IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, EASTERN ZONAL BENCH: KOLKATA

S.T.Appeal No.112/09

(Arising out of Order-in-Original No.01/ST/SEC.84/Commissioner/2009 dated 27.01.2009 passed by the Commissioner of Central Excise & Service Tax, Patna)

M/s Color Lab

Applicant (s)/Appellant (s)

Vs.

Commr. of Central Excise & Service Tax, Patna

Respondent (s)

Appearance:

On Merit
Shri S. Mukhopadhyay, Supdt. (A.R.) for the Revenue

CORAM:
HON'BLE SHRI P.K.CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE SHRI V. PADMANABHAN, MEMBER (TECHNICAL)

Date of Hearing : 26.10.2018
Date of Pronouncement : 07.01.2019

ORDER NO…FO/A/75026/2019

Per Bench :

This is a second round of litigation before the Tribunal. We find that the appeal has been listed on Board at various dates, but none appeared on behalf of the appellant. However, an application has been received praying for deciding the appeal on merit.

2. Heard the ld.D.R. for the Revenue and perused the appeal records.

3. We find that the issue is no more *res-integra* in view of the decision of the Larger Bench of the Tribunal in the case of Aggarwal Colour Advance Photo System Vs. Commr. of Central Excise, Bhopal reported in 2011 (23) STR 608 (Tri.-LB). The period of dispute in the present case is from April, 2003 to September, 2003. We find that the

Civil Appeal filed by the Department against the Tribunal's judgement in the case of Shilpa Colour Lab Vs. CCEx., Calicut reported in 2007 (5) STR 423 (Tribunal), has been dismissed by the Hon'ble Supreme Court [2009 (14) STR J163] by order stating "civil appeal is dismissed". The relevant observations are reproduced below :

> ***"3.*** *At the beginning of hearing by the Larger Bench, it was suggested by both sides that if question (2) and (3) appearing in para 3 of the referral order as extracted herein before is answered, that shall serve the purpose of Reference. With such suggestion, the Bench proceeded to hear the arguments advanced by both the sides on the following two questions only appearing in referral order reported as Agarwal Colour Advance Photo System v. CCE, Bhopal reported in [2010 (19) S.T.R. 181 (Tri.-Del.)] :*
>
> *"(2) Whether for the purpose of Section 67 of the Finance Act, 1994 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?*
>
> *(3) Whether the term 'sale' appearing in exemption Notification No. 12/03-S.T., dated 20-6-03, 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?"*
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> *[Emphasis supplied]*
>
> ***4.*** *Dealing with question No. (2), the referring Bench was of the view that in case of services in relation to photography, Service tax has to be levied on the "gross amount" charged by the service provider for providing such service, which would include*

value of all materials or goods used/consumed or becoming medium or basis for providing the taxable service being inseparably and integrally connected with such service enabling the same performable or capable of being performed. The only deduction, permissible from the gross amount, will be of the value of unexposed film, if any, sold. With great respect the judgments of Tribunal in cases of Shilpa Color Lab. (supra), Adlab v. CCE (supra), Delux Colour Lab & Others v. CCE, Jaipur & Others (supra) are impediment and appear to be contrary to the law laid down by Hon'ble Supreme Court in case of C.K. Jidheesh v. UOI (supra), which is a direct judgment of Hon'ble Supreme Court on the issue of valuation of photography service.

5. *So far as the third question referred to the Larger Bench is concerned, the view of the Referring Bench was as under :-*

