

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

Appeal No. ST/738 & 760/2007 - CU[DB]
ST/CO/48/2008

Date 28/09/2011

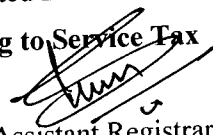
Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
C.C.E. CHANDIGARH
C.R. BUILDING, PLOT NO. 19, SECTOR 17-C,
CHANDIGARH 160017
C.C.E. CHANDIGARH

Appellant
Vs
Respondent

M/S SATYAM DIGITAL PHOTO LAB

I am directed to transmit herewith a certified copy of Final order No. ST/503-04/ 2011 CU[DB] dated 20.09.2011
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 SATYAM DIGITAL PHOTO LAB
SCO 1040, SECTOR 22-B,
CHANDIGARH
2. Adv. / Consult
MISSNISHA BAGCHI
C-630, GROUND FLOOR,
NEW FRIENDS COLONY, NEW DELHI, 110065
3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd., No.2 (Old No. 36), Vaithyaram Street, T. Nagar, Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A, Iscon Mall, Above Star India Bazar, Satellite Road,
Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10, Faridabad 121003 (Harvana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor, Vasant Arcade, Nelson Mandela Road,
Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

(14) CCE Raipur.
C.R. Building, Dhantari Road
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(15) M/s R.K. Photo Studio
Jai Ram Complex
Shadva Chowk
Raipur - (CG)


Assistant Registrar
(Customs Appeal Branch)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. III**

Service Tax Appeal No.738 and 760/2007 with ST/CO/48/2008

For approval and signature:

Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Mathew John, Member (Technical)

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

Service Tax Appeal No.738

[Arising out of Order-in-Appeal No. 402/CE/CHD/2007 dated
14.9.2007 passed by the Commissioner of Central Excise (Appeals),
Chandigarh]

Commissioner of Central Excise
Chandigarh

Appellants

Vs.

M/s. Satyam Digital Photo Lab

Respondent

Appearance:

Shri Sumit Kumar, SDR for the Appellants
 Ms. Nisha Bageli and Shri Vikram Mehta for the Respondent

Service Tax Appeal No. 760/2007 with ST/CO/48/2008

[Arising out of Order-in-Appeal No. 60(ST)/RPR-I/2007 dated 10/13.8.2007 passed by the Commissioner of Customs & Central Excise (Appeals), Raipur]

Commissioner of Central Excise
 Raipur

Appellants

Vs.

M/s. R.K. Photo Studio

Respondent

Appearance:

Shri Sumit Kumar, SDR for the Appellants
 None for the Respondent

CORAM:

Hon'ble Ms. Archana Wadhwa, Member (Judicial)
 Hon'ble Mr. Mathew John, Member (Technical)

Date of Hearing : 25.08.2011

Date of decision : .2011

Final ORAL ORDER NO. ST/503-504/11

Per Archana Wadhwa (for the Bench):

Both the appeals of the revenue are being disposed of by a common order as the issue involved in all of them is identical. The

impugned orders stand passed by the Commissioner (Appeals) vide which he has set aside the demand of Service Tax against the respondents on the ground that the value of the goods and materials sold by the respondents while providing the services, are not required to be added in the value of services.

2. As per the facts on record, the respondents are engaged in providing photography services to their customers. The dispute in the present appeals relates to the legal issue as to whether the value of paper, chemicals and other materials used by them is required to be added in the value of services being provided by them so as to make the entire gross amount charged by them from their clients leviable to service tax. The Commissioner (Appeals) has held in favour of the respondents by following the precedent decision of the Tribunal in the case of *Shilpa Colour Lab vs. CCE, Calicut* reported in [2007 (5) STR 423 (Tri-Bang)] as also in the case of *Bharat Sanchar Nigam Ltd. vs. Union of India* reported in [2006 (2) STR 161 (SC)] affirmed by Supreme Court as reported at [2009 (14) STR J 163 (SC)] and *Adlab vs. CCE, Bangalore* reported in [2006 (2) STR 121 (Tri)] affirmed by Karnataka High Court as reported at [2010 (18) STR J 85]. He has accordingly set aside the demand of duty against the respondents alongwith setting aside of penalties etc. The said order is impugned by Revenue.

3. After hearing both sides, we find that the issue on merits is no more res integra and stands settled in favour of the Revenue by the Larger Bench decision of the Tribunal in the case of M/s. Agrawal Colour Photo Industries vs. Commissioner, vide Misc. order No. ST /129/11 dated 11.8.2011. It stands held in the said decision of the Larger Bench that the value of services in relation to photography would be the gross amount charged including the cost of goods and material used and consumed in the course of such services.

