


<p>आयुक्त का कार्यालय केंद्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क ,अहमदाबाद उत्तर, कस्टम हॉउस(तल प्रथम) नवरंगपुरा- अहमदाबाद ,380009</p>		<p>Office of the Commissioner of Central Goods & Services Tax & Central Excise, Ahmedabad North, Custom House(1st Floor) Navrangpura, Ahmedabad-380009</p>
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निबन्धित पावती डाक द्वारा / By REGISTERED POST AD

फा .सं/. F.No. STC/4-48/R-V/O&A/11-12

आदेश की तारीख / Date of Order : 16.12.2019

जारी करने की तारीख / Date of Issue : 16.12.2019

द्वारा पारित/Passed by -

डॉ. बलबीर सिंह / Dr. BALBIR SINGH

आयुक्त / COMMISSIONER

मूल आदेश संख्या /

ORDER-IN-ORIGINAL No. AHM-EXCUS-002-COMMR-12/2019-20

जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसे व्यक्तिगत प्रयोग के लिए निःशुल्क प्रदान की जाती है।

This copy is granted free of charge for private use of the person(s) to whom it is sent.

2. इस आदेश से असंतुष्ट कोई भी व्यक्ति -इस आदेश की प्राप्ति से तीन माह के भीतर सीमा शुल्क ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ,अहमदाबाद पीठ को इस आदेश के विरुद्ध अपील कर सकता है। अपील सहायक रजिस्ट्रार ,सीमा शुल्क ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ,O-20, मेघाणीनगर ,न्यु मेन्टल हॉस्पिटल कम्पाउन्ड , अहमदाबाद -380016 को संबोधित होनी चाहिए।

Any person deeming himself aggrieved by this Order may appeal against this Order to the Customs, Excise and Service Tax Appellate Tribunal, Ahmedabad Bench within three months from the date of its communication. The appeal must be addressed to the Assistant Registrar, Customs, Excise and Service Tax Appellate Tribunal, O-20, Meghani Nagar, Mental Hospital Compound, Ahmedabad-380 016.

2.1 इस आदेश के विरुद्ध अपील न्यायाधिकरण में अपील करने से पहले मांगे गये शुल्क के 7.5% का भुगतान करना होगा, जहाँ शुल्क यानि की विवादग्रस्त शुल्क या विवादग्रस्त शुल्क एवं दंड या विवादग्रस्त दंड शामिल है ।

An appeal against this order shall lie before the Tribunal on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

(as per amendment in Section 35F of Central Excise Act,1944 dated 06.08.2014)

3. उक्त अपील प्रारूप सं .इ.ए 3.में दाखिल की जानी चाहिए। उसपर केन्द्रीय उत्पाद शुल्क (अपील) नियमावली 2001 ,के नियम 3 के उप नियम (2)में विनिर्दिष्ट व्यक्तियों द्वारा हस्ताक्षर किए जाएंगे। उक्त अपील को चार प्रतियाँ में दाखिल किया जाए तथा जिस आदेश के विरुद्ध अपील की गई हो ,उसकी भी उतनी ही प्रतियाँ संलग्न की जाएँ)उनमें से कम से कम

एक प्रति प्रमाणित होनी चाहिए। अपील से संबन्धित सभी दस्तावेज भी चार प्रतियाँ में अग्रेषित किए जाने चाहिए।

The Appeal should be filed in Form No. E.A.3. It shall be signed by the persons specified in sub-rule (2) of Rule 3 of the Central Excise (Appeals) Rules, 2001. It shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be certified copy). All supporting documents of the appeal should be forwarded in quadruplicate.

4. अपील जिसमें तथ्यों का विवरण एवं अपील के आधार शामिल हैं चार प्रतियाँ में दाखिल , उसकी भी उतनी ही ,की जाएगी तथा उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उनमें से कम से कम प्रतियाँ संलग्न की जाएंगी एक प्रमाणित प्रति होगी।(

The Appeal including the statement of facts and the grounds of appeal shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be a certified copy.)

5. अपील का प्रपत्र अंग्रेजी अथवा हिन्दी में होगा एवं इसे संक्षिप्त एवं किसी तर्क अथवा विवरण के बिना अपील के कारणों के स्पष्ट शीर्षों के अंतर्गत तैयार करना चाहिए एवं ऐसे कारणों को क्रमानुसार क्रमांकित करना चाहिए।

The form of appeal shall be in English or Hindi and should be set forth concisely and under distinct heads of the grounds of appeals without any argument or narrative and such grounds should be numbered consecutively.

6. अधिनियम की धारा 35बी के उपबन्धों के अंतर्गत निर्धारित फीस जिस स्थान पर पीठ स्थित है, वहां के किसी भी राष्ट्रीयकृत बैंक की शाखा से न्यायाधिकरण की पीठ के सहायक रजिस्ट्रार के नाम पर रेखांकित माँग ड्राफ्ट के जरिए अदा की जाएगी तथा यह माँग ड्राफ्ट अपील के प्रपत्र के साथ संलग्न किया जाएगा।

The prescribed fee under the provisions of Section 35 B of the Act shall be paid through a crossed demand draft, in favour of the Assistant Registrar of the Bench of the Tribunal, of a branch of any Nationalized Bank located at the place where the Bench is situated and the demand draft shall be attached to the form of appeal.

7. न्यायालय शुल्क अधिनियम 1970 ,की अनुसूची ,1-मद 6 के अंतर्गत निर्धारित किए अनुसार संलग्न किए गए आदेश की प्रति पर 1.00रुपया का न्यायालय शुल्क टिकट लगा होना चाहिए।

The copy of this order attached therein should bear a court fee stamp of Re. 1.00 as prescribed under Schedule 1, Item 6 of the Court Fees Act, 1970.

8. अपील पर भी रु 4.00 .का न्यायालय शुल्क टिकट लगा होना चाहिए।

Appeal should also bear a court fee stamp of Rs. 4.00.

विषय: -कारण बताओ सूचना:

Subject- Proceedings initiated vide Show Cause Notice bearing No. STC/4-48/R-V/O&A/11-12 dated 03.10.2011 issued to M/s. Gujarat Infotech Limited, A-2, 2nd Floor, Jay Tower, Ankur Complex, Naranpura, Ahmedabad-380013.

BRIEF FACTS OF THE CASE:

M/s. Gujarat InfoTech Limited, A-2, 2nd Floor, Jay Tower, Ankur Complex, Naranpura, Ahmedabad-380013 (hereinafter referred to as "the assessee") are engaged in the business of providing taxable services covered under the definition of Manpower Recruitment Agency, Online Information & Data & Commercial Training & Coaching. They are registered with the Service Tax Department and having Service Tax registration No. AABCG6123EST001.

2. During the course of audit of the records maintained by the assessee for the period from 2006-07 to 2009-10, it was noticed that the assessee have provided Electoral Photo Identity Cards (hereinafter referred to as "EPIC") related services to various District Election Officer/Collectors of Gujarat state in the year 2006-07 to 2009-10 and collected an amount of Rs.17,20,85,217/-, however no Service Tax was paid on the same.

3. The above service provided by them appeared to fall under the category of "Photography Service" as defined under Section 65(78) and Section 65(79) of the Finance Act, 1994.

3.1. As per the provisions of Clause (78) of Section 65 of the Finance Act, 1994 "**photography**" includes still photography, motion picture photography, laser photography, aerial photography or fluorescent photography;

4. As per the provisions of Section 65 (79) of the Finance Act, 1994, "**Photography studio or agency**" means any professional photographer or [any person] engaged in the business of rendering service relating to Photography;

4.1. The services which will come within the purview of service are:

4.1.1 **Still photography** such as photographing persons or other subjects in studios or other locations, passport or identification photographs; fashion photos; industrial photographs of machine and buildings etc; photographic service for advertising display, brochures, newspaper advertisement, catalogues; photography of any live event such as weddings, receptions, conventions fashion shows, sports and news (excluding news agency services, that was, press photographers theyre excluded);

4.1.2 **Aerial photography** such as photographs of landscape, structures and other surfaces from aircraft or helicopters with the help of cameras mounted on such aircraft or helicopter;

4.1.3 **Laser photography** to create holograms;

4.1.4 **Motion picture photography**, also known as cinematography to make films, which involves the general composition of a scene; the lighting of the set or location; the choice of cameras, lenses, filters, and film stock; the camera angle and movements; and the integration of any special effects;

4.1.5 **Fluorescence photography** using ultraviolet rays to irradiate a surface or substances to identify dyes, stains, and markings, specific chemical substances and fluorescent components in microscope specimens; **and any other kind of special photography service.**

4.1.6 Further, the photography services such as restoration of old photographs, processing and developing of photographic films and printing of photographs etc are also covered under the Photography Service.