Notification No. 12/2003-S.T., dated 20-6-2003 fully exempts from Service tax, the value of the goods which are sold in course of providing a taxable service. The contention of the appellant in appeal Nos. ST/301, 302 and 303/2006 and of the respondent in appeal No. ST/437/2009 is that the term "sale" in this Notification also includes the "deemed sale" under Article 366(29A) of the Constitution and, therefore, if a service contract is a work contract and hence divisible into service component and goods component for the purpose of charging Sales tax on the goods component, no service tax can be charged on the goods component and the same being deemed sale, would be exempt from Service tax under this notification. But in a service of photography when there is no sale of goods involved following the ratio laid down in the case of Everest Copiers v. State of Tamilnadu reported in (1996) 103 S.T.C. 360 (S.C.) and service element is dominant, Article 366(29A)(b) of Constitution making a legal fiction by which the scope of the expression "tax on sale or purchase of goods" in entry 54 of List-II of the 7th Schedule to the Constitution, has been expanded so as to include certain deemed sales, including the transfer of property in goods *involved in execution of work contract does not override provision relating to valuation of photography service under Finance Act, 1994 in view of object of this Act to levy tax on services. In view of settled legal position on this issue, the contention that the word "sale" in this notification would cover the deemed sale under Article 366(29A) of the Constitution is of no relevance for the reason that Notification does not override statutory provision. The word 'sale' in this notification has to be interpreted on the basis of its definition as given in Section 2(h) of the Central Excise Act, 1944, which by virtue of Section 65(121) of the Finance Act, 1994 is applicable to Service tax. When there is no primary intention of parties to sell paper, consumable or chemical in providing photography service there is no room left to plead fiction of Article 366(29A)(b) of the constitution in absence of any such sale of these commodities as goods qua goods. In case of transactions where sale of goods is made in disguise and incidentally while providing service, those transactions call for settling in terms of provisions of sales tax law. But under Finance Act, 1994 providing of service being event of levy, incidence of tax arises on the whole of value of service including materials used in providing such service, the moment event of levy arises.*

6. *Learned Counsel Shri Madhav Rao appearing in all cases except Service Tax Appeal No. 437/2009 submitted that controversy has already been resolved. There is no further scope for the Larger Bench again to relook into the matter. Apex Court in Civil Appeal No. 263/2008 having dismissed the Revenue's appeal, the issue on the valuation of photographic service has been resolved. On the basis of law settled, the value of the goods used in the photography services shall not contribute for the purpose of valuation of such services. When the law does not make any provision for any inclusion of value of the goods, various Benches of the Tribunal have rightly excluded the value of goods used in providing photography service to determine assessable value of such service. Taking into consideration the* *decision of the Tribunal in Surabhi Colour Lab. case [2010 (20) S.T.R. 40 (Tribunal)], the Hon'ble Apex Court having dismissed Revenue's appeal in the past Reference need not be answered in favour of Revenue and the present reference was unwarranted. Such a view is also supported from the judgement of Hon'ble High Court of Punjab and Haryana in the case reported in 2010 (18) S.T.R. 548 (P&H) which has held that the gross amount charged does not necessarily imply value of the chemicals and other consumables used in the course of providing photography services.*

6.1 *Shri Rao pointed out that Revenue went in appeal before Apex Court on following grounds among others :*

"(A) Whether the value of taxable service for the purpose of Service Tax is not the gross amount charged from the customer for service rendered and whether while valuing the photographic services for the purpose of Service Tax the value/cost of goods which are consumed in the process are not liable to be included in the value of photographic services. Another question raised was as to whether the ratio of the decision of Hon'ble Court in BSNL case reported in 2006 (3) SCC 1 = 2006 (2) S.T.R. 161 (S.C.), which to issue of levy of sales tax on "SIM Card" etc. would at all be attracted for the purpose of valuation of the photographic services under Finance Act, 1994 and whether the decision of Apex Court in Rainbow Colour Lab v. State of M.P. reported in (2000) 2 SCC 385 = 2001 (134) E.L.T. 332 (S.C.) and C.K. Jidheesh v. Union of India reported in (2005) 13 SCC 37= 2006 (1) S.T.R. 3 (S.C.) do not hold the field on the issue of valuation of the taxable service.

(B) Section 67 provides that the value of taxable service shall be the gross amount charged by the service provider for such service rendered by him. The Explanation to Section 67 exempts only the cost of unexposed photography film, unrecorded magnetic tape or such other storage device, if any, sold to the

client during the course of providing the service. Whereas Apex Court in BSNL case reported in 2006 (3) SCC1 = 2006 (2) S.T.R. 161 (S.C.) considered the meaning of 'goods' after 46th amendment in para 43-52 and in para 53 thereof, the Hon'ble Court approved the test that for being goods it should be capable of being bought and sold. Thus BSNL decision no where overrules the C.K. Jidheesh case [2005 (13) SCC 37 = 2006 (1) S.T.R. 3 (S.C.)] on any material issue relating to service tax.

