(2008) 03 MP CK 0009

In the Madhya Pradesh High Court

Colorway Photo Lab APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 05-03-2008

Acts Referred:
Finance Act, 2001 — Section 67

Citation : (2008) ILR (MP) 1397 : (2009) 15 STR 17 : (2009) 22 STT 123 : (2009) 25 VST 97

Hon'ble Judges : Shantanu Kemkar, J;R.S. Garg, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

R.S. Garg, J.—By this petition filed under Article 226 of the Constitution of India the petitioners are seeking the following reliefs:

(a) That, this Hon''ble Court may be pleased to declare Section 67 in its present form vis-a-vis the petitioner''s activity of service, ultra vires the Constitution, void and inoperative.

(b) That, this Hon''ble Court may be pleased to declare circular dated 9-7-2001 as ultra vires the Constitution and law and further declare the same as void and inoperative.

(c) That, this Hon''ble Court may be pleased to declare by an appropriate writ that the petitioner''s service activity does not attract the provision of service tax and accordingly forbear the respondents from subjecting the petitioner''s activity to levy, assessment and collection of service tax.

(d) That, without prejudice to the aforesaid, this Hon''ble Court may be pleased to declare that the value of the goods (raw-materials) comprised of any service such as photography paper and chemicals etc. is not liable to be included in the value of taxable service and the same be directed to be segregated for the purpose of assessment of service tax.

(e) That, this Hon''ble Court may further be pleased to issue a writ, direction or order, restraining the respondents from recovering service tax from the petitioner calculated on the basis of gross receipts and including the components of inputs or raw-materials used by the petitioner such as photography paper, chemicals etc.

(f) That, this Hon''ble Court may be pleased to issue an appropriate writ or order or direction directing the respondents to refund service tax assessed and calculated by the respondents illegally and unauthorizedly.

(g) Any other appropriate Writ order or direction thought just and proper in the circumstances of the case may also be passed in favour of the petitioner.

(h) Cost of the petition.

2. The submission of the petition in nutshell is that provisions of Section 67 of Finance Act, 2001 be declared ultra vires the Constitution, void and inoperative. According to the petitioner the circular dated 9-7-2001 issued by the respondent is also ultra vires the Constitution as it runs contrary to the provisions of the law.

3. The short facts necessary for disposal of this writ petition are that the petitioner''s firm is engaged in the activity of developing of exposed negatives, film processing, and printing of photographs. In the year 1994 service tax came to be imposed for the first time with a view to levy the service tax on recognized sectors such as Telephones, General Insurance, Stock Brokers etc. However, the Finance Act, 2001 made various amendments in the law with a view to widen the net of the service tax by including various services in the ambit of law. Section 65(72) defines "taxable service" which included vide clause z(b) service provided to a customer by a Photo Studio or Agency relating to photography.

4. According to the petitioner the term "photography" and "photography studio or agency" have been defined in clauses 47 and 48 respectively of Section 65 of the Act and as the work done by the petitioners does not fall within the definition or mischief of "photography" and/or "photography studio or agency" they are not liable to pay the service tax. It is also submitted that the respondents by widening the definition of "photography" or "photography studio or agency" cannot be allowed to include the work of the petitioner in the mischief of the taxable clauses.

5. Respondents in their submission have come out with the case that the word "photography" is not a restrictive definition but is an inclusive definition as "photography studio or agency" would mean to include any professional photography or commercial concern engaged in the business related to photography, the work of the petitioner would certainly come under the service and the petitioner would be liable to pay service tax.

6. During the course of the arguments Shri Bhide, learned Counsel for the respondents, submitted that an identical challenge was made to the provisions of the Finance Act and inclusive definition of "photography", "photography studio and/or agency" but the same had been turned down by the Apex Court in the

matter of C.K. Jidheesh v. Union of India and Ors. 2006 (1) S.T.R. 3 (S.C.) : 2005 AIR SCW 5905, therefore, nothing survives in the petition. The respondents also placed their reliance on a Division Bench judgment of the High Court in the matter of Kerala Colour Lab. Association Vs. Union of India (UOI), to contend that the colour lab would come within the mischief of the definition of "photography" and "photography studio and agency".

7. Shri Verma, learned Counsel for the petitioner submitted that most of the issues proposed to be raised in the present writ petition stand concluded in view of the Judgment of the Supreme Court reported in the matter of M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], but the question raised by the petitioner, that the petitioner does not come within the mischief of clause 47 and/or clause 48 of Section 65 of the Act, therefore, this Court must decide the said question.

8. Shri Verma placing reliance upon the judgment of the Supreme Court in the matter of The South Gujarat Roofing Tiles Manufacturers Association and Another Vs. The State of Gujarat and Another, submitted that ordinarily the inclusive definition would not restrict its application to another article but in a given case the inclusive definition can be treated to be a closed definition. According to him the definition as given in clause 47 and 48 of Section 65 of the Act if are appreciated in their true perspective, it would clearly appear that the definitions are closed definitions.

9. On the other hand Shri Bhide, learned Counsel for the respondents, submitted that in the present set of the circumstances the Court must widen the scope of the subject because the opening words say that the definition is inclusive and there are no special reasons to treat the definition as closed definitions. The scope of the subject should always be considered in its true perspective.

