

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 24.01.2019

CORAM
THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR
W.P.Nos.4499 & 4500 of 2011
and M.P.Nos.2 and 2 of 2011

M/s.P.R.Mani Air Fridge & Electronics
Rep.by its Managing Partner P.Rajamani,
No.154, Car Street,
Tiruvannamalai,
Tiruvannamalai District. ... Petitioner in both W.Ps.

vs.

The Assistant Commissioner (CT),
Tiruvannamalai-I,
Tiruvannamalai District. ... Respondent in both W.Ps.

Prayer in both W.Ps.: Writ petition filed under Article 226 of the Constitution of India praying to issue a writ of Certiorari calling for the impugned proceedings of the respondent in TNGST.No.4520689/2004-05 and 2005-06 dated 31.12.2010 quash the same as arbitrary, illegal and contrary to the order of this Court in W.P.No.37120 of 2005 dated 26.09.2006 and the law laid down by the Hon'ble Apex Court in BSNL vs Union of India reported in (2006) 145 STC 91 (SC).

For Petitioner : Mr.S.Rajasekar
For Respondent : Mr.M.Hariharan
Govt.Advocate(T)

C O M M O N O R D E R

These writ petitions have been filed by the petitioner praying to issue a writ of Certiorari calling for the impugned proceedings of the respondent in TNGST.No.4520689/2004-05 and 2005-06 dated 31.12.2010 and to quash the same.

2. According to the learned counsel for the petitioner, the petitioner is a dealer, who was registered under the erstwhile TNGST Act, presently under the TNVAT Act, 2006, on the file of the respondent herein. The petitioner was engaged in the sales of Electrical items and in the course of his business also procure and sale of SIM Cards and Recharge Coupons of various Telecommunication Service Providers like BSNL, Airtel, Aircel.

3. The business was inspected by the officials of the Enforcement Wing on 11.03.2006, and reported that they had failed to pay sales tax on the sale of Recharge Coupons and it appears that on the above premise they had forwarded to the Assessing Authority. As per the proposal, the respondent had issued pre-Assessment notice dated 29.08.2008 de-hors the earlier notice dated 04.10.2005 inter-alia contending that the transaction between the service provider and ultimate customer was undoubtedly a sale transaction was liable to pay tax at 4% under Entry 46 Part-B of the 1st schedule.

4. According to the learned counsel for the petitioner, the SIM Card is technically known is nothing but a 'Subscribers Identification Module' which is on the face of its represent merely a means of access to the service provider and contains the identity of the particular subscriber. The most primary object of the said SIM Card is to keep track of the identity of the ultimate subscriber so as to keep vigil over its legitimate usage for lawful purposes. A person intending to avail the services of any specific service provider has to approach the franchisee of any service provider i.e. BSNL or Airtel, Aircel etc express his desire of availing the services, upon which he was directed to furnish all basic particulars like identity proof, address proof etc., then he was required to specify details of the mobile numbers that he wishes to avail and on subjective satisfaction of the service provider franchisee, he was provided with a SIM Card and subsequently activated for which an activation fees would be collected. The respondent cannot access for the recharge coupons or SIM Cards as goods for the purpose of levy under the local sales tax enactment.

5. In support of his contention, the learned counsel for the respondent has also relied upon the decision of the Hon'ble Supreme Court in Idea Mobile Communication Limited vs. Commissioner of Central Excise and Customs, Cochin, (2011) 12 SCC 608 and another decision of this Court in M/s.S.R.P. Enterprises, rep.by its Proprietor, S.Ramesh vs. the Deputy Commercial Tax Officer, 2016 SCC Online 25668. In para Nos.4 and 5 of the Judgement, it has been reads as follows:

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. Considering the facts and circumstances of the case and the decisions cited supra and considering the submission made by the learned counsel for both parties, this Court is inclined to pass the following orders:

i) These writ petitions are allowed and the impugned assessment order passed by the respondent dated 31.12.2010, is hereby set aside and the matter is remanded to the respondent.

ii) The respondent is directed to reconsider the assessment order and pass appropriate orders after giving opportunities to the petitioner concerned, as expeditiously as possible, preferably, within a period of twelve weeks from the date of receipt of a copy of this order. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

kkd

To

The Assistant Commissioner (CT),
Tiruvannamalai-I,
Tiruvannamalai District.

+1 cc to Mr.K.Hemalatha, Advocate Sr.No.5749
+1 cc to The Government Pleader, Sr.No.6233

W.P.Nos.4499 & 4500 of 2011
and M.P.Nos.2 and 2 of 2011

NRL (CO)
CSL/05.04.2019



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