(C) Tribunal without appreciating the above mentioned fact allowed the claim of the respondent by holding that the decision of C.K. Jidheesh was overruled by the BSNL. The Tribunal further erroneously held that summary dismissal of SLP against decision of Kerala Colour Lab. [2006 (2) S.T.R. 554 (Ker.) = 2003 (156) E.L.T. 17 (Ker.)] would not tantamount to affirmation of the decision of the High Court. It is submitted that decision of Kerala Colour Lab. was considered by Apex Court in C.K. Jidheesh v. Union of India [2005 (13) SCC 37 = 2006 (1) S.T.R. 3 (S.C.)] on merit and after hearing the parties their Lordships were pleased to hold as under :-

"9. The provisions of the Finance Act had been challenged by the Kerala Colour Labs association. That challenge had been repelled by the Kerala High Court and an SLP against that judgement has already been dismissed by this Court. We have read the judgement of the Kerala High Court. In our view, the judgement correctly considers all aspects including the aspect of double taxation. We find no infirmity in that judgement. The principles set out therein fully apply herealso."

Thus the decision of the Tribunal is totally erroneous and liable to be set aside by this Hon'ble Court. Further the Tribunal failed to appreciate that in case of sale of material the dealer is permitted to claim exemption by producing the invoice and other necessary documents. The provisions of Section 65(47), 65(48), 65(72)(zb), 66 read with Section 67 and its explanation it is *abundantly clear that the value of taxable service for the purpose of Service Tax is the gross amount charged from the customer for service rendered and the goods which are consumed in the process of rendering service cannot be an item of sale; therefore, the claim of the respondent was devoid of merit and the Tribunal has erroneously relied on the decision of BSNL which pertains to sales tax and where the issue of definition of goods for the purpose of sales tax was involved.*

(D) On further scrutiny it was found that the respondents have grossly undervalued their tax liability by deducting the cost of raw material from the gross amount received from the customer. It is submitted that as per Section 67 of the Act read with instruction dated 9-7-2001, the value of taxable service shall be the amount charged by the service provider for the service rendered. Accordingly a show cause notice was issued as to why Service tax of Rs. 9,74,050/- should not be demanded and penalty u/s 76 & 77 of the Act should not be imposed.

(E) It is submitted that the value/cost of goods which are consumed in the process are liable to be included in the value of photographic services. The decision of this Hon'ble Court in Rainbow Colour Lab and C.K. Jidheesh were also relied by the Adjudicating Authority.

(F) Relying on the decision of this Hon'ble Court in BSNL case reported in 2006 (3) SCC1, it was held that the decisions of this Hon'ble Court which were relied by the appellant here [i.e. Rainbow Colour Lab. v. State of M.P. reported in (2000) 2 SCC 385 = 2001 (134) E.L.T. 332 (S.C.) and C.K. Jidheesh v. UOI reported in (2005) 13 SCC 37 = 2006 (1) S.T.R. 3 (S.C.)] were overruled in BSNL case. It is submitted that the Tribunal quoted para 41 to 49 of the decision of BSNL case which clearly show that said decision pertains to issue of levy of sales tax on "SIM Card" etc. which would not be attracted for the purpose of valuation of the photographic services under the Service Tax Act.

(G) In C.K. Jidheesh case this Hon'ble Court rejected the prayer of the petitioners therein regarding bifurcation of the gross receipts of processing of photographs into the portion attributable to goods and that attributable to services. In the said decision this Hon'ble Court held that "Section 65(47) defines photography as including still photography, motion-picture photography, laser photography, aerial photography and fluorescent photography. Section 65(48) defines photography studio or agency as including any professional photographer or a commercial concern engaged in the business of rendering service relating to photography. Section 65(72)(zb) defines taxable service in relation to photography studio or agency as any service provided to a customer, by a photography studio or agency in relation to photography, in any manner. Section 66 is the charging section. Sub-section (5) levies service tax at the rate of five percent of the value of the taxable services referred to in clause (zb) of Section 65(72).

(H) Section 67 provides that the value of taxable service shall be the gross amount charged by the service provider for such service rendered by him. The Explanation to Section 67 exempts only the cost of unexposed photography film, unrecorded magnetic tape or such other storage device, if any, sold to the client during the course of providing the service. Whereas this Hon'ble Court in BSNL case [2006 (3) SCC (1) = 2006 (2) S.T.R. 161 (S.C.)] considered the meaning of "goods" after 46th amendment in para 43-52 and in para 53 this Hon'ble Court approved the test that for being goods it should be capable of being bought and sold. Thus BSNL decision no where overrules the C.K Jidheesh case [2005 (13) SCC 37 = 2006 (1) S.T.R. 3 (S.C.)] on any material issue relating to service tax. The Tribunal further erroneously held that summary dismissal of SLP against decision of Kerala Colour Lab. would not tantamount to affirmation of the decision of the High Court. It is submitted that decision of Kerala Colour Lab. was considered by this Hon'ble Court in C.K. Jidheesh v. Union of India [2005 (13) SCC 37 =

2006 (1) S.T.R. 3 (S.C.)] on merit in para 9. Further the Tribunal failed to appreciate that in case of sale of material the dealer is permitted to claim exemption by producing the invoice and other necessary documents. From the provisions of Section 65(47), 67(48), 65(72)(zb), 66 read with Section 67 and its explanation, it is abundantly clear that the value of taxable service for the purpose of Service Tax is the gross amount charged from the customer for service rendered and the goods which are consumed in the process of rendering service cannot be an item of sale; therefore the claim of the respondent was devoid of merit."

