IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 15.09.2016

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.Nos.6532 to 6535 of 2010 &
M.P.Nos.1 to 1 of 2010 &
M.P.Nos.2 to 2 of 2010

Aircel Limited,
5th Floor, Spencer Plaza,
769 Anna Salai,
Chennai-600 002. .. Petitioner in all Writ Petitions

Versus

The Assistant Commissioner (CT),
T.Nagar (East) Assessment Circle,
46 Greenways Road,
Chennai-600 028. .. Respondent in all Writ Petitions

Prayer in all Writ Petitions: This Writ Petition is filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorari to call for the records on the file of the respondent herein in TNGST/1561102/1999-2000, 2000-2001, 2001-2002, 2002-2003, respectively, dated 22.02.2010, and quash the said order as illegal, contrary to law and without jurisdiction.

For Petitioner in all Writ Petitions: Mr.N.Sriprakash

For Respondents in all Writ Petitions: Mr.S.Kanmani Annamalai
Additional Government Pleader (Taxes)

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COMMON ORDER

Heard Mr.N.Sriprakash, learned counsel appearing for the petitioner in all Writ Petitions and Mr.S.Kanmani Annamalai, learned Additional Government Pleader, appearing for the respondent in all Writ Petitions.

2. In these Writ Petitions, the petitioner has challenged the order of Assessments under the provisions of the erstwhile Tamil Nadu General Sales Tax Act, 1959 for the Assessment

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years 1999-2000 to 2002-2003.

3. The petitioner is a Public Limited Company incorporated under the Companies Act, 1956 having registered Office at Chennai. The petitioner is a registered dealer on the file of the respondent under the provisions of the Tamil Nadu General Sales Tax Act, and presently under the Tamil Nadu Value Added Tax, 2006 (hereinafter referred as "the TNVAT Act") and the Central Sales Tax Act, 1956 (hereinafter referred as "the CST Act").

4. Though elaborate factual details have been set out in the affidavit in support of these Writ Petitions and submitted during the course of argument by the learned counsel for the petitioner and after hearing the matter elaborately, this Court finds the dispute in these Writ Petitions lies in a very narrow campus.

5. Though the Assessment orders seem to be very elaborate and would appear that it is a speaking order, on a closer reading of the same, it reveals that the Assessing Officer has merely extracted the objections given by the petitioner, and without assigning any reasons for rejecting the same, in one paragraph consisting about 5 to 8 lines, passed the impugned orders.

6. To decide the controversy in issue, it would be relevant to note that for all the four Assessment years common issues have been pointed out by the respondent, while issuing the pre-revision notices, dated 06.02.2007 and 03.02.2009.

7. The issues can be broadly classified into three categories, viz., the first category is termed by the petitioner as a "Service Income", the second category, the petitioner would term it as a "Miscellaneous Income" and third pertains to SIM Card. For better reference, the details given by the petitioner in a tabulated format for four Assessment years is quoted herein below:-

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" FOR THE ASSESSMENT YEAR 1999-2000

Sl. No.	*Income from Tele-cummunication Services*	*Nature of Income*	*Percentage on total demand*
1	**Airtime Charges**	These are charges collected from subscribers towards Extending Mobile Telephone Services by which subscribers can communicate to others while on the move and receive calls. These are call charges which are calculated on per minute basis.	11.46
2	**Recurring Charges**	Represents fixed amount collected from subscribers every month towards usage of Mobile Services	35.37

