

(2011) 02 KAR CK 0045

In the Karnataka High Court

Case No : W.A. No's. 530-541 of 2011 and W.A. No. 654 of 2011

Bharti Airtel Ltd. Formerly Knows as Bharti Telenet Ltd.

APPELLANT

Vs

The State of Karnataka, Finance Department, The Union of India (UOI) and The Deputy Commissioner of Commercial Taxes
 Bharat Sanchar Nigam Ltd. Vs The State of Karnataka, Finance Department and Others

RESPONDENT

Date of Decision : 25-02-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 141, 19 (1) (g), 246, 248
Karnataka Value Added Tax Act, 2003 — Section 2, 2 (15), 2 (m)

Citation : (2011) ILR (Kar) 2859 : (2011) 32 STT 483

Hon'ble Judges : Ravi Malimath, J;N. Kumar, J

Bench : Division Bench

Advocate : N. Venkataraman, Mohammed Shafiq and Harish V.S, in W.A. Nos. 530-541/2011, Mohan Parasaran, Assistant Solicitor General, Maninder Singh, Parthasarathy, Atul K. Alur, Sona Badigar and P.S. Dinesh Kumar, in W.A. No. 654/2011, Sunil Gupta, Punit Tyagi, N.M. Harish and Tanmaya Agarwal, for Aaren Associates, in W.P. Nos. 2015-2065/2011, P.S. Dinesh Kumar KPSD Partners and Atal K. Alur, in W.A. No. 789, 790, 791, 792-803, 805-816, 817-828 and 829-840/2011, for the Appellant; Ashok Haranahalli, General, T.K. Vedamurthy, AGA for R1 and N.R. Bhaskar, Senior Standing Counsel for Central Government for R2 and R3 in W.A. Nos. 530-541, 654, 789, 790/2011, W.P. No. 2015-2065/2011, T.K. Vedamurthy, AGA for R1 to R3 and N.R. Bhaskar, Senior Standing Counsel for Central Government for R4 and R5 in W.A. Nos. 791, 792-803, 805-816 and 829-840/2011, Maninder Singh, Parthasarathy, Atul K. Alur, Sona Badigar and P.S. Dinesh Kumar, in W.A. No. 654/2011, Sunil Gupta, Punit Tyagi, N.M. Harish and Tanmaya Agarwal for Aaren Associates in W.P. Nos. 2015-2065/2011, P.S. Dinesh Kumar KPSD Partners and Atal K. Alur in W.A. No. 789, 790, 791, 792-803, 805-816, 817-828 and 829-840/2011, for the Respondent

Judgement

N. Kumar, J.—In all these appeals, the question raised relates to the competence of the State to levy Sales Tax/VAT on telecommunication service, interpretation of constitutional and

2. For the purpose of clarity, the facts pleaded by Appellants/Petitioners in each of these cases are set out in brief.

FACTUAL MATRIX

W.A. Nos. 654/2011, 817-828/2011, 789/2011, 790/2011, 805-816/2011, 792-803/2011, 791/2011 and 829-840/2011.

3. The Appellant in all these appeals M/s. Bharath Sanchar Nigam Limited (for short herein after referred to as the "BSNL") is wholly owned Government of India undertaking providing all types of telecom services in the country except the metro cities of Delhi and Mumbai. It is the successor and assign of the erstwhile Department of Telecom. Ministry of Communication and IT (Government of India). The BSNL as a Service Provider merely facilitates its subscribers in transmission of their voice or data in its network. The transmission facilitation services are provided by using different medium of transmission depending upon the technology in use and in operation from time to time. The transmission of signals may be provided through overhead lines, cabling systems, microwave systems, etc., by using complex system exchange network equipments. Each of these transmission systems has limited signal carrying capacity. With the explosive growth in telecommunications in India and exponential growth in subscribers, optical technology has also been adopted by BSNL in providing telecommunication services in view of its capacity, reliability, speed and dependability.

4. The Optical Fibre Cable (for short hereinafter referred to as the "OFC") provides large bandwidth enabling transmission of large data and/or voice from many subscribers at the speed of light i.e. 3,00,000 kilo metre per second. The transmission of signals in OFC is done by converting electrical signals to optical electromagnetic signals, which is propagated through an OFC medium (glass) on the principles of internal reflection, where optical signals are guided through OFC. The transmission system in telecommunication is controlled by the complex transmission equipments and switching equipments like routers, regenerators, transmitters, modulators, cross-connectors, multiplexes, etc. Every component is interdependent on each other for effective transfer of data or voice belonging to subscribers. The transmission of voice/ data may be provided using media like copper cable, microwave or wireless etc or combination of all. The signals are transmitted through different transmission media depending upon the load/traffic and availability of a particular medium at the relevant point of time.

5. BSNL got itself registered under the provisions of the Service Tax under the Finance Act, 1994 and paying service tax regularly. BSNL also got registered under the provisions of Karnataka Sales Tax Act (for short, hereinafter referred to as "KST Act")/Karnataka Value Added Tax, 2003 (for short hereinafter referred to as the "KVAT Act") as certain transactions such as sale of scrap, sale of tender forms and sale of used directories, fall under the definition of the "Sales" under the Act. BSNL was filing regularly monthly returns under the Act and the said

returns were accepted and assessments were concluded by the authorities.

6. That on 08.05.2007, the 3rd Respondent issued a notice to the BSNL to furnish the year wise particulars of total receipts from the OFC lease-lines in the State of Karnataka from the date of inception or commencement and produce books of accounts. The BSNL filed a writ petition challenging the same in W.P. No. 2460/2008, which came to be disposed off by an order, dated 22.02.2008 permitting BSNL to submit written submissions before the 3rd Respondent. Subsequently, the 3rd Respondent issued a notice u/s 12-A of the KST Act/ Section 39 of the KVAT Act dated 03.02.2009 and 04.05.2009 and directed the BSNL to furnish information with regard to the services provided by them. The BSNL challenged the said notice dated 04.05.2009 in W.P. No. 13315/09 which came to be disposed off by an order dated 06.10.2009 directing the parties to approach the Committee on Dispute (CoD) headed by the Cabinet Secretary. The CoD, by an order dated 24.11.2009 permitted the BSNL to approach this Court.

7. Thereafter, the 3rd Respondent issued a notice dated 15/22.02.2010 u/s 39(1) of the KVAT Act proposing to levy taxes for the respective years. The BSNL contested the demand by contending that there is no sale transaction in transmission of voice or data in telecommunication services, which would fall under the definition of either sale or deemed sale. The issue regarding levy of tax on telecom services has already been conclusively decided by the Apex Court wherein it has been held that electromagnetic waves or radio frequencies are not goods. The said findings squarely apply to the case of light energy. They set out in detail the relevant facts/particulars in support of their contentions. Relying on the aforesaid judgment, they specifically contended that there is no element of goods in services provided by the BSNL. There is no transfer of right to use the goods. The electromagnetic waves in telecommunication services are not goods whether it is Open wire lines/cable/ microwaves/wireless/OFC network atmosphere. Hence, initiation of proceedings against the BSNL to levy Sales Tax or VAT by the Assessing Authorities on service revenue is without jurisdiction and sanctity of law. However, over-ruling the said objections, the 3rd Respondent passed separate assessment orders for the years 2001-2002 to 2008-2009 and also issued demand notice which aggregate to about Rs. 6382 crores which includes KST/KVAT interest and penalty.

8. The issue with regard to levy of tax on telecom services is no more res-integra as the same is settled by the judgment of the Hon^{ble} Supreme Court in the case of Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, . The said judgment dated 02.03.2006 was delivered in Writ Petition (C) 183/2003 filed by BSNL under Article 32 of the Constitution of India where it has been authoritatively held that no sales tax can be levied on telecommunication services under the State sales tax laws. The State of Karnataka was a party to the said case and bound by the said judgment. After the pronouncement of said judgment a committee on subordinate legislation of the State of Karnataka comprising of legislators and officials of its Finance, Commercial Tax Department,

etc., was formed which took a decision to file a review petition before the Hon'ble Supreme Court seeking review of the judgment in the aforesaid BSNL case. Review Petition (C) 33523/2007 was accordingly filed. The only ground urged in the said review petition was that the State of Karnataka is entitled to levy sales tax on the Artificially Created Light Energy (for short hereinafter referred to as the "ACLE". The Supreme Court declined to entertain the review petition and accordingly, the same came to be rejected both on the grounds of delay as well as on merits.

9. BSNL also contends that the 3rd Respondent who has taken active part in the 35th report on the Committee of subordinate legislation and who ultimately passed the reassessment orders was biased and therefore, the reassessment orders are null and void. They have set out all the relevant particulars, the grounds and the contentions of the review petition and contend that the 3rd Respondent had a preconceived and predetermined mind on the subject matter of decision before him and was completely biased. The 3rd Respondent had already made up his mind and come to a conclusion that the judgment of the Supreme Court in BSNL case was erroneous and that the BSNL was wrongly taking advantage of the judgment of the Apex Court. The said bias has translated itself in the reassessment order, which is apparent from the observations made by the 3rd Respondent in paragraphs 35, 36 and 306 of the impugned order.

10. The BSNL further contends that, revenue receipts are generated from three streams viz., revenue from landline, mobile phone services and broad band services on OFC. In the impugned order, the 3rd Respondent has taken into account, the revenue from all the three streams and not confined himself only to broadband OFC connected to subscribers.

11. Therefore, the BSNL preferred a writ petition in W.P. No. 21836/2010 challenging the reassessment orders dated 18.06.2010 before this Court. The learned Single Judge, after hearing the parties, rejected the writ petition on the ground that the judgment in the BSNL case is open ended; that, the case involves phenomenal scientific investigation and research and as the BSNL has an alternative and efficacious remedy by way of a statutory appeal against the impugned order. Aggrieved by the same, the present appeals are filed by BSNL.

W.P. Nos. 2015-2065/2011

12. The Petitioner - Tata Teleservices Limited (for short hereinafter referred to as TTL) is a public limited company incorporated under the Companies Act, 1956. It is one of the leading Telecom Companies in India having its operations in various States and Union territories in India including State of Karnataka. It is operating, managing and providing telecom services to its subscribers in the State of Karnataka in terms of the licences granted by the Department of Telecommunication, Government of India, Ministry of Telecommunications u/s 4 of the Indian Telegraph Act, 1885.

13. The Petitioner is a registered dealer under the provisions of the Karnataka

Sales Tax Act, 1957 (for short hereinafter referred to as "KST Act") and also Karnataka Value Added Tax Act, 2003 (for short hereinafter referred to as the "KVAT Act"]. The Petitioner has been regularly filing monthly returns with the concerned authorities. The returns filed by the Petitioner for the assessment years 2002-03 to 2008-09 primarily for its SIM-card and scrap sale business. The returns were accepted and assessments were concluded by the authorities. On March 24, 2007, the 2nd Respondent-Commissioner of Commercial Taxes, Karnataka, purportedly exercising the powers u/s 12 and 12(A) of the KST Act, 1957 and Sections 38 and 39 of KVAT, Act issued an order authorizing and conferring a jurisdiction on Respondent-Commissioner No. 3 for audit under Sections 38 and 39 of the KVAT Act, and for assessment u/s 12 and 12A of the KST Act in respect of light energy in broadband lines as goods. The said authorisation is one without jurisdiction. The 3rd Respondent-Commissioner issued notice to the Petitioner u/s 12A of KST Act and 39(1) of the KVAT Act claiming that telecommunication involves only the data transfer and nothing else and since for all types of data transfers, OFC's are used, wherein an artificially created light carrier is necessarily used for causing the data transfers in the telecom network and therefore, there is a definite transfer of property in goods for a consideration, the goods being the artificially created, attracts levy of VAT under KVAT and called upon to show cause as to why the amount claimed by the Petitioner as income from services may not be considered as turnover in terms of Section 2(v)/2(36) of the Act. He also called upon the Petitioner to show cause as to why the transactions of broadband, allegedly authorized by the Commissioner and also other transactions, not so covered by the alleged authorization, may not be taxed as sale of goods. The Petitioner submitted a detailed reply to the show cause notices contending that its operations/business is a pure service and does not involve any element of sale and the light energy is not "goods". There is neither any agreement for the alleged sale nor is there any sale of light energy. The OFC is used in broad band. The entire revenue is not from the broadband or the alleged sale of light energy. The income from the leased lines is much less and the total revenue includes receipts towards other services as well and provided the break up of revenue from broadband services. They also enclosed the technical opinion from IIT, Mumbai to substantiate their contention. An enquiry was conducted. The technical experts were examined and they were permitted to be cross-examined. On consideration of the aforesaid material, the Respondent No. 3 passed the impugned reassessment orders and imposed Sales Tax/VAT on the broadband transactions for the assessment years 2002-03 to 2008-09 and not only on the broadband transactions but also on various other telecommunication transactions including mobile service etc., which was not at all the subject matter of authorisation by the Commissioner. They have set out in the writ petition the relevant portion of the law set down in the BSNL case. The opinion of the technical experts, the constitutional positions emanating from the various judgments of the Apex Court. They have preferred this writ petition challenging the impugned order passed by the 3rd Respondent on the question of constitutionality of the impugned provisions of KVAT, Act viz.,

Section 62(1) and Section 62(4)(c)(i), Rule 148 of the 2005, Rules and the exemption notification issued by the State Government in respect of electrical energy under the Act and sought for declaration that the aforesaid provisions in the Karnataka VAT Act, 2003 are arbitrary, unconscionable, onerous and volatile of Article 14 of the Constitution and for a declaration that Rule 148 of the Karnataka VAT Rules, 2005 is arbitrary, unreasonable, subject to bias and ultra vires and that their case is fully covered by the judgment of the Apex Court in BSNL case and for a direction to the authorities to give effect to the judgment of the BSNL case in their case and for other reliefs.

14. When these writ petitions were listed before the learned Single Judge and on a submission made to the effect that the questions involved in the writ petition are the same as those involved in the above writ appeals, the writ petitions were ordered to be placed before this Bench along with the said writ appeals, by an order of the Hon'ble Chief Justice dated 11.02.2011, to be heard along with the writ appeals.

W.A. Nos. 530-541/2011

15. The Appellant, M/s Bharti Airtel Limited is a company incorporated under the Indian Companies Act, 1956. It is one of the India's leading telecom conglomerates offering telecommunication solutions to its customers on its own state of the art network. The functioning of the Appellant and its activities, i.e. rendition of services are governed in terms of the licence granted by the Government of India, Ministry of Telecommunications, u/s 4 of the Indian Telegraph Act, 1885.

16. The Appellant treated the activity carried on by them, namely rendition of broad band services to be a contract for service and has been periodically discharging taxes under the Finance Act, 1994. The Appellant have also registered as dealers both under the Karnataka Sales Tax Act and Karnataka Value Added Tax Act. However, they did not disclose the receipts in respect of broad band services for the assessment year 2005-06. On completion of assessment, the authorities levied VAT on the broad band services. The Petitioners challenged the said order before this Court in W.P. No. 1537/2007 which came to be dismissed by the learned Single Judge on the ground of alternative remedy and the Petitioner was permitted to file a statutory appeal. The said order of learned single Judge was challenged in W.A. No. 629/2007 which also came to be dismissed on merits upholding the assessment orders by an order dated 16.01.2009. The Petitioner challenged the said order of the Division Bench before the Hon'ble Supreme Court in SLP 4481/2009. By an order dated 02.03.2009, the Supreme Court set aside the order of the Division Bench and restored the order of the learned single Judge. The Appellant has filed the statutory appeal and the matter is now pending before the Karnataka Appellate Tribunal. During the pendency of the aforesaid appeal, again notices were issued for the period 2007-08 proposing to levy taxes on broad band services on the premise that the same results in sale of ACLE. The Appellant filed detailed

objections contesting the said claim inter alia contending that ACLE is not "goods" and broad band service is a contract for service and thus outside the purview of the KVAT Act. However, overruling the said objections, the third Respondent has passed the impugned order levying sales tax.

17. The Appellant contends that, admittedly ACLE is electro magnetic waves. The Apex Court in the BSNL's case has categorically held that electro magnetic waves are not goods. Assuming it to be goods, broad band service is a contract of service for transmission of data. It is an indivisible contract for sale and, therefore, there is no element of sale of ACLE is involved. The judgment in BSNL's case squarely applies to the facts of this case, the assessing officer committed a serious illegality in ignoring the said binding decision, therefore, the impugned order is arbitrary, illegal and perverse. The third Respondent has, through a series of assumptions, conjecture, surmises, tried to overreach the decision of the Hon'ble Supreme Court in BSNL's case. Therefore, aggrieved by the said impugned order the Appellant preferred the Writ Petitions.

18. The learned single Judge has refused to entertain the Writ Petition on the ground that the BSNL judgment of the Apex Court is an open ended judgment and the case involves investigation of phenomenal scientific data and that the Courts are not well equipped to deal with such matters and relegated the Appellant to the appellate authority. Aggrieved by the said order of the learned single Judge, these appeals are filed.

19. From the facts set out above in these Writ Appeals it is clear that, the question involved in all these appeals is one and the same.

20. The Respondent-State has filed a common statement of objections. In the statement of objections, they have raised a preliminary objection regarding the maintainability of the Writ Petition which is reiterated in these proceedings also. They contend that there is an alternative remedy by way of appeal against the reassessment orders u/s 20 of the KST Act and 62 of the KVAT Act. It is the third Respondent who has got valid jurisdiction to pass the impugned order and the reason given by the Petitioners at para 19 of the petition that the statutory appellate authority cannot decide the interpretation of definition of sale is not correct. They contend that in identical facts and circumstances in the case of M/s. Bharati Televentures. the learned single Judge had dismissed Writ Petition No. 1537/2007 by an order dated 16.3.2007 holding that the competence of the State to levy tax on "goods" being a question of fact in any given case and such question of fact is the basis for levy of tax by the authorities, the writ jurisdiction of this Court cannot be invoked. However, the learned single Judge had permitted the Petitioner therein to avail the statutory remedy of appeal. Against that order, an appeal came to be filed before the Division Bench of this Court in W.A. No. 629/20 07 which also came to be dismissed on merits by judgment dated 1b. 1.2009 upholding the assessment orders passed by the assessing officer. Against that order, M/s Bharathi Televentures filed a SLP in SLP 4481/2009 before the Hon'ble Supreme Court of India and by order dated 2.3.2009 the Supreme Court

set aside the order of the Division Bench and restored the order of the learned single Judge. Subsequently, M/s. Bharati Airtel Limited have availed the statutory remedy. It is contended in these circumstances, the Writ Petitions are not maintainable.

21. The Respondent-State further contends that telecommunication is all about transfer of data from one place to another in the telecom network. Other than data transfers, absolutely nothing else is done in telecommunications. There are various types of data routinely transferred by the Petitioner which can be broadly classified into three categories - audio data, video data and textual data. Whatever be the type of data to be transferred in the telecom network, it is pertinent to note that data of all kinds are basically lifeless, and therefore, lacks spontaneous movement of its own. Therefore, to cause the transfer/movement of such lifeless and motionless data from one place to another, obviously, some specific carrier (energy) is indispensably required. Without such carrier, the data cannot be moved at all, let alone at the speed of light. Thus, without a data carrier, telecommunication of data is not possible. Such data carrier in the modern day telecommunications is the Artificially Created Light Energy (ACLE) or the Light Carrier. In simple terms, when such data-carrier-energy/Light Carrier is added/attached to the customers' data in the network of the telecom dealer/Petitioner, by a process called modulation, (embedding the data on the Light Carrier-data carrier energy), and the data gets carried/transferred to its intended destination in the network in a micro second. The ACLE/light carrier is reliable, economical, and commercially viable, which advantages have made it the best data carrier in the field of telecommunications across the world. Whatever be the ultra-sophistication of the network, it cannot carry the customers' data, without a data carrier energy therein.

22. The Respondent-State further contends that the sole business activity in the telecommunications is data transfers (DT). This is done under a contract, claimed as pure service contract, but which in effect is a composite-cum-indivisible contract, as it requires compulsory utilization of not only the data transfer through specific infrastructure/network but also transfer of specific goods (specifically required energy), which is intentionally created by the telecom dealers, for the sole purpose of data transfers. The sole goods element required for data transfers is the specific light carrier, (i.e. specially required energy), which acts as a data carrier, and carries the data to the desired destinations at light speed, delivers the data there, and gets consumed. The customers are charged on the basis of use/consumption of this carrier energy, which is directly related to the quantity of data transferred by them, which is digitally measurable.

