

***THE HON'BLE SRI JUSTICE P. SAM KOSHY**
AND
***THE HON'BLE SRI JUSTICE N. TUKARAMJI**

+ WRIT PETITION No.5675 OF 2004

% 24.01.2024

Idea Cellular Limited

...Petitioner

vs.

\$ State of Andhra Pradesh, represented by the Chief
Secretary, Department of Revenue, Govt. of A.P.,
Secretariat Building, Hyderabad & Anr.

... Respondents

!Counsel for the Petitioner: Sri Narendra Dave

^Counsel for Respondents: Sri K.Bhaskar Reddy, learned
G.P. for Commercial Tax

<Gist :

>Head Note :

? Cases referred

1. 2006 (3) SCC 1
2. 2011 (12) SCC 608
3. 2012 (25) S.T.R.321 (A.P)
4. (2017) 99 VST 24 (MP)
5. 2023 (73) G.S.T.L.449 (SC)

HIGH COURT FOR THE STATE OF TELANGANA,
HYDERABAD

* * * *

WRIT PETITION No.5675 OF 2004

Between:

Idea Cellular Limited

...Petitioner

State of Andhra Pradesh, represented
by the Chief Secretary, Department of Revenue,
Govt. of A.P., Secretariat Building, Hyderabad & Anr.

... Respondents

JUDGMENT PRONOUNCED ON: 24.01.2024

THE HON'BLE SRI JUSTICE P. SAM KOSHY
AND
THE HON'BLE SRI JUSTICE N. TUKARAMJI

1. Whether Reporters of Local newspapers
may be allowed to see the Judgments? :
2. Whether the copies of judgment may be
Marked to Law Reporters/Journals? :
3. Whether Their Lordships wish to
see the fair copy of the Judgment? :

P.SAM KOSHY, J

N.TUKARAMJI, J

**THE HONOURABLE SRI JUSTICE P.SAM KOSHY
AND
THE HONOURABLE SRI JUSTICE N.TUKARAMJI**

WRIT PETITION No.5675 OF 2004

ORDER: *(per Hon'ble Sri Justice P.SAM KOSHY)*

Heard Mr. Narendra Dave, learned counsel for the petitioner and Mr. K.Bhaskar Reddy, learned Government Pleader for Commercial Tax appearing for the respondents.

2. The instant Writ Petition has been filed seeking the following reliefs:

“(a) declare the levy of sales tax on the telecommunication services provided by the Petitioner as *ultra vires* the provisions of the APGST Act, 1957 and the Constitution of India by the issuance of a writ of *Mandamus* or a writ in the nature of *Mandamus* or any other appropriate writ direction or order; and consequently

(b) declare the Reassessment Order G.I. No. 2972/2000-2001 (APGST) dated March 10, 2004 issued by the Respondent No.2 herein as *non est* and invalid in law and wholly without Jurisdiction; and

(c) restrain the Respondents, their subordinates, successors in office agents and servants from, in any manner, imposing or recovering the sales tax in respect of the telecommunication services provided by Petitioner in the State of Andhra Pradesh; and

(d) pass such further or other order (s) as may be deemed fit and proper on the facts and in the circumstances of the case, including awarding of costs of these proceedings and render Justice.”

3. Primarily the challenge was to the re-assessment order dated 10.03.2004 issued by respondent No.2. In the course of re-assessment, the authority concerned had ordered that the prepaid starter packs and prepaid recharge coupons, so also the activation fee and SIM replacement fee would be amenable to the sales tax under the Andhra Pradesh General Sales Tax Act, 1957.

4. Today when the matter is taken up for hearing, learned counsel for the petitioner drew the attention of this Court to series of decisions on the subject matter and the issue involved in the present Writ Petitioner. Accordingly, he has referred to the landmark judgment of the Hon'ble Supreme Court in the case of **Bharat Sanchar Nigam Ltd. Vs. Union of India**¹ and **Idea Mobile Communication Ltd. Vs. CCE**². In addition, he has also referred to a decision of the United High Court of Andhra Pradesh in the case of **State of Andhra Pradesh Vs. M/s.Bharath Sanchar Nigam Ltd.**³ and a decision of the Madhya Pradesh High Court in the case of **M/s.Idea Cellular Ltd.**

¹ 2006 (3) SCC 1

² 2011 (12) SCC 608

³ 2012 (25) S.T.R. 321 (A.P)

Vs. The Asstt. Commissioner of Commercial Taxes, LTU, Indore⁴, in which, the said High Courts dealt with the question of law raised in the present Writ Petition.

