and appeal No. ST-137/07 is allowed with consequential relief. The other appeals filed by the assessee are disposed of in the above terms.

(Dictated and pronounced in open court)

(P.K. Das)
Member (Judicial)

(Rakesh Kumar)
Member (Technical)

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