



## IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CWP No.8411 of 2010.

Judgment reserved on : 19.03.2014.

Date of decision: 29 March, 2014.

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**M/s Bharat Sanchar Nigam Ltd.**

**....Petitioner.**

**Versus**

**State of Himachal Pradesh & others**

**.....Respondents.**

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***Coram***

**The Hon'ble Mr. Justice Mansoor Ahmad Mir, Acting Chief Justice.**

**The Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.**

***Whether approved for reporting?<sup>1</sup> Yes***

**For the Petitioner**

**:**

**Mr.Rakesh Sharma and Mr.Goverdhan  
Sharma, Advocates.**

**For the Respondents**

**:**

**Mr. Shrawan Dogra, Advocate General with  
Mr.Romesh Verma and Mr. V.S.Chauhan,  
Additional Advocate Generals, Mr.J.K.Verma  
and Mr.Kush Sharma, Deputy Advocate  
Generals.**

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**Tarlok Singh Chauhan, Judge.**

A short but interesting question which arises for determination in the present writ petition is to the effect whether the SIM cards can be termed to be "goods" within the meaning of the H.P. General Sales Tax Act, 1968, and, therefore, liable for payment of tax.

2. Briefly the facts may be noticed thus; the petitioner is a public sector undertaking incorporated under the Companies Act, 1956, and providing comprehensive range of telecom services in India including CDMA mobile, GSM mobile, wireline, internet, broadband etc. The services are being provided after licence had been granted in favour of the petitioner-company by the Government of India. The petitioner is

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***Whether the reporters of the local papers may be allowed to see the Judgment? Yes***

registered under the provisions of the H.P. General Sales Tax Act, 1968, and also the Central Sales Tax Act, 1956.

3. It is alleged by the petitioner that Entry 92C in List 1 of Seventh Schedule of the Constitution of India provides "tax on services" which includes "Telecommunication Services". Accordingly, petitioner-company is also registered as "service provider" with the Central Excise Department and paying service tax on the services provided by including activation charges/initializing charges (on face value of the SIM cards at the time of issue) in accordance with the Finance Act, 1994. It is submitted that though the petitioner-company came to be registered in the year 2005, yet it has been assessed and is paying service tax from the year 2002 on the entire telecom services provided by it including face value of SIM card.

4. The Assessing Authority on 04.09.2006 issued a notice to the petitioner under Sections 14 and 20 of the H.P. General Sales Tax Act, 1968 for the years 2003-04 to 2004-05. The petitioner in response to such notice furnished details of the SIM cards issued to its distributors. It is also alleged that the petitioner apprised the Assessing Authority about the judgment passed by the Hon'ble Supreme Court in ***Bharat Sanchar Nigam Ltd. and another vs. Union of India and others (2006) 3 SCC 1***. But the Assessing Authority in utter disregard to the judgment passed by the Hon'ble Supreme Court proceeded to levy tax on the value of SIM cards vide order dated 14.11.2006 which has been impugned before this Court. This order was unsuccessfully challenged by the petitioner before respondent No.3 and thereafter before the Tax Tribunal, who dismissed the same vide order dated 03.08.2010. It is these orders which are challenged in this writ petition.

5. The respondents in their reply tried to justify the levy of the tax and it is alleged that the Hon'ble Supreme Court in ***Bharat Sanchar Nigam's*** case (supra) by a majority view had left the issue regarding taxability of SIM cards open for the Assessing Authority to decide being a question of fact. It is further submitted that whenever a new connection of any category is given by the petitioner to its customers, some consideration is charged by the petitioner and certain amount is charged by the petitioner towards the cost of SIM card. Therefore, there was definite distinction between providing of SIM card and the services which were provided lateron. The petitioner was charging the cost on SIM card and this transaction involved both transfer of goods in the shape of SIM cards and also there was consideration being paid in the said transaction and accordingly the transaction amounted to sale and was, thus, taxable under the relevant provisions of law.

6. The term "goods" has been defined under the H.P. General Sales Tax Act, 1968, as per definition contained in 2(e), to mean:-

*"[(e) "goods" means every kind of movable <sup>3</sup>[ property other than news-papers, actionable] claims, stocks, shares or securities, and includes growing crops, grass, trees and things attached to or fastened to anything permanently attached to the earth but which under the contract of sale, are agreed to be severed, and includes any class of goods;]*

Similarly, term "sale" has been defined in Section 2 (j), to mean:-

<sup>1</sup> [(j) "sale" means any transfer of property in goods for cash or for deferred payment or for any other valuable consideration other than a mortgage, hypothecation, charge or pledge, and includes-

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

(ii) the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(iii) the delivery of goods on hire-purchase or any system of payment by instalments;

(iv) 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;

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

(vi) 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;]"

7. Though, prima facie, we were of the view that the question involved in this petition was no longer *res integra* in view of the judgment passed by the Hon'ble Supreme Court in ***Idea Mobile Communication Ltd. versus Commissioner of Central Excise and Customs, Cochin (2011) 12 SCC 608***. But, the learned Advocate General insisted that he would try to persuade us to take a different view and distinguish the judgment aforesaid.

