

**W.P. No. 770 of 2015
IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Original Side**

**Srijan Realty (P) Ltd.
Vs.
Commissioner of Service Tax,
Service Tax Commissionerate-II Kolkata & Ors.**

For the Petitioner : Mr. Arnab Chakraborty, Advocate
Mr. Abhijit Biswas, Advocate

For the Union of India : Mr. Somnath Ganguli, Advocate
Ms. Manasi Mukherjee, Advocate

For the State : Mr. Prithu Dudhoria, Advocate

Hearing concluded on : February 18, 2019

Judgment on : March 8, 2019

DEBANGSU BASAK, J.:-

The petitioner has sought a declaration that, supply of electricity by the petitioner to the occupiers of “Galaxy Mall”, a commercial complex, is not a service exigible to tax under the Finance Act, 1994.

Learned Advocate appearing for the petitioner has submitted that, the petitioner has a commercial complex developed and operated under the name and style of “Galaxy Mall” lying and situated at Asansol. The Commercial Complex has various occupants. In order to effect electric supply to the commercial

complex, the petitioner entered into an agreement on October 26, 2010 with DPSC Ltd. (now known as Indian Power Corporation Ltd.). Such licensee provides electric supply through an 11KV substation installed at the commercial premises. The licensee raises a single consolidated electricity bill upon the petitioner. The petitioner on receipt of electric supply redistributes the same to the occupiers of the commercial complex. The petitioner has installed sub- meters for the respective occupiers. Based on the readings of such sub-meters, the petitioner raises bills upon such occupiers. The petitioner initially collected Service Tax. However, upon objections being raised by the some of the occupiers, the petitioner consulted the Superintendent of Service Tax, ST II Commissionerate for determining whether such redistribution of electricity was exigible to Service Tax under the Act of 1994 or not. The Superintendent of Service Tax held the view that, such a service is exigible to tax. The petitioner had obtained legal advice which was of a contrary view than the Superintendent of Service Tax. Thereafter, the petitioner by its letter dated January 30, 2015 intimated the respondent no. 3 that, it was not liable to pay Service Tax. The Assistant Commissioner of Service Tax, by a letter dated March 27, 2015, held

the view that, the redistribution of electricity by the petitioner was eligible to Service Tax.

Learned Advocate for the petitioner has submitted that, the action of redistribution of electricity is a sale/trading activity. It cannot be termed as a service. Absence of any licence under the Electricity Act, 2003 does not mean that, the petitioner is not selling or trading in electric supply. According to him, electricity is a 'goods'. He has referred to Chapter 27 of the Central Excise Tariff Act, 1985 and submitted that, it incorporates electrical energy under the heading 271160000 thereof as a 'good'. The West Bengal Value Added Tax Act, 2003 includes electrical agency as a 'good' capable of being bought and sold and exempt the same from any levy thereunder. He has referred to Section 21 of the West Bengal Value Added Tax Act, 2003. He has also relied upon the definition of 'electricity' under the Electricity Act, 2003, particularly Section 2(15), 2(23), 2(70) and 2(71) thereof. He has also referred to Regulation 4.2.3 of the West Bengal Electricity Regulatory Commission (Recovery of Expenditure for Providing New Actions) Regulation, 2013.

Relying upon **2002 Volume 5 Supreme Court Cases page 3 (State of Andhra Pradesh v. National Thermal Power Corpn. Ltd.)** learned Advocate for the petitioner has submitted that, electricity is a 'good' and is capable of being traded. He has relied upon **1996 Volume 7 Supreme Court Cases page 637 (Aluminium Co. v. State of Kerala)** for the proposition that, electricity or electrical energy can be sold. Moreover, the entire transaction of supplying electricity from the point of its generation to the point of its consumption is treated as being part of a sale of goods. According to him, the absence of any authorisation to supply electricity does not change the nature and character of the sale. He has submitted that, at best, unauthorised supply of electricity may invite penalties under the Electricity Act, 2003. However, even if such penalties are imposed, the transaction will not lose the character of a sale. He has submitted that, redistribution of electricity such as that undertaken by the petitioner falls within the scope of sale/trading activity. That being so, such a transaction is not exigible to Service Tax. He has referred to and relied upon the definition of sale as appearing in Section 2(39) of the West Bengal VAT Act, 2003. He has submitted that, the State Legislature has the competence to levy taxes on sale of electricity and goods in terms of Entries 53 and 54 of

List II of Schedule 7 read with Article 246 of the Constitution. In support of his contention, he has relied upon **2016 Volume 1 Supreme Court Cases page 170 (CCE Customs v. Larsen & Toubro Ltd.)**.