23. The subject matter of the impugned orders is all about the energy, which precisely is the data carrier in telecommunications. The similarly operating electrical energy has already been held by the Hon'ble Supreme Court in the case of Commissioner of Sales Tax v. Madhya Pradesh Electricity Board 25 STC 188 as "goods". The electrical energy is a flow of electrons and similarly

operating Light Carrier, or the ACLE, is the flow of photons. Thus, the third Respondent by recording a finding of fact in the impugned order in Part K has rightly held that the Light Carrier constitutes "goods".

24. ACLE is Possess able in the same sense as the electrical energy, as the customers can use it at any time they want during the agreement period to transfer any quantum of their data to any destination, without any hindrance/restrictions from the Petitioners. This is despite the fact that the custody of the network as a whole, including the energy, rests with the Petitioners. Dr. Reji Phillip of Raman Research Institute in his technical opinion has observed that ACLE/ Light Carrier is capable of being delivered and transferred. Thus the third Respondent has held that ACLE/Light Carrier is capable of being used for a specific purpose.

25. This Light Carrier, which is the data carrier energy, has all attributes of goods, within the meaning of Article 366(12) of the Constitution. If this energy is not there in the telecom network for a second, the data will not move an inch for that second, very much like the case of a bulb or a fan without the electricity. In Tata Consultancy Services case, the Hon''ble Supreme Court has re-affirmed the determination of goods by holding that a movable property must have the properties of abstraction, possession, transfer and delivery. The non-radiant energy that moves strictly within the confines of the cable under full control of the Petitioner has been held to possess the aforesaid properties.

26. It is further contended that, once the presence of this discernible and transferable goods element in the telecom network is established, the telecom contracts for data transfers cease to be pure service contracts, (contracts not involving any goods element), as declared by the telecom dealers, and become composite contracts, consisting of both transfer of goods and service components therein. In such composite contracts, the 3rd Respondent applying the principles of dominant intention of the contract, as laid down by the Supreme Court in the BSNL case, has held that the contract in question is one for sale of goods and accordingly levied the sales tax/VAT on full amount. Absence of separate contract for supply of goods is common in composite contracts, as also other cases of sales of goods. In the case of composite contracts, Hon''ble Supreme Court in the BSNL case has categorically held that the dominant intention will determine whether it is the one for sale of goods or rendition of service. Since these transactions are purely commercial transactions, by the business houses wherein the only binding bond between the telecom dealer and their customers, is the "payment of price", and since the Light Carrier is the only discernible and transferable "goods" element in the network, the dominant intention of the contract is to soil as much of the goods as possible and maximize profits (goods in the context of telecommunications being the data carrier energy, i.e. light carrier). It is evident in the public domain that the customers are being wooed by the telecom dealers by giving them incentives, to attract them towards their brands. Thus, telecom contracts for data transfers are composite cum indivisible

contracts of sale.

27. The State contends that, even presuming for a moment that dominant intention is not sale of goods, the transfer of property in "goods" that is taking place in these telecom contracts for data transfers would take the shape of compulsory/involuntary transfer of property in "goods" for a consideration in which case too, these transactions would constitute a deemed sale, in terms of Article 366(29-A)(a) of the Constitution.

28. Artificially created data-carrier-energy/ light carrier is added/attached to the customers' data in the network of the Petitioners, by a process called modulation, (embedding the data on the carrier energy), data gets carried/ transferred to its intended destination in the network in a micro second. Once a measure of energy attached to particular quantity of data of a particular customer, the Petitioners lose all their control on the same, since it neither can be withdrawn nor diverted and attached to some other data of some other customer. The carrier energy has to carry that quantum of data of that particular customer to that particular destination, and get extinguished thereafter. Thus, appropriation of the goods (Data Carrier Energy) to the contract takes place, which is accompanied by delivery of "goods", and transfer of property. The customers are billed on the basis of the quantity of data transferred by them, for which only the carrier energy is needed in the network.

29. In short, like Electrical Energy network telecom network also is another type of Energy network, -which energy is utilizable exclusively for any type of data transfers. This Energy cannot be used for any other purpose. The above facts culminate in satisfaction of all conditions of sale under law, attracting levy of Sales Tax/VAT falling within the legislative powers conferred under Entry 54 of List II of the Seventh Schedule of the Constitution on the States. This energy is taxable at 12.5% u/s 4(l)(b) of the KVAT Act, as no exemption is available to Light Carrier Energy under law.

30. This levy is notwithstanding the fact that the telecom dealers are paying service tax on these transactions to the 5th Respondent under a different statute, wherein the term "service" itself is not defined. On perusal of both statutes it can be noticed that sales tax/VAT and service tax are compensatory in nature. In these telecom contracts for data transfers, elements of goods and service cannot be separated for levy of sales tax on the goods portion. This is on account of the legal constraint that 46 Amendment of the Constitution provides for splitting only two types of composite contracts, i.e., Works Contracts and the catering contracts. The telecom contract for data transfers are neither works contracts nor catering contract, and therefore, splitting of the contract into goods and service components is legally not possible. The telecom dealers too are not collecting their charges separately, one portion for goods, and the second for the service (utilization of network). Thus, telecom contracts for data transfers are indivisible contracts of sale - for sale of goods i.e., energy, since nothing else is present in the data transfer network, other than this energy.

31. It is the further case of the Respondent-State that in the BSNL case, it is clearly recorded that no arguments were addressed before the Supreme Court that electromagnetic waves are "abstractable" or "are capable of delivery". This makes it clear that the BSNL verdict is rendered in the absence of arguments on the properties of the electromagnetic waves. BSNL verdict was rendered in connection with mobile telephone connections, as forthcoming from the very first para of the verdict. In mobile telephones, the data carrier is the Electromagnetic Energy in space, which is generated by the customers, and which moves in all directions in the open space (omni-transmission), only a small portion of which reaches the intended instrument, and completes the communication. As a result, the data carrier energy, i.e., electromagnetic energy, traveling in the open space, cannot be possessed, transferred or delivered point to point and as such held that the data carrier energy in a mobile phone cannot be treated as goods. In this background, the 3rd Respondent has rightly distinguished the facts in the Petitioner's case from that involved in the BSNL case and has recorded a finding of fact by holding that the energy created was abstractable and are capable of delivery and the presence of OFC's from first mile exchange to last mile exchange in wireless connectivity, was not placed before the Hon'ble Supreme Court. Thus, the verdict covered only first mile and last mile data transfers by electromagnetic energy, in the mobile to mobile connection, and not the long mid-range OFC connectivity. Since the Hon'ble Supreme Court observed in the BSNL case that it cannot anticipate what may be achieved by scientific and technological advances in future; no one had argued that electromagnetic waves were abstractable or capable of deliver,- the third Respondent has placed legally permissible evidence in the assessment records while distinguishing the judgment relied upon by the Petitioners. The ACLE or the Light Carrier which is artificially generated by the Petitioner in the network is made to carry the data to its intended destination within the confines of the optic fibre cable under full control of the Petitioner. It is the light energy which is the data carrier in OFC, while in case of mobile phone, it is the EM energy which acts as the data carrier. They function in altogether different way. Therefore, the two cases are completely different and distinct. And the ratio laid down in the case of mobile phone in BSNL case cannot be applied to an entirely different case of OFC connectivity. The assessing authority has recorded a finding of the fact in the impugned order.

32. Subsequently, an additional statement of objections is filed on behalf of Respondent 1 to 4 traversing the allegation of bias and prejudice made in the Writ Petitions. They have specifically denied those allegations. They contend that the impugned order is passed on technical opinion of reputed technical bodies in the country, detailed reasons are given for rejecting the contention of the Petitioners and, therefore, there is no substance in the said contentions. The Respondent have also filed one more additional statement of objections referring to the deliberations of the committee on Subordinate Legislation and the correctness of the said report and reiterating their earlier assertion that there is

no bias.

33. The Union of India have filed their statement of objections. They contend that, so far as the levy of service tax on the activities of the Petitioner is concerned, neither the Petitioner nor the State of Karnataka have denied the right or questioned the validity of levy of service tax. There is no challenge in regard to legislative competence/constitutional validity of levy of service tax by the Central Government. The Petitioner is duty bound to pay the service tax and the same is beyond any doubt. The question of the legislative competence of the State Government to levy sales tax on the activities/transactions of the Petitioner has to be deduced from the ratio of the various judgments of the Apex Court and other Courts. After referring to the observations of the Apex Court in the BSNL's case it is asserted that, if the data is transferred through the OFC with an alleged generation of ACLE it cannot be presumed automatically that the transaction would be equivalent to sale of goods. Thus in case of digital transmission either through OFC with the use of ACLE or any other medium would fall squarely in the domain of service tax. States can tax the sale of goods, manufacture of goods, and service, even when associated with such goods, is taxed by the centre. Thus, even in case of goods, each transaction needs to be examined in the light, of the principles laid down by the Hon'ble Supreme Court in BSNL's case. It is the nature of transaction that will determine the taxability in each case. Irrespective of the technology involved in optical fibre cable, the main thrust in the case will revolve around the test laid down by the Hon'ble Supreme Court of India in the case of Tata Consultancy Services Vs. State of Andhra Pradesh, to determine as to what are goods. In the Finance Act 1994, Section 65(109a) under definition of telecommunication service, transmission of voice or data is included specifically. While defining telecommunication service, the reference to "signs and signals", which is sufficient to cover transmission through optical fiber using ACLE. Service tax liability on transmission through optical fiber cable cannot be disputed. Therefore, they contend that the activities of BSNL would be liable to service tax. The application of Sales Tax and Service Tax is not mutually exclusive. The same transaction can have both sales and service element embedded to it subject to the State Government qualifying the tests laid down by the Hon'ble Supreme Court of India.

34. Though in all the three cases, the third Respondent has passed separate reassessment/assessment orders, substantially the reason given for holding that ACLE is "goods", and that the same is capable of being abstracted and delivered is one and the same and it is the correctness of the said findings which is the subject matter of all these proceedings.

ARGUMENTS

35. Assailing the impugned order Sri. Mohan Parasaran, the Additional Solicitor General appearing for Bharat Sanchar Nigam Limited, contended that the questions involved in these appeals are fully covered by the judgment of the Apex Court in BSNL case. The State of Karnataka was a party to the said case in

Supreme Court. The arguments which they are canvassing now in this proceedings were never canvassed in the said proceedings. The 33rd and 35th reports of the Legislative Committee of the State of Karnataka make it abundantly clear that in the face of the judgment of the Supreme Court, they were unable to levy tax on the activity of Appellants. Therefore they took a decision to move the Supreme Court by way of review. Accordingly, a Review Petition came to be filed urging the very same grounds which are urged in these proceedings. The Supreme Court rejected the review petition both on merits as well as on the ground of delay. However, after the Review Petition was dismissed, the State is making an attempt to turn round and contend that the issues involved in these appeals were not the subject matter of judgment in BSNL case. Their contention that only mobile telephone services were subject matter of the said proceedings and the Supreme Court was concerned about the deemed sale and that both are not the subject matter of this proceedings, is factually incorrect. A reading of the judgment of the Apex Court makes it clear that the questions involved therein were regarding the nature of transactions and the definition of "goods" as understood in Telecommunication Services. Therefore he submits that it is a clear case of Revenue trying to over-reach the judgment of the Apex Court which is otherwise fully binding on them.

36. He further contended that the contract between the Service Provider and the Subscriber is not a composite contract as contended by the Revenue. It is an indivisible contract. The contract of rendering service only. There is no element of sale involved in the contract. Therefore the State has no power to levy sales tax on any aspect of the contract between the parties. He also contended that ACLE is only a carrier which is used by the Service Provider to render service to the subscribers for transmitting the message from one point to another point and therefore it does not satisfy the criteria prescribed for "goods". Lastly it was contended that when once a Parliamentary Legislation exclusively covers the area by way of Finance Act and the relevant entry therein, the jurisdiction of the State Legislature to levy tax on matters covered by the Parliamentary Legislation is ousted. Therefore, seen from any angle, the reassessment proceedings initiated by the authorities on the assumption that there is suppression of sale of goods in the impugned transaction is without any basis and the reassessment orders which are impugned in these proceedings are liable to be quashed.

37. Sri. N. Venkataraman, learned Senior Counsel appearing for the Bharati Airtel Limited contended that Article 366(12) of the Constitution defines the word "goods". Before any tax could be levied on sale of goods, the activity in question should satisfy the requirement of goods. The Supreme Court in catena of decisions has clearly prescribed the test, which have to be satisfied before a commodity could be treated as "goods". The first and the foremost requirement is that the said goods should be marketable. Secondly, there must be an agreement to sell the said goods. Parties to the contract should be ad idem in so far as the goods to be sold is concerned. Apart from this it has to satisfy other requirements of abstraction, consumption and delivery of such goods. In the

instant case, ACLE does not satisfy any of these conditions. As asserted by the Respondents in the statement of objections and as held by the Assessing Authority in the impugned order, it is only a carrier. It is also one of the forms of electro magnetic wave. It is intangible. In fact, the subscriber is not aware of the existence of such goods at all. The contract between the subscriber and the service provider only speaks about services and in the entire contract there is no indication of the subscriber either purchasing this ACLE or the service provider selling the same. The admitted expert opinion clearly demonstrates that when the subscriber makes a call, he only desires transmission of his voice or data to a particular destination. In the network, the message gets embedded into the light energy and carried to the destination where on the same being deposited on photo detector, the ACLE gets decipated drops out and message reaches the destination. Therefore, at no point of time, the subscriber ever comes in contact with this carrier. Thus, he contends that firstly, ACLE is not "goods" and even if it is to be construed as "goods", there is no sale of such goods. Except in the case of deemed sale, the law does not permit levying of tax on the same event twice. In the first round of litigation the Supreme Court relegated his claim to alternative remedy of appeal, because at that stage there was a dispute regarding the nature of ACLE and experts in the field had to be cross examined. After such remand, the parties adduced evidence and assessment order is passed. Against the said assessment order, statutory appeal is filed and the same is pending. During the pendency of the said appeal, fresh notices were issued for the subsequent years. Relying on the factual finding recorded by the Assessing Authority, it was contended by the Appellant that is no "goods" nor sale of such "goods". The said contention was negatived. As constitutional issues such as determination of the Entry to which this particular subject falls, is there any overlapping in the entries, and more particularly when the judgment in the BSNL case squarely applies to the facts of this case, the Appellants approached the High Court as the right of appeal is not efficacious. The said question cannot be gone into in an appeal in the absence of Union of India. Therefore, the writ petition filed is maintainable. But the learned Single Judge without properly appreciating the issues involved has declined to entertain the writ petitions and relegated the Appellant to alternative remedy, which is erroneous in the facts of this case.

38. Sri. Sunil Gupta, learned Senior Counsel appearing for Tata Tele Services, contended that the case squarely falls within the law laid down by the Apex Court in BSNL case. There are two aspects, namely the positive aspect and negative aspect. At paragraph 71 of BSNL, the Apex Court has considered the question as to whether the electro magnetic waves are "goods" and categorically held that electro magnetic waves are not "goods". It is only a carrier and therefore the said finding equally applies to the facts of this case. Further, on a careful consideration of the activity involved in the telecommunication services, the Apex Court has recorded a categorical finding that the telecommunication is a simple, pure service and no element of sale is involved. It is also held therein that when

Union of India passed Finance Act, 1994 and when the area is covered by the said Parliamentary Legislation, the question of State Legislating in respect of the same area on the ground that element of sale is involved in some portion of the service rendered by the service provider, is wholly illegal. He also pointed out that Assessing Authority has not read the said judgment in proper perspective. His understanding that the said judgment only deals with mobile telephones, that it was a case of only a deemed sale and further that the said judgment has no application to the facts of this case is patently perverse. He seems to have not looked into the judgment of Justice Laxmanan, which exclusively deals with Optic Fibre Cable, the nature of transaction. There is a categorical finding that electro magnetic waves in Optic Fibre Cable is only a carrier and there is no goods or transfer of goods involved in rendering such telecommunication service. He also pointed out that the Assessing Authority not only attempted to distinguish the judgment of the Supreme Court but also went on to point out how the Supreme Court is not correct and where the Judges went wrong, etc., which conduct cannot be countenanced.

39. He also pointed out that the said artificially created light energy does not have the characteristic of goods and it is not a marketable commodity. In the transmission of message or data from one network to another network, no element of sale is involved. The Union of India grant licence u/s 4 of the Indian Telegraph Act, 1885 to these service providers for rendering telecommunication services. The service providers have to strictly adhere to the terms of the licence and any violation of the terms and conditions would entail them for cancellation of the licence. According to them, the contract in question is not a composite contract. It is an indivisible contract to render services. No element of sale is involved in rendering the services. Therefore, the judgment of the Apex Court in BSNL case squarely applies to the facts of this case. The questions raised in these appeals are fairly settled by the Apex Court to which the Respondents herein are parties. However, in total disregard to the binding precedent, the Respondent-State are attempting to distinguish the judgment of the Apex Court and foist the liability on the service provider. Hence, the only course open to the service provider is to approach this Court. The alternative remedy of appeal, is not efficacious because, the question involved requires interpretation of various provision of Constitution as well as the statutory" provisions and application of the binding precedent to the facts of the case.

40. The learned Advocate General supporting the impugned order firstly contended that against the order of assessment as well as the order of re-assessment, a statutory remedy of appeal is provided. When an attempt was made by one of the Service Provider, i.e., Bharathi Tele Ventures to by-pass this alternative remedy, the Supreme Court has relegated them to the alternative remedy. In the light of the aforesaid pronouncement of the Supreme Court, these cases also have to be relegated to the appellate authority and therefore writ petition is not maintainable. The writ appeal is also not maintainable as the learned Single Judge committed no illegality in refusing to exercise his

jurisdiction.

Secondly he contended that there is no attempt on part of the Assessing Authority to ridicule the judgment of the Apex Court in BSNL case. The Apex Court has observed at paragraph 65 of the judgment that it cannot anticipate what may be achieved by scientific and technological advances in future. It is also observed that no one had argued that no electromagnetic waves were abstractable or capable of delivery. As the said question was not gone into, the same are raised here for consideration. The BSNL judgment would not come in the way of the Assessing Authority independently assessing the cases of the Appellants/ Petitioners. Therefore he has rightly embarked upon these Respondent-assessment proceedings and demonstrated as to how the said judgment is distinguishable from the facts of these cases and based on technical opinion. The assessing authority has demonstrated that the ACLE which is the subject matter of these proceedings is "goods" and there is sale of "goods" and therefore the sales tax is leviable. According to the Assessing Authority, it is a case of simple sale and not a deemed sale as in the BSNL case.

In so far as the nature of the contract is concerned, he contended that if it is to be held as a composite contract, it is indivisible and if the doctrine of dominant intention is adopted in interpreting the contract, it clearly demonstrates that it is a contract of pure and simple sale and not a contract of service. Alternatively he contends that it is an indivisible contract of pure and simple sale, no service element is involved. Further, he contended that the expert opinion shows that this light energy is abstracted from electrical energy. This is one of the test which is to be fulfilled and which has been done. The second test of delivery is satisfied when the message or data of the subscriber is embedded to the light energy, that portion of the light energy which is required to transmit the data or message is divested from the service provider. He has no control over the same, he cannot take it back and that energy when it takes the message or data to its destination is consumed by the subscriber. The test of delivery is also satisfied and the law declared by the Constitution Bench of the Supreme Court in the case of Tata Consultancy Services squarely covers the case on hand. Therefore he contends that there is no merit in the appeals/petitions and prays for dismissal of the same.

41. From the aforesaid facts and rival contentions, the points that arise for our consideration are as under:

1. Whether the activity of transmission of data/ messages would fall under Entry 97 of List J or would fall under Entry 54 of List 2 of VII Schedule to the Constitution of India?
2. When Finance Act, 1994, in particular, Section 65(109-a) specifically deals with Telecommunication Services, which includes data transmission services including provision of access to wired or wireless facilities and services which is carried on by the service provider after obtaining a licence under Section 4 of the

Telegraphic Act, whether the State Legislature can levy tax on any portion or aspect of the activity carried on by such service provider?

