W.P. No. 126 of 2008
IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Original Side

M/s. Webel Technology Ltd.
Vs.
Commissioner of Service Tax,
Kolkata & Ors.

For the Petitioner : Mr. J.P. Khaitan, Sr. Advocate
Mr. Agnibesh Sengupta, Advocate
Mr. Ranjit Talukdar, Advocate

For the Respondent General
Nos. 1, 2 and 3 : Mr. Kaushik Chandra, Addl. Solicitor
Mr. Uday Sankar Bhattacharyya, Advocate
Ms. Aishwarya Rajyashree, Advocate

For the Respondent General
No. 4 : Mr. Kaushik Chandra, Addl. Solicitor
Mr. Pradeep Kr. Das, Advocate

Hearing concluded on : July 12, 2018
Judgment on : August 3, 2018

DEBANGSU BASAK, J.:-

The petitioner has assailed a show-cause notice dated October 16, 2007 issued by the respondent no. 1. The petitioner has also challenged the provisions of Sections 65(78), 65(79) and 65(105)(zb) of the Finance Act, 1994 as ultra vires the Constitution of India.

Learned Senior Advocate for the petitioner has submitted that, the petitioner was awarded two contracts for preparation of Electoral

Photo Identity Card (EPIC). The petitioner has suffered the impugned show-cause notice calling upon the petitioner to pay service tax as according to the department, the preparation of EPIC includes taking of photographs of voters by Digital Camera, processing, lamination and, therefore, such authority comes within the purview of photography service. According to the department the petitioner is liable to pay service charges.

Learned Senior Advocate for the petitioner has submitted that, the authorities in issuing the show-cause notice did not take into account the agreements subsisting between the Electoral Officers of West Bengal and Bihar. He has also referred to a letter dated January 22, 2007 issued by the Deputy Chief Electoral Officer where the rates were approved. He has submitted that, photography is one of the several activities which a person has to undertake in order to produce an EPIC. The differential rates mentioned in the letter dated January 22, 2007 of the State of West Bengal would establish that, the value of taking photograph is about of 5.5% of the price of the complete EPIC. The petitioner is not a photography studio or agency within the meaning of Sub-section (79) of Section 65. The petitioner does not

come under the purview of Sub-Clause (3b) of Clause (105) of Section 65.

Learned Senior Advocate for the petitioner has relied upon Section 69(19) of the Act of 1994 and has submitted that, Service Tax excludes any activity which results in manufacturing. In the present case, the petitioner is engaged in the production of an EPIC. The nature of activity would, therefore, exclude the same from the purview of Service Tax. He has also referred to Section 2(f) of the Central Excise Act, 1944 and to the Circular bearing No. 141/52/95-CX dated August 14, 1995. He has submitted that, by such circular, the authorities have acknowledged that photo identity cards are distinct product as compared to other identifiable articles of plastic. It has acknowledged that a photo identity card involves process of manufacturing. Consequently, by virtue of Section 65(19) of the Act of 1994, production of EPIC does not involve any service rendered for the purpose of attracting tax under the Act of 1994. Moreover, according to him, Section 65(76)(b) of the Act of 1994 excludes manufacturing activity. Section 65(78) and (79) of the Act of 1994 defines photography and a photography studio or agency respectively. The petitioner does not come within any of the two definitions. The

petitioner is not carrying on a business of photography or is a photography studio or agency. The petitioner is liable to pay Service Tax. He has referred to Section 65(105) which defines taxable services particularly to clause (zb) and has submitted that, taxable service would mean any service being rendered by a photography studio or agency in relation to photography in any manner. He has contended that, the petitioner is neither engaged in the business of photography studio or agency nor is the petitioner rendering any service of photography. The nature of contracts does not require the petitioner to render any service of photography to any customer. He has also referred to Section 65A which deals with classification of taxable service, Section 66 which is the charging section and Section 67 which is the valuation of taxable service for charging Service Tax.

