(2006) 10 P&H CK 0091

In the Punjab And Haryana At Chandigarh

Delhi Studio Colour Lab APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 18-10-2006

Acts Referred:

Constitution of India, 1950 — Article 266, 366
Finance Act, 1994 — Section 65, 66, 67, 69

Citation : (2007) 2 RCR(Civil) 472 : (2007) 5 STR 184 : (2007) 7 STT 265

Hon'ble Judges : Rajesh Bindal, J;Adarsh Kumar Goel, J

Bench : Division Bench

Judgement

1. This writ petition seeks direction for quashing Section 65(47)(48) and Clause (72), sub-clause (zb) of Finance Act, 1994. Further prayer is for quashing departmental clarifications/instructions, Annexure P. 2 pertaining to colour processing and developing laboratories and including the activities of colour processing and developing laboratories within the purview of taxable services for levying service tax and other consequential actions taken.

2. Case of the petitioner-firm is that it has set up a high-tech laboratory for developing and processing of exposed colour photographic films. It has no studio in its premises for still or video photography and only engaged in developing and processing exposed colour photographic films. Raw material used by the petitioner is paper and chemicals purchased after paying sales tax at the rate of 8.8% at the first stage and customs duty also stands paid by the importer on the imported material and excise duty stands paid by the manufacturer on the raw material manufactured in India. The petitioner spends 77% of the total consideration on purchase of paper, chemicals, packing material and other material which attracts sales tax, excise duty and customs duty. Services mentioned in the 1994 Act use no or negligible quantity of raw materials/material inputs. By amendment made in the year 2001, photography studio or agency has been included in the definition of "taxable service" u/s 65, clause 72. "Photography" has been defined in Section 65, Clause 47, while "photography studio or agency" has been defined in Section 65, Clause 48. Section 66 deals

with the charge of service tax and Section 67 provides for valuation of taxable services for charging service tax. As per circular dated 9-1-2001 (sic), Annexure P. 2, clarification has been issued to the effect that developing and processing of photography was included in the ambit of service tax and exclusion of costs incurred by a laboratory is not permitted. The petitioner has been registered u/s 69 of the 1994 Act and has paid service tax till 30-6-2003 on the gross amount charged by it without claiming deduction and costs incurred on goods and materials. On 20-6-2003, notification, Annexure P.3 has been issued exempting service tax on so much value of service as was equal to value of goods and materials sold by the service providers if there was documentary proof indicating value of goods and materials. Further circular was issued on the same day, Annexure P.4 to the effect that in case of authorised service stations, maintenance or repair services, commissioning and installation services and photography services, costs of goods and materials shall not form part of value to be subjected to service tax, if evidence showed that the goods were sold. In view of exemption granted vide notification, Annexure P.3, there has to be evidence of sale of goods and sale of goods has to be separately quantified and shown in the invoice.

3. Respondent No. 3 i.e., the Department of Revenue, Central Board of Excise and Customs wrote a letter to the Director General (Service Tax) Mumbai dated 3-9-2003, Annexure P5/A to the effect that cost of material was not excludable. The petitioner found it difficult to give the actual cost of material used in the photography services and a representation was submitted, pointing out this difficulty, Annexure P.6 followed by further representations. The respondents were proceeding to recover service tax on the ground that the petitioner had not sold the paper and chemicals and, therefore, exemption was not available.

4. In the reply filed, stand taken on behalf of the respondents is that statutory remedy is available to challenge the order of the competent authority after adjudication. In a writ petition, challenge to a show cause notice ought not to be entertained. It is submitted that as per instructions, the petitioner can avail of exemption by complying with the conditions showing sale of goods so that finally the tax is assessed on the services provided in conformity with law.

5. Learned Counsel for the petitioners submitted that challenge to the vires of the Act is not pressed but only issue which requires consideration is that service tax was not leviable on the cost of material used in rendering photography services which amounted to sale of goods covered by Entry 54 of List II of the Seventh Schedule to the Constitution. Reliance was also placed on the circular, Annexure P.3 granting exemption from service tax to the extent of value of goods and material sold by the service providers, subject to proof in respect thereof.

6. Learned Counsel for the respondents relying upon judgment of the Hon''ble Supreme Court in C.K. Jidheesh Vs. Union of India (UOI) and Others, , wherein while approving the judgment of the Kerala High Court in Kerala Colour Lab. Association Vs. Union of India (UOI), , levy of service tax was upheld. The

Hon''ble Supreme Court followed its earlier judgment in M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], . It was also submitted that in judgment of three Judges Bench of the Hon''ble Supreme Court in Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, , the issue of transactions involving service as well as supply/sale was gone into and it was held that sale tax was not leviable under Article 366(29A) by applying "dominant intention" test by including value of service in sale element relying on "aspect theory" and on service element, service tax was leviable.

7. Learned Counsel for the petitioners relied upon judgment in BSNL''s case (supra) to submit that the value of sale element in a composite transaction could not be subjected to service tax. It was also submitted that judgment in C.K. jidheesh''s case (supra) was not approved in BSNL''s case (supra) to the extent of observations in M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs, , that conclusion in Rainbow Colour Lib''s case (supra) was contrary to the provisions of Article 366(29A) and Constitution Bench judgment in Builders Association of India and Others Vs. Union of India (UOI) and Others, .

8. We have considered the rival submissions.

9. The issue of extent to which service tax could be levied in a composite contract, has already been gone into, inter alia, in judgments of the Hon''ble Supreme Court in C.K. Jidheesh and BSNL''s cases (supra). The observations in C.K. Jidheesh''s case (supra) which have been disapproved, do not substantially affect leviability of service tax, the said observations being:

This conclusion was doubted in M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs, saying (page 74):

The conclusion arrived at in M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], in our opinion, runs counter to the express provision contained in Article 266(29-A) as also of the Constitution Bench decision of this Court in Builders Association of India and Others Vs. Union of India (UOI) and Others, .

We agree. After the 46th Amendment, the sale element of those contracts which are covered by the six sub-clauses of clause (29-A) of article 366 are separable and may be subjected to sales tax by the States under Entry 54 of List II and there is no question of the dominant nature test applying. Therefore, when in 2005, C.K. jidheesh v. Union of India (2005) 8 Sca 784 : (2005) 5 RC 670 held that the aforesaid observations in M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs, were merely obiter and that Rainbow Colour Lab M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], was still good law, it was not correct. It is necessary to note that Associated Cement M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs, did not say that in all cases of composite transactions the 14th Amendment would apply.

10. In any case, the questions raised in the writ petition need not be gone into at this stage, alternative remedies being available to the petitioners to raise all the said questions at the appropriate stage.

11. In view of existence of alternative statutory remedies, we uphold the preliminary objection raised on behalf of the respondents that at the stage of show cause notice, this Court should not interfere in exercise of writ jurisdiction.

12. In U.P. State Spinning Co. Ltd. Vs. R.S. Pandey and Another, , it was observed by the Hon''ble Supreme Court:

11... At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy. If somebody approaches the High Court without availing the alternative remedy provided, the High Court should ensure that he has made out a strong case or that there exist good grounds to invoke the extraordinary jurisdiction.

13. Accordingly, the petitioners are relegated to the alternative statutory remedies and the questions raised in the petition are left open to be considered and decided by the competent authority in terms of law laid down on the subject.

14. The petition stands disposed of.