IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.09.2016

CORAM:

THE HON'BLE MR. JUSTICE T.S.SIVAGNANAM

Writ Petition No.36562 of 2015
& M.P.No.1 of 2015

M/s. S.R.P.Enterprises,
Rep. By its Proprietor, S.Ramesh,
No.87/1, Anna Salai,
Chennai - 600 002 ... Petitioner

Versus

The Deputy Commercial Tax Officer,
Chepauk Assessment Circle,
PAPJM Buildings, 1st Floor,
No.1, Greams Road, Chennai - 600 006 ... Respondent

Prayer:- Petition filed under Article 226 of the Constitution of India, seeking for the issuance of Writ of Certiorari to call for the records of the respondent in TIN:33366275745 / 2014-15 and to quash the impugned order, dated 12.06.2015.

For Petitioner : Mr. V.Sundareswaran

For Respondent : Mr. S.Kanmani Annamalai,
Additional Government Pleader

O R D E R

Heard Mr.V.Sundareswaran, learned counsel appearing for the petitioner and Mr.S.Kanmani Annamalai, learned Additional Government Pleader appearing for the respondent. By consent of the learned counsel for both sides, the writ petition is taken up for final disposal.

2. The petitioner, who is a registered dealer, on the file of the respondent under the provisions of the Tamil Nadu Value Added Tax Act, 2006, (hereinafter will be referred to as "TNVAT Act) has filed this writ petition, challenging the order of assessment dated 12.06.2015 for the assessment year 2014-15.

3. The petitioner's case is that they are selling recharge vouchers for mobile Sim Cards and the same is not

taxable. However, the respondent has proposed the tax on the transactions partly due to mistake committed by the dealers.

4. The legal issue on this aspect has been settled in the case of BSNL v. Union of India and Others, reported in (2006) (145) S.T.C. 91, which was considered by the Hon 'ble Supreme Court in the case of Idea Mobile Communication Ltd., v. Commissioner of Central Excise and Customs, Cochin, reported in 2011 (23) S.T.R. 433 (S.C.), wherein the Hon 'ble Supreme Court held as follows:-

> "13. It would be appropriate to mention that later on the said Escotel Mobile Communications Ltd. merged with the appellant company i.e., M/s. Idea Mobile Communication Ltd. The aforesaid decision of the Kerala High Court was under challenge in this Court in the case of BSNL vs. Union of India reported in (2006) 3 SCC 1. The Supreme Court has framed the principal question to be decided in those appeals as to the nature of transaction by which mobile phone connections are enjoyed. The question framed was, is it a sale or is it a service or is it both. In paragraphs 86 and 87 of the Judgment the Supreme Court has held thus: -
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> > 86. In that case Escotel was admittedly engaged in selling cellular telephone instruments, SIM cards and other accessories and was also paying Central sales tax and sales tax under the Kerala General Sales Tax Act, 1963 as applicable. The question was one of the valuation of these goods. The State Sales Tax Authorities had sought to include the activation charges in the cost of the SIM card. It was contended by Escotel that the activation was part of the service on which service tax was being paid and could not be included within the purview of the sale. The Kerala High Court also dealt with the case of BPL, a service provider. According to BPL, it did not sell cellular telephones. As far as SIM cards were concerned, it was submitted that they had no sale value. A SIM card merely represented a means of the access and identified the subscribers. This was part of the service of a telephone connection. The

Court rejected this submission finding that the SIM card was "goods" within the definition of the word in the State Sales Tax Act.

87. 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 Assn. of India v. Union of India: (SCC pp. 652-53, paras 30-31) " `... 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'.

* * *

> There 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."

> 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."

5. Thus, in the light of the above decisions, the legal position, which emerges is that there was no element of sale involved in the sale of Sim Cards or recharge vouchers. If the petitioner had filed appropriate returns, then there would not have been any problem in that regard and by applying the decisions of the Hon'ble Supreme Court, the Assessing Authority would have treated the sale as "exempted sale". However, while submitting the returns, though in the annexure, the petitioner had mentioned it as "exempted goods", while giving the commodity code, the petitioner gave the wrong commodity code, by mentioning it as "363", which is the

commodity code for Television Sets. This resulted in an impugned assessment being made and tax being demanded.

6. After receiving the impugned order, the petitioner came to know about the mistake and immediately, thereafter, has submitted a representation, dated 29.07.2015, bringing to the notice of the respondent about the mentioning of the wrong commodity code. This request has been rejected by the respondent on the ground that the respondent did not find any reasonable cause for revising the assessment.

7. After hearing the learned counsels for the parties and after perusing the materials placed on record, two issues have to be pointed out in this writ petition. Firstly, the legal aspect cannot be disputed by the respondent as it is covered by the aforestated decisions. The second aspect is that, if some mistake has been committed by the dealer, can he be given an opportunity to rectify the mistake. Undoubtedly, Section 84 of the TNVAT Act, provides for such a remedy and the Assessing Officer is empowered to rectify the mistake.

8. If such is the situation, then the next question would be what sought of mistakes that can be rectified. It may be true that the power of rectification is not equivalent to the power of review. However, if on account of the mathematical error committed by the dealer resulted in a wrong assessment imposing higher rate of tax, in the considered view of this Court, such mathematical error can be corrected. This is what was requested by the petitioner stating that he has wrongly given the commodity code. That apart, the petitioner would state that he has got all the purchase bills and documents to prove that the nature of business conducted by him was only the sale of recharge coupons.

9. In such circumstances, this Court is of the view that the assessment can be re-done, after giving due opportunity to the petitioner. Accordingly, the writ petition is allowed, the impugned order, dated 12.06.2015, is set-aside and the matter is remanded back to the respondent, for fresh consideration, who shall afford an opportunity of personal hearing to the petitioner, verify all the purchase bills and documents and re-do the assessment, in accordance with law. No costs. Consequently, the connected MP is closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

srk

To

The Deputy Commercial Tax Officer,
Chepauk Assessment Circle,
PAPJM Buildings, 1st Floor,
No.1, Greams Road, Chennai - 600 006.

+1cc to Mr.V.Sundareswaran, Advocate, S.R.No.52489
+1cc to the Special Government Pleader(T), S.R.No.52408

W.P.No.36562 of 2015
& M.P.No.1 of 2015

ALA(CO)
CA(28/09/2016)