IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	22.09.2020
Pronounced on	25.09.2020

CORAM:
THE HONOURABLE MR. JUSTICE M.S. RAMESH

W.P.No.16289 of 2016
and
W.M.P.No.14077 of 2016

M.Sivasankar,
Proprietor,
Panduranga Agencies,
No.55E, S.K.Road, Krishnapuram,
Ambur - 635802. ...Petitioner

Vs

1. Bharat Sanchar Nigam Limited (BSNL),
Rep. by its General Manager,
Vellore.

2. The Asst. Commissioner,
Office of the Asst. Commissioner of
Central Excise,
Service Tax Cell, Vellore Division,
Vellore.

3. Superintendent of Central Excise,
O/o Superintendent of Central Excise,
Ambur Range, Ambur - 635802. ...Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Declaration, declaring that the levy of Service Tax on the petitioner for the assessment year 2003-2004 on the sale of BSNL SIM Card and Recharge Coupon amount to double taxation, violative of Article 265 of Constitution of India, and illegal and consequentially hold the order dated 14.10.2005 in C.No.IV/16/62/2005-STC Order in Original No.57/2005 passed by the 2nd respondent as null and void.

For Petitioner : Mr.N.Murali Kumaran
for M/s.Mcgan Law Firm
For Respondents: Mr.K.R.Ramesh Kumar for R1
Mr.S.Rajasekar
for Mrs.R.Hemalatha for R2 & R3

ORDER

The Writ Petition was called through Video Conferencing on 22.09.2020. By consent of both the parties, this Writ Petition is taken up for final disposal.

2. The petitioner herein is a dealer in SIM Cards and Recharge Coupons of Bharat Sanchar Nigam Limited (BSNL). The petitioner is aggrieved against the demand of Service Tax by the second respondent herein. According to the petitioner, the price of the SIM Card as well as the Recharge Coupon is fixed by BSNL, which includes Service Tax and there is a liability on BSNL to discharge the Service Tax. Hence, the demand of Service Tax for the period from 01.07.2003 to December 2004 cannot be substantiated.

3. As rightly pointed by the learned counsel for the petitioner, the petitioner is authorised to sell the BSNL's prepaid products like SIM Cards and Recharge Coupons and the maximum retail price for these products is fixed by BSNL, which also includes Service Tax, payable to the Service Tax Authorities. While that being the case, the demand of Service Tax by the second respondent from the retailer once again, would amount to double taxation and therefore would be illegal.

4. The learned Standing Counsel appearing on behalf of the first respondent-BSNL also reiterated the stand taken by the petitioner and admitted that the maximum retail price fixed by BSNL for SIM Card and Recharge Coupon includes Service Tax and that the entire Service Tax on the gross value of the products has been fully paid by BSNL to the Service Tax department.

5. The learned counsel appearing for the second and third respondents submitted that the Order-in-Original has an appeal remedy and that the writ petition does not deserve consideration, since the statutory appeal has not been availed. I am not in agreement with such a submission made.

6. The Hon'be Supreme Court in the case of Union of India vs Tantia Construction Private Limited reported in (2011) 5 SCC 697, has held that the presence of an alternative remedy is not an absolute bar in entertaining a writ petition. Likewise, in the case of Whirlpool Corporation vs Registrar of Trade Marks reported in (1998) 8 SCC 1, it was held that the rule of exclusion of writ jurisdiction by availability of an alternative remedy, is a rule of discretion and not one of compulsion and there could be contingencies in which the jurisdiction under Article 226 of the Constitution of India could be exercised in spite of availability of an alternative remedy. When the demand

of Service Tax in the present case is prima facie illegal, no purpose would be served, if the petitioner is directed to exhaust the appeal remedy.

7. For all the foregoing reasons, the levy of Service Tax on the petitioner for the assessment year 2003-04 on the sale of BSNL SIM Card and Recharge Coupon amounts to double taxation and therefore, the demand made in this regard in the order dated 14.10.2005 in C.No.IV/16/62/2005-STC Order in Original No.57/2005 passed by the 2nd respondent is declared to be null and void.

8. The Writ Petition stands allowed accordingly. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

To

1. The Bharat Sanchar Nigam Limited (BSNL),
Rep. by its General Manager,
Vellore.

2. The Asst. Commissioner,
Office of the Asst. Commissioner of
Central Excise,
Service Tax Cell, Vellore Division,
Vellore.

3. Superintendent of Central Excise,
O/o Superintendent of Central Excise,
Ambur Range, Ambur - 635802.

+1 cc to M/s.Mcgan Law firm, Advocate,sr.31428

+1 cc to Mr.K.R.Rameshkumar, Advocate,sr.31402.

Ajs(co)
krd 3/11