Learned Advocate for the petitioner has submitted that, in the event the transaction between the petitioner and the occupiers, is found not to be a sale as, the petitioner did not possess the requisite licences, then, the same transaction cannot be exigible to Service Tax as, such a transaction is void in the eye of law. Void transaction cannot be exigible to any tax. He has submitted that, the dominance purpose test should be applied to find out as whether the transaction is exigible to Service Tax or not. He has relied upon **2006 Volume 2 S.T.R page 161 (Supreme Court) (Bharat Sanchar Nigam Ltd. v. Union of India)** and submitted that, applying such test, since, the transaction is eminently one of sale and the sale and the so-called service being indivisible, then, the transaction is to be treated as a sale. Therefore Service Tax is not leviable.

Without prejudice to his previous contentions, learned Advocate for the petitioner has submitted that, in view of Section 66D(e) of the Finance Act, 1994 read with Section 66B thereof,

trading of goods is excluded from the scope of taxability under the Act of 1994. Even if the petitioner does not qualify as an electricity consumption or distribution utility within the meaning of Section 65(B) of the Act of 1994, the same is not relevant as, the petitioner is not claiming any benefit under Section 66D(k) of the Act of 1994.

In such circumstances, he has submitted that, it should be declared that, the nature of transactions by the petitioner with its occupiers with regard to electricity, should be held to be sale rather than a service.

Learned Advocate appearing for the respondents has submitted that, the petitioner is essentially providing service to the occupiers and is therefore, liable to Service Tax. The petitioner is enjoying high tension electric supply from a licensee. It is converting such high tension to low tension and is supplying the low tension electricity to the various occupiers. The conversion from high tension to low tension and the distribution thereof to the occupiers is a service. Therefore, the entire transaction is liable to Service Tax.

Learned Advocate appearing for the respondents has relied upon Section 66D of the Finance Act, 1994 and submitted that, providing electricity is chargeable to Service Tax. The exemptions are

provided under Section 66D(k). The petitioner does not come within such exemption. Moreover, according to him, a trading or a sale can be done by a person legally permitted to do so. The petitioner is not permitted to sell electricity. The petitioner is legally authorised to redistribute electricity. The Court therefore should not allow an interpretation which permits an illegality to be perpetrated. In the event, the Court is pleased to hold that, the petitioner is indulging in a sale activity, then the Court would be encouraging the petitioner to indulge in an activity which is not permitted under the Electricity Act, 2003. However, in the event, the Court is pleased to hold that, the transaction is a service then, there is no violation of any law. The transaction then becomes exigible to Service Tax. Such an interpretation should be preferred by a Court.

Learned Advocate for the respondent has drawn the attention of the Court to the fact that, the invoices raised by the petitioner contains a component of Service Tax. The petitioner was registered with the Service Tax Authorities. The invoice bears the Service Tax Registration Number of the petitioner. The petitioner having collected Service Tax, is obliged to deposit the collected tax with the authorities. Moreover, the petitioner itself is of the view that, Service Tax is payable in respect of the transaction concerned.

Referring to Section 65B(23) of the Finance Act, 1994, learned Advocate for the respondents has submitted that, all services are taxable save and except which are excluded specifically by the statute. He has referred to Sections 65B(51), 66B, 66D(k) in support of his contentions.

Referring to the memorandum of understanding entered into between the petitioner and the licensee, learned Advocate appearing for the respondents has submitted that, the petitioner is a consumer. Therefore, the petitioner cannot claim itself to be a trader. The petitioner has no approval from any of the State or the Central Authorities, to trade in electricity. The bills raised by the petitioner are as a consumer. The licensee has raised bills on the petitioner treating the petitioner as a consumer. The transaction in question, does not fall within the negative list and therefore, the transaction is exigible to Service Tax.

Learned Advocate appearing for the respondents has referred to Sections 2(70) and (74) of the Electricity Act, 2003 and submitted that, the nature of transactions between the petitioner and the ultimate consumers, cannot be treated as a sale of electricity by the petitioner to such consumers. Therefore, according to him, the

transaction being exigible to Service Tax, the petitioner is liable to pay the same.