6.2 *According to Shri Rao, learned Advocate, while deciding Surabhi Colour Lab case [2010 (20) S.T.R. 40 (Tri. - Bang.)] adjudicated by Revenue before Apex Court, the court has held as under :-*

"In the case of Adlabs v. CCE, Bangalore, reported in 2006 (2) S.T.R. 121 (Tri.-Bang.), it has been observed as follows :

3. On a careful consideration, we notice that the Commissioner was not justified in taking the view in contra to the Boards' letter and the Notification. The appellants have maintained the records of the inputs used in the photography, nowhere it is stated in the Circular and Notification that the inputs used in the photography should be mentioned in the invoices/bills issued to the customers. The reasoning given by the Commissioner is not sustainable. In view of the clarification given in the Boards' letter and the Notification itself the denial of benefit by the lower authorities is not justified and not correct in law. The appellants are eligible for the benefit of deduction in terms of the Boards' circular and the Notification. The order passed by the impugned authorities is not correct in law as the same is contra to the Boards' letter and the Notification. The impugned order is set aside by allowing the appeal."

In terms of the above order, the only limited exercise we want the Tribunal to undertake is to ascertain whether the respondent assessee has maintained the records of the inputs used in the photography and only to that extent the matter stands remitted to the Tribunal.

Civil appeal is disposed of. No order as to costs."

6.3 *In the case of Technica Colour Lab, when the matter was called by the Revenue, that was also dismissed by Apex Court in 2009 in Civil Appeal No. 7060 of 2009, dated 21-7-2010, following its decision in Surabhi Colour Lab. in Civil Appeal No. 263 of 2008.*

6.4 *Citing the decision of Tribunal in case of Adlabs - 2006 (2) S.T.R. 121 (Tri.-Bang.), Ld. Counsel submitted that Tribunal has a consistent view that the Assessees are eligible for benefit of deduction in terms of Board's Notification No. 12/2003-S.T., dated 20-6-2003 and Board's Clarification in letter No. 233/2/2003-CS.4, dated 7-4-2004 addressed to Punjab Colour Lab Association.*

6.5 *Relying on the decision of Hon'ble High Court of Punjab and Haryana in the case of Vahoo Colour Lab. - 2010 (18) S.T.R. 548 (P & H), submissions of Assessee was that processing of photography is a works contract and it involves elements of both sale and service, therefore, service tax is not leviable on the sale portion.*

6.6 *The appellants submitted that the decision of the Tribunal and the law laid down by Apex Court are 'Stare decisis' basis following the Apex Court's decision in Shankar Raju v. Union of India - JT 2011 (1) SC 49. Therefore, Revenue has no case in Reference when it has lost its appeals repeatedly before Apex Court and the grounds raised by Revenue as aforesaid were considered by the Hon'ble Court while dismissing Revenue's appeals.*

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20. *Reliance was placed by Assessees on the letter dated 7-4-2004 issued by an office/posted in the Board to the Punjab Color Lab Association. That letter has described the terms of the Notification No. 12/2003-S.T., dated 20-6-2003 and also states that exemption in respect of input material consumed/sold by the service provider while providing taxable service to the service recipient is permissible subject to maintenance of records showing the material consumed/sold while providing taxable service. It may be appreciated that the word "consumed" was not used in the Notification and there is no provision in law to recognize such letter that has no legs to stand in the eyes of law. Further we find that the impugned letter has been subsequently with drawn.*

21. *..................................*

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, it 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.

4. In view of the aforesaid decision of the Larger Bench of the Tribunal, the impugned order is set aside and the appeal filed by the appellant is allowed with consequential relief to the appellant, if any.

(Pronounced in the open court on 07.10.2019)

Sd/	Sd/
(V.Padmanabhan)	**(P. K. Choudhary)**
Member (Technical)	**Member (Judicial)**

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