3. Whether the artificially created light energy used in transmitting the data or message through Optic Fibre Cable is "goods" as defined under Article 366(12) of the Constitution of India and in the transmission of data, is there a sale of said "goods"?

4. Whether the contract between the subscriber and the service provider is a composite contract or indivisible contract or a composite contract which is indivisible?

5. Whether the issue involved in this case is covered by the judgment of the Apex Court in B.S.N.L. case?

6. Whether these Writ Appeals/Writ Petitions are not maintainable on the ground of availability of alternative remedy?

CONSTITUTIONAL ISSUES

LIGHT ENERGY" - FALLS UNDER WHAT LEGISLATIVE ENTRY

42. The question is whether the activity involved in these transactions falls within Entry 97 of List-I or Entry 54 of List-II of the VII Schedule to the Constitution of India.

Article 246 of the Constitution vests in the Parliament, the exclusive power to make laws with respect to any of the matters enumerated in List I in the VII Schedule, i.e., Union List. Similarly, the State legislature has exclusive power to make laws with respect to any of the matters enumerated in List II in the VII Schedule, i.e., State List. Both the Parliament as well as the State Legislature have power to make laws with respect to any of the matters enumerated in List III in VII Schedule, i.e. Concurrent List. In addition to the aforesaid power conferred on the Parliament under Article 246, residuary power of legislation is conferred on the Parliament under Article 248. Under Article 248 Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List. Such power shall include the power of making any law imposing tax not mentioned in either of those Lists. The entries in the three lists are only legislative heads or fields of legislation. They demarcate the area over which the appropriate legislatures can legislate. However, the power to legislate in respect of the aforesaid three Lists flows from Article 246. In so far as Parliament is concerned, the power to legislate with respect to any matter not enumerated in the Concurrent or State List flows from Article 248. It is well settled by a catena of decisions of the Apex Court that taxing entries must be construed with clarity and precision so as to maintain such exclusivity. Construction of a taxation entry which may lead to overlapping must be eschewed. If the taxing power is within a particular legislative field, it would follow that the other fields in the legislative lists must be construed to exclude this field so that there is no possibility of legislative trespass. The legislative

entries should be liberally interpreted. None of the items in the List is to be read in a narrow or restricted sense. Each general word should be held to extend to ancillary and subsidiary matters which can fairly and reasonably be said to be comprehended in it.

43. In none of the three Lists there is a mention of "service". Entry 97 of List I provides that Parliament has the exclusive power to make laws in respect to any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists. It is under that legislative head or the field of legislation, the Parliament by virtue of the power conferred under Article 248 made the law in respect of service and imposed tax on such services. That is how Chapter v. of the Finance Act, 1994 refers to Service Tax and the law imposing tax on such service was passed by the Parliament.

44. Service Tax was introduced for the first time in the year 1994 by making provisions in Chapter v. of the Finance Act, 1994 (hereinafter for short referred to as "the Act"). Initially the levy of service tax was introduced only in respect of three services in the organized sector, namely telephone, general insurance and stock trading. Subsequently, in the year 1996 the levy was extended to three more sectors, namely advertising, pager and courier. The Finance Act, 1997 extended the Act to as many as 12 more services, most of which are in the unorganized sector. The Finance Act, brought in 12 more services into service tax net. Under the Finance Act passed annually more and more services were brought within the tax net. Thus, in all, as of today 120 services are brought within the tax net. By the Finance Act 2007 which came into force from 01.06.2007, telecommunication services were specifically inserted in the Finance Act, 1994.

45. Section 65(109a) defines telecommunication services as under:

Section 65(109a)-

"telecommunication service" means service of any description provided by means of any transmission, emission or reception of signs, signals, writing, images and sounds or intelligence or information of any nature, by wire, radio, optical, visual or other electromagnetic means or systems, including the related transfer or assignment of the right to use capacity for such transmission, emission or reception by a person who has been granted a licence under the first proviso to Sub-section (1) of Section 4 of the Indian Telegraph Act, 1885 (13 of 1885) and includes--

- (i) Voice mail, data services, audio tax services, video tax services, radio paging;
- (ii) Fixing telephone services including provision of access to and use of the public switched telephone network for the transmission and switching of voice, data and video, inbound and outbound telephone service to and from national and international destinations;
- (iii) Cellular mobile telephone services including provision of access to and use of

switched or non-switched networks for the transmission of voice, data and video, inbound and outbound roaming service to and from national and international destinations;

(iv) Carrier services including provision of wired or wireless facilities to originate, terminate or transit calls, charging for interconnection, settlement or termination of domestic or international calls, charging for jointly used facilities including pole attachments, charging for the exclusive use of circuits, a leased circuit or a dedicated link including a speech circuit, data circuit or a telegraph circuit;

(v) Provision of call management services for a fee including call waiting, call forwarding, caller identification, three-way calling, call display, call return, call screen, call blocking, automatic callback, call answer, voice mail, voice menus and video conferencing;

(vi) Data transmission services including provision of access to wired or wireless facilities and services specifically designed for efficient transmission of data; and

(vii) Communication through facsimile, pager, telegraph and telex, but does not include service provided by--

(a) any person in relation to on-line information and database access or retrieval or both referred to in Sub-clause (zh) of Clause (105);

(b) a broadcasting agency or organisation in relation to broadcasting referred to in Sub-clause (zk) of Clause (105); and

(c) any person in relation to internet telephone referred to in Sub-clause (zzzu) of Clause (105);

Section 65(110) defines telegram as under:

Section 65(110) - "telegraph" has the same meaning assigned to in Clause (1) of Section 3 of the Indian Telegraph Act, 1885.

65(111) defines "telegraph authority" as,

Section 65(111) - "telegraph authority" has the meaning assigned to it in Clause (6) of Section 3 of the Indian Telegraph Act, 1885 and includes a person who has been granted a licence under the first proviso to Sub-section (1) of Section 4 of that Act.

46. By the Constitution (Eighty-eighth Amendment) Act, 2003 Article 268A was inserted for appropriation of the service tax levied by Union and collected and appropriated by the Union and the States. Article 269 provides for taxes levied and collected by the Union but assigned to the States. Whereas, Article 270 deals with taxes levied and distributed between the Union and the States. Correspondingly, Entry 92C was inserted by the Constitution (Eighty-eighth Amendment) Act, 2003 in List I to the VII Schedule specifically providing for tax on service. However, the said entry is yet to come into force. Therefore, the question which arises for consideration in these proceedings is whether the

activity of these service providers would fall in the residuary Entry at 97 in List I and consequently levy of Service Tax under the provisions of the Finance Act, 1994 is valid and legal or under what legislative head or field of legislation, the State Legislature is trying to levy tax on the activity which is the subject matter of these proceedings. The State relies on Entry 54 of List II of VII Schedule which reads as under:

54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92-A of List I.

47. The case of the State is that, the Petitioners have rendered telecommunication services necessarily by generating and using the artificially created/generated energy. This light energy acts as a data carrier and carries the data to the desired destinations at light speed, delivers the data there and gets consumed. Other than this energy, nothing else is required to carry the data in the network created by the Petitioner. This Light Carrier, which is the data carrier energy, has all attributes of goods, within the meaning of Article 366(12) of the Constitution. The telecom contracts for data transfers cease to be pure service contracts, as declared by the telecom dealers. It is a composite contract, consisting of both goods and service components therein. In such composite contracts, applying the principles of dominant intention of the contract, as laid down by the Supreme Court in the BSNL case the contract in question is one for sale of goods and accordingly they have levied the sales tax/VAT on full amount. Telecom contracts for data transfers are composite cum indivisible contract of sale. Therefore, as the said contracts are neither works contracts nor catering contract, splitting of the contract into goods and service components is legally not possible. Therefore, the State Legislature has power to levy tax on the sale of goods.

48. It is not in dispute that service or telecommunication service as such do not find an entry in any of the three Lists. Therefore, by virtue of Entry 97 of List I of VII Schedule read with Article 248 of the Constitution, the Parliament has the power to enact a law in respect of service and levy tax on such services. As this service aspect is not enumerated in the Concurrent List or State List, the Parliament has exclusive power to make the law and to impose tax. The stand of the State is that the contract in question is a composite but an indivisible contract. In other words, the element of service in the contract is admitted. Once the Parliament makes law in respect of the said service by virtue of the exclusive power conferred on it under Article 248, it would follow that the other fields in the legislative lists must be construed to exclude this field so that there is no possibility of legislative trespass. Thus, the power of the State Legislature to levy tax on service aspect is completely excluded. Both the parties contend that it is an indivisible contract. According to the Petitioners, the contract in question is a contract of service simpliciter. There is no element of sale at all and, therefore, the State legislature has no power to levy the sales tax or VAT on any portion of the contract. On the contrary, the stand of the State is that it is a composite

contract. It necessarily means there is an element of service and an element of goods. But, according to the State the contract is indivisible. Therefore, it is the doctrine of dominant intention which has to be applied. If so applied, the contract is a contract for sale of Artificially Created Light Energy and, therefore, levy of service tax by the Union is impermissible and State Legislature alone has the power to levy sales tax/VAT on the said goods.

49. From the aforesaid admitted position, it is clear if the contract in question is an indivisible contract and contract of service simplicitor, then the Union alone has the power to levy service tax on the said activity and the State Legislature has no power to levy sales tax. If it is a composite contract as contended by the State consisting of both service and sale of goods, then it has to satisfy the test provided under Article 366(29A).

NATURE OF CONTRACT: COMPOSITE OR INDIVISIBLE

50. Prior to Forty-sixth amendment to the Constitution the sales tax could not have been levied when the contract in question was a single and indivisible works contract. After the Forty-sixth Amendment the works contract which was indivisible one was by a legal fiction altered into a contract which is divisible into one for sale of goods and the other for supply for labour and services. After the Forty-sixth amendment it has become possible for the State to levy sales tax only in so far as the goods involved in works contract, in the same way in which the sales tax was leviable on the contracts of sale of goods, the materials supplied in any building contract, though the parties did not enter into two independent and separate contract as stated above. However, such a composite contract is permissible only in cases as provided under Article 366(29-A). One for works contract and another is catering. If the contract did not fall in any one of those categories the law laid down by the Constitution Bench in *Gannon & Dunkerely* case holds the field. Therefore, if the contract is stated to be a composite contract then we have to find out the dominant nature of the contract to levy tax under the Finance Act of 1994 or under the Karnataka Sales Tax Act. To levy tax on the same aspect under both the legislation is impermissible. Though the service providers have taken a consistent stand throughout, that the contract in question is an indivisible contract and not a composite contract, it is the State which has taken inconsistent stand. It contends, in one breadth that the agreement is a composite contract but in another breadth they contend it is an indivisible contract of sale simplicitor. The service providers categorically contend that, even if it is a composite contract and indivisible, as it does not fall under Article 366(29-A) the State Legislatures have no competence to levy tax. Therefore, the question is if it is a composite contract, what is the dominant nature of the contract. In so far as testing the dominant nature of the contract the law is well settled.

51. When once the contract is reduced into writing the intention of the parties is to be gathered from the terms used in the said contract. The words used in such written contract has to be given its ordinary meaning. It is by looking into such

contract we have to find out what is the agreement entered into, what is the consideration paid, what for the said consideration is paid? In order to understand the nature of the contract entered into between the subscriber and the service provider, let us see the provisions contained in the terms of contract printed on the BSNL form which is almost identical in all the cases is as under:

BSNL BROADBAND INTERNET

SERVICE TERMS AND CONDITION

1. Subject to the acceptance of the application and technical feasibility BSNL will endeavour to provide the Broadband Service as soon as possible.
2. A demand note will be issued to the customer for depositing the charges payable as per the tariff plan selected for enabling the customer to pay the same before commencement of service.
3. The contract with BSNL for provision of Broadband Service will be for a minimum period from the date of commencement (depending upon the plan chosen) in accordance with the tariff plan, opted.
4. The data rates shown as down stream or upstream are applicable only to last mile. However, BSNL shall not. be responsible for lesser download or upload data rates caused by the accessed website status or the international gateway or the media.
9. The subscriber is required to fully comply with the provisions of the Indian Telegraph Act 1885, Indian Telegraph Rules and the Information Act 2000 made there under and any amendments or replacements made thereto from to time.

OTHER CONDITIONS

Billing for the service will be included in the normal b-fone bill. The billing cycle shall be same as b-fone billing cycle etc.

RIGHT TO TERMINATION SERVICE

1. BSNL reserves the right to disconnect the service to any customer in case there is sufficient evidence of the customer intentionally or unintentionally using the service in a manner which would adversely impact BSNL or BSNL's Network.
2. The customer shall be responsible for using the service only for legal and appropriate purposes.
3. BSNL reserves the right to terminate the services in the event of non-payment of bills issued by BSNL in accordance with the tariff plans opted by the customer and the extent of usage or any default on the part of customers.

DISCLAIMER

1. BSNL will exercise all reasonable care in providing its services, but it is not responsible for interruption in service due to power failures, equipment

malfunctions, or acts of natural calamity.

2. BSNL is not responsible for subscriber's computer hardware and software or areas of the Internet not under its control. BSNL does not warrant privacy, security, or efficiency or the Internet.

3. BSNL is not responsible for actions taken by its customers or others as a result of its services.

4. BSNL is not responsible for material any person (including household members of the subscriber) may receive or transmit via the Internet, or for anything bought or sold via the Internet or for any other result of an action taken by anyone using its service

52. If we look into the said contract it is clear that there is no whisper about the word "sale of goods". On the contrary, the written words are explicit and -that the contract is one for rendition of telecommunication service. The consideration is paid for the services rendered to the subscriber. Therefore, it is clear from the recitals in the written contract that it is a service contract which in fact is admitted by the assessing officer in the order, as well as in the statement of objections filed in these proceedings. In fact the authorities proceeded on that basis and passed the assessment orders. It is only after the 33rd and 35th Committee on subordinate legislation directed that action should be taken on the basis of the expert opinion, the Commissioner issued directions for reassessment of those orders. Therefore, assessing authority had no doubt in their mind, that the contract in question is a contract of service simplicitor and there is no element of sale of goods involved in the said contract. Whether it is treated as a composite contract which is indivisible or as an indivisible contract, it is a contract for rendering service. In that view of the matter, the State is not empowered to levy sales taxes under the said legislation for the services rendered by the service provider to the subscriber.

53. However the State contends that the telecommunication is all about data transfer from one place to another in the telecom network, other than data transfer, absolutely nothing else is done in telecommunication. Without a data carrier, the telecommunication of data is not possible. Such data carrier in the modern day telecommunications is the Artificially created light energy (ACLE) or the light carrier. The customers are charged on the basis of use/consumption of this carrier energy, which is directly related to the quantity transferred by them, which is digitally measurable. The similarly operating electrical energy has already been held by the Hon"ble Supreme Court in the case of Commissioner of Sales Tax v. Madhya Pradesh Electricity Board 25 STC 188 as "goods". The electrical energy is a flow of electrons and similarly ACLE is the flow of photons. Once the presence of this discernible and transferable "goods" element in the telecom network is established, the telecom contracts for data transfer cease to be pure service contracts (contracts not involving any goods element) as contended by telecom dealers and become composite contracts, consisting of

both goods and service components therein. The dominant intention of the contract is to sell as much as the goods as possible and maximize profits. The customers are being wooed by the telecom dealers by giving them incentives, to attract them towards their brands. Thus, telecom contracts for data transfers are composite cum indivisible contract of sale. Even presuming for a moment that dominant intention is not sale of goods, the transfer of property in goods that is taking place in these telecom contracts for data transfers would take the shape of compulsory/involuntary transfer of property in goods for a consideration in which case too, these transactions would constitute a deemed sale, in term of Article 366(29-A)(a) of the Constitution of India.

54. This takes us to the next question, what exactly is this "artificially created light energy (ALCE)", is it "Goods" as understood in law and is there a "sale of such goods", in telecommunication service.

WHAT IS ARTIFICIALLY CREATED LIGHT ENERGY (ACLE)?

55. The assessing authority has relied on the opinion of the following experts to explain and understand what is artificially created light energy, to levy tax.

(1) Centre for Development of Advanced Computing

56. According to them, mobile phones work on the principle of electromagnetic energy transmission in space -(wireless mode). Whereas OFC broadband uses artificially created light energy transmitted through an optic fibre line only. Hence these energies are quite different both in physics and chemistry and operate on different platforms. OFC broadband lines work only on artificially created light energy and no other energy is required for transmission of data and information. The naturally available light energy cannot be used for this purpose. It is the artificially created light energy only, which actually carries the data or information from one place to another in an OFC Broadband line. Without such light energy data or information cannot be transmitted through this OFC Broadband line. The owner of the OFC Broadband network creates this light energy for the sole purpose of transmitting the data or the information. This light energy is created by LED (Light Emitting Diode) or Laser Device (LD), which is mixed/modulated with the data or information. When this light energy is transmitted through OFC Broadband the data or the information is delivered at the desired other end. According to the experts, these are all long established and confirmed scientific truths.

57. That during the current, world OFC has become essential for data communication covering many areas for mass transfer of data and interactive communication. Fibre optic networks operate at high speeds transferring several gigabits which is not possible with Copper cables for longer distances. OFC costs much less to maintain as against copper cable system. Basically OFC is preferred as data transfer is reliable, fast and cost effective. Most of the mobile towers are interconnected via dedicated OFC for better and undisturbed connections between them. As the towers are stationary OFC is found to be the most cost

effective media. This also helps in connecting large number of connections simultaneously between the towers.

58. Radio frequencies are used for wireless communication like Radio, Television, Mobile etc. This communication can result in interference if not controlled/managed properly. Because of this, there is a strict regulation worldwide in the usage of these frequencies. Government of India regulates these frequencies and one can acquire a radio frequency for the purpose of doing business by applying and paying a license fee and other charges and use for specific purposes as per norms till expiry of licence period. After the expiry of licence period, if not renewed the frequencies will be taken back by the Government of India. Thus the radio frequencies can be possessed or dispossessed. The radio frequencies can be abstracted, possessed, transferred and delivered. The modern day telecommunication and associated businesses like data transfer activity uses the radio frequencies extensively. Hence, the radio frequencies have got highly important and crucial role in the modern day telecommunications system.

59. The radio waves used by the mobile (Cellular) network and the light waves used in the optical network are both electromagnetic waves which are a part of the electromagnetic spectrum. They merely happen to occur at different frequencies. The electromagnetic spectrum spans a large number of frequencies starting with gamma rays, X-rays, ultra-violet rays, visible light, infrared, terahertz radiation, microwave radiation and radio waves. Light used in OFC network is typically in the infra-red portion of the electromagnetic spectrum while microwave and radio waves occupy the lower end.

60. Digital information from the customer in cellular networks is impressed onto the radio wave, and digital information in optical networks is impressed onto the light wave. Just as digital information on radio frequency carrier is carried through the air from the customer's mobile to the cellular base station, the digital information on the light wave in optical network is efficiently carried by the optical fibre from the customer to the service provider.

61. At the request of the service provider, the Department provided an opportunity to cross-examine the expert. An expert witness Sri Ganga Prasad G.L., Centre Head, Centre for Development of Advanced Computing, Electronic City, Bangalore was cross-examined. The questions and answers are extracted hereunder:

1. Is it true that light energy in OFC work on the principle of electromagnetic transmission?

Ans. Yes. Light is also one form of electromagnetic wave.

2. Does Light energy act as a carrier of data only in carrier modulation in OFC?

Ans. Yes. The light energy is used as a carrier of data.

3. Does this light energy have any value to the subscriber if he has no data for

transmission?

Ans. Yes. However when his data is to be transferred the light energy is required.

4. Is the modulated light energy demodulated in a equipment (like STM mux) and finally data packets are delivered to the customer without any content of light carrier?

Ans: Yes.

5. Is it true that in OFC transmission, customer never receives light energy in its abinitio light form?

Ans. Yes.

6. The light energy is used not only as a carrier of data delivered to the customer but also the data to be delivered to the network from the customer and using the same form of light energy?

Ans. Yes.

7. Can this light energy be used by the subscriber just like normal electricity which a subscriber can use it to convert into light (bulb/tubelight), heat (heater/ AC/fridge) or mechanical (fan) energy?

Ans. No.

8. Is true that the light energy can be measured in bita/second?

Ans. No. The unit of measuring light energy (like any other energy including normal electricity) is in JOULES or KILOWATT House.