Learned Senior Advocate for the petitioner has submitted that, the petitioner had entered into contracts for production of EPIC. None of the contracts attracts Service Tax. In one of the contracts, only 50 paisa has been attributed as the cost of the photography. Service Tax cannot be assessed on the basis of such a breakup of the contract. The contracts cannot be broken up into different segments and one segment be made chargeable to Service Tax. In support of his

contentions, he has relied upon ***2015 (39) S.T.R. page 913 (S.C.) (Commissioner of C. Ex. & Cus., Kerala v. Larsen & Toubro Ltd.)***, Circular No. 104/7/2008-S.T. dated August 6, 2008, Circular No. 334/1/2008 dated February 29, 2008, Circular No. 334/4/2006-TRU dated February 28, 2006, ***2007 Volume 7 S.T.R. page 702 (Tri. Bang.) (Commissioner of Cus. & C. Ex., Hyderabad-II v. CMC Limited)***, ***2013 (31) S.T.R. page 523 (Guj.) (Commissioner of Service Tax v. Sujal Developers)***, and ***2006 Volume 3 Supreme Court Cases page 1 (Bharat Sanchar Nigam Ltd. & Anr. v. Union of India & Ors.)***. He has submitted that, the impugned show-cause notice should, therefore, be quashed.

Learned Additional Solicitor General appearing for the respondents has submitted that, since the petitioner has not pressed the challenge to the vires of the various provisions of the Act, then, the show-cause notice cannot be said to be without jurisdiction. A Writ Court need not interfere when a show-cause notice is under challenge. The issues raised by the petitioners with regard to the show-cause notice can be raised, and adjudicated upon by the adjudicating authority.

Learned Additional Solicitor General has submitted that, Section 65(105)(zb) of the Act of 1994 makes any service rendered in relation to photography taxable. EPIC cannot be prepared without photography. Photography is involved in preparation of EPIC. Therefore, the contention of the petitioner that, it is not rendering any service in relation to photography is fallacious. Such a service is amenable to tax. The adjudicating authority is entitled to decide such issue. He has referred to the definition of photography given in Section 65(78) of the Act of 1984 and the definition of photography studio or agency given in Section 65(79) of the Act of 1994. He has submitted that, the preparation of an EPIC involves photography as defined under Section 65(78) of the Act of 1994. The petitioner is carrying on a business which can be termed as photography studio or agency within the meaning of Section 65(79) of the Act of 1994. There is no justification in the petitioner claiming that, it is not amenable to tax under the Act of 1994. The petitioner cannot contend that, it is a manufacturer. The petitioner is not registered under the Central Excise Act. He has referred to the show-cause notice impugned in the present writ petition. He has submitted that, the agreement between the petitioner and the State of Bihar does not contemplate any

bifurcation of the service. The contract with the State of West Bengal has the breakup of the photographic component. Moreover, in any view of the matter, the petitioner is rendering photography service. Photography is an essential part of the preparation of EPIC.

Referring to Section 65(78) and 65(105)(zb) of the Act of 1994, learned Additional Solicitor General has submitted that, the phrase "in relation to" will include any type of activity connected with photography. Again referring to the two contracts he has submitted that, since photography is involved, the petitioner is amenable to Service Tax. Referring to Section 65(a) and (b) of the Act of 1994 he has submitted that, the essential character of the contract has to be taken into consideration. He has also referred to Section 65(19)(vi) of the Act of 1994. In support of his contentions, he has relied upon ***2003 (156) ELT page 17 (Ker.) (Kerala Colour Lab. Association v. Union of India)***, ***2005 Volume 13 Supreme Court Cases page 37 (C.K. Jidheesh v. Union of India & Ors.)***, ***All India Reporter 1925 Patna page 717 (Daroga Gope v. King-Emperor)*** and ***2007 Volume 7 Supreme Court Cases page 347 (Collector of Central Excise & Ors. v. Solaris Chemtech Ltd. & Ors.)***. He has submitted that, the

widest possible meaning should be taken into consideration in the context of Service Tax.

The petitioner is a Government of West Bengal undertaking and is primarily engaged in the business of software technology. Election Commission of India introduced the system of issuing Electoral Photo Identity Card (EPIC) to the citizens of India. Election Commission took the assistance of the petitioner for preparation of EPIC. The petitioner was awarded a contract by the District Election Officer, Muzaffarpur, Bihar by an agreement dated May 31, 2005. The Electoral Officer of the State of West Bengal issued letters dated March 11, 2005 and January 22, 2007 to the petitioner for preparation of EPIC for the State of West Bengal.