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Sl. No.	Income from Tele-cummunication Services	Nature of Income	Percentage on total demand
3	**Connection/ Activation Charges**	An amount collected for activating connection to a subscriber in the Net work. During activation details such as subscribers name, address and facilities that the subscriber is likely to avail is entered in the system	21.98
4	**Public Switch Telephone Network (PSTN)**	These are charges collected from the subscribers. And paid to other operators.	11.37
5	**Value Added Services**	These are charges for additional facilities such as call conferencing, SMS, Call wait etc.	2.11
6	**Inter connect charges**	These are charges billed to customers towards call made to Telephone Nos. allotted by other Mobile Phone operators	-
7	**Income from Bandwidth**	These are charges collected for browsing on cellphone.	-
8	**Plan Enrollment fee**	These are charges collected for maintaining details of tariff plan selected by a subscribers in the net work.	-
9	**Easy Deal Processing Fee**	On postpaid connection, service is provided by way of recharge. Processing fee is collected towards maintaining record of utilization of Telephone Service	-
10	**Residual Income**	It includes charges for the bills to the subscribers such as late fee, itemised billing, number changes, dehotlining charges & reactivation charges	0.51
11	**Miscellaneous service income**	One time processing fee, SMS one time enrollment fee expired talk time	-
12	**Lease Charges**	Charges for dedicated line to a subscriber	-
	Total income from Telecommunication Services		**82.80**
	Income from sale of assets & other miscellaneous income		
1	**Rent from building**	Rent received from others who shared office premises with Aircel	0.14
2	**Interest of deposits**	Interest received from the bankers for the short term deposits	14.31
3	**Sale of Assets**	Sale of video conferencing equipments & Plant and Machinery	0.26
4	**Sale of scraps**	Sale of discarded materials, wooden scraps & Newspapers	-
5	**Financial Charges from agent**	Finance charges recovered from agent on account of delayed receipt of receivables/outstanding	-
6	**Recovery from employees**	Received from resigned employees on account of notice period, as per terms and conditions of appointment letter	-
7	**Income from Volvo truck**	Own truck let on hire basis during idle time	-
	Total income from sale of assets & other miscellaneous income		**14.71**
1	**SIM Card**	Providing Sim card to the customers in the course of services	2.49
			-
		Total Turnover	**100.00**

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FOR THE ASSESSMENT YEAR 2000-2001

Sl. No.	*Income from Tele-cummunication Services*	*Nature of Income*	*Percentage on total demand*
1	**Airtime Charges**	These are charges collected from subscribers towards Extending Mobile Telephone Services by which subscribers can communicate to others while on the move and receive calls. These are call charges which are calculated on per minute basis.	32.38
2	**Recurring Charges**	Represents fixed amount collected from subscribers every month towards usage of Mobile Services	45.34
3	**Connection/ Activation Charges**	An amount collected for activating connection to a subscriber in the Net work. During activation details such as subscribers name, address and facilities that the subscriber is likely to avail is entered in the system	14.31
4	**Public Switch Telephone Network (PSTN)**	These are charges collected from the subscribers. And paid to other operators.	2.21
5	**Value Added Services**	These are charges for additional facilities such as call conferencing, SMS, Call wait etc.	0.12
6	**Inter connect charges**	These are charges billed to customers towards call made to Telephone Nos. allotted by other Mobile Phone operators	0.01
7	**Income from Bandwidth**	These are charges collected for browsing on cellphone.	0.02
8	**Plan Enrollment fee**	These are charges collected for maintaining details of tariff plan selected by a subscribers in the net work.	-
9	**Easy Deal Processing Fee**	On postpaid connection, service is provided by way of recharge. Processing fee is collected towards maintaining record of utilization of Telephone Service	-
10	**Residual Income**	It includes charges for the bills to the subscribers such as late fee, itemised billing, number changes, dehotlining charges & reactivation charges	0.06
11	**Miscellaneous service income**	One time processing fee, SMS one time enrollment fee expired talk time	-
12	**Lease Charges**	Charges for dedicated line to a subscriber	-
	Total income from Telecommunication Services		**94.45**
	Income from sale of assets & other miscellaneous income		
1	**Rent from building**	Rent received from others who shared office premises with Aircel	0.02
2	**Interest of deposits**	Interest received from the bankers for the short term deposits	3.75
3	**Sale of Assets**	Sale of video conferencing equipments & Plant and Machinery	0.29
4	**Sale of scraps**	Sale of discarded materials, wooden scraps & Newspapers	0.01
5	**Financial Charges from agent**	Finance charges recovered from agent on account of delayed receipt of receivables/outstanding	0.03
6	**Recovery from employees**	Received from resigned employees on account of notice period, as per terms and conditions of appointment letter	0.04
7	**Income from Volvo truck**	Own truck let on hire basis during idle time	0.06

