

AIT-2011-338-SC

IN THE SUPREME COURT OF INDIA

CIVIL APPEAL NO. 6319 OF 2011

[Arising out of SLP(C) No. 24690 of 2009]

Idea Mobile Communication Ltd.Appellant (s)

Versus

C.C.E. & C., CochinRespondent(s)

Coram: Justice Dr. Mukundakam Sharma and Justice Anil R. Dave

Date of Judgment: August 4, 2011.

AIT Head Note: 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.(Para 19)

J U D G M E N T

Dr. MUKUNDAKAM SHARMA, J.

1. Leave granted.

2. The present appeal is filed against the judgment and order dated 04.09.2008 passed by the Kerala High Court whereby and whereunder, the High Court allowed the appeal filed by the Commissioner of Central Excise & Customs, Cochin.

3. The issue which arises for our consideration in this appeal is whether the value of SIM cards sold by the appellant herein to their mobile subscribers is to be included in taxable service under Section 65 (105) zzzx of the Finance Act, 1994, which provides for levy of service tax on telecommunication service OR whether it is taxable as sale of goods under the Sales Tax Act.

4. The facts leading to the filing of the present case are that during the relevant assessment years, i.e., 1997-1999, the appellant was selling the SIM cards to its franchisees and was paying the sales tax to the State and activating the SIM card in the hands of its subscribers on a valuable consideration and paying service tax only on the activation charges. The Department of Sales Tax, State of Kerala, included the activation charges as part of the sale consideration of SIM cards on the ground that activation is nothing but a value addition of the "goods" and thus comes under the definition of "goods" under the Kerala General Sales Tax Act, 1963 (hereinafter referred to as "**KGST Act**") and accordingly levied sales tax on activation charges. The Department of Central Excise, Ernakulum (Service Tax Department) observed that a mere SIM card without activation is of no use and held that the appellant is liable to pay service tax on the value of SIM card also. In both the cases interest and penalty were levied.

5. Being aggrieved, the appellant filed appeal before the respective appellate authorities under the KGST Act and Central Excise Act, 1944. There were consequential recovery proceedings against the appellant and the appellant filed Writ Petition O.P. No. 4973 of 2001(P) in the High Court of Kerala challenging the levy of service tax on the sale price of SIM cards and also challenging the levy of sales tax on the amounts recovered by the appellant by way of activation charges from its customers which was dismissed vide order dated 15.02.2002.

6. Aggrieved thereby, the appellant filed Civil Appeal No. 2408 of 2002 before this Court. Based on the judgment of the High Court dated 15.02.2002, the appellant also filed appeal before the Commissioner (Appeals), Customs and Central Excise which was dismissed vide order dated 08.04.2003. The appellant preferred appeal u/s 35B of Central Excise Act, 1944 before the Central Excise and Service Tax Tribunal (hereinafter referred to as "**TRIBUNAL**") viz. Appeal No. ST/18/03 against the order dated 08.04.2003, in which the appellant did not challenge the levy of sales tax as the same was already paid.

7. The aforesaid Civil Appeal No. 2408 of 2002 before this Court was heard and decided with appeals and Writ Petitions of several other telecom operators, including BSNL, BPL etc. and vide judgment reported as **BSNL vs. Union of India** reported in (2006) 3 SCC 1, the matter was remanded to the Sales Tax Authorities concerned for determination of issue relating to SIM cards. The Tribunal in the pending Appeal No. ST/18/03, vide order dated 25.05.2006, held that the levy of service tax in the case is not sustainable.

8. Aggrieved thereby, the respondent challenged the order of the Tribunal dated 25.05.2006 before the High Court of Kerala by way of Appeal being CE Appeal No. 20 of 2006. The High Court vide order dated 04.09.2008 allowed the appeal of the respondent - department against which this appeal has been filed, upon which, we heard the learned counsel appearing for the parties.

9. The counsel appearing for the appellant submitted that the appellant was charging from its subscribers Rs. 1,000/- towards sales tax and Rs. 1,200/- as service tax upon activation of the SIM Card and that since they were selling the SIM Cards, therefore, at that point of time, they were charging Rs. 1000/- towards sales tax and for activating the SIM Card

they were charging Rs. 1200/- as service tax. Counsel also drew our attention to the earlier judgment rendered by the Kerala High Court as against which the Supreme Court pronounced the Judgment being **BSNL vs. Union of India** reported in (2006) 3 SCC 1.

10. The counsel appearing for the respondent on the other hand submitted that SIM Card has no intrinsic sale value and it is supplied to customers to provide telephone service. It is also submitted by the counsel that selling of the SIM Card and the process of activation are "services" provided by the mobile cellular telephone companies to the subscriber. He further submitted that the decision of the Supreme Court has clearly stated that if the sale of a SIM Card is merely incidental to the service being provided and it only facilitates the identification of the subscribers, their credit and other details, it would be assessable to service tax.

11. We have examined the materials on record in the light of the facts placed before us and also the decisions referred to and relied upon by the counsel appearing for the parties.