10. In the matter of South Gujarat Roofing Tiles Manufacturers Association and Anr. (supra) the question before the Supreme Court was that the Entry 22 which related to "Employment in Potteries Industry" provided an explanation that for the purposes of the said entry potteries industries includes the manufacture of the following articles of pottery, viz.:

(a) Crockery.

(b) Sanitary appliances and fittings.

(c) Refractories.

(d) Jars.

(e) Electrical accessories.

(f) Hospital ware.

(g) Textile accessories. (h) Toys.

(i) Glazed Tiles

In the said matter, the question before the Court was whether manufacturers of Mangalore pattern roofing tiles were covered in the definition of potteries industries especially when the definition provided for certain articles to be part of the potteries industries. Taking into consideration the nature of the work and the intention of the legislature the Supreme Court observed that the definition though was inclusive but was to be treated as closed definition because the legislature in its wisdom provided nine articles as part of the Potteries Industries.

11. In the present matter the definition of "photography" as provided in clause 47 says that "photography" includes still photography, motion picture photography, laser photography, aerial photography and fluorescent photography". This definition cannot be considered to be a closed definition because the photography avenues are much more then what are shown in clause 47. Similarly clause 48 provides that "photography studio or agency" means any professional photographer or a commercial concern engaged in the business relating to photography" then a person who is a professional photographer or a commercial concern would always come under the mischief of "photography" and "photography studio or agency". In the matter of C.K. Jidheesh (supra) the Supreme Court observed that the letter/circular dated 9-7-2001 issued by the Ministry of Finance was neither arbitrary nor discriminatory nor was in violation of Article 14 and 19(1)(g) of the Constitution nor was violative of the Finance Act, 1994 as amended by the Act 14 of 2001. In view of the said judgment one of the main challenge to the letter-cum-circular dated 9-7-2001 does not survive. The Supreme Court in the matter of C.K. Jidheesh (supra) found that the petitioner before the Supreme Court got separated from the Kerala Colour Labs Association''s SLP on the ground that the issues were similar to those raised in an S.L.P filed by the State of Meghalaya challenging the order of the Gauhati High Court dated 5-9-2001. The Supreme Court observed that though the challenge was ostensibly to the letter issued by the Ministry of Finance but the real challenge is to the amendment in the Finance Act and the letter dated 9-7-2001 was simply clarifying what Section 67 of the Finance Act, 1994 as amended by Act No. 2001 provided.

12. The Supreme Court further observed that the provisions of the Finance Act were challenged by the Kerala Colour Laboratories Association, the challenge was repelled by the Kerala High Court and SLP against the said judgment had been dismissed by the Supreme Court. According to the Supreme Court the Kerala High Court correctly considered all aspects including the aspect of double taxation. In view of the said judgment the provisions contained in Clauses 47 and 48 of Section 65 were not ultra vires the Constitution.

13. In the matter of Rainbow Colour Lab. and Anr. v. State of M.P. and Ors. (supra) the question before the Supreme Court was that whether the work of the photographer in taking photographs, developing and printing films was in the nature of a service contract not involving in any sale of goods. The Supreme Court observed that the work was not exigible to levy of Sales Tax because the

work done by the colour lab was not in the nature of a works contract.

14. In the matter of Kerala Colour Lab. Association v. Union of India (supra) the Association came to the Court with a submission that the service tax was not leviable on the colour laboratories because they were not providing any service to the consumer. The Division Bench of the Kerala High Court in paragraph ''4'' observed that the photo colour laboratories were to develop the negative and supply positive prints in the desired size, in the process the cost of material involved and passed on the consumer was far greater than the service involved. It was submitted before the High Court that in view of the peculiar type of service rendered by the colour laboratories where 80% of the value of property is passed to the consumer consists of costs of photographic film, value of service being negligible, it would be wholly erroneous to treat colour laboratories and photography studio as rendering "service" as understood generally. The contention was repelled by the Division Bench holding that the colour laboratories were also providing service to the consumers.

15. The colour photo laboratory in fact is an extended design of a studio. In a photography studio the photographer shoots the photos, thereafter in his dark room he develops negatives and, thereafter prints the desired size of the photographs. The work of the colour laboratory is to receive the exposed negatives/rolls, develop the same and print the photographs of the desired size as per the orders placed by the original consumer through the photographer who had taken the photographs either in the studio or anywhere else. When the word "photography" includes still photography, motion picture photography, lazer photography, arial photography, fluorescent photography etc. then any negative used for taking photograph would come under the inclusive definition of photography. The work of the photographer is not only to shoot the person or the scene but is also to develop the negatives and bring the prints. When a part of the work is done by the photographer and part of the work is assigned to others then such person i.e. colour laboratory would in fact be a "photography studio or agency".

16. In our considered opinion the colour laboratories would be a part of the "photography studio or agency" involved in providing the service to the consumer and are amenable to the service tax.

17. We are unable to hold that the respondents are unnecessarily trying to tax the petitioner.

18. For the reasons aforesaid we do not find any reason to interfere. The petition deserves to be and is accordingly dismissed. There shall be no order as to costs.