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Sl. No.	Income from Tele-cummunication Services	Nature of Income	Percentage on total demand
	Total income from sale of assets & other miscellaneous income		**4.21**
1	**SIM Card**	Providing Sim card to the customers in the course of services	1.34
			-
	Total Turnover		**100.00**

FOR THE ASSESSMENT YEAR 2001-2002

Sl. No.	Income from Tele-cummunication Services	Nature of Income	Percentage on total demand
1	**Airtime Charges**	These are charges collected from subscribers towards Extending Mobile Telephone Services by which subscribers can communicate to others while on the move and receive calls. These are call charges which are calculated on per minute basis.	21.10
2	**Recurring Charges**	Represents fixed amount collected from subscribers every month towards usage of Mobile Services	51.35
3	**Connection/ Activation Charges**	An amount collected for activating connection to a subscriber in the Net work. During activation details such as subscribers name, address and facilities that the subscriber is likely to avail is entered in the system	3.32
4	**Public Switch Telephone Network (PSTN)**	These are charges collected from the subscribers. And paid to other operators.	16.00
5	**Value Added Services**	These are charges for additional facilities such as call conferencing, SMS, Call wait etc.	2.75
6	**Inter connect charges**	These are charges billed to customers towards call made to Telephone Nos. allotted by other Mobile Phone operators	0.01
7	**Income from Bandwidth**	These are charges collected for browsing on cellphone.	-
8	**Plan Enrollment fee**	These are charges collected for maintaining details of tariff plan selected by a subscribers in the net work.	2.58
9	**Easy Deal Processing Fee**	On postpaid connection, service is provided by way of recharge. Processing fee is collected towards maintaining record of utilization of Telephone Service	0.48
10	**Residual Income**	It includes charges for the bills to the subscribers such as late fee, itemised billing, number changes, dehotlining charges & reactivation charges	-
11	**Miscellaneous service income**	One time processing fee, SMS one time enrollment fee expired talk time	-
12	**Lease Charges**	Charges for dedicated line to a subscriber	-
	Total income from Telecommunication Services		**97.58**
	Income from sale of assets & other miscellaneous income		
1	**Rent from building**	Rent received from others who shared office premises with Aircel	-

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Sl. No.	Income from Tele-cummunication Services	Nature of Income	Percentage on total demand
2	**Interest of deposits**	Interest received from the bankers for the short term deposits	1.67
3	**Sale of Assets**	Sale of video conferencing equipments & Plant and Machinery	0.05
4	**Sale of scraps**	Sale of discarded materials, wooden scraps & Newspapers	-
5	**Financial Charges from agent**	Finance charges recovered from agent on account of delayed receipt of receivables/outstanding	-
6	**Recovery from employees**	Received from resigned employees on account of notice period, as per terms and conditions of appointment letter	-
7	**Income from Volvo truck**	Own truck let on hire basis during idle time	-
Total income from sale of assets & other miscellaneous income			**1.72**
1	**SIM Card**	Providing Sim card to the customers in the course of services	0.70
			-
		Total Turnover	**100.00**

