(2006) 04 BOM CK 0107

In the Bombay High Court

Case No : Central Excise Appeal No. 30 of 2006

Commissioner of Service Tax APPELLANT

Vs

BPL Mobile Communication Ltd. RESPONDENT

Date of Decision : 04-04-2006

Acts Referred:

Citation : (2008) 9 STR 349

Hon'ble Judges : R.M. Lodha, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : R.V. Dasai, N.V. Masurkar and A.S. Rao, instructed by T.C. Kaushik, for the Appellant;

Final Decision : Dismissed

Judgement

1. Heard Mr. R.V. Desai, the learned senior counsel for the revenue.

2. The Tribunal set aside the penalty imposed by the authority on the respondent by holding that the issue of levy of service tax in respect of service involved in the sale of SIM Card is not free from doubt. In this connection, the Tribunal referred to the judgments of the Kerala High Court and Allahabad High Court. As regards the judgment rendered by the Allahabad High Court the Tribunal observed that the said decision has been reversed by the Supreme Court State of Uttar Pradesh and Another Vs. Union of India (UOI) and Another, . In so far as the judgment of the Kerala High Court Escotal Mobile Communications Ltd. Vs. Union of India (UOI) and Others, is connected, the Tribunal noticed that the issue was pending before the Constitution Bench.

3. Mr. R.V. Desai, the learned senior counsel for the revenue invited our attention to the three Judge Bench decision of the Supreme Court in the case of Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, .

In paragraph 87 of the report, the Supreme Court observed thus:

87. It is not possible for this Court to opine finally on the issue. What a SIM card

represents is ultimately a question of fact, as has been correctly submitted by the States. In determining the issue, however the assessing authorities will have to keep in mind the following principles; if the SIM card is not sold by the assessee to the subscribers but is merely part of the services rendered by the service providers, then a SIM card cannot be charged separately to sales tax. It would depend ultimately upon the intention of the parties. If the parties intended that the SIM card would be a separate object of sale, it would be open to the Sales Tax Authorities to levy sales tax thereon. There is insufficient material on the basis of which we can reach a decision. However we merely incidental to the service being provided and only facilitates the identification of the subscribers, their credit and other details, it would not be assessable to sales tax. In our opinion the High Court ought not to have finally determined the issue. In any event, the High Court erred in including the cost of the service in the value of the SIM card by relying on the "aspects" doctrine. That doctrine merely deals with legislative competence. As has been succinctly stated in Federation of Hotel & Restaurant Assn. of India v. Union of India (SCC) pp. 652-53, paras 30-31

...subjects which in one aspect and for one purpose fall within the power of a particular legislature may in another aspect and for another purpose fall within another legislative power. There might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is overlapping does not detract from the distinctiveness of the aspects.

4. The aforesaid decision of the Supreme Court relates to levy of sales tax on the sale of SIM card to the subscribers. Mr. R.V. Desai, the learned senior counsel did not dispute that the judgment of the Kerala High Court is still pending before the Supreme Court.

5. In this background, we are of the view that the Tribunal did not err in observing that the issue as to the levy of service tax in respect of the sale of SIM card was not free from doubt and, therefore, penalty was not justified.

6. The impugned order does not give rise to any substantial question of law.

The appeal is dismissed in limine.