(2015) 07 CESTAT CK 0023

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Appeal No. 99 Of 2009

C.C.E., Indore APPELLANT

Vs

M/s. Photo Fast Colour Lab RESPONDENT

Date of Decision : 23-07-2015

Acts Referred:

Constitution Of India 1950 — Article 366

Citation : (2015) 07 CESTAT CK 0023

Hon'ble Judges : G. Raghuram, J;R. K. Singh, Technical Member

Bench : Division Bench

Advocate : MR Sharma, Abhishek Jaju

Final Decision : Dismissed

Judgement

1. Revenue has filed appeal against Order-in-Appeal dated 12.11.2008 which set aside the order in original dated 30/06/2008 in terms of which service

tax demand of Rs.3,34,382/- along with interest and penalties was confirmed on the ground that in the value of the photographic service provided by

the respondent the value of photographic paper and processing chemicals was not added.

2. The Revenue has contended that the cost to material is to be added to the value of the photographic services and cited the judgement of CESTAT

in the case of Deluxe Colour tab [2006 (4) STR 152 (Tri. Del.)]. The Revenue also stated that the decision of the apex court in the case ofC K

Jidheesh Vs. Union of India [2006 (1) STR 3 (SC)] which was relied upon by the Commissioner (Appeals) has been overturned by the Supreme Court

in the case of BSNL and another versus Union of India [2006 (2) STR 161 (SC).]However, during hearing, the Ld. Departmental Representative

fairly concedes that the issue has since been settled by Supreme Court in the case of State of Karnataka etc Vs. Pro Lab and Others etc. [2015 -

TIOL - OB - SC- CT- LB].

3. The Id. advocate for the respondent argued that value of goods is not includible in the value of service and that the service was rendered under a

works contract.

4. We have considered both sides contentions. We find that in the case of State of Karnataka etc Vs. Pro Lab and Others etc. (supra) the Supreme

Court after discussing the trajectory of the issue regarding the vivisectability of works contracts has held as under:-

21. To sum up, it follows from the reading of the aforesaid judgement that after insertion of clause 29-A in Article 366, the Works Contract

which was indivisible one by legal fiction, altered into a contract, is permitted to be bifurcated into two; one for ""sale of goods"" and other

for ""services"", thereby making goods component of the contract exigible to sales tax. Further, while going into this exercise of divisibility,

dominant intention behind such a contract, namely, whether it was for sale of goods or for services, is rendered otiose or immaterial. It

follows, as a sequitur, that by virtue of clause 29-A of Article 366, the State Legislature is now empowered to segregate the goods part of

the Works Contract and impose sales tax thereupon. It may be noted that Entry 54, List II of the Constitution of India empowers the State

Legislature to enact a law taxing sale of goods. Sales tax, being a subject-matter into the State List, the State Legislature has the competency

to legislate over the subject.

22) Keeping in mind the aforesaid principle of law, the obvious conclusion would be that Entry 25 of Schedule VI to the Act which makes

that part of processing and supplying of photographs, photo prints and photo negatives, which have ""goods"" component exigible to sales

tax is constitutionally valid. Mr. Patil and Mr. Salman Khurshid, learned senior counsel who argued for these assesses/respondents, made

vehement plea to the effect that the processing of photographs etc. was essentially a service, wherein the cost of paper, chemical or other

material used in processing and developing photographs, photo prints etc. was negligible. This argument, however, is founded on dominant

intention theory which has been repeatedly rejected by this Court as no more valid in view of 46th Amendment to the Constitution.

In the light of the foregoing judgement of the Supreme Court coupled with judgement of the Supreme Court in the case ofI magic Creative Pvt. Ltd.

vs. Commissioner of Commercial Taxes [2008 (9) STR 337 (SC),] wherein it has been held that payment of service tax and VAT are mutually

exclusive, there remains no doubt that the value of photographic paper and consumables cannot be included in the value of photography service to levy

service tax.

4. In the light of the foregoing analysis we find no merit in Revenue's appeal and the same is therefore dismissed.

