

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI**

REGIONAL BENCH

Appeal No ST/87260/2019

(Arising out of Order-in-Original No. 69/SKV-50/MUMECEGST/2018-19 dated 13.03.2019 passed by the Commissioner Central Tax and GST, Thane)

M/s SRK Creative Pvt Ltd

No 8 Vasnt Breezy Chambers,
467 Dr Ambedkar Road, Maheshwari Udyan
Matunga West, Mumbai 400019

Appellant

Versus

Commissioner Central Tax & GST, Thane.

4th Floor NavBharat Chambers
Ranade Road, Dadar (W)
Mumbai 400028

Respondent**Appearance:**

Shri Bharat Raichandani, Advocate for the Appellant

Shri D M Shinde, Authorized Representative for the Respondent

CORAM:**HON'BLE SHRI S K MOHANTY MEMBER (JUDICIAL)****HON'BLE SHRI SANJIV SRIVASTAVA, MEMBER (TECHNICAL)****FINAL ORDER NO. A/85600/2020**

Date of Hearing: 11.02.2020

Date of Decision: 11.02.2020

Per: Sanjiv Srivastava

This appeal is directed against Order-in-Original No. 69/ SKV-50/ MUMECEGST/ 2018-19 dated 13.03.2019 passed by the Commissioner Central Tax and GST, Thane. By the impugned order Commissioner (Appeal) has held as follow:

"6.1 In view of above findings I

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- a. *Confirm demand of Service Tax amounting to Rs 6,61,85,652/- under Section 73(2) of the Finance Act, 1994, against the noticee;*
- b. *Order levy imposition and collection of interest at appropriate rate on the above amount of service tax under Section 75 of the Finance Act, 1994 from the noticee;*
- c. *Impose a penalty of Rs 6,61,85,652/- on the noticee, under Section 78 of the Finance Act, 1994;*
- d. *Impose a penalty of Rs 10,000/- on the noticee, under Section 77 of the Finance Act, 1994.*

6.2 The amount of service tax, interest thereon and penalty should be paid forthwith. Noticee, however, has an option to pay penalty equivalent to 25% of the penalty under Section 78 of the Finance Act, 1994, if the amount of Service Tax, interest and reduced penalty are all paid within 30 days of receipt of this order and the issue should be considered as settled in this event as per provisions of Section 78(ii) of Finance Act, 1994.”

1.2 The early hearing application filed by the Appellant has been allowed by the CESTAT vide Miscellaneous Order No M/85945/2019 dated 24.10.2019. Accordingly this matter has been listed for final hearing before us.

2.1 Appellant is registered with the department as provider of the services under the category of “Photography Services”.

2.2 Acting on intelligence that the appellant was not discharging appropriate liability of Service Tax, investigations were undertaken by the officers of Director General Central Excise Intelligence. During the course of investigations Statement of Shri Darshan Doshi (Director) was recorded.

2.3 Investigations undertaken revealed that apart from undertaking the activities for which the appellants were registered and were paying service tax, appellants undertook the activity of “digital offset printing”. This activity was undertaken by the appellant, for which necessary soft copies of pictures, photographs and print material was provided by the clients. As per the investigating agency the activities undertaken by the appellants in relation to “digital offset printing” was a service leviable to service under the category of “photography services” both prior and post introduction of negative list regime with effect from 01.07.2012.

2.4 On completion of investigation a Show Cause Notice dated 15.10.2015 was issued asking them to show cause why Service Tax amounting to Rs 6,61,85,652/- short paid by them should not be recovered from them by invoking proviso to Section 73(1) of the Finance Act, 1994 along with the interest under Section 75. Penalties under Section 76, 77 & 78 of the Finance Act, 1994 was also proposed.

2.4 After considering the submissions made Commissioner, has vide his order in original referred in para 1, supra adjudicated the show cause notice.

2.5 Aggrieved by the impugned order, Appellants preferred an appeal before CESTAT.

3.1 We have Shri Bharat Raichandani, Advocate on the behalf of Appellants and Shri D M Shinde, Assistant Commissioner, Authorized Representative for the Revenue.

