IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 16.03.2018

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THE HONOURABLE Mr.JUSTICE T.S.SIVAGNANAM

W.P.No.12611 of 2006
and W.P.M.P.No.14203 of 2006

Tvl.Mahanth Enterprises,
Rep. by its Partner,
Sri RM.Ramasamy,
11, First Cross Street,
Trustpuram, Chennai-24. ... Petitioner

Vs.

1. The State of Tamil Nadu,
Rep. by the Secretary to Government,
Department of Commercial Taxes,
Fort St. George, Chennai-9.

2. The Union of India,
Rep. by the Secretary,
Ministry of Finance,
Department of Revenue,
New Delhi.

3. The Commercial Tax Officer,
Vadapalani-II Assessment Circle,
Sire Mansion, 1st Floor,
621, Anna Salai,
Chennai-6. ... Respondents

Writ Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Declaration declaring the 1st respondent, State of Tamil Nadu and its officers and agents are incompetent either to legislate for or impose and realise sales tax and re-sale tax under any power conferred under serial No.54, List II of the Seventh Schedule to the Constitution of India, on the services provided by Cellular Mobile Telephone service providers, operating under the licence issued by the Department of Telecommunications, Ministry of Communications, Government of India, under Section 4 of the Indian Telegraph Act, 1985, directly or through their distributors or agents like the petitioners by way of recharge coupon and that resultantly the demands and notices requiring payment of such taxes under the provisions of Tamil Nadu General Sales Tax Act 1959 are ultra vires Articles 265, 269[3], 286 and 366[29-A] and violative of Articles 14, 19[1][g] and 300A of the Constitution of India.

For Petitioner	:	Mr.N.Murali
For Respondents	:	Mr.M.Hariharan, AGP for R1 and R3
	:	Mr.A.P.Srinivas for R2

O R D E R

Heard Mr.N.Murali, learned counsel for the petitioner and Mr.M.Hariharan, learned Additional Government Pleader for the respondents 1 and 2 and Mr.A.P.Srinivas, learned counsel for the third respondent.

2.This Writ Petition has been filed seeking Writ of Declaration to declare the first respondent and its officers and agents are incompetent either to legislate or to impose and realise sales tax and re-sale tax under any power conferred under serial No.54, List II of the Seventh Schedule to the Constitution of India, on the services provided by Cellular Mobile Telephone service providers, operating under the licence issued by the Department of Telecommunications, Ministry of Communication, Government of India, under Section 4 of the Indian Telegraph Act, 1985, directly or through their distributors or agents like the petitioners by way of recharge coupon and that resultantly the demands and notices requiring payment of such taxes under the provisions of Tamil Nadu General Sales Tax Act, 1959 are ultra vires.

3.Though such prayer has been sought for, it may not be necessary for the Court to place the matter before the Hon'ble Division Bench, since the legal issue has been settled by the Hon'ble Supreme Court in the case of BSNL Vs Union of India and Others reported in [2006] [145] STC 91 which was considered by the Hon'ble Supreme Court in the case of Idea Mobile Communication Ltd. Vs Commissioner of Central Excise and Customs, Cochin, reported in 2011 [23] STR 433 [SC]. In the said decision, the Hon'ble Supreme Court has 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: -

> 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.
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> 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 Vs 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."

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.

4.Following the decisions, the Writ Petition is allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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To

1. The Secretary to Government,
State of Tamil Nadu,
Department of Commercial Taxes,
Fort St. George,
Chennai-9.

2. The Secretary,
Union of India,
Ministry of Finance,
Department of Revenue,
New Delhi.

3. The Commercial Tax Officer,
Vadapalani-II Assessment Circle,
Sire Mansion, 1st Floor,
621, Anna Salai,
Chennai-6.

+1cc to Mr.A.P.Srinivas, Advocate, S.R.No.20231
+1cc to the Special Government Pleader(T), S.R.No.20726

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and
W.P.M.P.No.14203 of 2006

KAN(CO)
CS/05/04/18