4.2. The photography services rendered by Still photography studios, Still film processing laboratories, Cinematographic studios/labs who undertake Motion Picture photography and processing of cine films, holography studios (laser photography) who make holograms, aerial photographers, industrial photographers, etc. are covered under the definition of "Photography Service".

5. The assessee was assigned Work order by the various District Election Officers/Collectors of Gujarat State for providing the services related to preparation of Electoral Photo Identity Cards. The assessee was required to prepare EPIC as per the guidelines of the Election Commission of India. Further processes on the Identity Cards, namely:

- 1) Lamination of cards by using polyester film having thickness of more than 125 microns
- 2) Sealing and water proofing them so as to make them tamper proof were also required to be carried out by the assessee

6. Scanned copy of one such work order shows that the assessee had entered into agreement /contract with the District Election Officer and Collector of Gujarat State for service related to Electoral Photo Identity Card. It appeared that the service related to EPIC is covered under the category of "Photography Service" and the assessee is liable to pay Service Tax on the amount collected from the District Election Officer/Collectors of Gujarat State. Details of the amount received for Photography Service provided for the period from 2006-07 to 2010-11 are as under:

SR.NO	Description of Service	Period	Value of Service Provided
1.	Photography service for preparation of Electoral Photo Identity card	2006-07	3,57,67,746/-
2.	---Do---	2007-08	6,71,48,431/-
3.	---Do---	2008-09	3,13,14,631/-
4.	Photography service for preparation of Electoral Photo Identity card	2009-10	3,78,54,409/-
5.	Photography service for preparation of Electoral Photo Identity card	2010-11	1,61,32,363/-
TOTAL			18,82,17,580/-

7. It was also noticed that the said assessee had neither got registration for Photography Studio or Agency Service, nor paid any Service Tax on the amount of **Rs.18,82,17,580/-** received for the said service, during the period from 2006-07 to 2010-11 This has resulted in non payment of Service Tax to the tune of **Rs. 2,21,08,643/-**, which is required to be recovered from them along with interest.

8. In view of the above it appeared that:

- The assessee had provided taxable services under the category of 'Photography Service' but failed to pay Service Tax thereon.
- The values of taxable service in respect of aforesaid service rendered by them have not been subjected to assessment.
- The assessee had failed to add the service namely 'Photography Service' in their existing Service Tax registration for the taxable service rendered by them within stipulated time.
- The assessee had failed to self-assess the Service Tax payable on the taxable value received.
- The assessee had failed to include the gross value received for Photography Service in their S.T-3 returns.
- The assessee had failed to pay service tax at the applicable rate on the taxable value received by them.
- Moreover it was also observed that the said service provider has failed to file correct Service Tax returns under section 70 of the Finance Act, 1994 in the prescribed ST-3 for the period involved herein for the category of Photography Service.

9. All these acts of contravention on the part of the said assessee particularly 1) non indicating the total value of services 'Photography Service' in the ST-3 returns, 2) non applying for addition of the taxable service namely 'Photography Service' in their existing Service Tax registration for the taxable service rendered by them within stipulated time; appeared to have been committed by way of suppression of the facts by not producing the correct facts and figures of the amount received/realized for providing above said taxable service to the department with an intent to evade payment of Service tax & Education Cess. Therefore the Service tax & Education Cess of Rs 2,21,08,643/- which was not paid at the material time was demanded under the provision of Section 73 of the Finance Act, 1994 by invoking extended period of 5 years.

10. The assessee had not paid the service tax leviable thereon and thereby contravened the provisions of Section 68 of the Act and rendered themselves liable for penalty as provided under section 76 of the Act. The assessee failed to add the service namely 'Photography Service' in their existing Service Tax registration for the taxable service rendered by them within stipulated time. They have contravened the provisions of Section 69 of the Finance Act, 1994 read with Rule 4 of Service Tax Rules, 1994 and has thus rendered themselves liable for penalty under the provisions of Section 77(1)(a) of the Finance Act, 1994. The assessee have not filed returns for the services received by them during the period under reference and has contravened the provisions of section 70 of the Act and rendered themselves liable to pay late fee as provided under section 70 of the Act. In addition to the Service Tax, the assessee is also required to pay the interest at the appropriate rate under Section 75 of Finance Act, 1994. Penalty under Sections 76,77 & 78 of the Finance Act, 1994, was also proposed to be imposed on the assessee.

11. All the above acts of contravention on the part of the said assessee appeared to have been committed by way of suppression of facts with an intent to evade payment of service tax and therefore the said service tax not paid/short paid is required to be demanded and recovered from them under Section 73(1) of the Finance Act,1994 by invoking extended period of five years.

12. Therefore, a Show Cause Notice was issued to the assessee, as to why:

- (i) The amount of Rs.18,82,17,580/- received as consideration for providing 'Photography Service' should not be considered as taxable value and the Service Tax amounting to Rs.2,21,08,643/- (Rupees Two Crore Twenty One Lakh Eight Thousand Six Hundred Forty Three Only) should not be demanded and recovered from them under the provisions of Sub-Section (1) of Section 73 of the Finance Act, 1994.
- (ii) Interest at the appropriate rate should not be demanded and recovered from them under Section 75 of the Finance Act, 1994;
- (iii) Penalty under Section 76 of the Finance Act, 1994, should not be imposed upon them in as much as they failed to pay service tax within the stipulated time frame as mentioned above and for contraventions mentioned in foregoing paras.
- (iv) Penalty should not be imposed upon them under Section 77 of the Finance Act, 1994, as amended from time to time in as much as they failed to add the above mentioned service in their existing registration certificate and also failed to file periodical ST-3 return under the category of Photography service.
- (v) Penalty should not be imposed upon them under Section 78 of the Finance Act, 1994, for suppressing and not disclosing the value of the taxable service provided by them before the department with intent to evade payment of Service Tax.

13. REPLY TO THE SHOW CAUSE NOTICE:

The assessee has filed their reply to the Show Cause Notice, on 5.12.2011. They filed further submissions, vide their letters dated 5.12.2011, 21.9.2012 and 4.12.2019. Vide the above submissions, the assessee, has *interalia* submitted as under:

- (1) The main issue to be decided in this case is whether the activity of preparation of Electoral Photo Identity Card (EPIC) for various District Election Officer/Collector of Gujarat State is taxable service under the category of 'photography service' as defined under section 65 (105) (zb) or not. The SCN is issued mechanically without properly understanding the activities involved in preparation of EPIC and all the allegations of violations of some provisions of law as stated in the SCN are baseless and are routinely made without perusing the submissions made by the assessee to the department.
- (2) Service tax liability cannot be determined by reading the definition of term 'photography' in isolation, but should be determined by combined and comprehensive reading along with definition of 'taxable service' as given in section 65 (105) (zb) and definition of 'photography studio or agency' as given in section 65 (79).
 - (i) The SCN is vague as it does not even refer to the definition of taxable service in relation to photography service in the SCN. They state that the SCN is not maintainable in law as it does not even quote precise section under which the service is taxable. Service tax liability cannot be determined by reading the

definition of term 'photography' in isolation but should be determined by combined and comprehensive reading along with definition of 'taxable service' as given in section 65 on the ground of being vague.