9. Can the light energy be artificially created?

Ans. No. In OFC technology the electrical energy is converted into light energy and the term ACLE is used for common man"s understanding.

(e) In the case of M/s. Tata Tele services the questions and answers recorded in the Cross-examination are as under:

1. What is the speed of light?

Ans: 1,86,000 miles per second.

2. Can you stop light?

Ans: As a matter of fact no waves can be stopped.

3. Is it possible to purchase light?

Ans: I have not seen or heard where light is purchased and sold. It may not be in existence in that nature.

4. Do you have an internet connection at home or office?

Ans: I have at both places. At home I have BSNL Broadband and at office we have other service providers.

6. Through this connection do you send or receive data?

Ans: Yes. We send and receive data.

7. What do you have in mind when you get internet connection?

Ans: Internet connection is obtained for communication.

8. When you enter into agreement with BSNL what do you

Ans: I enter with an agreement for supply and receiving of data.

9. Are you interested to know how data is sent?

Ans: As a subscriber, I would expect the data to be send or received at a speed I expect to be done.

10. I, a BSNL if I am transfer data through a copper cable, would there be any objections by you?

Ans: As a subscriber I am not worried about the manner in which the data is transferred may be wireless communication or wired communication. As a matter of fact subscriber is not worried about method of communication so long as the communication happens without any disruption.

11. In an MTNL/BSNL connection for landlines how does the communication get established from the speaker to the receiver?

Ans: In an landline communication for voice the first step is to establish the connection between the speaker and receiver. After the connection is established the sound waves of the speaker has to reach the receiver. For this purpose the sound waves has to be converted into electrical waves. These electrical waves travel through the media to reach the other end. At the other end, the electrical waves are again converted into sound waves for the receiver to hear the speech of the speaker. The media that was and is used for the electrical waves to travel are copper cable, steel wires, fibre cables, all of which represent wired communication. In the case of wireless communication electrical waves cannot travel as electrical waves beyond the stage where there is no wire. The electrical waves have to be converted into electromagnetic waves which travel in space. The electromagnetic waves that so traveled are received by the antenna at the recipient's end where the electromagnetic waves are converted into electrical waves for conversion thereafter to sound waves. In the case of communication through optical fibre, the electrical signals are converted into optical signals so as to travel through optical fibres to other end where the optical signals at the other end are reconverted into electrical signals. Thereafter the electrical signals are converted to sound waves for the receiver to hear the speech.

12. Can you please tell us the difference between the mobile and landline?

Ans: The purpose and the mechanism of both the phones are similar. However while in the case of mobile phone there is greater mobility, in case of landline there is no mobility.

13. Is it possible to transfer data instead of voice through the above mechanism of BSNL.

Ans: Yes.

14. Kindly explain whether the same line can be used for sending data as well as voice?

Ans: Initially the same line used for sending voice was used for sending data. For e.g. When we send a fax of some text, the textual content in the page is converted by a modem into a "VOICE FORM" for sending it in the same method in which the voice is sent. At the other end, there is a modem which recognizes that this "VOICE FORM" actually represents data and converts it into a printable version. This was the same method followed for sending all types of data. But there was restriction on speed and the use of the line. For instance if a line is used for sending data, the same line cannot be used for sending voice. Only one use is possible at a time. Later on the technology developed by which it was found that using the difference in frequency of voice and data, both can be sent in the same line simultaneously. This is what is called as DSL (Digital Subscriber Line) and ADSL (Advanced Digital Subscriber Line). In such a situation BSNL provides what is called splitter at the subscriber's place where one line can be used for handset for voice purposes and the other line for data purposes. Beyond the subscriber's place both data and voice travel in the same line. The actual distinction between data and voice is done at the exchange by BSNL by appropriate methods.

15. Can you tell us what is LED?

Ans: It is Light Emitting Diode.

16. Where are LE Ds commonly used?

Ans: It is used for many purposes. Egn. It is used in traffic lights, torches, LED based Televisions and other light sources etc.

17. What is the cost of LED?

Ans: It varies from Re.1/- to Rs. 1000/-

18. Can you please tell us the function of LED?

Ans: LED are in a nature of "ELECTRICAL JUNCTION" wherein the electrical signals are converted into light. This light if not focused around for large are the lense is there provided to guide light in a particular direction.

19. How much of light can be generated by

LED?

Ans: The quantum of light generated by LED depends on the quantum of electricity passing through the diode within its limit.

20. What happens to the light that is emitted by an LED?

Ans: Light emitted by LED which is measured in terms of lumens keeps traveling until it attenuates till zero energy. What it means is that energy exists in different forms. For example, sound energy can get converted into heat energy; heat energy gets converted into light energy. Energy cannot be destroyed nor created. The total quantum of energy remains the same but in different forms.

20. What is leased line?

Ans: Leased line exists for transfer of data and for voice. It is nothing but a point to point dedicated line.

21. In the case of leased circuit where optical fibre cable is employed, can you tell us the various equipments that would be employed for transfer of data?

Ans: In a simplest form a leased line is a point to point dedicated line used for transferring data. In a leased line, connection already stands established unlike in a telephone connection where connection is established after dialing is done. However the quantum of data and speed at which it is to take place would decide and depend on the technology employed. In simplest form, the various equipments that would be used would be the following: a) computer of the sender, b) modem connected to the computer having a fibre port c) Fibre cable d) a modem containing a fibre port at recipient's end and e) computer at the receiver's end.

In case the communication is for a longer distance, then the fibre cables would go to an exchange. Since there is a possibility of light energy getting attenuated, equipment called "repeater" is available which boosts up the signals for them to travel further. The LED is part of either the modem or the multiplexer or equipment similar to that. The light signal that travels through the cable is converted back to the electrical signal by photo detector. The equipment would also have an LED for conversion of electrical signals to light signals for further signal.

23. Sir. In your answer to question No. 11, you had explained to us the manner in which communications gets established between the speaker and receiver in a landline. Kindly tell us whether when a speaker lifts the handset and does not do the dialing, he gets a dial-tone; what is the source of energy for this dial tone; would it be right to say that in the connection between the speaker and the exchange there is an electrical current flowing from the exchange to the speaker point the moment the handset is lifted by him.

Ans: The handset when lifted acts as a switch to establish a connection between the speaker and the exchange. At the exchange there is always a source of

electrical energy drawn from stored sources like batteries etc. The moment the handset is lifted and the switch is activated, using the stored energy available in the exchange, dial-tone is sent to the handset indicating that a call can be initiated.

24. Would it therefore be right to say that even without dialing by the speaker, by merely lifting the handset the electrical signals keep flowing in the wired connection?

Ans: Yes. The flow of electrical energy takes place even without the dialing is made by the subscribers. In fact for this reason alone the exchanges have come out with automatic circuitries which will identify such instances and disconnect the connection so as to prevent the loss of energy.

25. According to what you have explained to us the sound waves get converted into electrical waves. You have stated above that there is electrical energy always present in the circuit. Kindly clarify what happens when the electrical signals which has been converted from sound waves combines with the electrical signals already present in the circuit on what is delivered to the speaker; is it the electrical signals present in the sound being delivered; if only the electrical waves representing the sound is to be delivered to the receiver what happens to the electrical signals that carried the electrical signals representing the sound waves?

Ans: The electrical waves present on the circuit are called as carrier waves. Once the carrier waves with the electrical waves representing sound reach the receiver end, the electrical waves representing sound are extracted and given to the receiver. The carrier current is lost or dropped at the receiver's end.

26. Kindly explain what is electromagnetic wave. Is optical signal that travel through optical fibre used for communication of voice and data also categorized as electromagnetic wave?

Ans: Electromagnetic waves are those waves have two inseparable components viz., electrical waves and magnetic waves. Optical signals used in optical fibres are also electromagnetic waves. Electromagnetic waves could be of a lower range of frequency upto higher range of frequency. The waves of lower frequency are used for radio purposes while waves at the higher frequency are light rays.

27. Can you explain what happens in a Light Emitting Diode and how does light get emitted?

Ans: As explained by me earlier, the LED is a type of a diode which is basically an electrical junction (P-N junction) wherein the electricity is flowing through that light waves are emitted from the junction converting the electrical energy that flows into it into light energy. It is basically a converter which converts electrical from of energy into light form of energy. That is the reason why I had indicated that the quantum of light generated by LED depends on the quantum of electricity flowing through it.

28. What is the difference between the dial-up telephone connection and not line?

Ans: In the case of normal dial-up connection as explained above, the speaker is required to lift the handset and dial the number to speak to the receiver. In the case of hotline, there is no need to dial the number. However the manner in which communication takes place is the same.

29. Sir, Can you explain how the infrastructure is used to send voice/data of multiple users at the same time.

Ans: When the telephone connection is established between two individuals it has been found that since only one person talks at one time, 50% of the capacity remains unused. Similarly when there is pause between words of the speaker about 30% of remaining 50% does not get utilised. Similarly, when there is gaps between sentences, about 10% of the capacity does not get utilised. As a result there is only an effective utilization of 20% of the total capacity. Thereafter it was researched and found that if the data or voice of other users could be combined, called as multiplexing, the same infrastructure could be used for multiple users. Similarly, when a telephone talk takes place, the speed at which sound waves travel is less when compared to that of the carrier. Here also it was found that high frequency carriers can carry multiple data and voice of lower frequency of different users through the same infrastructure. This is the reason why an OFC is used, essentially to reduce the cost per user and transmit data/voice of different users through the same OFCs. This OFCs can be compared to the train where different passengers get-in and get-off at different places and since the same train is used for different passengers, the cost of transportation per passenger gets reduced. The OFC can be compared to the train. The diesel for the train can be compared to the light and the passenger can be compared to the data.

30. You have shown us a diagram which indicates the source, the multiplexer. OFC, the multiplexer and the source. The same is reproduced herein below:

I put it to you that in a typical data transmission network the various devices involved are:

1. Computer (sender/receiver)
2. Modem
3. Copper cable
4. Multiplexer
5. Optical Fibre cable
6. Multiplexer
7. Copper cable
8. Modem

9. Computer (sender/receiver)

In the above network, which are the equipments according to you belong to the sender/receiver of data and which are the equipments according to you would belong to/operated by the service provider?

Ans: The items at 1 and 9 above would belong to the sender/ receiver of data. The items at 2 & 8 may or may not be owned by sender/receiver of data. The rest of the items are owned, controlled and operated by the service provider.

31. We put to you that the manner in which

leased line services operate is as under. Kindly confirm whether our understanding is correct:

- i. Data is to be transferred from point A to Point B
- ii. At point A and point B there are two computers.
- iii. The computer at point A is connected to a modem.
- iv. The modem is connected to a Multiplexer (encoder) through a copper wire.
- v. Data from the customer's computer to the modem is transmitted by way of electrical signals.
- vi. the modem transmits the electrical signals to the Multiplexer.
- vii. The Multiplexer contains an SDH box. The SDH box contains a micro processor which is connected to an LED which beams optical signals or to the OFC.
- viii. The optical signals which are beamed by the LED are received at point B by a photodetector (decoder).
- ix. The optical signals which are beamed can be divided into two parts. One part for synchronization and the other part for transmitting the data. In the absence of receipt of any data also the micro processor in the multiplexer gives instructions to the LED to beam containing synchronization signals and dummy bits. The photodetector recognizes the dummy bits and discards them. This is done to keep the system alive and to prepare for transmission/receipt of data of various customers.
- x. When data is being sent, the electrical signals carrying the data are received by the multiplexer. The micro processor in the multiplexer recognizes these electrical signals and sends instructions to the LED to beam the appropriate optical signals to transmit the data. The optical signals so generated will have a combination of synchronization signals and data signals (in the place of dummy bits).
- xi. This optical signal is received by the photodetector at the other end which recognizes the data contained in the optical signal. The photodetector thereafter

converts this optical signal containing the data into electrical signals and sends it to the modem through a copper cable. The modem in turn sends it to the computer at point B.

Ans: I agree with the above steps excepting that the synchronization or dummy bits are control signals provided by the service provider and this is not provided by the subscriber/person other than the telecom provider. These control signals can originate either from the microprocessor or a computer of the telecom operator and is in the form of electrical signals which pass through the OFC as optical signals.

32. Kindly refer to your opinion dated 11.9.2006 where in question number 5, you were asked as to who creates light energy in OFC broadband lines and you have answered that the owner of the broadband network creates the light energy and that when the light energy is transmitted through the broadband the data is delivered at the desired other end. Where you asked as to what happens to the light energy after the data is delivered?

Ans: As could be seen from this question and this answer, I was not asked what happens to the light energy after the information is delivered at the desired end.

33. I am now showing you your letter dated 3.10.2006 issued in clarification to your letter dated 11.9.2006 wherein as answer to Question No. 5 you have stated as follows:

The subscriber's data from his computer is mixed (modulated) with the light carrier for the purpose of transmission in OFC media. At the receiver's end, this mixed light is separated (demodulated) and the separated data is delivered to the receiving subscriber. During this process, the carrier (here in this case light) gets dropped and only the data is let passed to the receiving subscriber. There is no part of the light received from the OFC is given to the receiving subscriber as it is in no way useful to the subscriber and is used as only a carrier.

Do you still stand by this answer?

Ans: Yes.

34. I put to you that in terms of the operation of transmission of data undertaken by the company, the consumption of energy is the same for sending the dummy bits/signals irrespective of whether the data in the forms of signals is received from the customers. Do you agree that this position is correct and whether you had visited the premises of this telecom operator while giving your opinion dated 11.9.2006?

Ans: I agree that the method employed by the telecom operator is correct. In my opinion this is basically to optimize the use of the network and thereby to reduce the cost and it represents the practical approach to the issue. I have not visited their premises to see the actual implementation of the network and my opinions are based on my understanding of the technology.

35. I put it to you that when the transmission of data takes place from one end to another and the data is delivered at the receiver's end, the energy that does not represent the data which is the carrier energy dissipates at the point of separation/demodulation.

Ans: Yes. I agree that at the point of separation the carrier energy dissipate. This was in fact clarified by me in my clarificatory opinion dated 3.10.2006.

(sic)

The same witness was also cross-examined by the representative of Bharathi Airtel Limited.

(2) OPINION OF DIRECTOR IIT. NEW DELHI

62. The data gets transmitted from point A to point B in the telecom network in one of two ways - as digital data (i.e. after getting converted to a series of equivalent ones and zeros) or as analog data (either as frequency modulated or amplitude-modulated waves). Modern computer networks use digital transmission. Information from the customer is impressed on the light traveling in the optical fibre medium. If the optical fibre is a pipe, the flow of photons is the stream of water flowing through the pipe, the modulator is the tap which may be turned off and on to modulate the flow of water. The modulated optical wave carries the information from the source to the destination. This routing of the information is done by a system of routers provided by the network service provider. A good service provider makes every technical effort (by installing the most modern infrastructure of wires, optical fibres and routers) to faithfully route each bit of information (losing little or none of the bits it accepted from the customer) from the source to its intended destination at the fastest possible speed -thus providing a good quality of service. This transport of large amounts of information at the greatest possible speed in the best and most reliable manner is a lodestone for a good technical design and results from many man-months of engineering design efforts made by large research and development teams in network equipment companies. Thus, the information, which modulates photons, comes into existence at the source node when the modulated photons start carrying the customer's information to the destination node. These modulated photons and their journey at the receiver when they are imperfectly (on a statistical basis) converted into electrons at the detector - typically, either a pin-FET photo-detector or an avalanche photo-detector. Once the photons are carried in a typical network, it is transmitted through optical fibre towards the service provider who transmits its information (in certain cases after converting the signal from optical to electronic form) towards its destination through a system of routers. This system of routers may be electronic (a conversion of the data in the OFC cable to electronic form, followed by a routing of this data through a collection of explicitly chosen electronic network routers) or optical routers (in an all optical network). The created photon is almost never stored - the storage of photons is difficult though not impossible. An illusion of storage

may be created by making the photon Respondent-circulate in a long loop of optical fibre while compensating for the inevitable losses that would occur during Respondent-circulation. An electron in an electronic network may be stored almost indefinitely in a memory by setting the state of a electronic memory bit (a bi-stable or two-state element such as a flip-flop) to either one or zero. Photons once created, may be transferred and the information impressed on them is delivered at the source-indeed. This is the reason why modern networks use optical communication. It makes the transfer of information using light, fast, reliable and secure.

63. The carrier light may carry the information from the customer in one of two ways - (i) it may exist as a stream of photons whose magnitude is varied in response to information from the customer (externally modulated optical source) and (ii) it may come into existence expressly in response to the data transmitted by customer (an ok modulation). Which of these two methods is used is dependent on the technology adopted by the service provider.

64. Thus, the essence of these networks lies not in the energy transfer but in the transfer of information. Energy is simply a vehicle for all such information transmission systems, whether it is based on copper wires, wireless transmission, optical fibre based communication or fdree-space communication.

(3) Dr. Reji Philips., Associate Professor, Light & Matter Physics Group, Raman Research Institute.

65. According to him, "there is no sale of "light Energy." Light is just a carrier of the data in a fibre. In the same way as electromagnetic radiation in the kilohertz (10 HZ +) to G Hz (10 HZ) region, which propagates through space, is the carrier for audio and video signals in Radio and T.V transmission. Moreover, the light itself is nothing but high frequency electromagnetic radiation in the 10HZ frequency region. The Broad Band Lines are based on the principle of photonics. When the light which is modulated by data, is transmitted through the optical fibre lines, it will be within the control of the Company and they can reuse, remove or redirect the lines as per the whims of the Company.

66. He prefers to say "light" as against use of "light energy" by other experts. Any way as light has energy in it, so light propagating through a fibre also will have some energy. There is nothing spectacular in this. Light is a medium to carry the data. What happens is that light is initially generated by an LED or Laser Diode. Then data is injected into it (in layman"s terms), which modulates one aspect of light, such as amplitude, frequency or phase. The light in a communication system is generated in an LED or Laser Diode. It can be generated even in the absence of a data to be transmitted. For Example, LE Ds. (Light Emitting Diodes) are used in display systems, traffic lights, modern torches etc. While laser diodes are used as a bar code readers, printers etc. Light will fall on a Photo Detector that senses the modulations in the light and reproduces the original data. If there is no modulation, there is no data also. The

photo detector surface will absorb the light, so it does not travel any further and it is only the data that is given back to the user of the leased line. In other words, what is received by the leased line owner and what is given by him, i.e., only the data. To a question whether light energy is capable of being abstracted, the answer is he does not know and whether is capable of being possessed the answer is No. One can make light at will, but, it cannot be possessed or stored. However he agrees that it can be transferred and that it can be delivered.

The revenue contends the aforesaid opinion of experts represents long established and confirmed scientific truths. It is not disputed by the Petitioners.

67. In the BSNL case the Supreme Court has approved the description of electromagnetic waves given by David Gilles & Roger Marshall: Telecommunications Law: Butterworths:

1.14. Electromagnetic waves travel through free space from one point to another but can be channeled through waveguides which may be metallic cables, optical fibres or even simple tubes. All electromagnetic waves are susceptible to interference from one another and unrelated electrical energy can distort or destroy the information they carry. To reduce these problems they have been organized within the spectrum into bands of frequencies or wavelengths for the transmission of particular types of services and information

68. They have also set out the process of sending signals as under:

62. The process of sending a signal is as follows:

Data is superimposed on a carrier current or wave by means of a process called modulation. Signal modulation can be done in either of two main ways: analog and digital. In recent years, digital modulation has been getting more common, while analog modulation methods have been used less and less. There are still plenty of analog signals around, however, and they will probably never become totally extinct. Except for DC signals such as telegraph and baseband, all signal carriers have a definable frequency or frequencies. Signals also have a property called wavelength, which is inversely proportional to the frequency". (Encyclopedia of Technology Terms of Techmedia)

69. The nature of transaction is described at paras 108 and 109 as under:

108. The contract between the telecom service provider and the subscriber is merely to receive, transmit and deliver messages of the subscriber through a complex system of fibre optics, satellite and cables.

109. Briefly, the subscriber originate/generates his voice message through the handset. The transmitter in the handset converts the voice into radio waves within the frequency band allotted to the Petitioners. The radio waves are transmitted to the switching apparatus in the local exchange and thereafter after verifying the authenticity of the subscriber, the message is transmitted to the telephone exchange of the called party and then to the nearest Base Transceiver

Station (BTS). BTS transmits the signal to the receiver apparatus of the called subscriber, which converts the signals into voice, which the subscriber can hear.