FOR THE ASSESSMENT YEAR 2002-2003

Sl. No.	Income from Tele-cummunication Services	Nature of Income	Percentage on total demand
1	**Airtime Charges**	These are charges collected from subscribers towards Extending Mobile Telephone Services by which subscribers can communicate to others while on the move and receive calls. These are call charges which are calculated on per minute basis.	23.34
2	**Recurring Charges**	Represents fixed amount collected from subscribers every month towards usage of Mobile Services	50.37
3	**Connection/ Activation Charges**	An amount collected for activating connection to a subscriber in the Net work. During activation details such as subscribers name, address and facilities that the subscriber is likely to avail is entered in the system	2.28
4	**Public Switch Telephone Network (PSTN)**	These are charges collected from the subscribers. And paid to other operators.	15.55
5	**Value Added Services**	These are charges for additional facilities such as call conferencing, SMS, Call wait etc.	2.52
6	**Inter connect charges**	These are charges billed to customers towards call made to Telephone Nos. allotted by other Mobile Phone operators	-
7	**Income from Bandwidth**	These are charges collected for browsing on cellphone.	-
8	**Plan Enrollment fee**	These are charges collected for maintaining details of tariff plan selected by a subscribers in the net work.	0.08
9	**Easy Deal Processing Fee**	On postpaid connection, service is provided by way of recharge. Processing fee is collected towards maintaining record of utilization of Telephone Service	2.29

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Sl. No.	Income from Tele-cummunication Services	Nature of Income	Percentage on total demand
10	**Residual Income**	It includes charges for the bills to the subscribers such as late fee, itemised billing, number changes, dehotlining charges & reactivation charges	-
11	**Miscellaneous service income**	One time processing fee, SMS one time enrollment fee expired talk time	-
12	**Lease Charges**	Charges for dedicated line to a subscriber	0.30
	Total income from Telecommunication Services		**96.74**
	Income from sale of assets & other miscellaneous income		
1	**Rent from building**	Rent received from others who shared office premises with Aircel	0.01
2	**Interest of deposits**	Interest received from the bankers for the short term deposits	1.94
3	**Sale of Assets**	Sale of video conferencing equipments & Plant and Machinery	0.65
4	**Sale of scraps**	Sale of discarded materials, wooden scraps & Newspapers	-
5	**Financial Charges from agent**	Finance charges recovered from agent on account of delayed receipt of receivables/outstanding	-
6	**Recovery from employees**	Received from resigned employees on account of notice period, as per terms and conditions of appointment letter	-
7	**Income from Volvo truck**	Own truck let on hire basis during idle time	-
	Total income from sale of assets & other miscellaneous income		**2.61**
1	**SIM Card**	Providing Sim card to the customers in the course of services	0.65
			-
		Total Turnover	**100.00**

" 8. So far as the Airtime Charges are concerned, it would fall in Serial No.1 of the first set, which the petitioner terms it as "Service Income". The Assessing Officer has referred to the petitioner's objection, wherein, the petitioner has stated that the Airtime Charges are collected from the subscribers towards Extending Mobile Telephone Services by which subscribers can communicate to others while on the move and receive calls as well, Air time charges represent call charges for originating by mobile subscriber. The tariff is dependent on the plan under which a subscriber has enrolled on the network. The call charges per call will depend on plan tariff and call durations. This is only a service and there is no transfer of goods or sales to attract the provisions of the TNGST Act. After extracting the above objection, the respondent has rejected the same by referring to the decision of the Kerala High Court in the case of Tvl.Escotel Mobile Communications Ltd., Vs. Union of India and others reported in 126 STC 175. This appears to be the common

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feature in respect of all the 12 heads in the first column, it cannot be disputed that the said finding recorded by the Assessing Officer is wholly erroneous in the light of the decision of the Hon'ble Supreme Court in the case of BSNL Vs. Union of India reported in 145 STC 1991, which has held that the decision in the case of Escotel, the Court erred in rendering such a finding. At this juncture, it would be relevant to quot a paragraph No.87 of the decision of the Hon'ble Supreme Court:-