- (ii) The proposed demand of service tax under the SCN is for the period from 2006-07 to 2010-11. However, this demand is based on some reference of EPIC work order dated 21-10-2002 scanned copy of which is given in the SCN. This shows that the SCN is issued without even considering the work orders for the period relevant to SCN. Since the SCN is issued in total disregard of the 16 activities involved in preparation of EPIC, it is clearly a presumption made by the audit party that the activity is photography service as it ignores the other 15 activities and SCN issued based on such presumption needs to be dropped on this ground alone.
- (iii) It is clear from the facts of the case that when they prepare Elector's Photo Identity Card (EPIC) for Election Commission, it can, by no stretch of imagination, be considered as 'photography studio or agency'. It is quite clear from the definition of taxable service that it is only 'photography studio or agency' providing photography service is liable for payment of service tax. Moreover, photography is only one of the total 16 activities involved in the process of preparation of EPIC and an SCN proposing classification under 'photography' service ignoring 15 other activities is clearly capricious as the classification assumed in the SCN is not in accordance with the provisions of section 65A guiding about classification of composite services. Moreover the matter stands covered by judgment of Hon. Bangalore Bench of CESTAT in the case of **CCE, Hyderabad-II v. CMC Limited [2007 (7) S.T.R. 702 (Tri. - Bang.)]** wherein it is categorically held that activity of issue of photo identity cards cannot be considered as falling under 'photography' and 'photography studio or agency' as per section 65 (78) and 65(79) of the Finance Act, 1994.
- (iv) The SCN is also not maintainable in on the ground of limitation in as much as it is issued beyond a period of one year from the relevant date as the department was aware about their activity of preparation of EPIC right from year 2006 and despite this knowledge, it did not issue any show cause notice for so many years and now routinely alleges suppression in the year 2011 without there being any **positive act of suppression** on their part.
- (v) Though there is no service tax liability on their part and they are not liable for payment of service tax as wrongly demanded in the SCN, they drew attention to the casual way of shooting an SCN **without applying correct value and service tax rates**. The SCN, in its Annexure A, shows calculation of service tax on gross amounts without taking these values as per audited accounts and without calculating deduction for service tax. They state that they have never charged or recovered any service tax on the activity of preparation of EPIC from District Election Commission as they were under the bonafide belief that on this sovereign activity, no service tax is payable. However, even where the tax is leviable, such value has to be considered as cum-duty or cum-service tax i.e. including the service tax in terms of section 67(2) of the Finance Act, 1994 that lays down that where the gross amount charged is inclusive of service tax, the value of taxable service shall be such amount as with the addition of tax payable, is equal to the gross amount charged. Further, the applicable rate of service tax during the period 01-04-2006 to 17-04-2006 was 10.20% and the SCN wrongly applies the rate of 12.24%. For the period from 01-04-07 to 10-05-2007 the correct rate applicable was 12.24%, but the SCN calculates tax at 12.36%. For the period from 24-2-2009 to 31-03-2009, correct applicable rate of service tax was 10.30% but the SCN calculates the same at 12.36%. Since in their case no service tax is payable, such casualness makes no difference. However, the SCN needs to be dropped on the ground that in undue and unwarranted hurry to recover service tax on something which is not taxable, the calculation is also made in a casual manner disregarding the clear provisions of law.

(3) They vehemently deny the allegations made in the SCN about contravention of certain provisions of Finance Act, 1994 and the rules made thereunder and state the following facts based on which it is clear that service tax is not payable as wrongly demanded in the SCN.

(3.1) According to the provisions of **section 65(105)(zb)** of the Finance Act, 1994 as in force upto 15-05-2008, 'taxable service' means any service provided or to be provided "to a

customer, by a photography studio or agency in relation to photography, in any manner." With effect from 16-05-2008 the term 'to any person' is substituted in place of 'to a customer' and the SCN covers the period prior to this amendment and period from the date of this amendment.

(3.2) It is clear from the definition of taxable services that all the following three essential ingredients must be present for attracting service tax. If any one of them is missing, the service tax liability cannot be attracted.

1. the service must be provided to customer upto 15-5-2008 and to any person from 16-5-2008;
2. the service must be rendered by a photography studio or agency
3. the service must be rendered in relation to photography

(3.3) In their case, all the three essential ingredients are missing as can be seen from the following facts.

- (i) **District Election Commission** which carries on sovereign function of issuing Elector's photo identity card (EPIC) for which they they are preparing EPIC cannot be termed as their customer.
- (ii) Their company, that helps prepare EPIC can, by no stretch of imagination, be termed as a photography studio or photography agency as they are not engaged in the business of photography. According to section 65(79) of the Finance Act, 1994, "photography studio or agency means any professional photographer or a commercial concern engaged in the business of rendering service relating to photography". They are not at all engaged in the business of rendering service relating to photography and theirs is not a photography studio or agency. It has been clarified by the Ministry of Finance (Department of Revenue) vide Letter F.No.B11/1/2001-TRU dt.09.07.2001 as under:

"Point for clarification:
A point has been raised as to whether the 'X-ray' or the 'CT scan' done using fluorescent photography technique will fall in the category of taxable service. It is clarified that these are not photography studios or agencies in common parlance; so the service provided by them does not come within the ambit of tax."
- (iii) Similarly, the Government has, by Circular F. No. B.11/1/2001-TRU dated 9-7-2001, also clarified that news agency services, that is, press photographers are excluded from the photography services. Copy of relevant extracts from CBEC Circular dated 09-07-2001 is enclosed as Annexure 4 for ready reference. This clearly shows that merely because photography is involved, it does not attract service tax under photography service unless the same is provided by a photography studio or agency. The word 'professional' has been defined in Chambers Dictionary as belonging to or relating to a profession; engaged in a profession or in the profession in question, undertaking as a means of subsistence as opposed to amateur. According to Black's Law Dictionary, 'professional' is 'one engaged in one of the learned professions or in an occupation requiring a high level of training and proficiency'. It is clear from the facts that they are not professional photographer each of their clerical level persons carry out the job of clicking on computer without any training in the field of photography. Further they are not engaged in the business of photography but the taking of photos with web camera is only incidental to preparation of EPIC. They request you to drop the demand of service tax based on these clarifications since they are not a photography studio or agency and no one in the trade parlance also knows us as a photography studio or agency.
- (iv) The service cannot be termed as service in relation to photography because they had to carry out 16 activities in preparing a defect free EPIC and only one of the activities therefrom was taking photographs. Merely 1/16th of the activity cannot determine the classification of the entire activity in sheer ignorance of rest of 15 activities. According to section 65(78) of the Finance Act, 1994, "Photography includes still photography, motion picture photography, laser photography, aerial photography and fluorescent photography". In the common parlance, photographic service includes development of negatives. Their process of preparation of EPIC does not involve such process of developing negatives and hence also the same is not covered under photography service. Further, the word 'photography' means the process of

obtaining permanent image of object on paper or film. It involves the following steps:

- i. Making negative film of the object.
- ii. Washing and developing the negative film.
- iii. Printing the image on the paper from the washed and developed film.

(v) **These three processes make for the complete photography.** They do not make negative film of the object, they do not wash or develop the negative film, and they do not print the image on the paper from the washed and developed film. This shows that they do not render any photography service.

(3.4) Based on the legal position and departmental clarifications, they are of bonafide belief that the contention of department that the activity of preparation of EPICs is 'photography service' is misplaced. They wish to bring to notice the fact that the activity of preparation of Electors' Photo Identity Card (EPIC) involves sixteen different activities and photography with the help of web camera and computer is only one of the sixteen activities which can, by no stretch of imagination, be branded as 'photography service' in total disregard of 15 other activities. They give below the activities involved in preparation of EPIC for ready reference and these activities are the part of written agreement/tender terms that they have entered into with State Election Commissioner and perused by the service tax Audit party and copy thereof is also taken by them.

- (i) Identification of elector's information based on Form 001
- (ii) Photography of Electors with digital cameras attached to the Computer at USB Port using standard software supplied by CEO/DEO
- (iii) Loading of photographed images into computers
- (iv) Report generation using relevant data and image details
- (v) Editing of data, if necessary at the time of photography/processing on the card format
- (vi) Printing of EPIC cards
- (vii) Cutting of printed cards (As per Sl. No. 15) to proper sizes
- (viii) Fixing of holograms
- (ix) Affixing appropriate facsimile signature of E. R. O.'s
- (x) Lamination of Cards
- (xi) Distribution of Cards to Electors after taking his acknowledgment and handing over of undistributed cards to ERO
- (xii) Taking back up of images and database
- (xiii) Printing and lamination of miniaturized archival copies and handing over the same to the ERO/authorized district authorities.
- (xiv) The entire job (Sl. No. 1 to Sl. No. 13) has to be carried out on-line (i.e. starting from photography till handing over the EPIC to the concerned elector is to be done at the site on the same day) at the different locations of the concerned district of the State of Gujarat.
- (xv) Delivery of DPL wise back up to DEO at the end of each DPL cycle
- (xvi) Maintenance of Issue Registers and relevant forms

(3.5) SCN, in its paragraph 5 mentions only about two further processes on the identity cards and ignores all above activities based on personal whims and fancy. Further, the SCN is silent on why it has chosen to state only these two processes instead of stating all the activities and even if these processes are taken into account these processes are not the covered within the definition of photography service. It is strange and shocking that the SCN ignores crucial activities involved in preparation of EPIC and eyes on only one activity selectively ignoring the 15 others. Classification cannot be determined based on presumptions or assumptions that are in favour of revenue in sheer disregard of legal provisions, departmental clarifications and decided case laws. Out of total sixteen activities to be carried out by us only one activity relates to photography and merely because the 1/16th of the total job involves a reference to photography, the same cannot be treated as photography service disregarding the host of 15 other activities which are very much the part and parcel of the whole work order.