3.2 Arguing for the Appellant, learned counsel submitted that-

- Apart from providing the photography services, for which they are registered with the department and paying the service tax on the same they also undertake the activity of digital printing of photo-books, catalogue, wedding cards etc on the basis of the softcopy of pictures etc provided by their clients to them.
- The activity of digital printing of photo-books etc is not an activity of Service as defined by the Finance Act, 1994 hence should not be leviable to Service Tax.
- Chandigarh Bench of CESTAT has considered the same very issue in case of Venus Albums [2019 (22) GSTL 386 (T-Chandigarh)], and held that the activity undertaken in digital printing of such photo books and photo albums etc is an activity amounting to manufacture of goods classifiable under Chapter 4911 of Schedule 1 to Central Excise Tariff Act, 1994
- During the entire period in dispute they had been filing their ST-3 returns and paying service tax due from them, hence they had not suppressed anything from the department, so the demand is barred by limitation

as extended period as per Section 73 is not invokable in such cases.

3.3 Arguing for the revenue learned Authorized Representative supported the impugned order and reiterated the findings recorded by Commissioner

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

4.2 The impugned order is entirely based on the decision of the tribunal in case of Global Digital Colour Lab [2016 (42) STR 746 (T-Del)]. We reproduce below the relevant paragraphs from the impugned order:

“5.2 The noticee was carrying out several activities and in respect of a couple of them they were paying service tax. There is no dispute between the demand notice and the noticee to this extent. It is also admitted position that they were not paying service tax on the activity of “digital offset printing”. The demand notice alleges that this activity is covered under “Photography Services” as defined under Section 65(78) of the Finance Act, 1994 and taxable as per the provisions of Section 65 (105) (zb) of the Finance Act, 1994. The contention of the noticee is that this activity is not a taxable activity.

5.3a As per the provisions of section 65(78) of the Finance Act, 1994:-

(78) “photography” includes still photography, motion picture photography, laser photography, aerial photography or fluorescent photography.

5.3b Further Section 65(79) of the Finance Act, 1994 reads as under:-

(79) “photography studio or agency” means any professional photographer or [any person] engaged in the business of rendering service relating to photography.

5.3c As per the provisions of Section 65 (105) (zb) of the Finance Act, 1994, service provided to any person by a photography studio or agency in relation to photography, in any manner is taxable service. As can be seen from the definition of photography it commences with the word “includes”, which in other words means it is inclusive definition. In other words activities in relation to photography are also covered under this definition.

5.4 Similar issue came up before Hon’ble Tribunal in case of *Global Digital Colour Lab vs CCE Jaipur -I* [2016 (42) STR 746 (T-Del)], wherein Hon’ble Tribunal while dealing with the issue of levy of service tax on photography services has held as under:

“3. We have considered the contentions of the appellants. Section 65(79) of Act 1994 defines a photography studio or agency to mean “any professional photographer or a commercial concern engaged in the business of rendering services relating to photography”. The taxable service was defined under Section 65(105)(zb) during the relevant period as “to a customer by a photography studio or agency in relation to photography in any manner”. According to Oxford dictionary, photography means “the taking or processing of photographs”. According to the

same dictionary photograph means picture obtained by means of photography. It is not in dispute that the appellants are professional photographers and commercial concerns and were engaged in the business of rendering services relating to photography. Thus they are covered within the scope of photography studio or agency. It may be seen that under Section 65(105)(zb) the service is to be rendered by a photography studio or agency in relation to photography in any manner. (emphasis added). Thus, even if they had not given black and white or colour prints and only loaded the images on CD, they do not get out of coverage of the Section 65(105)(zb), as they are photography studio or agency and provided service in relation to photography in some manner. In the light of this analysis it is not even necessary to quibble much over the scope of the word photography because the appellants clearly were engaged in taking or processing of photographs and were clearly covered under the scope of definition of photography studio or agency and they clearly provided service in relation to photography. Indeed the position is so unambiguous that there was no scope for any possibility of a reasonable person operating in an appropriate environment to entertain any confusion, leave alone belief, that the impugned service was not covered under photography service. It is pertinent to mention that bona fide belief is the belief of a reasonable person operating in an appropriate environment and is not some sort of hallucinatory belief. Thus the contention of the appellants that they were under a reasonable belief that the impugned service was not taxable is untenable. Consequently, the extended period is clearly invocable along with all its consequences.”

5.5 The only apparent difference in the case of Global Digital Colour Lab, supra and the present case is that in the said case, the service provider instead of printing the photographs/ material was providing it in soft copies to their clients, whereas in the said case, the noticee carried out “Offset Digital Printing” of the material before providing it to their customer. The ratio of the said judgement is

appropriately applicable to the present case. I, therefore, hold that the activity of “digital offset printing” carried out by the noticee is covered within the scope and ambit of definition of “photography services” as defined under Section 65(78) of the Finance Act, 1994 and taxable event for levy of service tax as per the provisions of Section 65 (105) (zb) of the Finance Act, 1994. Even after the introduction of the concept of negative list for levy of service tax after 01.07.2012, the activity carried out by the noticee does not fall under the negative list as per Section 66D of the Finance Act, 1994, and hence it continued to remain taxable post introduction of negative list.”