8. The learned Advocate General contended that insofar as the 'BSNL' case (supra) is concerned, the Hon'ble Supreme Court by a majority view had left the question of taxability open and the matter

thereafter had been remitted to the Sales Tax Authority concerned for determination of the issue relating to the SIM cards. He further contended that the judgment in **Idea Mobile Communication Ltd.**(supra) was not a decision based on merits of the case, but was based on a concession which had been given by the Sales Tax Authorities after the matter was remanded to it by the Hon'ble Supreme Court. For this purpose he sought to rely upon para-18 of the aforesaid judgment which reads as under:-

*“18. The High Court has given cogent reasons for coming to the conclusion that service tax is payable inasmuch as a 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 a 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 Authorities is practically the end of the matter and signifies the conclusion.”*

*(Emphasis supplied)*

9. It is settled law that it is neither desirable nor permissible to pick out a word or a sentence from the judgment, divorced from the context of the question under consideration and treat it to be the complete 'law' declared by the Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before the Court. A decision of the Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the courts

must carefully try to ascertain the true principle laid down by the decision of the Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by the Court, to support their reasonings. (See: **Commissioner of Income Tax versus Sun Engineering Works (P) Ltd. (1992) 4 SCC 363.**)

10. It is also to be borne in mind that the observations in the judgment cannot be read like a text of a statute or out of context. (See: **Hindustan Steel Works Construction Ltd. versus Tarapore & Co. and another (1996) 5 SCC 34.**)

11. Keeping in mind the aforesaid well settled principles of law, we now proceed to deal with the submissions of the learned Advocate General. The learned Advocate General has emphasized that the order passed by the Hon'ble Supreme Court was based upon a concession since the Hon'ble Supreme Court itself observed that after the remand of the matter from the Supreme Court to the Sales Tax Authorities, the Assessing Authority under the Sales Tax Act themselves dropped the proceedings after conceding the position that a SIM card has no intrinsic sale value and it is supplied to the customers for providing telephone service to the customers.

12. A complete reading of the judgment passed by the Hon'ble Supreme Court in **Idea Mobile Communication Ltd. (supra)** would clearly go to show that this judgment is not based on any concession having been given by the Assessing Authorities as has been canvassed by the learned Advocate General. Infact, the Hon'ble Supreme Court has firstly dealt with the rival contentions of the parties and, thereafter proceeded to decide these contentions on merits and has summed up its findings as follows:-

*“20. 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. 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 phones 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 the SIM cards 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 card which on its own but without the service would hardly have any value at all.*

*21. Thus, it is established from the records and facts of this case that the value of the SIM cards forms part of the activation charges as no activation is possible without a valid functioning of a 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 Authorities understood the aforesaid position that no element of sale is involved in the present transaction.*

*22. 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.”*

13. The Hon'ble Supreme Court concluded that the SIM card has no intrinsic sale value and was supplied to the customers for

providing mobile service to them and that the charges paid by the subscribers for procuring 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. The further conclusion that the SIM cards are never sold as goods independent from services provided and are considered the 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 card which on its own but without the service would hardly have any value at all, leaves no manner of doubt that the decision rendered by the Hon'ble Supreme Court was, infact, on the merits of the case and not based on any concession as is canvassed by the learned Advocate General.

14. On the face of such conclusion, we wonder what then would be left for determination before the Taxing Authorities, save and except, to drop the proceedings, which infact it had done.

15. Therefore, taking into consideration, the exposition of law of their Lordships of the Hon'ble Supreme Court in ***Idea Mobile Communication Ltd.*** (*supra*), we are left with no other option but to allow this petition and consequently the order passed by respondent No.4 on 14.11.2006, order passed by respondent No.3 on 07.06.2007 and the order passed by learned Tax Tribunal on 03.08.2010, are quashed and set aside. Costs easy.

**(Mansoor Ahmad Mir),  
Acting Chief Justice.**

**( Tarlok Singh Chauhan),  
Judge.**

**March 29, 2014.**  
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