(4) They also drew attention to judgment in the case of **Daelim Industrial Co. Ltd. v. CCE, Vadodara [2006 (3) STR 124 (Tri.-Del.)** wherein it is categorically held that a **work contract cannot be vivisected and a part of it subjected to tax.** Hon. Supreme Court has also maintained the said order by dismissing the Special Leave Petition filed by CCE, Vadodara and the said decision has been followed in a series of cases. In view of this, the facts of their case are similar to the ruling in Daelim case (Supra) whereby one contract involving 16 activities cannot be vivisected and a part thereof cannot be taxed. They earnestly requested to drop the demand under the SCN following the ratio laid down in this case. They find force, fairness and logic in the judgment delivered in Daelim case (Supra) because if the

contention raised by department is accepted, it will create a series of anomalies and undue harassment to law abiding people.

(4.1) For example, if an insurance surveyor, as a part of his job, takes photographs of damaged goods, he can, by no stretch of imagination, be considered as 'photography agency' because, his main job is to carry out survey and as a small part of this activity, he takes photographs. Similarly, if a project consultant who prepares project report and arranges finance for a client takes some photographs of some machines and puts them in the Project Report he does not become Photography studio or agency merely because one of his activities involve photography. In their case also, their main job is to prepare defect free EPIC and as a part of this main activity, if they have to do photography, they cannot be considered as photography agency.

(5) Section 65(79) of the Finance Act, 1994 defines 'photography studio or agency' to mean any professional photographer or any person engaged in the business of rendering service relating to photography. Hon. Gujarat high Court has, in the case of **CIT v. Natwarlal Tribhovandas [1973] 87 ITR 703 (Guj.)**, observed that the expression 'engaged in' is ordinarily intended to signify continuous occupation or employment. In the instant case, their company can, by no stretch of imagination, be called a 'photography studio' or a 'photography agency'. They are of the bonafide and firm belief that theirs is not a 'photography studio' or a 'photography agency', and hence are out of the purview of the definition of taxable service given under section 65(105)(zb) of the Finance Act, 1994 and hence are not liable to payment of service tax. They are not equipped for functioning as photography studio or agency and the activities of preparing EPIC do not include the services normally rendered by a photography studio or agency. In **Ajanta Fabrication v. CCE, Meerut [2006 (4) STR 605 (Tri.-Del.)]** it was held that extended definition cannot bring entirely alien and unconnected services within scheme of levy on service.

(6) In their case there is no agreement between the parties for rendering the service of photography for specific price as a standalone activity. Moreover, there is no understanding for a separate service for photography divorced from the main contract which is essentially for the preparation of EPICs. Therefore, no amount of total lump sum price can be attributable as taxable service of photography and hence there is no liability for payment of service tax on their part. They are not used by District Election Officer and Collector as 'Photographer'. They are responsible to produce and deliver a defect free EPIC as a part of agreement and hence are clearly out of the purview of service tax under the category of 'photography service'. In support of this contention, they enclose as **Annexure 6**, a copy of Letter EPC-1006-10644-CHH dated 29-11-2006 from Office of Chief Election Officer, Gujarat State addressed to the Office of the Principal Accountant General, Ahmedabad in response to their letter dated 08-11-2006 stating that they had not engaged any photographer for the work of issue of photo identity cards and hence there was no information about photographers.

(7) They drew attention to following judgments wherein it is categorically held that **issue of photo identity cards cannot be considered as falling under 'photography' and 'photography studio or agency' as per section 65 (78) and 65(79) of the Finance Act, 1994** and that the sovereign activities cannot be taxed.

- ii. **CCE v. CMC Limited [2007 (7) S.T.R. 702 (Tri. - Bang.)]** decided on 23-07-2007.
- iii. **CCE v. C. S. Software Enterprises Ltd. [2008 (10) STR 367 (Tri.-Bang.)]** decided on 20-12-2007.
- iv. **CCE v. Ankit Consultancy Ltd. [2007 (6) STR 101 (Tri.-Del.)]** decided on 10-12-2006 holding that preparation of voter list for Chief Electoral Officer is a part of sovereign activity of State. It is not a business activity with an eye on profit and hence is not taxable under business auxiliary service (BAS). This decision shows that initially department tried to demand service tax under BAS and when tribunal decided such matter in favour of assessee, it tried to recover the tax under photography service and even the demand under the category of photography service is held as not sustainable now.
- v. **Order-in-Appeal No. 26/ST/Kol/2011 Dated 21-01-2011** passed by Commissioner of Central Excise (Appeal-I), Kolkata in case of Comptronic Solutions holding that issue of Electors Voter Identity cards is a sovereign activity performed by the State functionaries and the appellant is not carrying out the activity of photographic service by issuing Electors Voters identity cards and the same cannot be considered as photo identity falling within the definition of photographic service.

(7.1) Since the matter is squarely covered in their favour by the above referred decisions, they request you to drop the proceedings under SCN. Copies of decisions relied upon are enclosed as Annexure 1 and 11 as mentioned in Index.

(8) They also relied on the following interim and final decisions of Hon. Tribunal to show that the activity of preparing identity cards do not fall under the category of photography service as department has either demanded service tax under business auxiliary service or where the demand was under photography service, the same has been stayed or is set aside.

- (i) Bajarang Infotech Systems P. Ltd. v. CCE [2007 (8) STR 11 (Tribunal-Bang.)] wherein pre-deposit was waived holding prima facie that activity of photo identity card for voters and bus pass is not covered under photography service. Photography service includes development of negatives in common parlance and also taking photo of animate or inanimate objects either still or in motion. In case of photograph taken for identity cards, development of negatives is not resorted to. This matter was finally decided in favour of the assessee vide Tribunal Orders No. 779-782/2007 dated 23-7-2007 as reported at 2007 (7) STR 702 (Tri.-Bang.)
- (ii) Bajrang Infotech Systems P. Ltd. v. CCE [2010 (20) STR 653 (Tribunal-Bang.)] wherein stay was granted holding prima facie that preparation of bus pass identity cards is not covered under Business Auxiliary service during the period from 01-07-2004 to 30-04-2006 and the demand on such activity under photography service is set aside by Tribunal. This shows that even the department is not clear about the classification of service as it demands service tax at one time on the same activity under photography service and for some other period under business auxiliary service.
- (iii) UTI Technology Services Ltd. v. CCE [2010 (19) STR 835 (Tri.-Mum.)] wherein stay was granted holding that prima facie preparing PAN cards and supplying such cards to assesses is statutory function of Income Tax Department and such service are not covered under Business Auxiliary service.
- (iv) In Smart Chip Ltd. v. CCE [2008 (10) STR 404 (Tri.-Del.)] appellant had entered into contract with Madhya Pradesh State Transport Department on a turnkey basis so that driving license and registration cards can be issued in the form of smart card. Department demanded service tax on this activity under BAS and the impugned order was set aside and remanded by Hon. Tribunal to original adjudicating authority to pass a reasoned order as the order was passed in gross violation of principle of natural justice.
- (v) In Smart Chip Ltd. v. CCE [2008 (12) STR 600 (Tri.-Del.)] Tribunal stayed the demand of service tax under business auxiliary service on smart card taking a prima facie view that the service is rendered in relation to statutory functions carried out by Govt. and cards cannot be considered as input and processing thereon cannot be considered as processing of goods.

(9) Alternatively, they also drew attention to the fact that production of such "Photo Identity Cards and Holograms" is classified under Tariff Item 4901 that attracts Nil rate of excise duty. Service tax is not payable on production and hence there is no question of demanding any service tax on this activity. They request you to refer Circular No. 141/52/95-CX, dated 14-8-1995 issued by Govt. of India, Ministry of Finance (Department of Revenue), Central Board of Excise & Customs, New Delhi in this regard which has clarified that in view of distinctive character, process of manufacture, relevant tariff headings, section notes, chapter notes and HSN notes, the Board is of the view that photo-identity cards and holograms merit classification under sub-heading 4901.90 of the Schedule of the Central Excise Tariff Act, 1985. The matter has also being further confirmed by CBEC Circular No. 195/20/96-CX, dated 3-4-1996. In view of this fact, the demand of service tax on preparation of EPIC is not legal or proper. A copy of the above mentioned CBEC Circulars is enclosed herewith as Annexure 2 and 3 respectively. Further, even if the EPIC is classified as recorded smart cards, the Govt. had exempted recorded smart cards falling under Heading 852352 vide Notification No. 31/2007-CE, dated 19-07-2007. They request you to drop the proceedings under the SCN based on this alternative contention also holding that on production of goods, service tax cannot be demanded.

