

(2008) 09 KL CK 0061

In the High Court Of Kerala

Case No : C.E. Appeal No. 20 of 2006

Commissioner of Central Excise and Customs

APPELLANT

Vs

Idea Mobile Communication Ltd.

RESPONDENT

Date of Decision : 04-09-2008

Acts Referred:

Finance Act, 1994 — Section 65(105), 65(111), 73

Citation : (2009) 224 CTR 311 : (2009) 1 KLT 889 : (2010) 19 STR 18 : (2009) 20 STT 19 : (2009) 12 Vat Reporter 12 : (2009) 22 VST 454

Hon'ble Judges : V.K.Mohan, J;C.N. Ramachandran Nair, J

Bench : Division Bench

Advocate : Vinod Chandran, for the Appellant; P. Sanjay and A. Parvathi Menon, for the Respondent

Judgement

C.N. Ramachandran Nair, J.—This appeal is filed by the Commissioner of Central Excise and Customs challenging the order of the Custom, Excise and Service Tax Appellate Tribunal, cancelling the demand of service tax on the value of SIM cards sold by the respondent to their mobile subscribers. We have heard Asstt. Solicitor General appearing for the appellant, counsel appearing for the respondent and Special Government Pleader appearing for the State Government.

2. The question involved is whether the value of SIM cards sold by the respondent to their mobile subscribers is to be included in taxable service u/s 65(105)(zzzx) of the Finance Act, 1994 which provides for levy of service tax on telecommunication service or it is taxable as sale of goods under the Sales Tax Act. Different mobile operators took divergent stand in the matter before the departmental authorities. While BPL Mobile Services, a leading mobile operator, took the stand that SIM card has no intrinsic sale value and is supplied to the customers for providing mobile service and they paid service tax including value of SIM card, respondent herein paid sales tax on the sale price of SIM cards and started remitting service tax only on activation charges. BSNL also took the stand similar to BPL Cellular services and their sales tax assessment on the value

of SIM cards upheld by this Court was taken up to Supreme Court which led to judgment in BSNL's case AIR 2000 SC 1383(sic). The Supreme Court elaborately discussed the issues raised and in paragraph 86, the contention of the respondent that they have paid sales tax on sale price of SIM card is recorded by the Supreme Court. However, the Supreme Court in the final judgment left open the issue to be considered by the assessing authorities under the Sales Tax Act. It was further discussed in paragraph 92 of the judgment that the nature of transaction involved in providing telephone connection may be a composite contract of service and sale. It is possible for the State to tax the sale element provided there is a discernible sale and only to the extent relatable to such sale. Since the sales tax authorities under the KGST Act did not show any anxiety to decide the matter after remand by of the Supreme Court, we issued specific direction for compliance with the judgment. Special Government Pleader produced orders of the Asstt. Commissioner of Commercial Taxes, Special Circle, Thiruvananthapuram, wherein he has conceded the position canvassed by BSNL and BPL Mobile services that SIM card has no intrinsic sale value and it is supplied to customers to provide telephone service to them. So much so, the assessing authority under the Sales Tax Act dropped the proceedings to levy sales tax on SIM cards. So far as the respondent is concerned, it is not known whether returns are filed conceding turnover and liability under the Act, or whether assessments are pending. In any case, the Assessing Officer in the case of respondent cannot take a stand different from the stand taken by another Assessing Officer in the case of BSNL (supra) and BPL mobile services. Consequently, no assessment for sales tax could be made on the sale value of SIM cards supplied by the respondent to their customers, no matter whether they have filed returns and remitted tax or not. There is no need for us to consider the legality or otherwise of the proceedings pertaining to respondent pending before the Sales Tax authorities. If tax is wrongly remitted, it is for them to claim refund and if tax remitted is collected tax, it has to be forfeited u/s 46(A) (1) of the KGST Act, and customers can claim refund. Leaving open this issue, we proceed to decide the correctness of the Tribunal's order which is under challenge.

3. In the BSNL's case (supra) decided by the Supreme Court, the controversy was whether sales tax is payable on the value of SIM cards to the State Government or whether the value has to be included in taxable service for reckoning liability towards service tax payable to Central Government. Now since the State Government after remand by Supreme Court has given up the claim for sales tax, the question to be considered is whether the value of SIM cards forms part of taxable service. Admittedly respondent answers the description of telegraph authority defined u/s 65(111) of Finance Act, 1994 and they are registered for the payment of service tax and they are in fact remitting tax on activation charges. The exclusion claimed by them is only on the value of SIM cards, that too only on the ground that they are free to supply SIM cards as sale of goods and remitted sales tax thereon. In order to consider whether the value

of SIM card constitutes taxable service, we have to examine the functioning of this item in the service provided by the respondent. Admittedly SIM card is a computer chip having its own SIM number on which telephone number can be activated. SIM card is a device through which customer gets connection from the mobile tower. In other words, unless it is activated, service provider cannot give service connection to the customer. Signals are transmitted and conveyed through towers and through SIM card communication signals reach the customer's Mobile instrument. In other words, it is an integral part required to provide mobile service to the customer. Customer cannot get service without SIM card and it is an essential part of the service. SIM card has no intrinsic value or purpose other than use in mobile phone for receiving mobile telephone service from the service provider. Therefore, in our view, the stand taken by the BSNL and BPL Mobile Services that it is not goods sold or intended to be sold to the customer but supplied as part of service is absolutely tenable and acceptable. Consequently, we hold that the value of SIM card supplied by the respondent forms part of taxable service on which service tax is payable by the respondent. Since the dispute was bona fide and it is settled based on the observations of the Supreme Court, we feel levy of penalty u/s 73 of the Finance Act, 1994 was not tenable. While upholding the demand of service tax on value of SIM cards and the interest thereon, we hold that no penalty could be levied on the respondent u/s 73 of the Act.

Consequently Appeal is allowed in part by vacating the order of the Tribunal and restoring the demand to the above extent.

4. After pronouncement of judgment, counsel for the respondent made an oral application for certifying the judgment as one fit for appeal to the Supreme Court. Since the decision rendered by us is based on facts found, we do not find any substantial question of law arising in the matter. Accordingly we decline the request of counsel for the respondent for leave to appeal to Supreme Court.