4. As such, the only issue required to be considered in the present appeals is as to whether the extended period of limitation would be available to the Revenue for raising the demands against the respondents. It is seen that in all the appeals, the show cause notices stand issued by invoking the longer period of limitation, except a small portion which may fall within the limitation period in some of the cases. Arguments were advanced by both sides on the point of limitation. Learned DR appearing for the revenue has also filed written submissions.

5. It is noted that the disputed issue was the subject matter of consideration by the Government as also by the Tribunal. Government in its circular F.No. 233/2/2003-CX-4 dated 7.4.2004 addressed to the Punjab Colour Lab Association had clarified that service provider was entitled to claim exemption in respect of inputs, material consumed / sold to the service recipient. Apart from the above clarification, the

earlier decision of the Tribunal in the case of Shilpa Colour Lab reported in [2007 (5) STR 423 (Tri-Bang)] as also in the case of Adlab Labs reported in [2006 (2) STR 121 (Tri)] etc. were in favour of the assessee. As such, the respondent submitted that there was enough material for them to entertain a bonafide belief as regards non inclusion of the material cost in the value of services. They submitted that the issue stands decided against the appellant, by the Larger Bench decision of the Tribunal delivered on 11.8.2011. As the decisions prior to the Larger Bench judgment were in favour of the assessee, no malafide can be attributed to them so as to invoke the longer period of limitation.

6. As against the above pleas of the respondents, the learned SDR Shri Sumit Kumar have submitted that the law on the issue was clear even prior to the Larger Bench judgement and relies upon the Supreme Court decision in the case of C.K. Jidheesh vs. Union of India as reported in [2006 (1) STR 3(SC)]. He submits that the Commissioner (Appeals) has misapplied the law and this error of law and fact should be corrected by the Tribunal by upholding the order of the adjudicating authority for the entire period. He draws our attention to the findings of the original adjudicating authority as regards the fact of suppression and non information of the crucial facts. As regards the appellants plea that the earlier judgements were in their favour and therefore, extended period would not be applicable, learned DR submits that the Apex Court decision in the case of C.K. Jidheesh

cover the disputed issue and as such the respondents contention of conflicting orders on the issue is without merit. As regards the Board's circular, he submits that it stands observed by the Larger Bench in the case of Aggarwal Colour Advance Photo System that there was no such Circular issued by the Board and the same was only a letter of an officer without authority and without legs to stand on. The Hon'ble Supreme Court in the case of CCE, Bolpur vs. Ratan Melting & Wire Industries reported as [2008 (231) ELT 22 (SC)] has held that a circular contrary to law laid down by Supreme Court is a nullity. As such he submits that in the light of finding of Larger Bench, the letter issued by the Board is erroneous and is contrary to the law pronounced by Larger Bench and as such is nullity. Further submitting, he pleads that the ignorance of law cannot be an excuse for deliberately omitting crucial data from ST 3 returns whereas it is clear from the provisions of Section 67 of Finance Act, 1994 that the gross value has to be treated as assessable value for the purpose of Service tax. He submits that once the adjudicating authority by appreciating the evidence on record has upheld suppression of crucial information from the revenue, the question of conflicting orders 'per incuriam' as being contrary to apex Court judgement cannot be cited in support of the proposition advanced by the respondents and needs to be rejected. In view of the above arguments, he submits that extended period stands rightly invoked by the adjudicating authority and prays for allowing the revenue's appeal.

He also relies upon Gujarat High Courts;’ decision in the case of Neminath Fabrics P. Ltd. reported as [2010 (256) ELT 369 (Guj) and the Hon’ble Supreme Courts’ decision in the case of Mehta & Co. reported as 2011 (264) ELT 481 (SC)].

7. We have considered the submissions made by both sides. There is no dispute about the merits of the case which stands decided against the respondents by the Larger Bench decision of the Tribunal. There is also no dispute about the fact that the earlier decision of the Tribunal were in favour of the assessee. The Hon’ble Supreme Court in the case of C.K. Jidheesh vs. CCE Chandigarh cited supra has held as under:

“6. As has been mentioned above, the challenge is ostensibly to the letter issued by the Ministry of Finance. But the real challenge is to the amendment in the Finance Act. That letter is only clarifying what Section 67 of the Finance Act, 1994, as amended by Act 14 of 2001, provides.”