(10) The principal objective of the preparation of identity card is to create a proof of identity for electors and not the photography. In card Protection Plan Ltd. V. Customs and Excise Commissioners (1999) STC 270 ECJ and Card Protection Plan Ltd. V. Customs and Excise

Commissioners (2001) STC 174 HL there was a single supply where one or more elements constituted the principal service and other were merely ancillary, in that they did not constitute for customers aims themselves, but simply a means of better enjoying the principal service. What constitutes a single supply in economic sense should not be artificially split. **Applying this ratio, the activity of preparation of EPIC with principal objective of providing a proof of identity cannot be artificially split as photography service.** The contract in the present case is for the purpose of preparing or generating EPICs involving sixteen different and diverse activities. Photography is only incidental without which the contract could not have been completed and therefore the contract cannot be vivisected so as to charge service tax on the services rendered in respect of residual process of photography. The contract is work contract for preparation of EPIC on a turnkey basis and not a contract of photography service. The payment is made to the contractor only on generation of defect free EPIC and not for photography.

(11) They state that they are under bonafide belief that they are not liable to pay service tax on the activity of preparation of EPIC and their bona fide belief was also based on legal opinion obtained by us to this effect. They enclosed a copy of Opinion dated 19-12-2006 of N. V. Suchak & Co., Chartered Accountants taken by one of the EPIC contractors wherein it is opined that activity of generating EPICs for Office of District Officer and Collector does not fall under the category of Photography Service. Demanding service tax by making convenient and vicarious interpretation of law in total disregard of legal provisions and settled case laws is an attempt to make unjust, unlawful and unfair demand from genuine tax payers and they earnestly request you to drop this unjust demand and thus render justice.

(12) They also do not agree with the value of taxable service as stated in the SCN even if the service is taxable and request you to hold that though no service tax is not payable in this case, even if the tax was payable, the value would have been the value received as per Profit and Loss Account for EPIC activity considering the same as inclusive of service tax because service tax was never charged or recovered by us based on bonafide belief that it is not payable.

(13) It was categorically clarified by CBEC vide Instruction Letter B11/1/2001-TRU, dated 09-07-2011 that photography for X-ray or CT scan is not carried out by photography studios or agencies in common parlance. On the same analogy, preparers of EPICs are also not photography studios or agencies in common parlance and this fact is also confirmed by office of Chief Electoral Officer, Gujarat State categorically stating that they had not engaged any photographers for the work of issue of Photo Identity cards. It is settled law that CBEC instructions are binding on the department. Such circulars are not advisory in character but are binding on the Central Excise Officers and department cannot be allowed to plead that such circular was not valid. They request you to drop the demand of service tax under the SCN respectfully obeying the CBEC instructions and thus render justice. They rely on the following decisions of in support of this contention.

- (i) Ranadey Micro Nutrients versus Commissioner Central Excise [1996 (87) ELT 19 (SC)] holding that Circulars/instructions of CBEC are binding on Revenue Authorities.
- (ii) CC v. Indian Oil Corporation Ltd. [2004 (165) ELT 257 (SC)] holding that although a circular is not binding on a Court or an assessee, Revenue cannot raise contention contrary to binding circular by Board. When circular remains in operation, Revenue is bound by it and cannot be allowed to plea that it is not valid nor that it is contrary to the terms of statute. **It further held that Show cause notice and demand contrary to existing circulars of Board is ab initio bad and Revenue cannot advance an argument or file an appeal contrary to circulars.**
- (iii) Ambuja Cements Ltd. v. UOI [2009 (14) STR 3 (P&H)] holding that C.B.E. & C. Circulars are binding on Department and Revenue is precluded from challenging correctness of circular even on ground of it being inconsistent with statutory provision.
- (iv) Avaya Global Connect v. CCE [2011 (264) ELT 549 (Tri.-Ahmd.)] holding that it stands clarified in the judgment of the Hon'ble Supreme Court in the case of *Ranadey Micronutrients* [1996 (87) E.L.T. 19 (S.C.)] that **where the circular issued by the Board are in favour of the assessee, the benefit of the same is required to be extended to the assessee in spite of the declaration of law to the contrary. It cannot be said that where the appellate orders are in favour of the assesses, the same have to be ignored in preference to Board's circular and the Commissioner is duty bound to follow the Board's circular.**

(14) It is very clear from the above representation, facts of the case, provisions of law, decided case laws and departmental clarifications that the activity of preparation of EPIC cannot be considered as photography service. In view of this, they requested to drop the demand of service tax wrongly demanded under SCN.

(15) They assail the demand beyond the period of one year from relevant date on the ground of limitation also. In terms of provisions of section 73(1) of the Finance Act, 1994 the SCN is to be served within one year from the relevant date as there was no fraud or collusion or willful mis-statement or suppression of facts, or contravention of any of the provisions of Finance Act, 1994 or of the rules made there under with an intent to evade payment of service tax on their part. They state that the major portion of demand is time barred as the SCN is served after a limitation period of one year from the relevant date. The extended period of limitation of five years is wrongly invoked in the SCN by merely alleging suppression without in any way substantiating the charge of suppression. Duty under SCN dated 03-10-2011 is demanded covering the period from 01-04-2006 and hence demand beyond a period of one year from relevant date is not sustainable on ground of limitation also. They state that they had a bonafide belief that they are not liable to pay service tax for the captioned period as the service tax was not payable on activity of preparation of EPIC. Moreover, there is no evidence to show that they have suppressed information with an intention to evade payment of duty. **On the contrary, department is aware about their activity of preparing EPIC right from 2006 when it had inquired through the Office of Principal Accountant General, Ahmedabad and the information about list of agencies which theyre appointed in the districts for EPIC Programme was provided vide letter dated 29-11-2006 as enclosed herewith. It is quite clear that department did not demand service tax because it was under the impression that no service tax is payable on this activity. Further, Superintendent of Service Tax, Range 4, vide letter dated 01-05-2007 (copy enclosed as Annexure 8), wrote to us asking to pay service tax of Rs. 577343/- for the years 2003-04 and 2004-05 under photography service for EPIC activity carried out by us. They had filed their detailed reply dated 05-05-2007 on 09-05-2007 with the Office of Superintendent of Service Tax, Range 4 stating that there is no service tax liability on activity of preparation of EPIC giving complete justification thereof. Thereafter, no communication was received from the service tax department which implies that the department has accepted their contention. A copy of this letter dated 05-05-2007 file don 09-05-2007 is enclosed as Annexure 9. The SCN does not talk about the circumstances why it can invoke the provisions of extended period of limitation. It only depicts wrong attitude of routinely invoking the extended period of limitation. They drew attention to CBEC Circular No. 5/92-CX.4, dated 13-10-1992 – (1993) 63 ELT T7, wherein Board has taken note of such attitude. Board has stated that such attitude only increased fruitless adjudication with the gamut of appeals and reviews, inflation of outstanding figures and harassment of assesses. Board has warned that such casualness in issuance of show cause notices will be viewed seriously. It further clarifies that mere non-declaration is not sufficient for invoking larger period, but a positive mis-declaration is necessary, as per decision of Supreme Court in Padmini Products and Chemphar Drugs. They have been paying due service tax on taxable services provided by us regularly since the date of their registration, they have provided all the information during the course of departmental audit, they have not suppressed any information and the service tax is not paid on the activity of preparation of EPIC only under a bonafide belief that the same is not payable. They emphatically stated that they have provided all the information required by the revenue officers as and when demanded and have not concealed anything from them nor is there any allegation about any specific suppression. Income from EPIC preparation activity is reflected in their Audited Accounts and they enclose as Annexure 10 copies of Profit and Loss Accounts for five years from 2006-07 to 2010-11 and Schedules that show income earned from preparation of EPIC, if any. Thus, true and complete details of the transactions are available in specified records and even service tax audit party has verified all these details. In view of there being reasonable and correct belief that service tax is not payable on activity of preparation of EPIC, they had not paid the same and their bonafide belief is also based on the departmental clarifications and judicial pronouncements in this regard. They have not violated any provisions of law as wrongly alleged in the SCN nor is there any willful suppression or intention to evade payment of service tax. They have reflected all their transactions in their books of accounts and there is no suppression or intention to evade payment of service tax.**

(16) They relied on the following judgments which clearly lay down that under such circumstances extended period of limitation cannot be invoked.

- (i) CCE v. Chemphar Drugs & Liniments [1989 (40) ELT 276 (SC)]
- (ii) Padmini Products v. CCE [1989 (43) ELT 195 (SC)]
- (iii) Aadishwar Motors Pvt. Ltd. v. CST [2011 (24) STR 81 (Tri.-Ahmd)]

- (iv) Mitul Engineering Services v. CCE [2011 (24) STR 323 (Tri.-Del.)]
- (v) Reliance Industries Ltd. v. CCE [2011 (23) STR 555 (Tri.-Ahmd.)]
- (vi) Subhash Khandelwal & Sons v. CCE [2011 (24) STR 461 (Tri.-Del)
- (vii) Tamilnadu Housing Board v. CCE [1994 (74) ELT 9 (SC)]
- (viii) Pahwa Chemicals P. Ltd. v. CCE, Delhi [2005 (189) ELT 257 (S.C.)]
- (ix) In Continental Foundation Jt. Venture v. CCE, Chandigarh-I [2007 (216) ELT 177 (S. C.)]
- (x) Dalveer Sing v. CCE, Jaipur [2008(9) STR 491 (Tri.-Del.)]