12. A SIM Card or Subscriber Identity Module is a portable memory chip used in cellular telephones. It is a tiny encoded circuit board which is fitted into cell phones at the time of signing on as a subscriber. The SIM Card holds the details of the subscriber, security data and memory to store personal numbers and it stores information which helps the network service provider to recognize the caller. As stated hereinbefore the Kerala High Court had occasion to deal with the aforesaid issue and in that context in its Judgment pronounced on 15th February, 2002 in **Escotel Mobile Communications Ltd. vs. Union of India and Others**, reported in (2002) Vol. 126 STC 475 (Kerala), it was stated in paragraph 36 that a transaction of selling of SIM Card to the subscriber is also a part of the "service" rendered by the service provider to the subscriber. The Kerala High Court in the facts and circumstances of the case observed at paras 36 and 47 as under: -

"36. With this perspective in mind, if we analyse the transaction that takes place, it appears to us that there is no difficulty in correctly understanding its facts. The transaction of selling the SIM. card to the subscriber is also a part of the "service" rendered by the service provider to the subscriber, Hence, while the State Legislature is competent to impose tax on "sale" by a legislation relatable to entry 54 of List II of Seventh Schedule, the tax on the aspect of "services" rendered not being relatable to any entry in the State List, would be within the legislative competence of Parliament under Article 248 read with entry 97 of List I of the Seventh Schedule to the Constitution. We are, therefore, unable to accept the contention of Mr. Ravindranatha Menon that there is any possibility of constitutional invalidity arising due to legislative incompetence by taking the view that "sale" of SIM card is simultaneously exigible to sales tax as well as service tax. Once the "aspect theory" is kept in focus, it would be clear that the same transaction could be exigible to different taxes in its different aspects. Thus, we see no reason to read down the legislation as suggested by Mr. Menon.

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47. Conclusions:

(a) The transaction of sale of SIM Card is without doubt exigible to sales tax under the KGST Act. The activation charges paid are in the nature of deferred payment of consideration for the original sale, or in the nature of value addition, and, therefore, also amount to parts of the sale and become exigible to sales tax under the KGST Act.

(b) Both the selling of the SIM Card and the process of activation are "services" provided by the mobile cellular telephone companies to the subscriber, and squarely fall within the definition of "taxable service" as defined in section 65(72)(b) of the Finance Act. They are also exigible to service tax on the value of "taxable service" as defined in Section 67 of the Finance Act."

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.

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'.

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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."

14. In paragraph 88 this Court observed that no one denies the legislative competence of the States to levy sales tax on sales provided that the necessary concomitants of a sale are present in the transaction and the sale is distinctly discernible in the transaction but that would not in any manner allow the State to entrench upon the Union List and tax services by including the cost of such service in the value of the goods. It was also held that for the same reason the Centre cannot include the value of the SIM cards, if they are found ultimately to be goods, in the cost of the service. Consequently, the Supreme Court after allowing the appeals filed by Bharat Sanchar Nigam Ltd and Escotel remanded the matter to the Sales Tax Authorities concerned for determination of the issue relating to SIM Cards in the light of the observations contained in that judgment.

15. As against the order passed by the adjudicating authority, the appellant assessee took up the matter in appeal before the Commissioner of Central Excise & Customs, Cochin. The appellate authority upheld the findings of the adjudicating authority. The assessee took up the matter before the CESTAT, Bangalore. The CESTAT vide its order dated 25.05.2006 held that the levy of service tax as demanded is not sustainable for the reason that the assessee had already paid the sales tax and therefore it follows that service tax is not leviable on the item on which sales tax has been collected.

16. Being aggrieved by the aforesaid order dated 25.05.2006, an appeal was filed before the Kerala High Court by the department, which was disposed of by the impugned order dated 04.09.2009.

17. The High Court has given cogent reasons for coming to the conclusion that service tax is payable inasmuch as SIM Card has no intrinsic sale value and it is supplied to the customers for providing mobile service to them. It should also be noted at this stage that after the remand of the matter by the Supreme Court to the Sales Tax authorities the assessing authority under the Sales Tax Act dropped the proceedings after conceding the position that SIM Card has no intrinsic sale value and it is supplied to the customers for providing telephone service to the customers. This aforesaid stand of the Sales Tax authority is practically the end of the matter and signifies the conclusion.

18. The sales tax authorities have themselves conceded the position before the High Court that no assessment of sales tax would be made on the sale value of the SIM Card supplied by the appellant to their customers irrespective of the fact whether they have filed returns and remitted tax or not. It also cannot be disputed that even if sales tax is wrongly remitted and paid that would not absolve them from the responsibility of payment of service tax, if otherwise there is a liability to pay the same. If the article is not susceptible to tax under the Sales Tax Act, the amount of tax paid by the assessee could be refunded as the case may be or, the assessee has to follow the law as may be applicable. But we cannot accept a position in law that even if tax is wrongly remitted that would absolve the parties from paying the service tax if the same is otherwise found payable and a liability accrues on the assessee. The charges paid by the subscribers for procuring a SIM Card are generally processing charges for activating the cellular phone and consequently the same would necessarily be included in the value of the SIM Card.

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.

20. That being the position, we find no infirmity with the findings and reasoning in the Judgment and Order passed by the High Court and therefore the appeal has no merit and the same is dismissed.

There will be no order as to costs.