8. As regards the learned SDR’s plea that the issue was covered by the Apex Court decision in the case of C.K. Jidheesh, we find that the said judgement was on the issue whether material sold by photograph studios can be separated from the value of services rendered by them and a letter / clarification issued by Ministry was under challenge. The decision was itself based on the decision of the Apex Court in a sales tax matter in Rainbow Colour Lab & Anr. v. State of M.P. & Ors. - (2000) 2 SCC 385. This decision of the Apex Court, in sales tax matter,

was overruled by the Apex Court in para 47 of *Bharat Sanchar Nigam Ltd. Versus UOI-2006 (2) S.T.R. 161 (S.C.)*.

“44. In *Rainbow Colour Lab & Anr. v. State of M.P. & Ors.* - (2000) 2 SCC 385, 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.

45. The Court answered the questions in the negative because, according to the Court:-

“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.* - (1958) 9 STC 353: AIR 1958 SC 560 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 46th Amendment and the judgment of this Court in *Builders’ case* (1989) 2 SCC 645 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* - (1977) 1 SCC 634 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”.

46. This conclusion was doubted in *Associated Cement Companies Ltd. v. Commissioner of Customs* - (2001) 4 SCC 593 saying :-

“The conclusion arrived at in *Rainbow Colour Lab case* [(2000) 2 SCC 385], 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 - (1989) 2 SCC 645”.

47. We agree. After the 46th 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 - (2005) 8 SCALE 784 held that the aforesaid observations in Associated Cement (supra) were merely obiter and that Rainbow Colour Lab (supra) 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 46th Amendment would apply.”

9. It appears that the SDR is arguing that the Apex Court had endorsed the contention of Revenue that in the case of photography service only the cost of unexposed films can be deducted from the value of service realized from the customer and not the value of chemicals used and further that since the Apex Court had declared the law in the matter on 27-10-2005 itself, any action (or inaction) of any assessee done without taking cognizance of this finding of Apex Court is with intention to evade payment of tax. In this context a careful reading of the decision in C.K. Jidheesh is required. Firstly, the major contention of the appellant in that case was that UOI was discriminating between persons providing services like photography services and those providing services like stock brokers, travel agents etc in the manner of computing taxable value of services. Secondly the dispute was in relation to a clarification dated 09-07-2001 issued by Finance Ministry in the matter. The decision also took into account the decision of the

Apex Court in *Rainbow Colour Lab v. State of M.P.* — 2001 (134) E.L.T. 332 (S.C.). Notwithstanding these interpretations of law, the CBEC, albeit an official of CBEC, issued a clarification contrary to the legal position as explained in these sources vide letter dated 07-04-2004 addressed to Punjab Color Lab Association giving a different interpretation of law. If an official of CBEC was not aware of the correct legal position in the matter then the members of the public cannot be faulted for having acted in good faith relying on the said clarification dated 07-04-2004 issued by an official of CBEC. Further the Tribunal also took cognizance of the letter and interpreted law in a manner different from the previous legal position and one such decision was upheld by the Supreme Court and another by the Karnataka High Court. In such a situation can an assessee be accused of suppressing information with intention to evade payment of duty?

10. Learned SDR's contention that the said letter was issued by one of the officer without authority and without jurisdiction, cannot be appreciated inasmuch as the fact of issuance of said letter addressed to Punjab Colour Lab Association is not being denied by the learned SDR. The assessee is not supposed to go into the correctness or otherwise of said letter having been issued without any jurisdiction or not. The said letter was issued in response to the representations received from the assessee and the fact whether the same was in the shape of circular or a letter issued by an officer without any authority has no bearing on the

assessee entertaining the bonafide doubt about non-inclusion of the material in the value of the services. We find no merits in the above contention of the learned SDR.

11. As regards the findings arrived at by the original adjudicating authority on the point of limitation, we note that the allegation of suppression and mis-statement justifying invocation of extended period of limitation stands upheld against the assessee on the sole ground that the specific details of computation of taxable value and the service tax were not being provided by the respondents at the time of filing the returns. Mere filing of return by itself without giving bifurcation of the cost of the material and cost of services do not act as estoppels in invoking the extended period. Inasmuch as the particulars mentioned in the return does not give a clear picture, it stands recorded by the adjudicating authority that in ST 3 return, the respondents have only mentioned the taxable value – *post deduction* from the gross bill amount. As such, he has arrived at a finding that no demand could have possibly be raised without disclosure of facts and figures.