(16.1) In view of these facts, they vehemently denied the charge of suppression and state that the demand beyond one year from relevant date is barred by limitation and is not sustainable. They request you to drop the demand on this ground also.

(17) They have not concealed any value of taxable service and state that there is no violation of any provisions of service tax law on their part. In view of this, the question of levy of penalty does not arise. They earnestly request you to drop the proposed demand of penalty under section 76, 77 and 78 of the Finance Act, 1994 and thus render justice. Since 10-5-2008, it is expressly provided in section 78 that penalties under section 76 and 78 cannot be imposed at the same time. Since the penalties are substantially for the same offence there is no reason to impose both the penalties even prior to that period. They rely on following decision in support of their contention.

- (i) CCE v. Krishna Automobiles [2011 (23) STR 57 (Tri.-Del.)].
- (ii) CCE v. Pendharkar Constructions [2011 (23) STR 75 (Tri.-Mum.)]
- (iii) Order-in-Original No. 16/COMMR/2010 dated 06-05-2010 passed by CCE, Ahmedabad-III in case of Gujarat Engineering Research Institute
- (iv) CCE, Ludhiana v. Silver Oak Gardens Resort [2008 (9) STR 481 (Tri.-Del.)]
- (v) CCE, Surat, vide his Order-in-Original No. 6/MP/2009 dated 30-10-
- (vi) CCE v. First Flight Courier Ltd. [2011 (22) STR 622 (P & H)],
- (vii) CCE v. Pannu Property Dealers [STA No. 13 of 2010 decided on 12-7-2010 also Hon. Punjab & Haryana High
- (viii) Hon. High Court of Kerala in case of ACCE v. Krishna Poduval [2006 (1) STR 185 (Ker)]
- (ix) CCE v. Town Hall Committee, Mysore City Corporation [2011 (24) STR 172 (Kar.)]
- (x) CST v. Kuoni Travel (India) Ltd. [2011 (24) STR 65 (Tri.-Del)
- (xi) Cosmic Dye Chemical v. CCE, Bombay [1995(75) ELT 721(SC)]
- (xii) ETA Engineering Ltd. v. CCE, Chennai [2003(3) STR 429 (Tri.- LB
- (xiii) Hindustan Steel v. State of Orissa [1978 (2) ELT (J159) (S.C.)]
- (xiv) Cement Marketing Co. [1980 (6) ELT 295 (SC)]
- (xv) CCE v. Damnet Chemicals P. Ltd. [2007 (216) ELT 3 (SC)],

(18) Since no service tax is payable based on the clear legal position, there is no question of payment of any interest and they request you to drop the demand of interest and oblige.

(19) For all these reasons and the fact that there was no fraud or collusion or willful mis-statement or suppression of facts, or contravention of any of the provisions of Finance Act, 1994 or of the rules made there under with an intent to evade payment of service tax, they requested to drop the proceedings the proceedings under SCN

(20) It is settled law that the department is required to follow the law laid down by the Tribunal and cannot take own view although it may be in its opinion a correct view. They relied on the following decisions laying down law on judicial discipline.

- i. Topland Engines Pvt. Ltd. v. UOI [2008 (9) STR 331 (Guj.)]
- ii. Pudumjee Pulp & Paper Mills Ltd. v. CCE [2009 (16) STR 91 (Tri.-Mum.)]
- iii. T. B. Shine v. CCE [2009 (14) STR 65 (Tri.-Bang.)]
- iv. BPL Mobile Communication Ltd. v. CCE [2008 (10) STR 538 (Tri.-Mum.)]
- v. K. D. Sales Corporation v. CCE [2007 (6) STR 418 (Tri.-Bang
- vi. Pals Micro Systems Ltd. v. CCE [2007 (6) STR 205 (Tri.-Bang.)]

14. PERSONAL HEARING:

Personal Hearing in the matter was held on 04.12.2019, wherein, Dr.N. V. Suchak, C.A. and Shri Prayag Shah, Accountant, appeared on behalf of the assessee, and reiterated the facts stated in their written submissions. They further added that the issue involved in this case is squarely covered in their favour, by the decision of Hon. High Court of Calcutta in the case of M/s. Webel Technology Ltd., reported in 2018 (19) GSTL 467 (Cal.).

DISCUSSION & FINDINGS:

15. I have gone through the records of the case and the written submissions made by the assessee. I find that the issue to be decided is whether the activity of preparation of Electoral Photo Identity Card (EPIC), by the assessee, for various District Election Officers and Collectors of Gujarat State can be considered a taxable service under the category of 'Photography Studio or Agency Service' as defined under section 65 (105) (zb) or otherwise.

16. The Show Cause Notice has been issued to the assessee, demanding the Service Tax amounting to Rs.2,21,08,643/- under the provisions of Sub-Section (1) of Section 73 of the Finance Act, 1994 on the amount of Rs.18,82,17,580/- received as consideration for providing 'Photography Service', along with interest and penalty.

17.1 In terms of Section 65(105)(zb) of the Finance Act 1944, taxable service in relation to photography is the service provided to the customer by a photographic studio or agency in relation to photography.

Photography Studio or Agency Service'

17.2 Section 65 (105) (zb) of the Finance Act, 1994 defines that the taxable service is a service provided or to be provided to any person by a photography studio or agency in relation to photography, in any manner.

17.3 Section 65 (78) of the Act defines the term 'photography' which includes still photography, motion picture photography, laser photography, aerial photography or fluorescent photography.

17.4 Section 65(79) of the Act defines 'photography studio or agency' as any professional photographer or any person engaged in the business of rendering relating to photography.

17.5 CBEC Circular No. B.11/1/2001-TRU dated 9.7.2001, stipulates the services which will come within the purview of this service as under:

- i. **Still photography** such as photographing persons or other subjects in studios or other locations, passport or identification photographs; fashion photos; industrial photographs of machine and buildings etc; photographic service for advertising display, brochures, newspaper advertisement, catalogues; photography of any live event such as theyddings, receptions, conventions fashion shows, sports and news (excluding news agency services, that was, press photographers theyre excluded);
- ii. **Aerial photography** such as photographs of landscape, structures and other surfaces from aircraft or helicopters with the help of cameras mounted on such aircraft or helicopter;
- iii. **Laser photography** to create holograms;
- iv. **Motion picture photography**, also known as cinematography to make films, which involves the general composition of a scene; the lighting of the set or location; the choice of cameras, lenses, filters, and film stock; the camera angle and movements; and the integration of any special effects;
- v. **Fluorescence photography** using ultraviolet rays to irradiate a surface or substances to identify dyes, stains, and markings, specific chemical substances and fluorescent components in microscope specimens; **and any other kind of special photography service.**
- vi. Further, the photography services such as restoration of old photographs, processing and developing of photographic films and printing of photographs etc are also covered under the Photography Service.

18. I find that the assessee had entered into contract/agreement with various District Election Officers/Collectors of Gujarat state in the year 2006-07 to 2010-11 for preparation of Electors Photo Identity Card. Issuance of EPIC is the sovereign function of the District Election Commission. The Elector Photo Identity Card is a photo identity card that is issued by the Election Commission of India to all individuals who are eligible to vote. The primary purpose of this card is to improve the accuracy of the electoral roll and to help prevent cases of electoral fraud. Additionally, it also serves as an identification proof when the citizens cast their vote.

19. It is apparent that activity of preparation of Electors' Photo Identity Card (EPIC) involves sixteen different activities; and photography with the help of web camera and computer is only one of the sixteen activities undertaken by the assessee. The activities involved in preparation of EPIC are a part of written agreement/ tender terms, that the assessee has entered into with State Election Commission, and are as under.

- (i) Identification of elector's information based on Form 001
- (ii) Photography of Electors with digital cameras attached to the Computer at USB Port using standard software supplied by CEO/DEO
- (iii) Loading of photographed images into computers
- (iv) Report generation using relevant data and image details
- (v) Editing of data, if necessary at the time of photography/processing on the card format
- (vi) Printing of EPIC cards
- (vii) Cutting of printed cards (As per Sl. No. 15) to proper sizes
- (viii) Fixing of holograms
- (ix) Affixing appropriate facsimile signature of E. R. O.'s
- (x) Lamination of Cards
- (xi) Distribution of Cards to Electors after taking his acknowledgment and handing over of undistributed cards to ERO
- (xii) Taking back up of images and database
- (xiii) Printing and lamination of miniaturized archival copies and handing over the same to the ERO/authorized district authorities.
- (xiv) The entire job (Sl. No. 1 to Sl. No. 13) has to be carried out on-line (i.e. starting from photography till handing over the EPIC to the concerned elector is to be done at the site on the same day) at the different locations of the concerned district of the State of Gujarat.
- (xv) Delivery of DPL wise back up to DEO at the end of each DPL cycle
- (xvi) Maintenance of Issue Registers and relevant forms

20. It is clear from the definition of taxable services that all the following three essential ingredients must be present for attracting service tax. If any one of them is missing, the service tax liability on "Photography Studio or agency service", cannot be attracted.