5. Referring to the decision in the case of **Bharat Sanchar Nigam Ltd.** (1 supra), learned counsel for the petitioner had submitted that the Hon'ble Supreme Court had remanded the matter back to the Sales Tax Authorities so far as determination of the issue relating to SIM cards being amendable to Sales Tax or not. The Hon'ble Supreme Court in the very same decision, in paragraph No.85, in categorical terms, held that goods in any case would not include electromagnetic waves or radio frequencies and that goods in telecommunication field are limited to the handsets supplied by the service provider and as far as SIM cards are concerned, the issue was left for determination by the Assessing Authorities. Relevant portion of para 85 in the case of **Bharat Sanchan Nigam Ltd.** (1 supra) is reproduced hereunder:-

“A. Goods do not include electromagnetic waves or radio frequencies for the purpose of Article 366(29A)(d). The goods in telecommunication are

⁴ [2017] 99 VST 24 (MP)

limited to the handsets supplied by the service provider. As far as the SIM cards are concerned, the issue is left for determination by the Assessing Authorities.

B. There may be a transfer of right to use goods as defined in answer to the previous question by giving a telephone connection.

C. The nature of the transaction involved in providing the telephone connection may be a composite contract of serviced and sale. It is possible for the State to tax the sale element provided there is a discernible sale and only to the extent relatable to such sale.

D. The issue is left unanswered.

E. The aspect theory would not apply to enable the value of the services to be included in the sale of goods or the price of goods in the value of the service.”

6. Subsequent to the remand being made by the Hon'ble Supreme Court, the Assessing Authorities have, as a matter of principle, took a stand that issuance of SIM cards would not attract sales tax and they have not further issued any notices to any of the service providers. This fact gets fortified from the subsequent decision of the Hon'ble Supreme Court in the case of the petitioners themselves in the case of **Idea Mobile Communication Ltd.** (2 supra), wherein in paragraph Nos.17 to 19, it is held as under:

“17. The High Court has given cogent reasons for coming to the conclusion that service tax is payable inasmuch as SIM Card has no intrinsic sale value and it is supplied to the customers for providing mobile

service to them. It should also be noted at this stage that after the remand of the matter by the Supreme Court to the Sales Tax authorities the assessing authority under the Sales Tax Act dropped the proceedings after conceding the position that SIM Card has no intrinsic sale value and it is supplied to the customers for providing telephone service to the customers. This aforesaid stand of the Sales Tax authority is practically the end of the matter and signifies the conclusion.

18. The sales tax authorities have themselves conceded the position before the High Court that no assessment of sales tax would be made on the sale value of the SIM Card supplied by the appellant to their customers irrespective of the fact whether they have filed returns and remitted tax or not. It also cannot be disputed that even if sales tax is wrongly remitted and paid that would not absolve them from the responsibility of payment of service tax, if otherwise there is a liability to pay the same. If the article is not susceptible to tax under the Sales Tax Act, the amount of tax paid by the assessee could be refunded as the case may be or, the assessee has to follow the law as may be applicable. But we cannot accept a position in law that even if tax is wrongly remitted that would absolve the parties from paying the service tax if the same is otherwise found payable and a liability accrues on the assessee. The charges paid by the subscribers for procuring a SIM Card are generally processing charges for activating the cellular phone and consequently the same would necessarily be included in the value of the SIM Card.

19. There cannot be any dispute to the aforesaid position as the appellant itself subsequently has been paying service tax for the entire collection as processing charges for activating cellular phone and paying the service tax on the activation. The appellant also accepts the position that activation is a taxable service. The position in law is therefore clear that the amount received by the cellular telephone company from its subscribers towards SIM Card will form part of the taxable value for levy of service tax, for the SIM Cards are never sold as goods independent from

services provided. They are considered part and parcel of the services provided and the dominant position of the transaction is to provide services and not to sell the material i.e. SIM Cards which on its own but without the service would hardly have any value at all. Thus, it is established from the records and facts of this case that the value of SIM cards forms part of the activation charges as no activation is possible without a valid functioning of SIM card and the value of the taxable service is calculated on the gross total amount received by the operator from the subscribers. The Sales Tax authority understood the aforesaid position that no element of sale is involved in the present transaction.”

7. The aforesaid judgment of the Hon’ble Supreme Court would lay to rest the issue that the issuance of SIM cards would not therefore be amenable to sale tax.

