

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**CWP No.2618 of 1997
Date of decision: 3.2.2016**

Union of India and another

.....Petitioners

Vs.

State of Punjab and another

.....Respondents

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MRS. JUSTICE RAJ RAHUL GARG**

Present: Mr. Anil Rathee, Advocate for the petitioners.

Ms.Sudeepti Sharma, DAG, Punjab.

Ajay Kumar Mittal,J.

1. This order shall dispose of CWP Nos.2618 to 2622 of 1997 as learned counsel for the parties are agreed that the issue involved in all the petitions is identical. However, the facts are being extracted from CWP No.2618 of 1997.

2. Prayer in CWP No.2618 of 1997 is for quashing the impugned amendment of section 2(h)(iv) of the Punjab General Sales Tax Act, 1948 (in short, "the PGST Act") No.8 of 1987 being violative of principles of natural justice and the provisions of the Constitution of India. Further prayer has been made for quashing the assessment order dated 8.1.1997, Annexure

P.3 passed by the assessing authority directing the petitioners to deposit ₹

6,86,098/- as sales tax and additional sales tax and for restraining the respondents from recovering the amount from the petitioners.

3. A few facts relevant for the decision of the controversy involved as narrated in CWP No.2618 of 1997 may be noticed. The petitioners represent the department of Telecommunications, Government of India and discharge their functions framed thereunder. In discharging their statutory functions under the Indian Telegraph Act, 1885 (in short, “the 1885 Act”) and the Indian Telegraph Rules, 1951 (in short, “the Rules”), as amended from time to time, the petitioners department provides telecommunication facilities all over India to various subscribers on the terms and conditions determined by the Central Government with reference to the mandate of 1885 Act and the Rules framed thereunder. One of the important functions that the petitioners discharge is of providing telecommunication facilities by establishing telephone exchanges at various places for the purpose of providing telephone connections to its various subscribers at places desired by them. Rental for telephone connections is therefore charged by the petitioners department from its various subscribers keeping in view different considerations including the strength of the Exchange system to which the telephone connections in question relate. The rental so charged on monthly or yearly basis varies from ₹ 150/- to ₹ 275/- for two months for various kinds of exchanges depending upon their total capacity. The rental keeps varying from time to time on the basis of variation in the cost of production of equipment, maintenance of equipment, wage structure of the employees employed for giving service to the subscribers. By the Constitution (Forty Sixth amendment) Act, 1982, Clause

29-A was inserted in Article 366 w.e.f 2.2.1983 which reads thus:-

“Article 366. Definition: In this Constitution, unless the context otherwise requires, the following expressions have, the meaning hereby respectively assigned to them, that is to say.....

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

(29A) “tax on the sale or purchase of goods” includes

(a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(b) a tax on the transfer of property in goods (whether as goods or in some other form) invoked in the execution of a works contract;

(c) a tax on the delivery of goods on hire purchase or any system of payment by instalments;

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is

made;”

On the basis of the above amendment, the State of Punjab amended PGST Act by Punjab Act No.8 of 1988, the relevant part of which reads thus:-

“2(h) “sale” means any transfer of property in goods other than goods specified in Schedule 'C' for cash, deferred payment or other valuable consideration and includes:-

- i) transfer, otherwise than in pursuance of a contract of property in any goods for cash, deferred payment or other valuable consideration;
- ii) transfer, of property in goods (whether as goods or in some other form) involved in the execution of a works contract;
- iii) delivery of goods on hire purchase or any system of payment by instalments;
- iv) transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
- v) supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;
- vi) supply by way of or as part of any service or in any other manner whatsoever, of goods, be being food or any other article for human consumption or any drink (whether or not intoxicating) where such supply or service is for cash, deferred payment or other valuable consideration;

and such transfer, delivery or supply of any goods shall be deemed to be a sale of these goods by the person making the transfer, delivery or supply is made but does not include a mortgage, hypothecation, charge or pledge.”

On the strength of the amendment made to the PGST Act, respondent No.2 issued a notice for assessment for the years 1991-92 to 1995-96 for assessing the petitioners in view of Section 2(h)(iv) of the PGST Act. The petitioners submitted reply, Annexure P.2 to the notice. The petitioners were asked to deposit the assessed amount vide order dated 8.1.1997, Annexure P.3 and penalty proceedings were also initiated. Hence the instant writ petitions by the petitioners.

4. A written statement has been filed on behalf of the respondents. A preliminary objection has been raised that the petitioner has an efficacious alternative remedy of appeal under section 20 of the PGST Act. On merits, it has been inter alia stated that with the insertion of Clause 29-A in Article 366 of the Constitution of India, the ambit of entry 54 of list second of the 7th Schedule had widened to a considerable extent which provides definition of "Tax on the sale or purchase of goods". The definition brought within its ambit not only legal but fictional sale including tax on the transfer of the right to use any goods for any purpose (whether or not for specified period) for cash, deferred payment or other valuable consideration. The order passed by the respondents is thus legal and valid. On these premises, prayer for dismissal of the petition has been made.