1. The service must be provided to customer
2. The service must be rendered by a photography studio or agency
3. The service must be rendered in relation to photography

21. I, hereby examine the above three aspects to ascertain whether the activity of the assessee is a taxable service under "Photography Studio or agency service" or otherwise.

(A) Whether the service is provided to a customer or any person:

22.1 In this case, the assessee is providing the services to the District Election Commission/Collectors of Gujarat State. They are preparing the EPICs solely on behalf of Election Commission, which solely executes the function of issuing EPIC. The assessee photographs the electors with digital cameras attached to the Computer at USB Port using standard software supplied by CEO/DEO. Starting from this photography, till the EPICs are handed over to the concerned elector, the entire process consists of about 13 activities.

22.2 District Election Commission, which carries on the sovereign function of issuing Elector's photo identity card (EPIC), for which the assessee are preparing EPIC; cannot be termed as their customer, in as much as that the assessee is not being remunerated by the District Election Commission for taking the photographs of the electorate, but for preparation of EPICs

(B) The service must be rendered by a photography studio or agency:

23.1 As per Section 65(78) of the Finance Act, 1994, "Photography includes Still photography, Motion picture photography, laser photography, aerial photography and fluorescent photography".

23.2 In common parlance, photographic service includes development of negatives. The word 'photography' means the process of obtaining permanent image of object on paper or film. It involves the following steps:

- i. Making negative film of the object.
- ii. Washing and developing the negative film.
- iii. Printing the image on the paper from the washed and developed film.

23.3 Photography comprises of all the three above mentioned processes. The process of preparation of EPIC, undertaken by the assessee, does not involve such process of developing negatives. The assessee does not make negative films of their "object", neither do they wash or develop the negative film; nor do they print the image on the paper from the washed and developed film. This shows that they do not render any photography service.

23.4 The process of preparing EPIC involves 16 activities, as detailed in the above paras, and photography using digital camera with computer is only one of the activities involved in the entire process. Merely 1/16th of the activity cannot be taken into consideration for determining the classification of the entire activity.

23.5 CESTAT, Delhi, in its decision in the case of M/s. Daelim Industrial Co. Ltd. v. CCE, Vadodara, reported in [2006 (3) STR 124 (Tri.-Del.)], has categorically held that a work contract cannot be vivisected and a part of it subjected to tax. Hon. Supreme Court has also maintained the said order by dismissing the Special Leave Petition filed by the department.

23.6 In view of this, in this case, it is clear that the assessee's contract cannot be vivisected to tax **only one** of the 16 activities.

(C): The service must be rendered in relation to photography

24.1 As per Section 65(79) of the Finance Act, 1994, "photography studio or agency" means any professional photographer or a commercial concern engaged in the business of rendering service relating to photography. They are not at all engaged in the business of rendering service relating to photography and theirs is not a photography studio or agency.

24.2 As discussed above, the assessee has prepared the EPICs for the District Election Commission/ Collectors of Gujarat State. It can never be said that the said assessee has rendered photography studio or agency service to the District Election Commission/ Collectors of Gujarat State and that they have been engaged merely as photographers. In this case there is no agreement between the parties for rendering the service of photography as an individual and independent activity for a specific price. Moreover, the service of taking photographs using web cams or digital cameras attached to computers cannot be considered an independent activity or a separate service for photography, detached from the main contract, which is essentially for the preparation of EPICs.

25. CESTAT, in its decision in the case of M/s. Bajrang Infotech Systems P. Ltd., reported in 2007 (8) S.T.R. 11 (Tri. - Bang.), has held as under:

Stay/Dispensation of pre-deposit - Photography service - Voter identity card and bus pass - Prima facie preparation of photo identity cards not covered under photography service - Definition of photography does not include taking photos for identity cards - Photography service includes development of negatives in common parlance and also taking photo of animate or inanimate objects either still or in motion - Face alone photographed directly on the identity card in impugned case - Stay application by Revenue on identical issue rejected in another case - Pre-deposit waived and recovery stayed - Section 35F of Central Excise Act, 1944 as applicable to Service tax vide Section 83 of Finance Act, 1994 - Sections 65(78) and 65(79) of Finance Act, 1994. [paras 1, 2, 4]

Para 4 of the order reads as under:

4. On a careful consideration, prima facie, the preparation of photo identity cards cannot be considered to come within the category of Photographic Services. The definition of photographic service does not contemplate the taking of photos for identity cards. In the common parlance, photographic service includes development of negatives. It includes taking of photos from various angles and the individual will not also be aware when photos are taken. Photography includes taking photo of animate or inanimate object either still or in motion. While in this case, only the face portion is photographed directly on the identity card. In similar matter, the Hyderabad Commissionerate has accepted the assessee's plea in the case of CMC Ltd. [2007 (7) S.T.R. 587 (Tribunal)] and the Revenue's stay application has been rejected. In view of this position, the prayer for waiver is accepted. The stay application is allowed.

26. From the preceding paras above, it comes out clearly that the service provided by the assessee is out of the purview of service tax under the category of 'photography service'. The assessee prepares EPICs for the District Election Commission/ Collectors of Gujarat State and this activity cannot be termed as a photography studio or photography agency service from any aspect.

27. CBEC, vide their Circular No. 141/52/95-CX, dated 14-8-1995 issued by Govt. of India, Ministry of Finance (Department of Revenue), Central Board of Excise & Customs, New Delhi, has clarified as under:

"6. Keeping in view the distinctive character, process of manufacture, relevant tariff headings Section notes, Chapter noted and HSN notes, the Board is of the view that Photo-Identity Cards and Holograms merit classification under Sub-Heading 4901.90 of the Schedule to the Central Excise & Tariff Act, 1985."

28. CBEC, has reiterated the above view vide their Circular No. 61/7/96-CX.4, where in it has been clarified as under:

"In this regard it is reiterated that Photo-identity cards merit classification under Sub-heading 4901.90 of the Schedule of the Central Excise Tariff Act, 1985. However, classification of holograms, cleared as such may be decided keeping in view the manufacturing process and end-use, etc. on merits of each case."

29. The Central Board of Excise and Customs in Circular No. 89/7/2006-S.T., dated 18.12.2006 had clarified as follows :

"A number of sovereign public authorities (i.e. and agency constituted/set up by government) perform certain functions/duties, which are statutory in nature. These functions are performed in terms of specific responsibility assigned to them under the law in force. For examples, the Regional Reference Standards Laboratories (RRSL) undertake verification, approval and calibration of weighing and measuring instruments; the Regional Transport Officer (RTO) issues fitness certificate to the vehicles; the Directorate of Boilers inspects and issues certificate for boilers; or Explosive Department inspects and issues certificate for petroleum storage tank, LPG/CNG tank in terms of provisions of the relevant laws. Fee as prescribed is charged and the same is ultimately deposited into the Government Treasury. A doubt has arisen whether such activities provided by a sovereign/public authority required to be provided under a statute can be considered as 'provision of service' for the purpose of levy of service tax.

2 The issue has been examined. The Board is of the view that the activities performed by the sovereign/public authorities under the provision of law are in the nature of statutory obligations which are to be fulfilled in accordance with law. The fee collected by them for performing such activities is in the nature of compulsory levy as per the provisions of the relevant statute, and it is deposited into the Government Treasury. Such activity is purely in public interest and it is undertaken as mandatory and statutory function. These are not in the nature of service to any particular individual for any consideration. Therefore, such an activity performed by a sovereign/public authority under the provisions of law does not constitute provision of taxable service to a person and, therefore, no service tax is leviable on such activities.

30. In view of the above Circulars, even the demand of service tax on preparation of EPIC is not justified, in as much as it has been covered under Central Excise.