The petitioner operates a commercial complex under the name and style of “Galaxy Mall” at Asansol. The commercial complex has various occupants. The petitioner obtains electric supply from India Power Corporation Ltd. formally known as DPSC Ltd. through a high-tension supply. The petitioner steps down such supply and supplies electricity to the various occupants. Initially, the petitioner raised bills upon the occupants containing a component of Service Tax. Subsequently, objections were raised by the occupants with regard to the collection of Service Tax. The occupants claimed that, they are not liable to pay Service Tax. Consequently, the petitioner obtained information of the Superintendent of Service Tax who by a writing claimed that Service Tax is payable. The petitioner thereafter obtained legal opinion which was of the view that Service Tax is not leviable. The Assistant Commissioner of Service Tax by a writing dated March 27, 2015 informed the petitioner that Service Tax is payable.

The petitioner obtains high-tension electric supply from India Power Corporation Ltd. It, in turn supplies electricity to the

occupants of the commercial complex, on low-tension. It collects the money equivalent of the amount of electricity consumed by the occupants on the basis of the sub-meter readings of such occupants. Whether this transaction is exigible to Service Tax or not is the issue that has fallen for consideration in the present writ petition.

The provisions of the Electricity Act, 2003 which are relevant for the purpose of discussion in the present writ petition are as follows:-

“Section 2. Definitions.-

.....

“(23) "electricity" means electrical energy-

(a) generated, transmitted, supplied or traded for any purpose; or

(b) used for any purpose except the transmission of a message;

.....

(26) "electricity trader" means a person who has been granted a licence to undertake trading in electricity under section 12;

.....

(28) "generating company" means any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person, which owns or operates or maintains a generating station;

(29) "generate" means to produce electricity from a generating station for the purpose of giving supply to any premises or enabling a supply to be so given;

.....

(38) "licence" means a licence granted under section 14;

(39) "licensee" means a person who has been granted a licence under section 14;

.....

(70) "supply", in relation to electricity, means the sale of electricity to a licensee or consumer;

(71) "trading" means purchase of electricity for resale thereof and the expression "trade" shall be construed accordingly;

(72) "transmission lines" means all high pressure cables and overhead lines (not being an essential part of the distribution system of a licensee) transmitting electricity from a generating station to another generating station or a sub-station, together with any

step-up and step-down transformers, switch-gear and other works necessary to and used for the control of such cables or overhead lines, and such buildings or part thereof as may be required to accommodate such transformers, switchgear and other works;

(73) "transmission licensee" means a licensee authorised to establish or operate transmission lines;

(74) "transmit" means conveyance of electricity by means of transmission lines and the expression "transmission" shall be construed accordingly;

SECTION 12. *(Authorised persons to transmit, supply, etc., electricity): No person shall (a) transmit electricity; or (b) distribute electricity; or (c) undertake trading in electricity, unless he is authorised to do so by a licence issued under section 14, or is exempt under section 13."*

The provisions of the Finance Act, 1994 which are relevant for the purpose of the present writ petition are as follows:-

“SECTION 65B. Interpretations.—

.....

(25) “ goods” means every kind of movable property other than actionable claim and money; and includes securities, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;

.....

(34) “negative list” means the services which are listed in section 66D;

.....

(37) “person” includes,— (i) an individual, (ii) a Hindu Undivided Family, 5 (iii) a company, (iv) a society, (v) A limited liability partnership, (vi) a firm, (vii) an association of persons or body of individuals, whether incorporated or not, (viii) Government, (ix) a local authority, or (x) every artificial juridical person, not falling within any of the preceding sub- clauses;

.....

(44) “service” means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—

(a) an activity which constitutes merely,—

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or

(iii) a transaction in money or actionable claim;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any Court or tribunal established under any law for the time being in force.

Explanation 1 . — For the removal of doubts, it is hereby declared that nothing contained in this clause shall apply to,—

(A) the functions performed by the Members of Parliament, Members of State Legislative, Members of Panchayats, Members of Municipalities and Members of other local authorities who receive any consideration in

*performing the functions of that office as such member;
or*

(B) the duties performed by any person who holds any post in pursuance of the provisions of the Constitution in that capacity; or

(C) the duties performed by any person as a Chairperson or a Member or a Director in a body established by the Central Government or State Governments or local authority and who is not deemed as an employee before the commencement of this section.

.....