4.3 It is a unique case where the Commissioner distinguishes the case decided by Tribunal, and still relies upon the ratio of same to hold against the appellant. If the Commissioner was of the view that the facts in case of Global Digital Colour Lab were not identical to the facts of the case under consideration then what is the relevance of that decision for deciding the issue in hand. The Commissioner has categorically recorded that the issue before the Tribunal in the case of Global was not in relation to “digital offset printing”, the bone of contention in present proceedings.

4.4 In case of Venus Albums [2019 (22) GSTL 386 (T-Chandigarh)] Chandigarh Bench has on the identical facts held as follows:

“13. On careful consideration of the submissions made by both sides, we find that service tax has been demanded from

the appellant in terms of Section 65 (78) of the Finance Act, 1994 for the period till 30.6.2012 and thereafter under Section 65B (44) of the Finance Act, 1994. For better appreciation the relevant sections of Finance Act, 1994 are reproduced as under:-

“Section 65 (105): “taxable service” means any service provided or to be provided, - (zb) to any person, by a photography studio or agency in relation to photography, in any manner.

Section 65 (78): “photography” includes still photography, motion picture photography, laser photography, aerial photography or fluorescent photography.

Section 65 (79): “photography studio or agency” means any professional photographer or [any person] engaged in the business of rendering service relating to photography.”

14. Section 65 (105) (zb) defines the service provided to a any person by a photography studio or agency in relation to photography, in any manner. We also take note of the fact Chapter 49 covers printed pictures, designs and photographs and other product of printing industries. For better appreciation, Chapter 4911 is reproduced as under:-

4911 Other printed matters, including printed pictures and photographs. 4911 91 00 Pictures, designs and photographs

15. We take note of the fact that what activity has been undertaken by the appellant. We observe that the process of formation of photo book, the photographers provide predesigned photos in soft form via e-mail or on CD/Pen

drive, to the appellant for supplying the photo book. In terms of the arrangement agreed, the appellant cannot format, edit or alter the photographs received by it in the soft form. The Customer specifies the nature of sheets covers, etc. to be used in photo books. The appellant prints photographs on both sides of standard plain printing paper by using high quality digital press. Thereafter, the printed photo sheets are laminated on both sides and specified number of printed photo sheets and then wire-stapled on the stapling machine. Finally, plain sheets are pasted on both sides of the stapled book and thereafter, cardboard cover having digital printed photographs of the function is pasted with the stapled book to finally make a photo book. Thus, there is a complete change in the identity and nature of the photographs when printed from soft form to hard bound form as a photo book.

16. Ld. Counsel has relied upon the various decisions in support of their arguments to say that the activity undertaken by the appellant is printing on paper, the photographs/photo book amounts to manufacture. The said issue has been examined in the case of *Fitrite Packers* (supra) wherein the Hon^{ble} Apex Court has observed as under:-

“10. On the facts of the present case, it is to be determined as to whether the case would fall under category (2) or category (4). We have already taken note of printing process. A cursory look into the same may suggest, as held by the Tribunal, that GI paper is meant for wrapping and the use thereof did not undergo any change even after printing as the end use was still the same, namely, wrapping/packaging. However, a little deeper scrutiny into

the facts would bring out a significant distinguishing feature; a slender one but which makes all the difference to the outcome of the present case. No doubt, the paper in question was meant for wrapping and this end use remained the same even after printing. However, whereas blank paper could be used as wrapper for any kind of product, after the printing of logo and name of the specific product of Parle thereupon, the end use was now confined to only that particular and specific product of the said particular company/customer. The printing, therefore, is not merely a value addition but has now been transformed from general wrapping paper to special wrapping paper. In that sense, end use has positively been changed as a result of printing process undertaken by the assessee. We are, therefore, of the opinion that the process of aforesaid particular kind of printing has resulted into a product, i.e., paper with distinct character and use of its own which it did not bear earlier. Thus, the „test of no commercial user without further process“ would be applied as explained in paragraph 20 of Servo-Med Industries (supra). The aforesaid paragraph is extracted hereunder.

“20. In Brakes India Ltd. v. Superintendent of Central Excise - (1997) 10 SCC 717, the commodity in question was brake lining blanks. It was held on facts that such blanks could not be used as brake linings by themselves without the processes of drilling, trimming and chamfering. It was in this situation that the test laid down was that if by adopting a particular process a transformation takes place which makes the product have a character and use of its own which it did not

bear earlier, then such process would amount to manufacture irrespective of whether there was a single process or several processes.”