31. CESTAT, Bangalore, in its decision in the case of M/s. CMC Ltd., reported in 2007(7) STR 702 (Tri.Bang.), has held as under:

Photography service - Service tax - Issue of Electors Photo Identity Cards cannot be considered as 'Photo Identity' falling within definition of 'Photography' and 'photography studio or agency' as per Sections 65(78)

and 65(79) of Finance Act, 1994 - Activity carried out by parties are sovereign activity performed by State functionaries which cannot be brought under tax limit - Section 65(105)(zb) *ibid.* [para 8]

Paras 5 to 8, read as under:

5. The learned Counsel, Shri K.S. Ravi Shankar, referred to Circular Nos. 141/52/95-CX, dated 14-8-1995 and 195/20/CX., dated 3-4-1996 wherein a clarification has been given by the Board with regard to the Photo Identity Cards. In terms of the said Notification, the department has viewed that the Photo Identity Cards are required to be treated as goods and to be classified under sub-heading 4109.90 of the Schedule to the CET, 1985. It is his submission that once the department has taken this view, then the question of attracting Service tax does not arise. It is his further submission that the issue of Photo Identity Cards by the Election Commissioner is a sovereign duty under the Constitution of India and such activity performed by an officer of the Election Commission is required to be treated as an activity of the State and, therefore, it cannot be levied to tax. He finds strength in the ruling of the Tribunal in the case of CCE, Indore v. Ankit Consultancy Ltd. - 2007 (6) S.T.R. 101 (Tri.-Del.) wherein this issue has been decided in assessee's favour.

6. The learned Counsel, Shri K. Parameswaran, relies on the Circular No. 89/7/2006-S.T., dated 8-12-2006 which clarifies with regard to certain functions and duties performed by statutory authorities that such activities performed by statutory authorities are to be treated as performed by a sovereign/public authority under the provisions of law and they cannot be considered for the purpose of service tax. The learned Counsel further submits that the clarification given by the Circular No. B.11/1/2001-TRU, dated 9-7-2001 also supports their plea.

7. The learned Counsel, Ms. Anjali Agarwal, also supported the argument raised by both the Counsels and prays for setting aside the order in the case of M/s. Bajarang Infotech Systems Pvt. Ltd. She submits that in their case, Service tax has also been levied in respect of passes issued by the Transport authorities. This also falls under the same category as Photo Identity Cards issued by the Election Commission.

8. We have carefully considered the submissions and we note from the Stay Order given in these matters that the activity carried out by the parties are sovereign activity performed by the State functionaries. The Office of the Chief Election Commission is constituted under the Constitution of India. They are not carrying out the activity of photographic service by issuing Electors Photo Identity Cards. The issue of Electors Photo Identity Cards cannot be considered as "Photo Identity" falling within the definition of "Photographic Service" as per Section 65(78) as well as Section 65(79). The Circular referred to by the Counsels clearly apply to the facts of the case. Furthermore, the Tribunal, in the case of CCE v. Ankit Consultancy Ltd. (cited *supra*), has clearly held that any activity performed by a State organ to discharge the sovereign activity of the State cannot be brought under the tax limit. This finding is also supported by the Circulars noted *supra*. Further, it is seen that the Board's Circular No. 141/52/95-CX and 195/20/CX views this activity to bring them under the definition of "goods" for exigibility. There is no merit in the Revenue appeals and the same are rejected and the appeal of M/s. Bajarang Infotech Systems Pvt. Ltd. is allowed with consequential relief, if any.

32. CESTAT, Bangalore, in its decision in the case of M/s. C.S. SOFTWARE ENTERPRISES LTD., reported in 2008 (10) STR 367 (Tri. Bang.), has held as under:

Photography service - Voter identity card - Photography for elector identity card - Appellant contending impugned activity as part of sovereign functions as per Constitution of India and not taxable - Impugned issue decided by Tribunal in 2007 (7) S.T.R. 702 (Tribunal) - Tribunal held in 2007 (6) S.T.R. 101 (Tribunal) that preparation of elector photo identity card not covered under Photography service - Issue settled in favour of assessee - Impugned order holding respondent as not liable, sustainable - Sections 65(78) and 73 of Finance Act, 1994. [paras 1, 4]

Paras 1 and 4 of the said order, read as under:

1. ".....The Revenue proceeded to consider the activity to come within the ambit of 'Photography Services'. The assessee took the contention that the issue of identity cards was a sovereign function in

terms of the Constitution of India and the same cannot be brought within the ambit of Service Tax. Their plea has been upheld by the Commissioner (A). Revenue is aggrieved with the order and hence, this appeal."

4. We have considered the submissions. We find that the issue in this case has already been decided in terms of Final Order rendered in the case of CCE, Hyderabad v. M/s. Bajarang Infotech Systems Pvt. Ltd. & M/s. CMC Limited & Others by Final Order No. 779 to 782/2007 dated 23-7-2007 [2007 (7) S.T.R. 702 (T)]. The order also covers the cases of M/s. CMC Ltd. and M/s. Kerala State Electronics Development Corporation Ltd. This Tribunal after due consideration and also applying the ratio of CCE, Indore v. Ankit Consultancy Ltd. - 2007 (6) S.T.R. 101 (Tri. - Del) has held that the activity of preparing elector photo identity cards cannot be considered to fall within the ambit of photographic services as per Section 65(78) as well as Section 65(79) of the Finance Act. We find that the issue is fully decided in assessee's favour. The impugned order passed by the Commissioner (A) is legal and proper. There is no merit in this appeal and the same is rejected.

33. CESTAT, Principal Bench, New Delhi, in its decision in the case of M/s. Ankit Consultancy Ltd, reported in 2007 (6) S.T.R. 101 (Tri.- Del.), has held as under:

Business Auxiliary Service - Service tax - Preparation of voter list - For Chief Electoral Officer - It is part of sovereign activity of State - It is not a business activity with an eye on profit - Section 65(19) of Finance Act, 1994. [para 8]

.....

34. Hon'ble High Court of Calcutta, in its judgment in the case of M/s. Webel Technology Ltd., reported in 2018(19) GSTL 467 (Cal.), has held as under:

Photography service - Election Photo Identity Card (EPIC) - Requiring photograph of voter and filling details of voter in EPIC - Photograph was one component of work discharged by noticee - Contracts were pre 2007 - HELD : Ultimate product was EPIC and photography was not sole purpose of contracts - Contract for EPIC was indivisible and could not be divided into separate compartments of photography - Noticee did not render photographic services to individual or to person who contracted with them - Show cause notice issued to noticee was without jurisdiction - Sections 65(19), 65(76b), 65(78), 65(79), 65(105)(zb), 65A, 66 and 67 of Finance Act, 1994. [paras 13, 20]

Paras 13 and 20 of the judgment read as under:

13. Whether Service Tax can be levied on indivisible works contracts prior to the introduction on June 1, 2007 in the Finance Act, 2007 have come up for consideration in Larsen & Toubro Ltd. (supra). It was 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.

14. In CMC Limited (supra), CESTAT, South Zonal Bench, Bangalore it was 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).

20. 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.


35. I find that the analogy of the above decisions of CESTAT and the judgment passed by the High Court of Calcutta, are undoubtedly applicable in the case of the assessee. I hereby rely on these decisions of CESTAT and the judgment passed by the Hon'ble High Court, as the issue on hand is squarely covered under them. The activity of preparation of Electors' Photo Identity Card (EPIC) involves sixteen different activities and photography with the help of web camera and computer is only one of them. The entire process of preparation of EPIC cannot be vivisected and thereby, a part of it cannot be subjected to Service tax disregarding the other 15 activities, merely because the 1/16th of the total job involves photography.

36. I hold that the activity of preparation of Electoral Photo Identity Card (EPIC), by the assessee for District Election Commission and Collectors of Gujarat State cannot be considered a taxable service under the category of 'Photography Studio or Agency Service'. I find that the amount of Rs. 18,82,17,580/- was received by the assessee from the State authorities solely for preparation of EPICs and not for providing Photography service. Therefore in view of the above discussions, I find that the said amount is not liable to Service tax. I conclude that the demand of Service Tax amounting to Rs.2,21,08,643/- is not sustainable. Consequently the question of charging of interest does not arise and the assessee is also not liable for penal action under the Finance Act.

37. In view of the above findings, I pass the following order:

O R D E R

(i) I hereby drop the proceedings initiated against the assessee vide Show Cause Notice No. STC/4-48/R-V/O&A/11-12, dated 3.10.2011.


(Dr. BALBIR SINGH)
COMMISSIONER
CENTRAL GST & C.EX.
AHMEDABAD NORTH.

F. No.STC/4-48/R-V/O&A/11-12

Date: 16.12.2019

To
M/s. Gujarat InfoTech Limited,
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Copy to:

1. The Principal Chief Commissioner, Central Excise, Ahmedabad Zone.
2. The Deputy/Assistant Commissioner, Division-VII, C.G.S.T, Ahmedabad(North)
3. The Superintendent of Central Excise, AR-I, Division-VII, C.G.S.T, Ahmedabad(North)
- ✓ 4. Guard File