5. We have heard learned counsel for the parties.

6. The primary issue revolves around validity of Section 2(h)(iv) of the PGST Act i.e. transfer of the right to use any goods for any purpose. The petitioners-Department of telecommunications is providing telecommunication facilities to the consumers. For applying a telephone connection, every consumer has to file an application on specific proforma

and on turn a telephone connection is provided by the department alongwith a telephone set/apparatus for which lump sum rent fixed by the department is received. The issue has already been considered in detail by the Apex Court and various High Courts. The Apex Court in ***Bharat Sanchar Nigam Limited and another vs. Union of India and others***, (2006) 3 SCC 1, while interpreting the provisions of Article 366(29-A)(d) of the Constitution of India and after elaborately considering the relevant statutory provisions and the case law on the point, summarized the legal position holding that goods in telecommunication do not include the carrier electromagnetic waves or radio frequencies and hence there cannot be any transfer of user of any goods under Article 366(29-A)(d) of the Constitution of India with respect to the telephone service/call itself as there are no deliverable goods involved therein. It was further recorded that a telephone service is nothing but a service. However, nature of the transaction involved in providing the telephone connection may be a composite transaction of service and sale. It is possible for the State to tax the sale element to the extent relatable to such sales. It would be apposite to quote the issues considered by the Apex Court and the conclusion recorded thereon:-

Issues

“32. These broadly speaking are the respective contentions and in our opinion, the issues which arise for consideration in these matters are:-

- A) What are "goods" in telecommunication for the purposes of [Article 366 \(29A\)\(d\)](#)?
- B) Is there any transfer of any right to use any goods by providing access or telephone connection by the telephone service provider to a subscriber ?

C) Is the nature of the transaction involved in providing telephone connection a composite contract of service and sale? If so, is it possible for the States to tax the sale element?

D) If the providing of a telephone connection involves sale is such sale an inter state one?

E) Would the "aspect theory" be applicable to the transaction enabling the States to levy sales tax on the same transaction in respect of which the Union Government levies service tax?

Conclusions:

“91. As far as the question whether providing of a telephone connection involves interstate sales, now that it has been clarified that electromagnetic waves or radio frequencies are not goods, the issue is really academic. For the reasons aforesaid, we answer the questions formulated by us earlier in the following manner:

A) Goods do not include electromagnetic waves or radio frequencies for the purpose of [Article 366\(29A\) \(d\)](#). The goods in telecommunication are 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 service 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.”

7. Further, in ***Union of India and another vs. State of Haryana and another***, CWP No.5820 of 1994 decided by this Court on 27.11.2000, vires of similar provision in Haryana have been upheld. After examining the relevant statutory provision and perusing the decisions rendered by Andhra and Allahabad High Courts, it was noticed as under:-

“An issue similar to the one raised in these petitions was considered by the Division benches of Andhra Pradesh High Court and the Allahabad High Court. In Civil Writ Petition Nos.25884 and 11826 of 1997 and 6742 of 1998 titled **Union of India and others vs. Secretary, Revenue and another**, a Division bench of the Andhra Pradesh High Court held as under:-

“Telephone facility is not merely installation of telephone instrument at the consumer's residence. It is in fact maintenance of a system at an exchange which exchange is connected by way of the instrument which is placed at the consumer's place. The instrument in itself is a useless thing unless it is connected to a system. It becomes only a service once it is connected to a system by Telecommunications department and as such there is no transfer of any tangible thing to the consumer only a facility is provided which by no stretch of imagination can be transferred as goods.”

Similarly, in Civil Writ Petition No.115 of 1995, ***Union of India and another vs. State of UP and another***, a Division bench of the Allahabad High Court held as under:-

“But what has constrained the court is that the State of UP not sovereign under the Constitution and in its functions in juxtaposition to the Government of India was destroying the subject which it was taxing. The subject

was torn out of context. It is a cardinal principle that tax is an incidence and may be extracted but not destroy the subject. The State of UP is not a superior sovereign power more so in the context of the Constitution of India where the delicate balance has clearly been separated on who may tax whom and with what immunity including exemptions. The Supreme Court in *re: New Delhi Municipal Committee* (supra), in no uncertain terms, has held that the Union of India enjoys immunity from State taxation. The States of the Union are protected by exemptions referred to in Article 289 of the Constitution of India.”

We respectfully agree with the views expressed by the Andhra Pradesh and Allahabad high Courts and add that what the petitioners are charging is the rent for connecting instrument placed in the premises of the subscriber with the Telephone Exchange by way of telegraphic lines. Till the instrument is connected with the telegraph lines to the telephone exchange, the instrument placed in the premises of the subscriber is useless. Through the telegraph lines, the apparatus receives the telegraphic or other communication by means of electricity. So the petitioners are charging the rent for telegraphic lines including the instrument. Therefore, mere charge of the rent or fee as per measured rate system or message rate system cannot be equated with sale of goods or deemed sale of goods within the meaning of the 1973 Act. As a logical corollary to the aforementioned conclusion, we hold that the orders of assessment passed by respondent No.2 and the demand notices issued by him are without jurisdiction and the same are liable to be quashed as such.”

8. Accordingly, following the pronouncement of the Division Bench of this Court in *State of Haryana's* case (supra), the provisions of Section 2(h)(iv) of the PGST Act defining “sale” are held to be valid and

constitutional being *pari materia* to the provisions contained in Haryana General Sales Tax Act, 1973. However, the assessing authority has recorded that the transfer of right to use the telephone sets/apparatus by the consumer against the rent is a sale in view of the amended provisions of section 2(h) (iv) of the PGST Act. Consequently, the rent received by the department has been held to be taxable. In view of the aforesaid authoritative pronouncement of the Apex court and also the Division Bench of this Court as noticed hereinbefore, the contract between the subscribers and the service provider cannot be interpreted as involving transfer of right to use goods. Consequently, the imposition of sales tax on any facilities of the telecommunication services is untenable in law. As a result, the impugned assessment orders Annexure P.3 in all the petitions are quashed. All the writ petitions stand allowed.

(vbnAjay Kumar Mittal)
Judge

February 03, 2016
'gs'

(Raj Rahul Garg)
Judge