17. Further, Hon“ble Delhi High Court in the case of Delhi Press Patra Prakashan (supra) has examined the issue and observed as under:-

“.....We do not think that we can read in this observation of Calcutta High Court, a decision that printing activity carried on by a publishing house may amount to manufacture does not ipso facto exclude the activity of printing from the scope of the expression “manufacture or produce an article or thing” as occurring in Section 80-I (2) (iii) of the Act. The contention of Mr.Sahni that an assessee who is engaged on job work basis cannot be considered as a manufacturer is also premised on the observations made by the Calcutta High Court in the case of A. Mukherjee & Co. (supra) and as stated earlier, we do not find that the language of Section 80-I of the Act support this contention.”

18. Further, in the case of Jamal Photo Industries (P) Limited (supra), Hon“ble Madras High Court has examined the issue and observed as under:-

“Whether in the facts and circumstances of the case, the Tribunal was right in holding that processing of the film and printing photographs from the negatives amounts to manufacturing activity and is an industrial undertaking eligible for the benefit of section 80-I” There cannot be any dispute that the expression “manufacture” involves the concept of changes effected to a basic raw material resulting

in the emergence of, or transformation into, a new commercial commodity. But it is not necessary that the original article or material should have lost its identity completely. All that is required is to find out whether as a result of the operation in question, a totally different commodity had been produced having its own name, identity, character or end use. In the instant case, a negative film roll fitted had been exposed and produced as a distinct article, viz. Photograph and such photograph cannot be called a negative film and thus the negative film loses its identity completely, after the same had been developed and had also become a totally different commercial commodity having its own identity/character and a product of end use. Therefore, what is involved while taking a photograph by a photographer is a manufacture. Hence, the assessee having engaged themselves in manufacturing process is entitled to claim investment allowance.”

19. In view of the above judicial pronouncements and the activity undertaken by the appellant chapter heading 4911, is very much clear that the appellant has undertaken the activity of printing photograph on plain printing paper and thereafter bind them and selling them as photo books. The said activity amounts to manufacture and the appellant is paying VAT and therefore, the said activity merits manufacturing activity and classified under Chapter 4911 and the appellant has classified accordingly.

20. We also take note of the fact that after introduction of GST, the classification of the same has been answered vide Circular F.No.332/2/2017-TRU dt. December, 2017 by

observing that these items fall under HS Code 4911 an attract 12% GST.

TABLE

S No	Queries	Reply
62	<i>What is the classification and GST rate for photo books printed using digital Offset printing press on printing paper [other than photo albums] and thereafter manually bound?</i>	<i>These items fall under HS code 4911 and attract 12% GST.</i>

21. Further, we take note of the fact that Notification No.14.04- ST dt.109.2004 amended by Notification No.19/06-ST dt.25.4.2006 with effect from 1.5.2006, exempts specifically the activity of printing from payment of service tax.

22. We also take note of the fact that the service exempted in terms of Notification No.25/2012-ST dt.20.6.2012 amended by Notification No.44/2012-ST dt.7.8.2012, 49/2012-ST dt.24.12.2012 and Notification No.3/2013 dt.1.3.2013 with effect from 1.4.2013, S.No.30, the activity of printing as job worker is exempted from payment of service.

23. As the activity of printing has also been exempted from payment of service tax, if we take note of the fact that the activity undertaken by the appellant in relation to photography service then also the activity undertaken by the appellant is not taxable service.

24. In view of the above discussion, we hold that on merit the activity undertaken by the appellant amounts to manufacture and classifiable the Chapter 4911, therefore, no service tax is payable by the appellant. In alternate, we hold that the activity undertaken by the appellant is exempted from payment of service tax. Therefore, no service tax is payable by the appellant.”

4.5 We do not find any reasons to differ with the decision of the Chandigarh Bench. Since we hold that the demand cannot be sustained on the merits, we are not going into the issue of limitation.

4.6 Since the demand of Service Tax itself cannot be sustained, demand of interest under Section 75 of Finance Act, 1994 and penalties imposed under Section 77 and 78 *ibid* to cannot be sustained and are set aside.

5.1 In view of discussions as above we allow the appeal filed by the appellants and set aside the impugned order.

(Order pronounced in open court)

S K Mohanty
Member (Judicial)

Sanjiv Srivastava
Member (Technical)