(50) "tax" means service tax leviable under the provisions of this Chapter;

(51) "taxable service" means any service on which service tax is leviable under section 66B;

Charge of service tax on and after Finance Act, 2012.

SECTION 66B.

There shall be levied a tax (hereinafter referred to as the service tax) at the rate of [fourteen] per cent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.

Negative list of services

SECTION 66D.

The negative list shall comprise of the following services, namely;-

(e).*Trading of goods.*

.....

(k).*transmission or distribution of electricity by an electricity transmission or distribution utility;"*

Under the definitions as obtaining in the Electricity Act, 2003, the petitioner cannot be said to be a generating company. It has not claimed itself to be so. It also cannot be said that, the petitioner is engaged in the supply or trading of electricity as, the definition of 'supply' and 'trading' does not allow the petitioner to come within the same. The petitioner is not an electricity trader as defined in Section 2(26) of the Electricity Act, 2003. The petitioner does not have a licence to undertake trading in electricity under Section 12 of the Electricity Act, 2003. The petitioner also cannot be said to be engaged in the business of transmission as, the petitioner does not have such a licence. The petitioner is not a person authorised to transmit, supply, distribute or undertake trading in electricity. In view of the definitions as obtaining in the Electricity Act, 2003, therefore, the petitioner cannot be said to be distributing or selling or trading in electricity when, it is receiving high-tension supply from Indian Power Corporation Ltd. and providing low-tension electricity to the occupants of the commercial complex. Sale, trading and distribution being taken out of the contention, the only other thing that remains to describe the activity undertaken by the petitioner, is service. Any other interpretation will render the steps

taken by the petitioner in receiving high-tension electric supply and making over low-tension electric supply to the occupants, violative of the provisions of the Electricity Act, 2003. Such an interpretation should be avoided. Service is defined in Section 65B(44) as an activity carried out by a person for another for consideration and includes a declared service. The activity of the petitioner comes within the definition of service. The activity of the petitioner sought to be made exigible to tax does not come within exclusions contained in Section 65B(44). The Finance Act, 1994 provides a negative list of services in Section 66D. If, an activity which does not come within the negative list of services as defined in Section 66D of the Finance Act, 1994, such an activity is to be termed as a service exigible to tax under the Finance Act, 1994. It is the contention of the petitioner that, the activity of the petitioner comes within the negative list of services defined in Section 66D particularly in view of Section 66D(e) and (k). As noted above, the petitioner cannot be said to be indulging in trading of goods or in transmission or distribution of electricity within the meaning of the Electricity Act, 2003. Although electricity is a 'goods' as held in ***National Thermal Power Corpn. Ltd. (supra)*** and is capable of being traded, the petitioner does not have the requisite licence to trade in electricity. The activity of the petitioner,

therefore, cannot be treated as a trade as it would violate the provisions of the Electricity Act, 2003. Therefore, it cannot be said that, the petitioner is trading in electricity.

Aluminium Co. (supra) has held that, the entire transaction of supplying electricity from the point of his generation to the point of his consumption is to be treated as being part of the sale of goods. **Aluminium Co. (supra)** was rendered before the Electricity Act, 2003 came into effect. Even then, subsequent to the Electricity Act, 2003 coming into effect, the petitioner cannot claim to be selling electricity as a 'goods' as, the petitioner is not licensed under the Electricity Act, 2003, to sell electricity.

The dominant purpose test as laid down in **Bharat Sanchar Nigam Ltd. (supra)** if at all applied would be against the petitioner, in the facts of the present case. The activity of the petitioner cannot be said to be a sale or a trade. Therefore, the only other classification of such activity is a service.

Larsen & Toubro Ltd. (supra) has dealt with indivisible works contract and the liability to pay Service Tax prior to June 1, 2007. In the facts of the present case, the activity of the petitioner cannot be said to be anything other than a service. Therefore, the

petitioner cannot take shelter of the ratio laid down in ***Larsen & Toubro Ltd. (supra)***.

In view of the discussions above, it has to be held that, the transaction of the petitioner obtaining high-tension electric supply converting it to low-tension supply, and supplying it to the occupants, raising bills on such occupants and realizing the electricity consumption charges from such occupants, is a service which the petitioner renders and such an activity is exigible to Service Tax under the Finance Act, 1994.

The writ petition fails.

W.P. No. 770 of 2015 is dismissed. No order as to costs.

[DEBANGSU BASAK, J.]