Whether preparation of EPIC by the petitioner attracts Service Tax, is the issue raised in the writ petition.

The parties have referred to and relied upon Sections 65(19), (76b), (78), (79), (105)(zb), 65A, 66 and 67 of the Finance Act, 1994. They are as follows:-

> *"**65(19).** "business auxiliary service" means any service in relation to –*
> *(i) Promotion or marketing or sale of goods produced or provided by or belonging to the client; or*

(ii) promotion or marketing of service provided by the client; or

(iii) any customer care service provided on behalf of the client; or

(iv) procurement of goods or services, which are inputs for the client; or

[Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client;]

(v) production or processing of goods for, or on behalf of, the client;

(vi) provision of service on behalf of the client; or

(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision,

and includes services as a commission agent, but does not include any information technology service and any activity that amounts to "manufacture" within the meaning of clause (f) of section 2 of the Central Excise Act, 1944 (1 of 1944)

[Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this clause,—

(a) "commission agent" means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person—

(i) deals with goods or services or documents of title to such goods or services; or

(ii) collects payment of sale price of such goods or services; or

(iii) guarantees for collection or payment for such goods or services; or

(iv) undertakes any activities relating to such sale or purchase of such goods or services;

(b) "information technology service" means any service in relation to designing or developing of computer software or system networking, or any other service primarily in relation to operation of computer systems;]

.....

..

(76b). *"packaging activity" means packaging of goods including pouch filling, bottling, labeling or imprinting of the package, but does not include any packaging activity that amount to "manufacture" within the meaning of clause (f) of section 2 of the Central Excise Act, 1944(1 of 1944)*

.....

....

(78). *"photography" includes still photography, motion picture photography, laser photography, aerial photography or fluorescent photography;*

(79). *"photography studio or agency" means any professional photographer or [any person] engaged n the business of rendering service relating to photography;*

.....

...

(105)(zb). *"taxable service" means any service provided[or to be provided],-*

.....

.....

(zb) *to a customer, by a photography studio or agency in relation to photography, in any manner;*

.....

..."

*"**65A.*** *(1) For the purposes of this Chapter, classification of taxable services shall be determined according to the terms of the sub-clauses of clause (105) of section 65.*

(2) When for any reason, a taxable service is, prima facie, classifiable under two or more sub-clauses of clause (105) of section 65, classification shall be effected as follows:—

(a) the sub-clause which provides the most specific description shall be preferred to sub-clauses providing a more general description;

(b) composite services consisting of a combination of different services which cannot be classified in the manner specified in clause (a), shall be classified as if they consisted of a service which gives them their essential character, insofar as this criterion is applicable;

(c) when a service cannot be classified in the manner specified in clause (a) or clause (b), it shall be classified under the sub-clause which occurs first among the sub-clauses which equally merit consideration."

*"**66. Charge of service tax.** –*

There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent. of the value of taxable services referred to in sub-clauses (a), (b), (c, (d), (e), (f), (g,) (h), (i), (j),(k), (l), (m), (n), (o), (p), (q), (r), (s), (t), (u), (v), (w), (x), (y), (z), (za), (zb), (zc), (zd), (ze), (zf), (zg), (zh), (zi), (zj), (zk),(zl), (zm), (zn), (zo), (zq), (zr), (zs), (zt), (zu), (zv), (zw), (zx), (zy), (zz), (zza), (zzb), (zzc), (zzd), (zze), (zzf), (zzg), (zzh), (zzi), (zzk), (zzl), (zzm), (zzn), (zzo), (zzp), (zzq), (zzr), (zzs), (zzt), (zzu), (zzv), (zzw), (zzx), (zzy), (zzz), (zzza), (zzzb), (zzzc), (zzzd), (zzze), (zzzf), (zzzg,) (zzzh), (zzzi), (zzzj), (zzzk), (zzzl), (zzzm), (zzzn), (zzzo), (zzzp), (zzzq), (zzzr), (zzzs), (zzzt), (zzzu), (zzzv) and (zzzw) of clause (105) of section 65 and collected in such manner as may be prescribed.