SCIENTIFIC TRUTH

(a) What follows therefrom is that the light is one form of energy. The light energy is used as a medium to carry data. It is a carrier of data. The naturally available light energy cannot be used for this purpose. It is the artificially created light energy which actually carries the data or information from one place to another in an OFC broad band line. Without such light energy, data or information cannot be transmitted through this OFC broad band line.

(b) This light energy is created by LED (Light Emitting Diode) or Laser Device (LD). This light energy is artificially created by the telecom dealers by deploying LD and LED sources which are basically light emitting devices and which emit waves of particular frequencies only, which have the energy required for data transfer in the telecom network. LED are in the nature of electrical junction, wherein the electrical signals are converted into light. The quantum of light generated by LED depends on the quantum of electricity passing through the diode within its limit. It can be generated even in the absence of a data to be transmitted. For Example, LEDs (Light Emitting Diodes) are used in display systems, traffic lights, modern torches etc. While laser diodes are used as a bar code readers, printers etc. The data gets transmitted from point A to point B in the telecom network in one of two ways - as digital data or as analog data. Modern computer networks use digital transmission. It is the photon (or, equivalently, the optical wave) which propagates as a guided wave through the optical fibre. A certain minimum number of photons are transmitted corresponding to each digital one and the transmission of less than this minimum number of photons corresponds to a digital zero.

(c) Information from the customer is impressed on the light traveling in the optical fibre medium. The subscriber's data from his computer is mixed (modulated) with the light carrier for the purpose of transmission in OFC media. At the receiver's end, this mixed light is separated (demodulated) and the separated data is delivered to the receiving subscriber. During this process, the carrier (here in this case light) gets dropped and only the data is let passed to the receiving subscriber. There is no part of the light received from the OFC is given to the receiving subscriber as it is in no way useful to the subscriber. The modulated optical wave carries the information from the source to the destination. This routing of the information is done by a system of routers provided by the network service provider. The created photon is almost never stored - the storage of photons is difficult though not impossible. An electron in an electronic network may be stored almost indefinitely in a memory by setting the state of an electronic memory bit (a bi-stable or two-state element such as a flip-flop) to either one or zero. Thus, a photon in an optical network is somewhat like a marathon runner who is never allowed to stop storing a photon for one second usually means sending it off to circulate in an optical fibre loop which is

long enough to take the photon one whole second to circulate in it. Thus, photons can be delayed but not stored indefinitely as a photon.

(e) The essence of these networks lies not in the energy transfer but in the transfer of information. Energy is simply a vehicle for all such information transmissions systems, whether it is based on copper wires, wireless transmission, optical fibre based communication or free-space communication. The energy transfer is minimal and by the time a signal reaches the destination, its energy content is extremely small due to the attenuation along the way, even though the information content remains intact.

(f) The radio waves used by the mobile (Cellular) network and the light waves used in the optical network are both electromagnetic waves which are a part of the electromagnetic spectrum. They merely happen to occur at different frequencies. Light is also one form of electromagnetic wave. Electromagnetic waves are those waves which have two inseparable components viz.,

electrical waves and magnetic waves. Optical signals used in optical fibres are also electromagnetic waves.

Electromagnetic waves could be of a lower range of frequency up to higher range of frequency. The waves of lower frequency are used for radio purposes while waves at the higher frequency are light rays.

70. Internet connection is obtained for communication. Customer enters into an agreement for supply and receiving of data. As a subscriber, one would expect the data to be sent or received at a speed he expects to be sent. A subscriber is not worried about the manner in which the data is transferred. It may be wireless communication or wired communication. He is not worried about method of communication so long as the communication happens without any disruption. The purpose and the mechanism of both the phones are similar. However while in the case of mobile phone there is greater mobility, in case of landline there is no mobility. This light energy cannot be used by the subscriber just like electricity which a subscriber can use it by converting into light or mechanical energy.

71. In the case of wireless communication electrical waves cannot travel, beyond the stage where there is no wire. The electrical waves have to be converted into electromagnetic waves which travel in space. The electromagnetic waves that, so travel are received by the antenna at the recipient's end where the electromagnetic waves are converted into electrical waves for conversion thereafter to sound waves. In the case of communication through optical fibre, the electrical signals are converted into optical signals so as to travel through optical fibres to other end where the optical signals at the other end are reconverted into electrical signals. Thereafter the electrical signals are converted to sound waves for the receiver to hear the speech.

72. Therefore, it is clear this artificially created light energy is a form of energy, wave used as a data or information carrier by a service provider in telecom

service. The question for consideration is, is this artificially created light energy satisfy the tests of being called "goods" as understood in law.

IS ACLE GOODS?

73. The case of the State is that light carrier which is the data carrier energy has all attributes of goods within the meaning of Article 366(12) of the Constitution. A movable property must have the properties of abstraction, possession, transfer, delivery and use to enable it to be treated as goods. The non-radiant energy that moves strictly within the confines of the cable under full control of the Petitioner has been held to possess the aforesaid properties. Light carrier is the only discernible and transferable goods element in the network. The dominant intention of the contract is to sell as much possible and maximize profits. The State places reliance on the observation of the Supreme Court in BSNL case where it has been observed that it cannot anticipate what may be achieved by scientific and technological advances in future and that no one has argued the point that electromagnetic waves are abstractable or are capable of delivery, and therefore, light energy is goods", as it possess all the aforesaid characteristics. Yet another reason assigned is that the Apex Court has already held electricity is "goods". The ACLE is derived from electrical energy and therefore it also falls under the definition of "goods". In order to appreciate this contention, it is necessary to first see the definition of "goods" in the Constitution and the statutes.

74. The word "goods" is defined under the Constitution of India at Article 366(12) as under:

Goods includes all materials, commodities, and articles.

75. In Karnataka Sales Tax Act, 1957, Section 2(m) defines "Goods" as under:

2(m).- Goods means all kinds of movable property (other than newspapers, actionable claims, stocks and shares and securities) and includes livestock, all materials, commodities and articles [(including goods, as goods or in some other form involved in the execution of a works contract or those goods to be used in the fitting out, improvement or repair of movable property) and all growing crops, grass or things attached to, or forming part of the land which are agreed to be severed before sale or under the contract of sale;

76. In Karnataka Value Added Tax Act, 2003, Section 2(15) defines the term "Goods" as under:

"Goods" means all kinds of movable property (other than newspaper, actionable claims, stocks and shares and securities) and includes livestock, all materials, commodities and articles (including goods, as goods or in some other form) involved in the execution of a works contract or those goods to be used in the fitting out, improvement or repair of movable property, and all growing crops, grass or things attached to, or forming part of the land which are agreed to be severed before sale or under the contract of sale;

77. The Constitution Bench of the Apex Court in the case of *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, dealing with the question as to how the word "goods" has to be understood after coming into force of the Constitution has held that the cardinal rule of interpretation was that words should be read in their ordinary, natural and grammatical meaning, subject to this rider that in construing words in a constitutional enactment conferring legislative power the most liberal construction should be put upon the words so that the same may have effect in their widest amplitude". And they have also pointed that there is no inconsistency between the words goods found in the Constitution and in other statutes and therefore, the meaning assigned in one, equally applies to the meaning in the other.

78. The Constitution Bench of the Supreme Court in the case of *Union of India (UOI) Vs. Delhi Cloth and General Mills*, held as under:

More over, the definitions of "goods" make it clear that to become "goods" an article must be something which can ordinarily come to the market to be bought and sold.

79. Again the Apex Court in the case of *South Bihar Sugar Mills Ltd. and Anr. v. Union of India and Anr.* reported in AIR 1968 SCC 922 has held as under:

The Act charges duty on the manufacture of goods. The word "manufacture" implies a change but every change in the raw material is not manufacture. There must be such a transformation that a new and different article must emerge having a distinctive name, character or use.

As the Act does not define goods, the legislature must be taken to have used that word in its ordinary dictionary meaning. The dictionary meaning is that to become goods it must be something which can ordinarily come to the market to be bought and sold and is known to the market.

80. Again in the case of *Bhor Industries Ltd., Bombay Vs. Collector of Central Excise, Bombay*, , the Apex Court held as under:

It appears to us that under the Central Excise Act as it stood at the relevant time, in order to be goods as specified in the entry the first condition was that as a result of manufacture goods must come into existence.

For articles to be goods these must be known in the market as such or these must be capable of being sold in the market as goods. Actual sale in the market is not necessary, user in the captive consumption is not determinative but the Articles must be capable of being sold in the market or known in the market as goods.

81. In the case of *Moti Laminates Pvt. Ltd. and Others Vs. Collector of Central Excise, Ahmedabad*, , the Apex Court held as under:

9. Although the duty of excise is on manufacture or production of the goods, but the entire concept of bringing out new commodity etc. is linked with

marketability. An article does not become goods in the common parlance unless by production or manufacture something new and different is brought out which can be bought and sold.

Therefore, any goods to attract excise duty must satisfy the test of marketability. The tariff schedule by placing the goods in specific and general category does not alter the basic character of levability. The duty is attracted not because an article is covered in any of the items or it falls in residuary category but it must further have been produced or manufactured and it is capable of being bought and sold.

82. Following this judgment, yet another Constitution Bench of the Apex Court in the case of Tata Consultancy Services Vs. State of Andhra Pradesh, at Para 9 held as under:

In India the test, to determine whether a property is "goods", for purposes of sales tax, is not whether the property is tangible or intangible or incorporeal. The test is whether the concerned item is capable of abstraction, consumption and use and whether it can be transmitted, transferred, delivered, stored, possessed etc.

While dealing with the question whether software is a goods, it was held at Para 78 as under:

A software may be intellectual property but such personal intellectual property contained in a medium is bought and sold. It is an article of value. It is sold in various forms like - floppies, disks, CD-ROMs, punch cards, magnetic tapes, etc. Each one of the mediums in which the intellectual property is contained is a marketable commodity. They are visible to senses. They may be a medium through which the intellectual property is transferred but for the purpose of determining the question as regards levability of the tax under a fiscal statute, it may not make a difference. A programme containing instructions in computer language is subject-matter of a licence. It has its value to the buyer. It is useful to the person who intends to use the hardware, viz. the computer in an effective manner so as to enable him to obtain the desired results. It indisputably becomes an object of trade and commerce. These mediums containing the intellectual property are not only easily available in the market for a price but are circulated as a commodity in the market. Only because an instruction manual designed to instruct use and installation of the supplier programme is supplied with the software, the same would not necessarily mean that it would cease to be a "goods". Such instructions contained in the manual are supplied with several other goods including electronic ones. What is essential for an article to become goods is its marketability.

The Supreme Court in the case of Commissioner of Sales Tax, Madhya Pradesh, Indore Vs. Madhya Pradesh Electricity Board, Jabalpur, where a question arose whether Madhya Pradesh Electricity Board is a dealer of electricity and whether electricity is goods, it held as under:

The Electricity Board carried on the business of selling, supplying and distributing electricity which fell within the meaning of the expression "goods" in the two Acts viz. Madhya Pradesh General Sales Tax Act and Central Sales Tax Act. The definition of goods is very wide and includes all kinds of movable property.

What has essentially to be seen is whether electric energy is goods within the meaning of the relevant provisions of the two Acts. The definition in terms is very wide according to which "goods" means all kinds of movable property. Then certain items are specifically excluded or included and electric energy or electricity is not one of them. The term "movable property" when considered with reference to "goods" as defined for the purposes of sales tax cannot be taken in a narrow sense and merely because electric energy is not tangible or cannot be moved or touched like, for instance, a piece of wood or a book it cannot cease to be movable property when it has all the attributes of such property. It is needless to repeat that it is capable of abstraction, consumption and use which, if done dishonestly, would attract punishment u/s 39 of the Indian Electricity Act, 1910. It can be transmitted, transferred, delivered, stored, possessed etc. in the same way as any other movable property.

It cannot be denied that the Electricity Board carried on principally the business of selling, supplying or distributing electric energy. It would therefore clearly fall within the meaning of the expression "dealer" in the two Acts.

83. Again, the Constitution Bench of the Supreme Court had an occasion to consider whether electrical energy is goods in the case of *State of A.P. v. National Thermal Power Corporation Ltd. and Ors.* reported in 2002 127 STC 280. At Para 21, it held as under:

21. Before we deal with the constitutional aspects let us first state what electricity is, as understood in law, and what are its relevant characteristics. It is settled with the pronouncement of this Court in *Commissioner of Sales Tax, Madhya Pradesh, Indore Vs. Madhya Pradesh Electricity Board, Jabalpur*, that electricity is goods. The definition of goods as given in articles 366(12) of the Constitution was considered by this Court and it was held that the definition in terms is very wide according to which "goods" means all kinds of movable property. The term "movable property" when considered with reference to "goods" as defined for the purpose of sales tax cannot be taken in a narrow sense and merely because electrical energy is not tangible or cannot be moved or touched like, for instance, a piece of wood or a book it cannot cease to be movable property when it has all the attributes of such property. It is capable of abstraction, consumption and use which if done dishonestly is punishable u/s 39 of the Indian Electricity Act, 1910. If there can be sale and purchase of electrical energy like any other movable object, this Court held that there was no difficulty in holding that electric energy was intended to be covered by the definition of "goods". However, A.N. Crover, J., speaking for three-Judge Bench of this Court went on to observe that electric energy "can be transmitted, transferred, delivered, stored, possessed, etc., in the same way as any other movable

property". In this observation we agree with Grover, J., on all other characteristics of electric energy except that it can be "stored" and to the extent that electric energy can be "stored", the observation must be held to be erroneous or by oversight. The science and technology till this day have not been able to evolve any methodology by which electric energy can be preserved or stored.

84. Another significant characteristic of electrical energy is that its generation or production coincides almost instantaneously with its consumption. In the case of Indian Aluminium Co. etc. etc. Vs. State of Kerala and others, at Para 25, it is held as under:

Continuity of supply and consumption starts from the moment the electrical energy passes through the meters and sale simultaneously takes place as soon as meter reading is recorded. All the three steps or phases take place without any hiatus. It is true that from the place of generating electricity, the electricity is supplied to the sub-station installed at the units of the consumers through electrical higher-tension transformers and from there electricity is supplied to the meter. But the moment electricity is supplied through the meter, consumption and sale simultaneously take place.

As soon as the electrical energy is supplied to the consumers and is transmitted through the meter, consumption takes place simultaneously with the supply. There is no hiatus in its operation.

85. From the aforesaid judgments of the Apex Court, it is clear that the essential test to be satisfied before an article is said to be "goods" is the test of marketability. In the market, the said goods is to be known as a commodity which is useful to a customer. In other words it should be known to the market as goods. That is, such goods must be bought and sold in the market. Therefore, an article or commodity or a material must be something which can ordinarily come to the market to be bought and sold. It must have a distinctive name, character or use. Thereafter it should satisfy the test of abstraction, transmission, transfer, delivery, storage and possession, etc.,

86. The Assessing Authority has held that the light energy satisfies the test of abstraction as laid down by the Apex Court both in the case of electricity as well as in the case of software. In order to find out the correctness of the said finding, it is necessary to know the meaning of the word abstraction.

87. In Lax Lexicon by P. Ramanatha Aiyer, the word abstraction has been given the following meaning:

Abstraction: Abstraction means taking or appropriation. Energy may be dishonestly abstracted by artificial means or unauthorised devices.

Abstract: As a noun, the word abstract denotes a less quantity containing the virtue and force of a greater quantity that which comprises in itself the essence of a larger thing or several things; an abridgment, compendium. epitome or

synopsis. To abstract monies or funds from a bank is to take or withdraw funds therefrom.

88. In the case of electricity, after it is generated either in a hydro electrical power station or from coal or from atomic energy, as it cannot be stored, it is transmitted through electrical lines and from electrical lines, it is delivered to the customer to his residence, office or industry. Therefore, when a customer puts on the switch, he abstracts electricity from the electrical line and then consumes it. In other words, before a customer abstracts electricity, electricity is in existence in abundance. He abstracts only so much of energy, which he requires. Even in the case of a software, when it is embedded in a floppy, there can be more than one programme or a series of instructions. A person who wants a programme or instructions, embedded in that software, can put the floppy into the computer and abstract that programme or instructions which he requires. Therefore, the Apex Court has held that both in the case of electricity as well as in the case of software it is abstractable.

89. In the case of ACLE, it is not something which is manufactured or generated by the service provider. It is derived from electricity. For abstraction the light energy must be available in abundance and if the service provider is making use of a portion of it, he abstracts a portion of it. However, by a technology called LED and LD, the service provider converts electricity into light energy. Therefore, the ACLE is not in existence in abundance in the form of ACLE. It comes into existence when electrical energy is converted into light energy. Therefore, there is no abstraction of light energy. It is a case of conversion and not abstraction. Therefore, the said test is not fulfilled. The Assessing Authority on an erroneous understanding, has held that it is capable of abstraction.

Consumption: Yet another test prescribed by the Apex Court is that of consumption. In the case of electricity, the customer abstracts electricity from the transmission lines maintained by electricity supply companies, in his house, office or industry, which is measured by an energy consumption meter installed at the consumer's place and uses the said energy. He can make use of the said energy for lighting, heating or other purposes. In other words, depending upon his requirements, he consumes electricity to meet his needs and for that consumption, he pays for it as measured by energy meters. Even in the case of a software, though it is embedded in a CD, the customer consumes only that much of intellectual property embedded in that software which he needs or requires at a point of time. In other words, he actually uses the said benefit from the said software.

90. In case of the ACLE, the subscriber never comes in contact with the light energy. When he sends a message or data for transmission, that message reaches a network maintained by the service provider. It is the service provider who for the purpose of transmitting the message or data generates light energy by converting electrical energy into light energy and uses the light energy as a carrier for the purpose of transmitting the message or data. In other words, it is

the service provider who consumes the light energy as much required for transmitting the message or data. At the other end, in the network again the ACLE drops out and the message or data are separated and thereafter, it is delivered to the recipient of the message or data. Therefore, neither the subscriber nor the recipient of the message or the data, consumes any portion of the ACLE. Therefore, ACLE is a tool in the hands of the service provider to render service. Therefore the finding recorded by the Assessing Authority that the subscriber or the recipient consumes this light energy in the process of transmission is patently erroneous.

Delivery: Yet another characteristic, which is recognised, is that the goods should be capable of being delivered. In the case of electricity, electricity is delivered to the customer at his residence, office or industry. After taking delivery, he consumes pays for it. Similarly, a software is also delivered to the customer after the same is embedded in the CD and physically handed over to the customer. In the case of ACLE, the subscriber sends his voice or data and the recipient receives only the voice or data and not any portion of ACLE. Neither the subscriber nor the recipient of the message or data ever comes in contact with the light energy. In fact both of them are completely ignorant of the existence of (he light energy).

91. In BSNL case, the Supreme Court has held as under:

63. It is clear, electromagnetic waves are neither abstracted nor are they consumed in the sense that they are not extinguished by their user. They are not delivered, stored or possessed. Nor are they marketable. They are merely the medium of communication. What is transmitted is not an electromagnetic wave but the signal through such means. The signals are generated by the subscribers themselves. In telecommunication what is transmitted is the message by means of the telegraph. No part of the telegraph itself is transferable or deliverable to the subscribers.

71. For the reasons stated by us earlier we hold that the electromagnetic waves are not "goods" within the meaning of the word either in Article 366(12) or in the State Legislations. It is not in the circumstances necessary for us to determine whether the telephone system including the telephone exchange was not goods but immovable property as contended by some of the Petitioners.

92. Therefore none of the tests prescribed to constitute "goods" exist in the case of light energy. Light energy is neither abstracted nor consumed. It is not delivered, stored or possessed. It is not marketable. The assessing authority though has very selectively taken the information and made it appear that the case is not covered by BSNL and has propagated a new theory which has no basis. In fact, the very word Artificially Created Light Energy is his own creation. In that view of the matter, we hold that this Artificially Created Light Energy is not goods as defined under Article 366(12) of the Constitution or under the Karnataka Value Added Tax Act or under the Value Added Tax.