We find that the grounds on which extended period of limitation can be invoked against the assessee are available in proviso to Section 11 A of Central Excise Act, 1944. While interpreting the expression “suppression, misstatement” there are plethora of judgement by the Hon’ble Supreme Court laying down that such suppression or mis-statement has to be with “an intent to evade payment of duty”. In other

words, if such suppression or mis-statement, if any, is based upon the available information in the field or on the basis of precedent decisions of the higher authorities, the mere fact of non-providing information by itself, cannot be held to be a ground for invocation of longer period of limitation. The question required to be seen in the present appeal is as to whether such non-filing of information with the revenue as regards the cost of material used, while providing the services, was with a malafide design on the part of the assessee or was the result of bonafide doubt being entertained by him. As already discussed, various Tribunal's judgements holding in favour of the assessee as also the fact of letter issued by an officer of the Board to the Punjab Colour Lab Association are sufficient reasons for an assessee to entertain a view that such material cost is not required to form part of the taxable services. The adjudicating authority having not referred to any evidence indicating that such non-information was with an intent to evade payment of duty, mere fact of non-filing of information by itself cannot be held to be justifiable reason for invocation of longer period of limitation.

12. The Hon'ble Supreme Court in the case of Jaiprakash industries Ltd. vs. CCE, Chandigarh reported in [2002 (146) ELT 481 (SC)] has observed that when there is a bonafide doubt as regards the non-excisability of the goods due to divergent views of the High Courts, extended period of five years cannot be invoked. It further stands

observed that mere failure or negligence in not taking licence or not paying duty is not sufficient to invoke extended period. Further, the Hon'ble Supreme Court in the case of Cosmic Dye Chemical vs. CCE, Bombay reported in (1995) 6 Supreme Court Cases 117 has observed that malafide intention is an essential element for invocation of longer period of limitation. There being different views of High Courts expressing conflicting opinion on the point of dispute are sufficient for any person to entertain a bonafide belief. In the circumstances, mis-statement or suppression of facts, if any, cannot said to be wilful.

13. The reliance placed by the learned SDR on the decision of the Hon'ble Apex Court in the case of Ratan Melting and Wire Industries were laying down that a Circular contrary to the law laid down by the Supreme Court is a nullity is not appropriate, inasmuch as the same has no bearing on the invocation of longer period of limitation. We are not holding that the law as clarified in the Board's letter dated 7.4.2004 is the correct law. The reference to the said letter is being made only to arrive at a conclusion that there could be a bonafide belief on the part of the assessees. The law as declared by the Larger Bench in the case of Aggarwal Photo Lab is the correct law, which is admittedly contrary to the said letter of the Board and is not being adopted for deciding the issue on merits.

14. Similarly, we note that the reference to the Hon'ble Gujarat Court's decision in the case of Neminath Fabrics cited supra is not

correct inasmuch as the issue involved in that case as also in the case of decision of the Apex Court in Mehta & Co. cited supra, was on the issue as to whether the period of 5 years would be available to the revenue from the date of search of the factory, when the officers get the knowledge about the clandestine activities of the assesseees.

15. By applying the ratio of law declared in the above decision, we find that since the earlier decisions of the Tribunal were in favour of the assessee, it has to be held that there was bonafide doubt about the inclusion of the cost of material in the cost of services. If that be so, no malafide can be attributable to the appellant so as to invoke the extended period of limitation.

16. We find that identical issue of limitation, in respect of other appellants / respondents assesseees similarly situated, was considered by the Tribunal in the case of M/s. Shobha Digital Lab. Vs. CCE, Bhopal Final Order dated 23.8.2011 in Appeal No. ST/745/2007 and many others. It stands held that in such cases, law on the issue declared on August, 2011 by the Larger Bench, and the earlier decisions being in favour of the assessee, the limitation would not apply and extended period would not be available to the Revenue. We accordingly hold that demands beyond the period of limitation in all the three appeals are not liable to be confirmed, though the issue on merits stands decided in favour of the Revenue. Wherever the demand is within the period of

limitation, the original adjudicating authority would requantify the same.

17. However, while re-quantifying the demand falling within the period of limitation, no penalty is required to be imposed on the appellants inasmuch as we have already held that there is no malafide on the part of the assessee who could have entertained the reasonable belief that the value of material is not required to be added in the value of services being provided by them.

18. In view of the foregoing discussion, Revenue's appeals are allowed to the extent of demand being within the period of limitation from the date of issuance of show cause notice. C.O. also get disposed of. Cross Objection also get disposed of.

(Pronounced in the open Court on 20/9/11)

(Archana Wadhwa ,
Member(Judicial)

(Mathew John)
Member(Technical)