66A. Charge of service tax on services received from outside India.-

(1) Where any service specified in clause (105) of section 65 is,—

(a) provided or to be provided by a person who has established a business or has a fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than India, and

(b) received by a person (hereinafter referred to as the recipient) who has his place of business, fixed establishment, permanent address or usual place of residence, in India,

such service shall, for the purposes of this section, be the taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India, and accordingly all the provisions of this Chapter shall apply:

Provided that where the recipient of the service is an individual and such service received by him is otherwise than for the purpose of use in any business or commerce, the provisions of this sub-section shall not apply:

Provided further that where the provider of the service has his business establishment both in that country and elsewhere, the country, where the establishment of the provider of service directly concerned with the provision of service is located, shall be treated as the country from which the service is provided or to be provided.

Explanation 1.—A person carrying on a business through a branch or agency in any country shall be treated as having a business establishment in that country.

Explanation 2.—Usual place of residence, in relation to a body corporate, means the place

where it is incorporated or otherwise legally constituted."

"67. Valuation of taxable services for charging service tax. –

(1) Subject to the provisions of this Chapter, service tax chargeable on any taxable service with reference to its value shall,-

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.

(4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.

Explanation.- For the purposes of this section,-

(a) "consideration" includes any amount that is payable for the taxable services provided or to be provided;

(b) "money" includes any currency, cheque, promissory note, letter of credit, draft, pay order, travelers cheque, money order, postal remittance and other similar instruments but does not include currency that is held for its numismatic value;

(c) "gross amount charged" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and book adjustment."

Levy of Service Tax had received the consideration of the department. It had issued a Service Tax clarification by a letter No. 334/4/2006-TRU dated February 28, 2006. Such clarification had noted that, often services provided consist of more than one service. In such situation, it had opined that, the guiding principle would be to identify the essential features of the transaction. The department had issued another clarification by Circular No. 334/1/2008-TRU dated February 29, 2008. It had noted Section 65A of the Finance Act, 2008. It had opined that, a supply which comprises with a single supply for an economic point of view should not be artificially split.

The method of charging or invoicing does not in itself determine whether the service provided is a single service or multiple services. Single price normally suggests a single supply though not decisive. The real nature and substance of the transaction and not merely the form of the transaction should be the guiding factor for deciding the classification. The department had issued a third Circular bearing No. 104/7/2008-S.T. dated August 6, 2008. It had opined that, both the form and substance of the transactions are to be taken into account. The guiding principle is to identify the essential features of the transaction.

Whether Service Tax can be levied on indivisible works contracts prior to the introduction on June 1, 2007 on the Finance Act, 2007 have come up for consideration in ***Larsen & Toubro Ltd. (supra)***. It had held that, there was no charge pre 2007 and that, there was no machinery provisions as well to bring indivisible works contracts under the Service Tax net. In the present case, the three writings, one by the District Election Officer, Muzaffarpur and two by the Electoral Officer of the Government of West Bengal relate to preparation of EPIC. In executing such a contract, the petitioner would necessarily have to take a photograph of the voter. It would also be required to fill

up the other requisite details of the voter in the EPIC. Photograph is one of the components of the work required to be discharged by the petitioner. The ultimate product is EPIC. The contracts are pre 2007. The subject contracts cannot be said to limit itself to photography. Preparation of a photograph or photography is not the sole purpose of the contracts. The end product is EPIC. Such end product involves a photograph of a voter. The photograph of the voter incorporated in EPIC is not a standalone product. To my understanding the contract for EPIC cannot be divided into separate compartments to say that, photography or photograph is a separate compartment. It is indivisible. Therefore, on the strength of ***Larsen & Toubro Ltd. (supra)*** such contracts cannot be divided to bring it under the Service Tax net assuming that, the petitioner was rendering the service of photography. In any event, as noted above, the contracts in question are for preparation of EPIC. The petitioner cannot be said to have rendered any photographic services to an individual or to the person who had entered into the contract with the petitioner.

In ***CMC Limited (supra)***, CESTAT, South Zonal Bench, Bangalore has held that, issue of EPIC cannot be considered to be falling within the definition of “photography” and “photography studio

or agency" in terms of Sections 65(78) and 65(79) of the Finance Act, 1994. It has also held that, activities carried out by the parties are sovereign activity performed by the State functionaries and the same cannot be brought under the tax limit. The petitioner herein is also rendering the same service as that of ***CMC Limited (supra)***. The department, therefore, cannot take a different stand than the one which is binding upon it by virtue of ***CMC Limited (supra)***.