SALE OF GOODS

93. Assuming for the argument sake that ACLE is "goods" it does not give any right to the State to levy the sales tax. It is only when the goods are sold or any repurchase takes place, the taxing event happens and the tax could be levied. In the instant case, the agreement entered into between the subscriber and the service providers are placed on record. In the entire agreement there is no whisper about this Artificially Created Light Energy is offered for sale by the service provider to the subscriber. So, the subscriber never approaches the service provider for purchase of this light energy. On the contrary in the entire agreement what is agreed upon is providing the service. Therefore, the terms of the agreement between the parties give no indication of sale or purchase of this light energy. On the contrary it exclusively provides that the agreement entered into between the parties is for service. In this context it is necessary to notice the legal requirements of sale of goods.

94. In the case of *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, referred to supra, the Constitution Bench has clearly laid down the legal position. At para-15 it is held as undent:

15. The concept of sale, as it now obtains in our jurisprudence, has its roots in the Roman law. Under the law, sale, *emptio venditio*, is an agreement by which one person agrees to transfer to another the exclusive possession (*vacuum possession tradere*) of something (*merx*) for consideration. In the earlier stages of its development, the law was unsettled whether the consideration for sale should be money or anything valuable. By a prescript of the Emperors Diocletian and Maximum of the year 294 A.D., it was finally decided that it should be money, and this law is embodied in t)i.e. Institutes of Justinian, vide Title 23. *Emptio Venditio* is, it may be noted, what is known in Roman law as a consensual contract. That is to say, the contract is complete when the parties agree to it, even without delivery as in contracts re or the observance of any formalities as in contracts *verbis* and *litteris*. The common law of England relating to sales developed very much on the lines of the Roman law in insisting on agreement between parties and price as essential elements of a contract of sale of goods. In his work on sale, Benjamin observes:

Hence it follows that, to constitute a valid sale, there must be a concurrence of the following elements viz.

(1) Parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property which is transferred from the seller to the buyer; and (4) a price in money paid or promised." (vide 8th Edn. p.2).

16. Thus, according to the law both of England and of India, in order to constitute a sale it is necessary that there should be an agreement between the parties for the purpose of transferring title to goods which of course presupposes capacity to contract, that it must be supported by money consideration, and that as a result of the transaction property must actually pass in the goods. Unless all

these elements are present, there can be no sale.

95. Following this judgment the Constitution Bench in *Tata Consultancy Services v. State of Andhra Pradesh* reported in (2005) 1 SCC 308 referred herein above has held at para 27 as under:

27. In our view, the term "goods" as used in Article 366(12) of the Constitution and as defined under the said Act is very wide and include all types of movable properties, whether those properties be tangible or intangible..... We see no difference between a sale of a software program on a CD/floppy disc from a sale of music on a cassette/ CD or a sale of a film on a video cassette/ CD. In all such cases, the intellectual property has been incorporated on a media for purposes of transfer. Sale is not just of the media which by itself has very little value. The software and the media cannot be split up. What the buyer purchases and pays for is not the disc or the CD. As in the case of paintings or books or music or films the buyer is purchasing the intellectual property and not the media i.e., the paper or cassette or disc or CD. Thus is transaction/sale of computer software is clearly a sale of "goods" within the meaning of the term as defined in the said Act. The term "all materials, articles and commodities" includes both tangible and intangible/incorporeal property which is capable of abstraction, consumption and use and which can be transmitted, transferred, delivered, stored, possessed, etc., The software programs have all these attributes.

In the very same *Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others*, it is held as under:

64. A subscriber to telephone service could not reasonably be taken to have intended to purchase or obtain any right to use electromagnetic waves or radio frequencies when a telephone connection is given. Nor does the subscriber intend to use any portion of the wiring, the cable, the satellite, the telephone exchange, etc. At the most the concept of the sale in a subscriber's mind would be limited to the handset that may have been purchased for the purposes of getting a telephone connection. As far as the subscriber is concerned, no right to the use of any other goods, incorporeal or corporeal, is given to him or her with the telephone connection.

78. But if there are no deliverable goods in existence as in this case, there is no transfer of user at all. Providing access or telephone connection does not put the subscriber in possession of the electromagnetic waves any more than a toll collector puts a road or bridge into the possession of the toll payer by lifting a toll gate. Of course the toll payer will use the road or bridge in one sense. But the distinction with a sale of goods is that the user would be of the thing or goods delivered. The delivery may not be simultaneous with the transfer of the right to use. But the goods must be in existence and deliverable when the right is sought to be transferred.

111. Traditionally, a contract for carriage of goods or passengers is by roadways, railways, airways and waterways. This is associated with carriage of tangible

goods. Such a carrier has no right over the goods of the customer and does not effect transfer of right to use any goods used by the carrier for goods. On this analogy, the Petitioners carry messages. They are only carriers and have neither property in the message nor effect any transfer to the subscribers. The advancement of technology should be so absorbed in the interpretation that this method of carriage of message should also be understood as carriage of goods and not a transfer of a right to use goods, if any.

96. Therefore the legislative intention is that the expression of "sale of goods" in Entry 48 should bear precise and definite meaning it has in law, and that the meaning should not be left to fluctuate with the definition of sale, in law relating to sale of goods which might be in force for the time being. If the words "sale of goods" have to be interpreted in their legal sense, that sense can only be what it has in the law relating to sale of goods. The ratio of the rule of interpretation that words of legal import occurring in a statute should be construed in their legal sense is that those words have, in law, acquired a definite and precise sense, and that, accordingly, the legislature must be taken to have intended that they should be understood in that sense. Therefore while interpreting an expression used in a legal sense, we have only to ascertain the precise connotation which it possess in law. In India, to constitute a transaction of sale there should be an agreement, express or implied, relating to goods to be conveyed by passing on title in those goods. It is the essence of this concept that both the agreement and the sale should relate to the same subject-matter. Where the goods delivered under the contract are not the goods contracted for, the purchaser has got a right to reject them, or to accept them and claim damages for breach of warranty. Therefore, in law, there cannot be an agreement relating to one kind of property and sale of different property. On the other hand there must be a definite agreement between the parties for the sale of the very "goods" in which eventually property passes.

97. To sum up, the expression "sale of goods" in Entry 48 is a nomen juris, its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement. A customer approaches the service provider to transmit voice or a data and the agreement he enters into with the service provider is for transmission of voice or data. He is not concerned with the technology adopted by the service provider to transmit the said voice or data. In the instant case, ACLE is used for transmitting the said voice/data as is clear from the technical information as well as the reasoning of the assessing authority. ACLE is only a carrier. The subscriber has not entered into an agreement to purchase ACLE or any portion thereof. The consideration paid by him is for the service rendered and transmitting the voice/data to its destination. He does not come in contact with this carrier at all. Therefore none of the conditions prescribed to constitute the sale of goods exists in the instant case. Therefore, there is no sale of goods, which empower the State to levy sales tax/Vat.

98. This aspect has yet another dimension. All these service providers have obtained licence from the Department of Telecommunication, Government of India, Transport of Telecommunications u/s 4 of the Indian Telegraph Act, 1885 (for short hereinafter referred to as "the Telegraph Act"). Section 3(1) defines what the telegraph means. It reads as under:

3(1) "telegraph" means any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images, and sounds or intelligence of any nature by wire, visual or other electro magnetic emissions, radio waves or hertzian waves, galvanic, electric or magnetic means;

Explanation.- "Radio waves" or "Hertzian waves" means electromagnetic waves of frequencies lower than 3,000 giga-cycles per second propagated in space without artificial guide.

It also defines message at 3(3) as under:

message means any communication sent by telegraph, or given to a telegraph officer to be sent by telegraph or to be delivered

99. Section 4 of the Telegraph Act under which licence is granted to these service providers reads as under:

4. Exclusive privilege in respect of telegraphs, and power to grant licenses.- (1) Within India, the Central Government shall have the exclusive privilege of establishing, maintaining and working telegraphs:

Provided that the Central Government may grant a license, on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain or work a telegraph within any part of India:

Provided further that the Central Government may, by rules made under this Act and published in the Official Gazette, permit, subject to such restrictions and conditions as it thinks fit, the establishment, maintenance and working-

a) of wireless telegraphs on ships within Indian territorial waters and on aircraft within or above India, or Indian territorial waters, and

(b) of telegraphs other than wireless telegraphs within any part of India.

(2) The Central Government may, by notification in the Official Gazette, delegate to the telegraph authority all or any of its powers under the first proviso to Sub-section (1).

The exercise by the telegraph authority of any power so delegated shall be subject to such restrictions and conditions as the Central Government may, by the notification, think to impose

100. Interpreting these provisions, the Apex Court in BSNL case held as under: -

60. Section 4 of the 1885 Act gives exclusive privilege in respect of

telecommunication and the power to grant licences to the Central Government. Pursuant to such power, licences have been granted to service providers. According to the service providers, in terms of their licence no further transfer of the rights to use the telegraph could be affected by them. Therefore, what was provided was a service by the utilisation of the telegraph licensed to the service providers for the benefit of the subscribers.

Again at paras 112, 113, 115 and 116 it held as under:

112. The licence clearly manifests that it is one for providing telecommunication service and not for supply of any goods or transfer of right to use any goods. It expressly prohibits transfer or assignment. The integrity of the licence cannot be broken into pieces nor can the telecommunication service rendered by them be so mutilated. Not only does this position flow from the terms of contract, this also flows from Section 4 of the Indian Telegraph Act which provides for grant of licence on such conditions and in consideration of such payments as it thinks fit, to any person "to establish, maintain or work at telegraph". The integrity of establishing, maintaining and working is not to be mutilated.

113. Clause 9 clearly interdicts the licensee provided that licensee will not assign or transfer his rights in any manner whatsoever under the licence to third party. It is impossible to contend that the right to use goods, assuming without conceding that they are goods, which are essential for the rendition of service can never be a transaction or transfer of right to use goods. Nor can the contract between subscribers and licensee viz. service provider be interpreted as involving transfer of right to use goods.

115. Section 4 of the Telegraph Act maintains the integrity of subject-matter of the licence viz. "establish, maintain or work a telegraph". Therefore, the transaction of service is composite one not capable of disintegrated. Except in Sub-clause (a) [of Article 366(29-A)] in all other sub clauses the transactions are contractual. There is no scope for importing any doctrine of statutory agency of the service provider. Except in the case of sub Clause (a) where the transfer other wise than in pursuance of contract of property in any goods is deemed to be sale in each one of the other sub clauses the transaction is consensual. The contrast between sub Clause (a) and all other sub clauses clearly manifests that the transactions involved in the present dispute are contractual. The fiction operates to deem what is not otherwise a sale of goods as a sale of goods i.e. even the transfer of a right to use goods is deemed to be a sale of the goods.

116. It is not possible to interpret the contract between the service provider and the subscriber that the consensus was to mutilate the integrity of contract as a transfer of right to use goods and rendering service. Such a mutilation is not possible except in the case of deemed sale falling under sub Clause (b). Nor can the service element be disregarded and the entirety of the transaction be treated as a sale of goods (even when it is assumed that there are any goods at all involved) except when it falls under sub Clause (f). This will also result in an

anomaly of the entire payment by the subscriber to the service provider being for alleged transfer of a right to use goods and no payment at all for service. The licence granted by the Central Government fixes the tariff rates and all are for services.

101. Therefore, it is clear the licence granted under the Telegraph Act is for providing telecommunication services and not for supply of any goods or transfer of right to use any goods. It expressly prohibits transfer or assignment. The licence clearly interdicts the licence and prohibits the licensee from assigning or transferring his rights in any manner whatsoever under the licence to a third party. It is not in the contemplation of both the parties that the contract between them involves transfer of ACLI or right to use any goods. In terms of the licence no transfer of the rights to use the telegraph could be effected by them. What was provided is service by utilization of the telegraph licence for the benefit of the subscribers. In this context it is also necessary to refer Article 366(29-A).

102. Article 366 was amended by inserting a definition of "tax on the sale or purchase of goods" in Clause 29A. The definition reads as under:

(29A) "tax on the sale or purchase of goods" includes-

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

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

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

(d) a tax on 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;

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

(f) a tax on 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;

103. Interpreting this provision in BSNL case, the Supreme Court held as under:

41. Sub-clause (a) covers a situation where the consensual element is lacking. This normally takes place in an involuntary sale. Sub-clause (b) covers cases

relating to works contracts. This was the particular fact situation which the Court was faced with in *Gannon Dunkerley (State of Madras v. Gannon Dunkerley and Co. (Madras) Ltd. (1958) 9 STC 353)* and which the Court had held was not a sale. The effect in law of a transfer of property in goods involved in the execution of the works contract was by this amendment deemed to be a sale. To that extent the decision in *Gannon Dunkerley* was directly overcome. Sub-clause (c) deals with hire-purchase where the title to the goods is not transferred. Yet by fiction of law, it is treated as a sale. Similarly the title to the goods under Sub-clause (d) remains with the transferor who only transfers the right to use the goods to the purchaser. In other words, contrary to *A.V. Meiyappan* decision (*A.V. Meiyappan Vs. Commissioner of Commercial Taxes, Board of Revenue, Madras and Another*, a lease of a negative print of a picture would be a sale Subclause (e) covers cases which in law may not have amounted to sale because the member of an incorporated association would have in a sense begun as both the supplier and the recipient of the supply of goods. Now such transactions are deemed sales. Sub-clause (f) pertains to contracts which had been held not to amount to sale in *The State of Punjab Vs. Associated Hotels of India Ltd.*, . That decision has by this clause been effectively legislatively invalidated.

42. All the sub-clauses of Article 366(29-A) serve to bring transactions where one or more of the essential ingredients of a sale as defined in the Sale of Goods Act, 1930 are absent, within the ambit of purchase and sales for the purposes of levy of sales tax. To this extent only is the principal enunciated in *Gannon Dunkerley Ltd. (sic modified)*. The amendment especially allows specific composite contracts viz. Works contracts (sub-clause(b)); hire-purchase contracts (sub-clause (c)), catering contracts (sub-clause(e)) by legal fiction to be divisible contracts where the sale element could be isolated and be subjected to sales tax.

43. *Gannon Dunkerley* survived the Forty-sixth Constitutional Amendment in two respects. First with regard to the definition of "sale" for the purposes of the Constitution in general and for the purposes of Entry 54 of List II in particular except to the extent that the clauses in Article 366(29-A) operate. By introducing separate categories of "deemed sales", the meaning of the word "goods" was not altered. Thus the definitions of the composite elements of a sale such as intention of the parties, goods, delivery, etc. would continue to be defined according to known legal connotations. This does not mean that the content of the concepts remain static. The courts must move with the times. But the Forty-sixth Amendment does not give a licence, for example, to assume that a transaction is a sale and then to look around for what could be the goods. The word "goods" has not been altered by the Forty-sixth Amendment. That ingredient of a sale continues to have the same definition. The second respect in which *Gannon Dunkerley* has survived is with reference to the dominant nature test to be applied to a composite transaction not covered by Article 366(29-A). Transactions which are mutant sales are limited to the clauses of Article 366(29-A). All other transactions would have to qualify as sales within the meaning of

the Sales of Goods Act, 1930 for the purpose of levy of sales tax.

44. Of all the different kinds of composite transactions the drafters of the Forty-sixth Amendment chose three specific situations, a works contract, a hire-purchase contract and a catering contract to bring them within the fiction of a deemed sale. Of these three, the first and third involve a kind of service and sale at the same time. Apart from these two cases where splitting of the service and supply has been constitutionally permitted in sub-clauses(b) and (f) of Clause (29-A) of Article 366, there is no other service which has been permitted to be so split. For example, the sub-clauses of Article 366(29-A) do not cover hospital services. Therefore, if during the treatment of a patient in a hospital, he or she is given a pill, can the Sales Tax Authorities tax the transaction as a sale? Doctors, lawyers and other professionals render service in the course of which can it be said that there is a sale of goods when a doctor writes out and hands over a prescription or a lawyer drafts a document and delivers it to his/her client? Strictly speaking, with the payment of fees, consideration does pass from the patient or client to the doctor or lawyer for the documents in both cases.

45. The reason why these services do not involve a sale for the purposes of Entry 54 of List II is, as we see it, for reasons ultimately attributable to the principles enunciated in *Gannon Dunkerley's* case, namely, if there is an instrument of contract which may be composite in any case other than the exceptions in Article 366(29-A), unless the transaction in truth represents two distinct and separate contracts and is discernible as such, then the State would not have the power to separate the agreement to sell from the agreement to render service, and impose tax on the sale. The test therefore for composite contracts other than those mentioned in Article 366(29A) continues to be - did the parties have in mind or intend separate rights arising out of the sale of goods. If there was no such intention there is no sale even if the contract could be disintegrated. The test for deciding whether a contract falls into one category or the other is to as what is the substance of the contract. We will, for the want of a better phrase, call this the dominant nature test.

At paras 50 and 84 it was observed as under:

50. What are the "goods" in a sales transaction, therefore, remains primarily a matter of contract and intention. The seller and such purchaser would have to be *ad idem* as to the subject-matter of sale or purchase. The court would have to arrive at the conclusion as to what the parties had intended when they entered into a particular transaction of sale, as being the subject-matter of sale or purchase. In arriving at a conclusion the court would have to approach the matter from the point of view of a reasonable person of average intelligence.

84. As we have said Article 366(29-A) has no doubt served to extend the meaning of the word "sale" to the extent stated but no further. We cannot presume that the constitutional amendment was loosely drawn and must proceed on the basis that the parameters of "sale" were carefully defined. But having said

that, it is sufficient for the purposes of this judgment to find, as we do, that a telephone service is nothing but a service. There is no sales element apart from the obvious one relating to the handset, if any. That and any other accessory supplied by the service provider in our opinion remain to be taxed under the State sales tax laws. We have given the reasons earlier why we have reached this conclusion.

Ultimately the Supreme Court has declared as under:

91. As far as the question whether providing of a telephone connection involves inter-State sales, now that it has been clarified that electromagnetic waves or radio frequencies are not goods, the issue is really academic. 92. For the reasons aforesaid, we answer the questions formulated by us earlier in the following manner.

(A) Goods do not include electromagnetic waves or radio frequencies for the purpose of Article 369(29-A)(d). The goods in telecommunication are limited to the handsets supplied by the service provider. As far as the SIM cards are concerned, the issue is left for determination by the assessing authorities.

104. Therefore from the aforesaid discussion and the law declared by the Supreme Court, it follows that:

The Forty-sixth Amendment does not give a licence, for example, to assume that a transaction is a sale and then to look around for what could be the goods. The word "goods" has not been altered by the Forty-sixth Amendment. That ingredient of a sale continues to have the same definition. By introducing separate categories of "deemed sales", the meaning of the word "goods" was not altered. Transactions which are mutant sales are limited to the clauses of Article 366(29-A). Apart from cases falling under Sub-clause (b) and (f) of Clause (29-A) of Article 366 there is no other service which has been permitted to be so split. If there is an instrument of contract which may be composite in form in any case other than the exceptions in Article 366(29-A), unless the transaction in truth represents two distinct and separate contracts and is discernible as such, the State do not have the power to separate the "agreement to sell" from the "agreement to render service", and impose tax on the sale. The question is did the parties have in mind or intend separate rights arising out of the sale of goods. If there was no such intention there is no sale even if the contract could be disintegrated. The test for deciding whether a contract falls into one category or the other is to as what is the substance of the contract. The seller and such purchaser would have to be ad idem as to the subject-matter of sale or purchase. In arriving at a conclusion the court would have to approach the matter from the point of view of a reasonable person of average intelligence.

105. This artificial light energy is created by conversion of electrical energy into light energy within the net work to the extent required for the transmission of data or message. At the other end, the ACLE drops out within the net work. ACLE is not seen by the subscriber/consumer. It never comes to the market for it to be

bought or sold. It is unknown in the market. It is not capable of abstraction, consumption, delivery by subscriber/customer. Therefore, it does not possess the characteristic of "goods" as understood in law and there is no sale of such goods involved in a telecommunication service.

ARTICLE 141 OF THE CONSTITUTION OF INDIA

106. The case of the Petitioners/Appellants is that the judgment rendered by the Supreme Court in the case of Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, squarely covers the issues involved in this proceeding. One of the Appellant in this proceedings is the very same BSNL Limited and the State of Karnataka was a party to the aforesaid judgment and party to the present proceedings. In spite of the binding decision, there is a calculated attempt on the part of the Respondents to defy the judgment of the Supreme Court. By ignoring the binding precedent they have levied sales tax on these Appellants/Petitioners.