8. As regards the others issue are concerned, a Division Bench of High Court of Andhra Pradesh in the case of **M/s.Bharath Sanchar Nigam Ltd.** (3 supra), by referring to the aforesaid judgments of the Hon’ble Supreme Court i.e., **Bharat Sanchar Nigam Ltd.** (1 supra) and **Idea Mobile Communication Ltd.** (2 supra), in conclusion paragraphs i.e., 62.2 and 62.3, has specially held that SIM cards, recharge coupon vouchers, mobile telephone rentals on post paid connections, value added services such as ring tones, music down loads, wall papers etc., and

proceeds received on sharing of infrastructure cannot be subjected to tax either under Section 4(1) or Section 4(8) of the A.P. VAT Act, 2005. While holding so, the Division Bench specifically held that telephone instruments, mobile handsets, modems and Caller ID instruments are “goods” both under Article 366(12) of the Constitution of India and Section 2(16) of the A.P. VAT Act, 2005. For ready reference, paras 62.2 and 62.3 are reproduced hereunder:-

“62.2 SIM Cards, recharge coupon vouchers, mobile telephone rentals on post paid connections, value added service such as ring tones, music down loads, wall papers etc., and proceeds received on sharing of infrastructure cannot be subjected to tax either under Section 4(1) or Section 4(8) of the Act.

62.3 Telephone instruments, mobile handsets, modems and Caller ID instruments’ are “goods” both under Article 366(12) of the Constitution of India and Section 2(16) of the Act”.

9. The aforesaid decision of the Andhra Pradesh High Court was subjected to challenge before the Hon’ble Supreme Court in the case of **Bharat Sanchar Nigam Ltd., through its Chief General Manager Vs. The State of Andhra Pradesh**⁵, wherein the Hon’ble Supreme Court held as under:

⁵ 2023 (73) G.S.T.L. 449 (SC)

“In the present case, the High Court held that SIM Cards, Rechargeable Coupons, Fixed Monthly Charges and Value-Added Services (towards SMS, ring tones, download music etc.) are not "goods". It relied upon not only the judgment in "Idea Mobile Communication” but also the judgments of this Court in "Bharat Sanchar Nigam Ltd. vs. Union of India [2006 (2) SCR 823], Associated Cement Companies Ltd. vs. Commissioner of Customs" [2001 (1) SCR 608] and Tata Consultancy Services vs. State of A.P." [2005 (1) SCC 308].

The High Court, however, remitted the matter for consideration for ascertainment of facts relating to levy of sales tax on non-refundable deposits and refundable deposits. It also held that the transactions relating to telephone sets, modems and caller IDs instruments are subject to sales tax levy.

Having considered submissions of the learned counsel for the parties and also having gone through the impugned judgment, this Court is of the opinion that no interference is called for especially in view of the fact that the High Court has taken note of all the decisions on the point.

Furthermore, in the recent judgment in C.A.Nos.11400-11401/2018 "Commissioner of Customs, Central Excise & Service Tax Vs. M/s. Suzlon Energy Ltd.", this Court has held in a slightly analogous context i.e., customized engineering drawings, are not "goods" but are essentially services and, therefore, subjected only to levy of service tax under the Finance Act, 1994.”

10. Similar is an order that was passed by a Division Bench of Madhya Pradesh High Court in the case of **M/s.Idea Cellular Ltd.** (4 supra), wherein again the same view was reiterated, relying upon the judgment of the Hon’ble Supreme Court in the cases of **Bharat Sanchar Nigam Ltd.** (1 supra) and **Idea Mobile Communication**

Ltd. (2 supra), and held that the provisions of the M.P. VAT Act, 2002 insofar as it relates to imposition of VAT on SIM replacement charges and lease line revenue to be *ultra-vires* and void.

11. In view of the aforesaid judicial pronouncements which lay to rest, the issue so far as recharge of coupons, SIM replacement charges and activation charges, etc., would be amenable to sales tax under the A.P. GST Act or not, we are of the considered opinion that the impugned re-assessment order dated 10.03.2004 for the year 2000-01 would not be sustainable and the same, therefore, deserves to be and is accordingly set aside/quashed.

12. The Writ Petition, to the aforesaid extent, stands allowed. No order as to costs. Consequently, miscellaneous petitions pending, if any, shall stand closed.

P.SAM KOSHY, J

N. TUKARAMJI, J

Date: 24.01.2024
Note: L.R. Copy to be marked.
B/o. TJMR