Sujal Developers (supra) has held that, a developer is not liable to pay Service Tax under Section 65(105)(zzzh) of the Finance Act, 1994, as in such a situation, there is no service provider and service receiver. It has held that, when after completion of the construction and full payment of the agreed sum, a sale deed is executed and only then the ownership of the property gets transferred to the ultimate owner, in such a case another service provided by the seller in connection with the construction of residential complex till the execution of the sale deed would be in the nature of self-service and consequently would not attract Service Tax. Applying such analogy to the facts of the present case, taking a photograph of a person in the process of preparation of EPIC, would be self-service and would not attract Service Tax.

Kerala Colour Lab. Association (supra) has considered ***2000 Volume 2 Supreme Court Cases page 385 (Rainbow Colour Lab & Anr. v. State of M.P.)***. It has held that, ***Rainbow Colour Lab & Anr. (supra)*** has been doubted in ***2001 Volume 4 Supreme Court Cases page 593 (Associated Cement Companies Ltd. v. Commissioner of Customs)***. It has held that, when the taxable event has been determined as service rendered, and not sale of goods, irrespective of whether it is a works contract or a contract of sale of goods, the taxable event would occur. The taxable event occurs because of the service rendered. Merely because the measure or valuation of tax is linked to the gross consideration received in the transaction, it does not determine the nature of tax. The taxable event determines the true event of tax. The measure of tax does not determine the nature of tax, but the quantum of tax which can be levied and collected.

C.K. Jidheesh (supra) has held that, ***Rainbow Colour Lab & Anr. (supra)*** was binding precedent. It has also held that, ***Kerala Colour Lab. Association (supra)*** lays down the correct law. ***Bharat Sanchar Nigam Ltd. & Anr. (supra)*** had noticed ***Rainbow Colour Lab & Anr. (supra)***. It has also noticed ***C.K. Jidheesh (supra)***. It has

said that, ***C.K. Jidheesh (supra)*** was not correct in saying that, ***Rainbow Colour Lab & Anr. (supra)*** was good law.

Daroga Gope (supra) has considered the provisions of the Criminal Procedure Code. In such context, it has dealt with the phrase "in relation to". The ratio laid down therein is not attracted in the facts of the present case. Similarly the expression "used in relation to the manufacture" has been considered in the context of the same occurring in Rule 57A of the Central Excise Rules, 1944 in ***Solaris Chemtech Ltd. & Ors. (supra)***. Such phrase has been interpreted in the context of the Central Excise Rules, 1944 and the ratio laid down is not attracted in facts of the present case.

Courts are ordinarily slow to interfere with a show-cause notice. However, if the show-cause is demonstrated to be without jurisdiction, then, a writ is maintainable. Moreover, the present writ petition is pending since 2008. It has been heard after completion of affidavit. At this stage, to require the petitioner to reply to the show-cause notice particularly when the liability of the petitioner to pay Service Tax is not attracted in the fact scenario of the present case, would be harsh.

The petitioner not having rendered any service of photography is not liable to pay Service Tax. The impugned show-cause notice is, therefore, without any jurisdiction.

W.P. No. 126 of 2008 is allowed. Show-cause notice dated October 16, 2007 issued by the respondent no. 1 is quashed. The question of vires of the provisions of the Finance Act, 1994 as assailed by the petitioner is kept open.

[DEBANGSU BASAK, J.]

Later:-

Learned Advocate appearing for the petitioner draws the attention of the Court to the order dated February 13, 2008. He submits that, deposits were made pursuant to the interim order. Such interim order enjoins upon the respondents the obligation to refund the amount deposited with interest that may be fixed by the Court.

There subsists an interim order dated February 13, 2008 in the present writ petition which is as follows:-

> *"During the pendency of the writ petition the petitioner will apply for registration and shall make payment without prejudice to the rights and contentions of the parties. If the*

petitioner succeeds the respondents will be under the obligation to refund the amount deposited with interest that may be fixed by the Court or that may be found payable in terms of the relevant provisions."

In such circumstances, the respondents will refund the deposits made by the petitioner along with statutory interest applicable so far as the refund of service tax is concerned. Let such refund be made within four weeks from the date of communication of this order.

[DEBANGSU BASAK, J.]