107. Therefore it is necessary to find out what was the issue involved in the said case, what are the finding recorded by the Court and then find out whether those issues are involved in this case and whether the said judgment covers the issues raised in this case. The said judgment was rendered by three Judges of the Supreme Court, though one of the Judges has written a separate judgment, but is a concurrent judgment.

108. The principle question which arose for decision in those matters is the nature of transaction with regard to mobile phone connections. Is it a sale or service or both? If it is a sale, are the State Legislature competent to levy sales tax on the transaction under Entry 54 List 2 of the VII Schedule of the Constitution? If it is a service, then the Central Government alone can levy sales tax under Entry 97 List 1. If the nature of transaction partakes the character of both sales and service, then the moot question would be whether both the Legislative Authorities could levy tax together or only one of them?

109. In this case, as also the BSNL case before the Supreme Court, the Petitioners are service providers and the Respondents are State Government. The specific case pleaded by service provider BSNL before the Supreme Court was that there is no sale transaction involved and the attempt of the several States to levy tax on the provision of mobile phone facilities provided by them to the subscribers was constitutionally incompetent. It was their specific case that the transaction in question was merely a service and the Union Government alone was competent to levy tax thereon.

110. BSNL initiated a proceeding under Article 32 of the Constitution of India complaining that the judgment of the Apex Court in the case of State of Uttar Pradesh and Another Vs. Union of India (UOI) and Another, is not correctly decided. A Bench consisting of two Judges found prima facie substance in the said submission and referred the matter to a Larger Bench. Therefore, in substance, what was in issue in the said case is the correctness of the view

expressed by the Hon''ble Supreme Court in the case of State of U.P. Incidentally, the Petitioner in the said case was dealing with mobile connections, whereas the subject matter of the aforesaid judgment in the State of U.P. was a land-line connection and not a mobile connection. It is in this context, though the Petitioners were only dealing with mobile connections, having regard to the general importance and the implications involved, the scope of the proceedings was broadened as could be seen from the questions which were framed for consideration in those proceedings which is found at para 32 as under:

A) What are "goods" in telecommunication for the purposes of Article 366(29-A) (d)?

B) Is there any transfer of any right to use any goods by providing access or telephone connection by the telephone service provider to a subscriber?

(C) Is the nature of the transaction involved in providing telephone connection a composite contract of service and sale? If so, is it possible for the States to tax the sale element?

(D) If the providing of a telephone connection involves sale, is such sale an inter-State one?

(E) Would the "aspect theory" be applicable to the transaction enabling the States to levy sales tax on the same transaction in respect of which the Union Government levies service tax?

111. A perusal of the aforesaid issues makes it clear that it was not the mobile connection alone which was under consideration by the Apex Court. The question for consideration was,

(a) "what are goods in telecommunication?",

(b) is there any transfer of any right to use such goods?

(c) what is the nature of transaction involved in providing of telephone connection?

(d) is it a composite contract of service and sale?

112. In deciding the aforesaid issues, the Hon''ble Supreme Court has categorically held that in telecommunication, the electromagnetic waves are used for transmission of data generated by the subscriber to the desired destination. The electromagnetic waves travel through free space from one point to another but can be channeled through wave guide which can be transmitted through optic fibres or even simple tubes. These electromagnetic waves are neither abstracted nor are they consumed in the sense that they are not extinguished by the user, they are not delivered or sent or transferred nor are they marketable. They are only a medium of transmission. What is transmitted is not an electromagnetic wave but the signal through such means. In telecommunication, what is transmitted is the message by means of a telegraph. No part of the telegraph

itself is transferable or deliverable to the subscribers. Therefore, they categorically declared that the electromagnetic waves are not goods within the meaning of the word, either in Article 366(12) or in the State Legislation.

113. Further, it is held therein there are no deliverable goods in existence, there is no transfer of user at all. Providing access or telephone connection does not put the subscriber in possession of the electromagnetic waves any more than a toll collector puts a road into the possession of toll payer by lifting the toll gate. Therefore the Supreme Court has ultimately held that whether goods are corporeal or incorporeal, tangible or intangible, they must be deliverable. To the extent, the decision of the State of U.P. held otherwise, it was in their humble opinion, erroneous. They also held a telephone service is nothing but a service. There is no sale element apart from the obvious one relating to the hand set, if any. Therefore, they summed up their findings by saying that goods do not include electromagnetic waves or radio frequencies for the purpose of Article 366(29-A)(d). The goods in telecommunication, are limited to the hand sets supplied by the service provider.

114. However, Justice Dr. A.R. Lakshman who delivered a separate but concurring judgment, was of the view that the principle issue that arose in those cases relates to the imposition of sale tax in the light of Article 366(29-A) Clause (d) on different activities carried on by the telecommunication service provider. After setting out what are the attributes which must be found before it can be said to be "goods" and "sale of goods", it was held that none of the attributes are present between a telecom service provider and a consumer of such service. On the contrary, the transaction is defined as one of rendition of service. Regarding the nature of transaction involved in the said case, it was held that it was a contract between the telecom service provider and the subscriber and the agreement was merely to receive, transmit and deliver messages of the subscriber through a complex system of fibre optics and cables. Thus, the Petitioner - service provider only carry messages. They are only carriers and have neither property in the message nor affected any transfer to the subscriber. The license clearly manifests that it is one for providing telecommunication service and not for supply of any goods or transfer of any right and expressly prohibits any transfer. The integrity of license cannot be broken into pieces nor the telecommunication service rendered by them be so modulated. Not only this is the position which flows from the terms of contract, but also the intent of Section 4 of the Telegraph Act which provides for grant of license issue on such conditions and in consideration of such payment as prescribed to any person to establish, maintain or work a telegraph. The integrity of establishing, maintaining or working is not to be modulated. It is not possible to interpret the contract between the service provider and the subscriber to mean that the Assessee was to modulate the integrity of contract as a transfer of right to use goods and rendering service. Such a modulation is not possible except in the case of deemed sale falling under Sub-clause (b) nor the service element be disregarded and the entirety of contract be treated as a sale of goods except where it falls

under Sub-clause (f). The State as stated earlier is a party to this judgment.

115. The authority who has passed the reassessment orders and assessment orders has categorically stated that he has read the judgment of the Apex Court in BSNL case and understood the ratio laid down in the said judgment and in his opinion, the said judgment has no application to the facts of this case for the following reasons:

1. In the BSNL case, the question involved was regarding radio frequency in mobile telephones, whereas in the instant case it is OFC technology involving light energy.
2. In the BSNL case, OFC light energy was not the subject matter of the proceedings at all.
3. The BSNL case was dealing with the deemed sale whereas the present case is a case of sale simplicitor.
4. The Apex Court at Para 65 of the judgment has categorically stated that it cannot anticipate what may be achieved by scientific and technological advances in future and therefore, the said judgment is open ended.
5. In BSNL case, no one argued that electromagnetic waves are abstractable or capable of delivery. Therefore, the said question was not gone into which is the question involved in the present case.

Therefore, in the view of the Assessing Authority, the judgment in BSNL case did not cover the case on hand.

116. It is true that in Para 1 of the judgment, it is stated that the principal question to be decided in those matters is the nature of the transaction under which mobile phone connections are provided. However, while framing the issue to be decided, as is clear from paragraph 32, it was not confined to only nature of transaction by which mobile connection functions. On the contrary, Clause (a) of paragraph 32 makes it clear that the question, which arose for consideration, was to determine as to what are goods in telecommunication and not what are goods in mobile connection.

117. In Para 34, the Supreme Court has amplified the scope of the enquiry by observing that the "writ petitions raised questions relating to the competence of the States to levy sales tax on telecommunication service and not on mobile service only." Then, their Lordships have discussed about what are electromagnetic waves and what is involved in telecommunication service and the electromagnetic waves generated by the subscriber through which voice/data was transmitted to the desired destination. They have referred to the definition of Telegraph, Radio Waves, Message, Telegraph Line found in the Telegraph Act, 1885 and then, approved the description of electromagnetic waves given by David Gilles and Roger Marshall where they have described it as electromagnetic waves travel through free space from one point to another but can be channeled

through wave guides which may be metallic cables, optical fibres or even simple tubes

118. Then, they have held that these electromagnetic waves are neither abstracted nor are they consumed in the sense that they are not extinguished by their user." They held that it is not marketable and it is only a medium of communication and in telecommunication. In telecommunication, what is transmitted is the message by means of the telegraph. In such electromagnetic waves, there are no deliverable goods in existence as in this case, there is no transfer of user at all and ultimately their Lordships have declared that the goods do not include electromagnetic waves or radio frequencies. It is not in dispute that light energy, as the Assessing Officer describes it as artificially created light energy, is one form of electromagnetic waves and therefore, the said declaration by the Apex Court includes this artificially created light energy and the said judgment applies to this ACLE also. Therefore, the argument that the said case dealt, only with mobile phone, radio frequencies, on the face of it, is erroneous.

119. In so far as the second distinguishing feature is concerned, the Assessing Authority has repeatedly asserted that this light energy is derived from OFC; that it was not the subject matter of the BSNL case; that the said question was not gone into nor agitated by any of the parties. When the Apex Court has approved the description of David Gilles and Roger Marshal given in their book Telecommunication Law and the said description includes Optic Fibre also.

120. In Para 108 of the BSNL case, there is a specific reference to this fibre optics and it is clear from the following passage "The contract between the telecom service provider and the subscriber is merely to receive, transmit and deliver messages of the subscriber through a complex system of fibre optics, satellite and cables.

121. In Para 111 of the BSNL case, it is observed that the Petitioner carry messages. They are only carriers and have neither property in the message nor effect any transfer to the subscriber. In Paras 95 and 96, it is observed as under:

95. The Petitioner Bharat Sanchar Nigam Ltd. (for short "BSNL") is a licensee under the Telegraph Act, 1885. The licence of the Petitioner is obtained from the Government of India which is the same as the licence given also to various private telecom operators which entitles the BSNL to carry the activity of operating telegraph limited to the scope of telecommunication facilities.

96. The entire infrastructure/ instruments/appliances and exchange are in the physical control and possession of the Petitioner at all times and there is neither any physical transfer of such goods nor any transfer of right to use such equipment or apparatuses.

122. Therefore, it is a clear case of Assessing Authority misreading the judgment of BSNL. The said judgment did involve transmission of messages through optic fibre and it is in the optical fibre, the ACLE is used for transmission of voice and

data.

123. The next ground made out is that the Supreme Court has observed that it cannot anticipate what may be achieved by scientific and technological advances in future and therefore, the said judgment is open ended. From the day, the judgment of the Supreme Court was delivered, till today, no body has pointed out as to what is the scientific and technological advances made if any which has a substantial effect in the telecommunication technology. On the contrary, in more than one place, the Assessing Authority has held that this case of artificially created light energy in optic fibre being used was not argued before the Apex Court in the said BSNL case. Thereby, this technology was very much available on the day, the judgment of BSNL case was pronounced. It is also not the case of the State that, on that day, they were not in the know of this technology. This technology was very much in existence and every one knew how the messages are sent through optic fibre and if they have not argued the said position before the Apex Court, taking advantage of the aforesaid sentence in the judgment, it is not open to the Assessing Authority to over turn a binding judgment of the Supreme Court on the ground that this aspect was not argued nor considered by the Supreme Court.

124. Yet another reason given by the Assessing Authority is that in the BSNL case, the Supreme Court has categorically stated that no one has argued the present electromagnetic waves are abstractable or capable of delivery. Therefore, he was of the view that as this light energy is abstractable and capable of delivery and that the said question was not agitated before the Apex Court while deciding the BSNL case, the said question could be re-agitated. It is on the very same ground, they moved the Supreme Court for review of the said judgment. The review petition was dismissed both on merits as well as on the ground of delay and laches. In other words, the said contention was negated. Therefore it was not open to the Assessing Authority to initiate re-assessment proceedings on the same grounds.

125. The question is whether the assessing authority or any Court in this country other than the Apex Court can refuse to follow the binding precedent on the ground that while deciding the said case a particular argument was not canvassed or a particular point was not considered by the Apex Court and therefore it is open to them to consider such points or contentions which are not either canvassed or considered by the Apex Court. Dealing with a similar situation the Constitution Bench of the Apex Court in the case of *Ambika Prasad Mishra v. State of U.P. and Ors.* reported in 1980 (3) SCC 719 held as under:

Every new discovery or argumentative novelty cannot undo or compel reconsideration of a binding precedent. In this view, other submissions sparkling with creative ingenuity and presented with high-pressure advocacy, cannot persuade us to reopen what was laid down for the guidance of the nation as a solemn proposition by the epic Fundamental Rights case. From *Kameshwar Singh* (1952) and *Golak Nath* (1967) through *Kesavananda* (1973) and *Kannan Devan*

(1972) to Gwalior Rayons (1976) and after Article 31-A has stood judicial scrutiny although, as stated earlier, we do not base the conclusion on Article 31-A. Even so, it is fundamental that the nation's Constitution is not kept in constant uncertainty by judicial review every season because it paralyses, by perennial suspense, all legislative and administrative action on vital issues deterred by the brooding threat of forensic blow up. This, if permitted, may well be a kind of judicial destabilisation of State action too dangerous to be indulged in save where national crisis of great moment to the life, liberty and safety of this country and its millions are at stake, or the basic direction of the nation itself is in peril of a shake up. It is wise to remember that fatal flaws silenced by earlier rulings cannot survive after death because a decision does not lose its authority "merely because it was badly argued, inadequately considered and fallaciously reasoned". And none of these misfortunes can be imputed to Bharati case. For these reasons, we proceed to consider the contention of counsel on the clear assumption that Article 31-A is good.

126. The Supreme Court in the case of *Fuzlvnbi v. K. Khader Vali* reported in 1980 (4) SCC 124 was considering the ease where both the Sessions Court and the High Court recorded a finding contrary to the law declared by the Apex Court under Article 141. In that context they characterised the conduct of the Sessions Court and High Court as

we say lawlessly, because no disciplined judge bound by the decision of this Court which lays down the law for the nation under Article 141 of the Constitution of India could have defied the crystal clear ruling of this Court in *Bai Tahira Vs. Ali Hussain Fidaalli Chothia and Another*, -ITS by the disingenuous process of distinguishing the decision. No Judge in India, except a larger lench of the Supreme Court., without a departure from judicial discipline can whittle down, wish away or be unbound by the ratio thereof. The language used is unmistakable, the logic at play is irresistible, the conclusion reached is inescapable, the application of the law as expounded there is an easy task. And yet, the Division Bench, if we may with respect say so, has. by the fine art of skirting the real reasoning laid down unlaw in the face of the law in *Bai Tahira* which is hardly a service and surely a mischief, unintended by the court may be, but embarrassing to the subordinate judiciary.

127. Glanville Williams in his *LEARNING THE LAW* (10th Edn., PP.70-72) gives one of the reasons persuading judges to distinguish precedents as

that the earlier decision is altogether unpalatable to the court in the later case, so that the latter court wishes to interpret it as narrowly as possible.

The same learned Author notes that

some judges may in extreme and unusual circumstances, be apt to seize on almost any factual difference between this previous case and the case before him in order to arrive at a different decision. Some precedents are continually left to the shelf in this way, as a way observed, they become very "distinguisfied". The

limit of the process is readied when a judge says that the precedent is an authority only "on its actual facts." We need hardly say that these devices are not permissible for the High Courts when decisions of the Supreme Court are cited before them not tensely because of the jurisprudence of precedents, but because of the imperatives of Article 141.

128. In the case of *Bharat Sanchar Nigam Ltd., v. Union of India* at para 22 it has been held as under:

No one can dispute in our judicial system it is open to a court of superior jurisdiction or strength before which a decision of a Bench of lower strength is cited as an authority, to overrule it. This overruling would not operate to upset the binding nature of the decision on the parties to an earlier *lis* in that *lis*, for whom the principle of *res judicata* would continue to operate. But in tax cases relating to a subsequent year involving the same issue as an earlier year, the court can differ from the view expressed if the case is distinguishable or *per incuriam*. The decision in *State of U.P. v. Union of India* related to the year 1988. Admittedly, the present dispute relates to a subsequent period. Here a coordinate Bench has referred the matter to a larger Bench. This Bench being of superior strength, we can if we so find, declare that the earlier decision does not represent the law.

129. The Supreme Court is not only the constitutional Court, but it is also the highest court in the country, the final court of appeal. By virtue of Article 141 of the Constitution, what the Supreme Court lays down is the law of the land. Its decision is binding on all courts. Its main role is to interpret the constitutional and other statutory provisions bearing in mind the fundamental philosophy of the Constitution. The Supreme Court is expected to decide questions of law for the country and not to decide individual cases without reference to such principles of law. The Supreme Court under Article 141 of the Constitution is enjoined to declare law. The expression "declared" is wider than the words "found or made". To declare is to announce opinion. The law declared by the Supreme Court is the law of the land. The Supreme Court has always been a law maker and its role travels beyond merely dispute-settling. It is a problem-solver in the "nebulous areas" without ignoring statutory provisions. The Supreme Court only interprets the law and cannot legislate it. The general principle of law laid down by the Supreme Court is applicable to every person including those who were not parties to that order. Judicial discipline to abide by declaration of law by the Supreme Court, cannot be forsaken under any pretext by any authority or court, be it even the highest court in a State, oblivious to Article 141 of the Constitution. What is binding in terms of Article 141 of the Constitution is the ratio of the judgment. The ratio decidendi of a judgment is the reason assigned in support of the conclusion. The decision of the Supreme Court upon a question of law is considered to be a binding precedent, and this must be ascertained and determined by analysing all the material facts and issues involved in the case. The doctrine of precedent helps in promoting certainty and consistency in judicial

decisions and enables an organic development of law besides providing assurance to the individual as to the consequences of transactions forming part of daily affairs. The decision in a judgment of the Supreme Court cannot be assailed on the ground that certain aspects were not considered or the relevant provisions were not brought to the notice of the Court. The judgments of the Supreme Court are binding on all authorities under Article 142 of the Constitution and it is not open to any authority to ignore a binding judgment of the Supreme Court on the ground that the full facts had not been placed before it and/or the judgment of the Supreme Court in the earlier proceedings had only collaterally or incidentally decided the issues.

130. The Apex Court, in the case of Kalyani Packaging Industry Vs. Union of India (UOI), has held that,

it must be remembered that the law laid down by this Court is law of the land. The law so laid down is binding on all courts/tribunals and bodies. It is clear that circulars of the Board cannot prevail over the law laid down by this Court.

131. Again the Apex Court in the case of Brahmo Samaj Education Society and Ors. v. State of West Bengal and Ors. reported in AIR 2004 SC 3358, has held that,

a larger Bench consisting of 11 Judges of this Court in T.M.A. Pai, has declared what the law on the matter is, we do not want to dilute the effect of the same by analysing various statements made therein or indulge in any dissection of the principles underlying it. We would rather state that the State Government shall take note of the declarations of law made by this Court in this regard and make statable amendments to their laws, needs and regulations to bring them in conformity with the principles set out therein.

132. Thus, it is clear that once the Apex Court declares the law, not only the High Court, and other Courts in the country are bound by the same, but also all the authorities such as Tribunal, Quasi judicial functionaries, State and its instrumentalities are bound by such law declared by the Apex Court and they are under an obligation to give effect to the said law. This aspect has been completely lost sight of by the State, Committee constituted by the State Legislature, the Revenue and the Assessing Authority.

133. Therefore, it is obvious that there is a deliberate attempt on the part of the State and its officials not to accept the judgment, of the Apex Court, which has attained finality and have overlooked the effect of such judgment as declared in Article 141 of the Constitution of India, which provides that the law declared by the Supreme Court shall be binding on all the Courts within the territory of India. Instead of giving effect to the law declared by the Apex Court, they employed their entire official machinery to overreach the said judgment, misinterpreted the said judgment and tried to levy tax without the authority of law. This conduct, at any rate, cannot be countenanced by the Court of law.