> It is not possible for this Court to opine finally on the issue. What a SIM card represents is ultimately a question of fact as has been correctly submitted by the States. In determining the issue, however the Assessing Authorities will have to keep in mind the following principles: If the SIM Card is not sold by the assessee to the subscribers but is merely part of the services rendered by the service providers, then a SIM card cannot be charged separately to sales tax. It would depend ultimately upon the intention of the parties. If the parties intended that the SIM card would be a separate object of sale, it would be open to the Sales Tax Authorities to levy sales tax thereon. There is insufficient material on the basis of which we can reach a decision. However we emphasise that if the sale of a SIM card is merely incidental to the service being provided and only facilitates the identification of the subscribers, their credit and other details, it would not be assessable to sales tax. In our opinion the High Court ought not to have finally determined the issue. In any event, the High Court erred in including the cost of the service in the value of the SIM card by relying on the aspects doctrine. That doctrine merely deals with legislative competence. As has been succinctly stated in Federation of Hotel & Restaurant Association of India Vs. Union of India (1989) 3 SCC 634- "subjects which in one aspect and for one purpose fall within the power of a particular legislature may in another aspect and for another purpose fall within another legislative power. They might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is overlapping does not detract from the distinctiveness of the aspects". No one denies the legislative competence of States to levy sales tax on sales provided that the necessary concomitants of a sale are present in the transaction and the sale is distinctly discernible in the transaction.

Therefore, the conclusion of the Assessing Officer under the

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said head, which is termed as "Service Income" by the petitioner calls for interference.

9. With regard to the other head viz., which, the petitioner terms it as a "Miscellaneous Income" in Serial Nos.1 to 7 of the table is concerned, the learned counsel for the petitioner would submit that the petitioner is ready and willing to file an Appeal after effecting pre-deposit. This submission is taken on record and the Court will grant time to file an Appeal.

10. The third issue, which is the major issue pertains to SIM Card. The respondent has discussed about the same in the impugned order; has referred to the objections given by the petitioner in the impugned Assessment Orders; has stated that the petitioner has not furnished the Net Purchase Value of SIM Cards delivered to the subscribers during the relevant year and in the absence of the same, it could be assessed to tax as deemed sale value of SIM Card.

11. As pointed by the learned counsel for the petitioner in the objections given by the petitioner, the petitioner has stated that no sales tax can be charged on the value of SIM Card and in the petitioner's case since the SIM is merely incidental to the service, the petitioner has also given the details of the purchases effected by their vendors viz., M/s.Gemplus India P Ltd., and has also given the cost incurred by them and other details. This aspect of the matter, though was verbatim extracted by the Assessing Officer while completing the Assessment, erroneously stated that there are no records available. Even assuming if there are no records, nothing prevented the Assessing Officer to direct the petitioner to produce necessary records. Therefore, the Assessment on said head, calls for interference.

12 . Accordingly, these Writ Petitions are partly allowed on the following terms:

(i) The findings with regard to the classification under "Service Income" (which is classified by the petitioner) which are Airtime charges, Recurring Charges, Connection / Activation Charges, Public Switch Telephone Network (PSTN), Value Added Services, Inter Connect charges, Income from Bandwidth, Plan Enrolment fee, Easy Deal Processing fee, Residual income, Miscellaneous service income, Lease charges, are set-aside and the matters are remanded to the Assessing Officer for fresh consideration.

(ii) With regard to the finding recorded by the Assessing Officer under the heads viz., Rent from building, Interest of deposits, Sale of Assets, Sale of Scraps, Financial Charges from agent, Recovery from employees, Income from volvo truck,

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is concerned, liberty is granted to the petitioner to file an Appeal before the Appellate Authority and if the Appeal is filed within a period of 30 days from the date of receipt of a copy of this order, the Appellate Authority shall entertain the Appeal without reference to limitation, as these Writ Petitions have been pending before this Court, since 2010 onwards.

(iii) So far as the finding rendered on the issue relating to the SIM Cards, the same is set-aside and the matters are remanded to the Assessing Officer for fresh consideration and the respondent shall take into consideration the decision of the Hon'ble Supreme Court in the case of BSNL Vs. Union of India reported in 145 STC 1991, particularly in paragraph No.87, and the respondent shall afford an opportunity of personal hearing to the petitioner and redo the Assessments in accordance with law.

No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS IV)

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Sub Assistant Registrar

r n s

To
The Assistant Commissioner (CT),
T.Nagar (East) Assessment Circle,
46 Greenways Road,
Chennai-600 028.

1 cc to Special Government Pleader(Taxes), sr.52418
1 cc to Mr.N.Inbarajan, Advocate, sr.52394

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