ALTERNATIVE REMEDY - MAINTAINABILITY OF WRIT PETITION

134. Learned Advocate General submitted that the Petitioners before this Court have an alternative and efficacious remedy by way of an appeal, the writ petition was not maintainable and the learned Single Judge has rightly dismissed the same on the ground of alternative and efficacious remedy being available to the Petitioners. Therefore, this appeal filed against the said order is also not maintainable for the very same reasons. In support of his contention, he submitted that M/s. Bharti Airtel Limited had challenged the assessment orders for the year 2005-06 by preferring the writ petition. The said writ petition was to be dismissed by the learned Single Judge on the ground of availability of alternative and efficacious remedy. Aggrieved by the same, they preferred a writ appeal before this Court, in W.A. No. 629/07. In the said writ appeal, the Division Bench did not agree with the aforesaid finding and therefore, it went into the merits of the case and formulated four points for its consideration and on merits it held that the artificially created light energy is goods and even though the Petitioner in the said case was paying service tax, there is no prohibition for imposing sales tax on the said goods and therefore, dismissed the writ petition on merits. Aggrieved by the same, the Petitioner preferred a SLP before the Apex Court in special leave to appeal in Civil Appeal No. 4481/09 wherein by order dated 2.3.2009, the said order of the Division Bench was set aside on the ground that the learned Single Judge was right in directing the Assessee to exhaust statutory alternative remedy and looking into the nature of issues involved in those matters in which technical evidence needs to be looked into they were of the opinion that the said issues have to be decided by the first appellate authority. Therefore, the order of the Division Bench was set aside and the entire matter was remanded to the first appellate Authority for disposal on merits. Therefore, he contends in the light of the aforesaid judgment of the Apex Court it is not appropriate for this Court to again go into the very same issues, which are involved in these appeals, and it is left to be decided by the appellate Authority.

135. Per contra, the learned Additional Solicitor General of India pointed out that insofar as BSNL is concerned, the said judgment has no application as they were not parties to the same. He also pointed out that the Sub-ordinate Legislation Committee in its 35th report while greatly appreciating the maiden and painstaking work of the Karnataka Commercial Taxes Department in this behalf, as a first time event in the entire country, clearly evaluated as to how all Karnataka based IT companies were transmitting the data/information, with the sole help of artificially created light energy in an OFC medium. How the said artificially created light energy is having all distinctive features of goods. All ISP dealers, who were providing such OFC services to the IT Companies, had to pay very huge taxes to the Government, for the past 8 years. The said Committee of Sub-Ordinate Legislation apart from consisting of members of Legislative Assembly, Legislative Council also consisted of Departmental Officers such as Commissioner of Commercial Tax Department, Additional Commissioner of Commercial Taxes, Joint Commissioner of Commercial Tax Department, Deputy

Commissioner of Commercial Tax Department. A reading of the aforesaid report shows that they have accepted the enquiries conducted by A.K. Chitaguppi, which discloses that the artificially created light energy is used in many other fields also, other than the Broad-band-line networks. Acting on the said technical opinion they were of the opinion that the said facts were not brought to the notice of the Hon''ble Supreme Court while rendering the judgment in BSNL case. They were of further opinion that if those facts had been brought to the notice of the Apex Court the results would have been different. They have appreciated the first effort of the Department in the Country to bring to light the hidden tax element in the high tech sectors like the telecoms and clarified that the legal battle will be fought till last and that they would leave no stone unturned to save this huge revenue. It is pointed out that in the discussion, the Principal Secretary (Finance) has expressed that this matter would be delegated to a noted Senior Counsel in the country. In further discussion on the matter, there were suggestions of Senior Counsels, Sri. F.S. Nariman and Sri. K.K. Venugopal, for appointment as Senior counsel in the matter. Thereafter, the said Committee discussed the steps to be taken to seek for review of the said judgment and they authorised the authorities to take steps to file the review petition. In the said report, it has been specifically stated that there is a big legal impediment, on account of the Hon''ble Supreme Court holding, in the BSNL Case, that for the sole reason of lack of APD properties, the Radio Frequencies or the Electromagnetic Waves do not constitute goods. The Commercial Taxes Department has informed that the only reason that, led to culmination of the above conclusion by the Hon''ble Supreme Court, was that the glaring scientific truths regarding the properties of the Radio Frequencies, which are so widely used in the telecom industry, were not. brought to the notice of the Hon''ble Supreme Court. Had these ever-existing scientific truths regarding the Radio Frequencies had been brought to the notice of the Hon''ble Supreme Court, the verdict would have been the reverse favoring the States and would have fetched enormous revenues to the States. Since thousands of crores of the State revenues are involved in this matter, and since there are irrefutable documentary evidences in support of the State cause, it is the firm opinion of the Department that a Review Petition be filed in the Supreme Court, with a prayer to review its verdict in the BSNL case, insofar as its observations on the Radio Frequencies in that, verdict are concerned, in the light of the indisputable and well documented truths about the radio frequencies. The Department, is of the opinion that if this patent anomaly is set right, the Radio Frequencies naturally would be treated as goods, and all States would stand to gain very-" huge revenues from these sections, from the transactions involving transfer of property in these goods. Incidentally, it was felt that this also would automatically raze down the false defence edifice fabricated in the crosshairs of the BSNL verdict, which was framed in the above background of non-submission of the scientific facts regarding the properties of the Radio Frequencies. Further that would certainly help the State's rightful and lawful cause in the ongoing Writ Appeal proceedings before the Hon''ble High Court, then pending.

136. After the said judgment, the Commissioner of Commercial Taxes (Karnataka), Bangalore came to the conclusion that BSNL, VSNL, Tata Tele Services Limited, Pacific Interest India Private Limited, Escotel Communications, Gateway Systems (India) Limited and host of other Companies are also engaged in the sale of light energy and which also need to be audited under KVAT Act-2003, for the years 2005-06 and onwards and therefore felt advisable to confer such jurisdiction on Sri. A.K. Chitaguppi, DCCT, Audit-42, DVO-4, Bangalore and accordingly passed an order on 24.3.2007 conferring jurisdiction for the year 2005-06 onwards under Sections 38 and 39 of the KVAT Act, 2003 and assessment powers for the years 2004-05 and earlier years under Sections 12 and 12(A) of the KST Act, 1957.

137. Acting on the said report, the Government took a decision to file the review petition. In the review petition apart from raising several legal grounds, it is specifically urged that the principle of res-judicata is not attracted in this case, for the reason that law laid down by the Hon'ble Supreme Court on the radio frequencies is a verdict which is declared in the absence of arguments on the scientific properties and empirical evidences. Thus, the said verdict rendered rests on an incorrect premise, in so far as the radio frequencies are concerned. It was also contended that the said judgment has been severely affecting the States' interest directly and indirectly, throughout the country. It was urged and prayed in the review petition that, in the interest of natural justice, the error in the verdict, which has happened on account of non-submission of the scientific facts, needs to be rectified in the light of the scientific facts. The person who has filed the affidavit in support of the review petition is one Sri. A.K. Chitaguppi, the Assessing Officer in this case. The said review petition came up for consideration before the Apex Court before a Bench consisting of three judges, who passed the following order:

The review petition is dismissed on the ground of delay and merits.

138. Relying on these proceedings, it was contended that departmental officials who are involved at every stage of these proceedings have already made up their mind not to obey the judgment of the Apex Court in BSNL case on the premise that judgment was rendered without considering the case which is now sought to be put forth and in their view the light energy is "goods" which is liable to tax under VAT Act. The learned ASG further contended that for the above reasons there is no point in going before the very same authorities who have made up their mind and who are not prepared even to follow the Supreme Court judgment and sit in judgment over the same and therefore, the argument of alternative remedy in the facts of this particular case has no substance. Therefore, he submits that this is a fit case where this Court should alone decide the case on merits, as it involves interpretation of constitutional provisions, the application of rule of precedent and its disobedience by the authorities through out the Country. He further submitted that as contended by the State, it is a scientific truth which is not in dispute and based on the scientific truth, the law has to be

interpreted. Therefore, he submits that this Court has the jurisdiction and it should be heard on merits.

139. The learned Counsel appearing for both the sides have cited various judgments of the Supreme Court both on the question when this Court has to entertain a writ petition or relegate the parties to avail an alternative remedy. The rulings which hold that, notwithstanding the availability of an alternative remedy, this Court can entertain the writ petitions in appropriate cases, have also been cited. Ultimately, it depends on the facts of the case. As a rule, the writ jurisdiction should not be exercised to decide the issues which are eminently suited to be decided in a remedy which is provided under the statute either by way of an appeal or in any other forum. But it is also equally well settled that when constitutional issues are involved, when matters are concluded by the pronouncement of the Apex Court and when judgment are delivered either in ignorance or total disobedience of law declared by the Apex Court not. only this Court can entertain the writ, petition, but also it is a duty of this Court to entertain such writ petitions and decide the constitutional issues and see that the law laid down by the Apex Court is respected and followed by all the authorities in the country. Those matters cannot be relegated to appellate authorities.

140. In the light of the aforesaid undisputed facts and the rival contentions, we are of the view that the availability of an alternative remedy by way of a statutory appeal would not come in the way of this Court in entertaining this appeal for the following reasons:

(i) The Writ Petitions raise questions relating to the competence of the States to levy sales tax on telecommunication service. If the State Legislatures are incompetent to levy the tax, it would not only be an arbitrary exercise of power by the State authorities in violation of Article 14, but also it would constitute an unreasonable restriction upon the right of the service providers to carry on trade under Article 19(1)(g) of the Constitution of India. The constitutional issues have to be decided exclusively by the High Court. These questions cannot be decided by a statutory authority and the appellate authorities constituted either under the Karnataka Sales Tax Act or the Karnataka Value Added Tax Act. Therefore, this is not a case where the matter could be relegated to an appellate authority under a statute.

(ii) Secondly, if the issues involved in these proceedings are already covered by a judgment of the Apex Court, which is binding on all the Courts and the authorities in India and if the Assessing Authority has held that the said judgment of the Supreme Court is not applicable and made an attempt to distinguish the same and the facts of the case, the matter cannot be relegated to an appellate authority. As held herein above, the sub-ordinate committee of the legislature found that the judgment of the Supreme Court covers the issue and therefore, it requires review of the said order as otherwise, the revenue of the State would be seriously effected and made an unsuccessful attempt to get a review of the order. In fact, the material on record shows that virtually State has

taken a policy decision to levy sales tax on the telecommunication services. After being unsuccessful to get a binding judgment of the Supreme Court reviewed, a direction was issued by the Commissioner of Sales Tax appointing a specialist who is not the regular Assessing Authority at all to carry out these reassessments in all cases involving these questions. It is thus clear that the entire Government machinery was bent upon to levy tax on this activity of the service providers. In fact in the recommendation there is a veiled threat of punitive action against those officials who do not tow the line of the Government in this matter. In those circumstances, exhaustion of alternative remedy is only an empty formality.

(iii) In the course of the order, the Assessing Authority was of the opinion that the contract in question is a contract of sale of goods implicit and in fact, it is not a contract of service. According to him, the imposition of service tax is not proper. He pleads his ignorance and inability and leaves it to the Supreme Court and authorities to decide the said question and therefore there is a need to go into the question as to whether the activity falls within the service tax or sales tax and decide the same. The Union of India, which has imposed service tax, is also to be heard. The Union of India will not be a party in the appeal before the appellate authority and therefore the question whether service tax alone is leviable or sales tax alone is leviable cannot be decided in the absence of Union of India.

(iv) The reasons given by the learned Single Judge to relegate the parties to an alternative remedy are that it needs to be established as to whether or not artificially created light energy carrying the data to the customer's desired destinations in the network could be held as goods; that it involves phenomenal scientific investigation and research and the Courts are not well equipped to go into the scientific and technological aspects of the matter. Therefore, in his view, it is desirable that the Petitioners have to file statutory appeals and the appellate authority to embark on a fresh enquiry, perhaps by taking the assistance of the technical persons and technical bodies in the matter. If the issues involved are to be decided by the Assessing Authority or the Appellate Authority or this Court based on technical opinion, the technical opinion is already on record. All the parties to the dispute do not dispute the said technical report. Both Appellants and the State have put forth contention based on the said technical report, which the Assessing Authority claims as scientific truth.

141. From the aforesaid technical report it emerges that the service providers who are using optical fibre cables for transmitting the messages or data are using light energy and the same is on record. This data or messages could be transmitted by a service provider either through copper wire or optical fibre cable or in the space through allotted spectrum using micro wave towers. In so far as optical fibre cable is concerned, the technology adopted is to convert electrical energy into light energy and use the light energy as a carrier for carrying message or the data to its desired destinations. The Assessing Authority has

given a name of his own. He calls it as Artificially Created Light Energy. Whereas the experts do not agree on the nomenclature, but there is no dispute on the fact that it is a light energy. It is also not in dispute from the technical report available on record that the subscriber's message after it reaches the nearest network, gets embedded or mixed in this light energy and this light energy acts as a carrier to carry the voice/data and when it reaches the network at the destination, this light energy carrying message is deposited on photo detector where this carrier light energy drops down and message gets separated and then it is delivered to the recipient. This is the technical aspect over which there is absolutely no dispute between the parties. Therefore, now the question for consideration is whether this light energy used as a carrier for transmitting the message from one network to another network has the characteristic of goods as defined under Article 366(12) of the Constitution of India read with the definition of goods found in the KST as well as the KVAT Acts. This is not the matter to be decided by any technical expert. This is the matter to be decided by the Judges or the taxing authorities, who are imposing taxes. Therefore, no further scientific investigation is required and called for from the Day of judgment of BSNL is delivered. Technological advancement if any, made after the BSNL judgment is not placed before us. Therefore it has to be held that there is no further advancement/development in technology after pronouncement of BSNL judgment.

142. In the BSNL case after taking note of the definition of "telegraph" contained in the Indian Telegraph Act, 1885 as well as the technology adopted by the service provider either in mobile or landline and taking note of the meaning assigned to a electromagnetic waves, which was not in dispute and after taking note of the definition "data", which was also not in dispute, the Supreme Court has authoritatively held that this electromagnetic waves are not goods. The said judgment refers to OFC also. Now the technical opinion available on record makes it abundant clear that ACLE is also one form of electromagnetic waves and the Apex Court has already declared that electromagnetic waves are not goods which includes this light energy. We do not see any impediment or difficulty in deciding the legal issues on the basis of admitted, undisputed, proved technical facts available on record.

143. The learned Single Judge has not applied his mind to these materials, which was very much available on record and which is extensively referred to by the Assessing Authority at length in the impugned order. Therefore, we do not see any justification to remit the matter to the appellate authority on that score.

144. Under these circumstances, consciously we have entertained these matters, decided these constitutional issues, interpreted the statutory provisions and tried to follow the judgment of the Supreme Court. We want to send a message to the authorities that, this attempt on their part under the guise of distinguishing the Supreme Court judgment, in reality they are showing disobedience and disrespect to the Supreme Court judgment and the same would not be

countenanced and would be viewed seriously.

SUGGESTION

145. Service constitutes heterogeneous spectrum of economic activities. Service sector is today occupying centre stage of the Indian economy. Development of service sector has become synonymous with the advancement of the economy. Economists hold the view that there is no distinction between the consumption of goods and consumption of service as both satisfy the human needs. It is this concept which is translated into a legal principle of taxation by the Finance Act, 1994 and 1998. Service tax is Value Added Tax. Service tax is on value addition by rendition of service. Service tax is the tax on notified services provided or to be provided.

146. It is undisputed fact that these service providers are paying service tax in pursuance of the provisions contained in the Finance Act, 1994 in particular Entry 65 (109-a) as the activities are all squarely falls within the said provision. In the BSNL case as well as in Tata Tele Services, the Assessing Authorities had concluded the assessment orders without imposing any sales tax or VAT for the services so rendered. It is only in the reassessment proceedings, they have imposed sales tax/VAT treating the said activity as amounting to sale of goods. The way, the litigation has been fought gives an impression that in the Telecom Sector, IT sector as it is blooming in this country, there is an attempt on the part of the Union and the States to have a share in profit, the entrepreneurs are making. The Parliament has enacted the Finance Act, 1994 bringing on the statute book the provisions for taxing service, which was not there earlier. These are essentially the service sectors. However, there can be element of sale of goods while delivering services also. It is on such element of sale that the State want to have their share and they are either passing the legislation taxing that portion of the sale of goods or trying to apply to the entire activity of the service. Whether it is sales tax or service tax, it is an indirect tax. Ultimately the citizen of the country has to bear the tax burden. Certainly these entrepreneurs are given all facilities in the country to do business and pay taxes to the Government. But they must know to whom they should pay tax and on what they should pay tax and how much they should pay tax in advance, so that they can carry on their activity uninterruptedly without any harassment from these taxing authorities. As it is clear from the facts of these cases, for more than two decades, the State Legislatures did not think of taxing the service provider as they also honestly believed that it is a pure service and there is no scope for tax of any aspect of the activity. Now they have opened their eyes and without examining as to whether they are eligible or not, have made an attempt to levy tax. As in the most of the cases, the goods, which are to be taxed, may not be easily identifiable. Therefore, scientific investigation and technical information is required to decide whether a particular property is "goods" and it satisfies the requirement of "goods" as held by various pronouncement of the Apex Court. The adjudicating authorities may or may not be well versed in tax but certainly

they are not well versed in scientific matters and they need the assistance of experts. In these circumstances, as this scientific advancement has no limit and end, it is desirable that when such a dispute arises between two statutory authorities, these disputes are first decided by an expert body in the field, who have necessary technical know-how, and well versed in the relevant scientific aspects. Though we have a federal structure and VII schedule which clearly demarcates the field of legislation and the power of the Parliament and State Legislature to legislate, it is not uncommon that, there is an over lapping while exercising these legislative powers. It is high time that an authority at the national level is constituted to resolve the dispute between the service tax and sales tax or other taxes whether on the commercial activity or product when both the Central Government and the State Government want to levy tax. IT, in the end of the day, the courts have to decide, they would have the sufficient material on the basis of which they could come to a conclusion one way or the other. Such exercise would be very helpful in the present day globalization, liberalization of Indian economy and also it will achieve the purpose of certainty on tax which is a crucial factor in a developing economy like ours.

COSTS

147. The way, the State and its authorities have ignored, disobeyed, by-passed a binding judgment of the Supreme Court and if permitted and remains unchecked, it will lead to a total disintegration of the system in which we are working. It will lead to total lawlessness and uncertainty. However, as this matter will not end here and it will be agitated before the Supreme Court, we leave it to the Hon'ble Supreme Court to take appropriate action against the State and its officials in order to prevent reoccurrence of such mis-adventures. However, the State has to pay costs to these Petitioners for all the turmoil they have undergone. The State shall pay Rs. 1,00,000/- to each of the Petitioners/Appellants.

148. At this stage, the learned Counsel for the parties submitted that the Petitioners and Appellants want that the costs to be paid by the State be directed to be paid to the Advocates' Welfare Fund so that the legal fraternity, which is in the forefront in fighting just causes is benefited. Therefore, we direct the State to deposit Rs. 3,00,000/- (Rupees Three Lakhs) to the Advocates' Welfare Fund within one month from today.

149. Before parting with the case, we place on record our appreciation for the valuable assistance extended by the learned Additional Solicitor General, Senior Counsel appearing for respective parties and the learned Advocate General of Karnataka in rendering this judgment.

For the aforesaid reasons, we pass the following:

ORDER

All the writ appeals and writ petitions are allowed to the following extent:

(a) The light energy which is used as a carrier in telecommunication service for

rendering service is covered by the Parliamentary Legislation i.e. the Finance Act, 1994 read with Section 65(109-a). It does not fall within the Entry 54 of List-II of VII Schedule.

(b) The contract in question is not a composite contract. It is an indivisible contract and a contract of service simplicitor. There is no element of sale at all to any extent. It is not a contract of sales simplicitor as contended by the State.

(c) It is declared that the light energy (Artificially Created Light Energy -ACLE) is one form of electromagnetic waves. It is not "goods" as defined in Article 366(12) of the Constitution of India or u/s 2(m) of the Karnataka Sales Tax Act, 1957 or Section 2(15) of the Karnataka Value Added Tax, 2003. Consequently, there is no sale of goods as held by the Assessing Authority. Therefore they have no power to levy tax.

(d) The judgment of Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, squarely applies to the facts of these cases.

(e) The orders passed by the learned Single Judge are set aside.

(f) The impugned re-assessment orders and Assessment orders passed by the Assessing Authority levying tax on light energy are set aside.

(g) Each of the Petitioners/Appellants shall be paid a costs of Rs. 1,00,000/- (Rupees One Lakh) each and the same shall be deposited to the Advocates' Welfare Fund within one month from today.