
(2002) 02 KL CK 0067

In the High Court Of Kerala

Case No : O.P. No's. 4973, 29239 and 31963 of 2001

Escotal Mobile Communications Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 15-02-2002

Acts Referred:

Constitution of India, 1950 — Article 248
Finance Act, 1994 — Section 65(72), 67
Kerala General Sales Tax Act, 1963 — Section 2

Citation : (2002) 126 STC 475 : (2006) 2 STR 567

Hon'ble Judges : B.N. Srikrishna, C.J;M. Ramachandran, J

Bench : Division Bench

Advocate : Arshad Hidayathulla, Joseph Markose, A. Kumar, P.K. Ravindranatha Menon and P. Sanjay, for the Appellant; Raju Joseph, Special Government Pleader and P.S. Sreedharan Pillai, SCGSC, for the Respondent

Final Decision : Dismissed

Judgement

B.N. Srikrishna, C.J.—These writ petitions under Article 226 of the Constitution of India impugn the levy of service tax on the taxable service provided by cellular telephone service providers.

O.P. No. 4973 of 2001 :

2. Petitioner is engaged in cellular telephone business within the State of Kerala. Apart from providing cellular telephone services to its subscribers, it is also engaged in selling cellular telephone instruments, subscriber identification module (SIM) cards and other accessories. The petitioner purchases the cellular telephones, SIM cards and other accessories from States outside Kerala by paying Central sales tax. For selling the products within the State of Kerala, it pays 12 per cent sales tax under the Kerala General Sales Tax Act, 1963 (hereinafter referred to as "the KGST Act"). According to the petitioner, the sale of the instrument and the SIM card to its customers is only a "sale pure and simple" exigible to sales tax under the KGST Act. One peculiar service it renders

is activation, on which service tax is leviable. Activation is a process by which the subscriber form details, scheme/plan details, deposits, etc., brought in by the sales team is manually fed through computer into the Customer Administration and Billing System (hereinafter referred to as "CABS") so that the system has a data base which can provide access for the customer to use the net work. Activation provides the customer a slot in the CABS system with an account ID by which his monthly bills/bill details, credit limits, plan of usage, etc., would all be kept in the data base. This enables the petitioner to provide/ change any or all service/s, or temporarily or permanently disconnect the customer by making suitable changes in the system. It is the stand of the petitioner that activation neither increases or decreases the value of SIM card, since it is not a process carried out on the SIM card, but only on the computer and the CABS system installed on the computer in the petitioner's office.

3. With this understanding, the petitioner was duly paying the sales tax on items exigible to sales tax and service tax on the activation charges. By a notice dated May 18, 1999 (vide exhibit P1), the Superintendent of Central Excise, Service Tax Range, Ernakulam II Division, called upon the petitioner to furnish information as to whether the value of SIM card/cash card was included in the "taxable service" for the purpose of computing service tax. He also sought details of the total value of such cards from January 1997 to April 31, 1999. By a reply dated June 15, 1999 (vide exhibit P2), the petitioner contended that the SIM card is merely a plastic computer chip which were inserted in a handset makes the handset operational. It is a part of the handset, as, in its absence, the subscriber would not be able to communicate on the cellular phone. It was pointed out that the SIM card was subject to customs duty and also to sales tax laws in various States, as it is a commodity capable of being bought and sold. However, the petitioner was recovering sales tax over the installation charges and remitting it to the sales tax authorities. Once the SIM card is sold to the subscriber, the mobile cellular phone service provider loses his claim over the property, nor can he claim any right in it. Thus, the petitioner made a distinction between sale of the SIM card for which it charged consideration, and the activation charges which according to it was not a "sale", but a mere service. The petitioner pointed out that, as far as the sale part was concerned, it was paying sales tax and it will duly paying service tax on activation charges.

4. By notice dated July 5, 1999 (exhibit P3), the Superintendent of Central Excise (Service Tax) reiterated the queries and called upon the petitioner to remit the service tax on the value of the SIM card during the period April, 1997 to March, 1999, and also to explain why the furnished account did not include the value of the SIM card in the value of taxable service. Along with the said notice, the Superintendent of Central Excise also enclosed a copy of the Trade Notice No. 161/97 dated November 7, 1997 reproducing the clarification issued by the department that charges towards SIM card can essentially be viewed as processing charges for activating the cellular phone and as such gross total should necessarily include the value of the SIM card for the purpose of levy of

service tax. It was further clarified that the amount received by the cellular telephone company from subscribers towards SIM card will form part of the taxable value for levy of service tax.

5. On September 17, 1999, the Joint Commissioner of Central Excise and Customs, Trivandrum, issued a show cause notice to the petitioner and its officers calling upon them to show cause why the value of 14,476 SIM cards involving service tax of Rs. 7,40,480, which has escaped assessment on account of the failure of the petitioner to wholly and truly disclose all material facts, should not be reassessed. The notice also called upon the petitioner and its officers to show cause as to why penal action should not be taken against them. The petitioner showed cause by its reply dated October 26, 1999 (exhibit P5) and urged that the value of the SIM card which was already a subject-matter of sales tax is not liable to be included in gross value of service charges and that it had duly, complied with the law, both KGST Act and Finance Act.

6. In the meanwhile, the Central Board of Excise and Customs, issued circular No. 23/3/97 dated October 13, 1997 in which it was clarified that the cost of SIM card has to be included in the valuation of "taxable service" rendered by cellular telephone service providers for levy of service tax. The petitioner addressed a letter dated June 20, 2000, Central Board of Excise and Customs (hereinafter referred to as "CBEC") for clarification (exhibit P7), but no clarification was given by the CBEC in the matter.

7. By an order made on November 28, 2000, the Additional Commissioner of Central Excise and Customs (exhibit P8) demanded Rs. 7,40,840 being the service tax payable on the value of 14,476 SIM cards amounting to Rs. 1,48,09,600 which was not included by the petitioner in the value of "taxable service" declared in their ST-3 returns filed for the quarters covered during the period from January, 1997 to April, 1999, u/s 73(a) of the Finance Act, 1994. An order was also made for payment of interest on the defaulted amount at the rate of 1.5 per cent for every month by which the crediting of the defaulted tax was delayed u/s 75 of the Finance Act, 1994. A penalty of Rs. 7,40,480 was imposed on the petitioner u/s 78 of the Finance Act, 1994 and a further penalty of Rs. 100 for every day for which there was failure to pay the service tax u/s 76 of the Finance Act, and also a penalty of Rs. 1,500 u/s 77. The penalty proceedings against the officers of the petitioner-company were dropped.

8. The petitioner contends that though a statutory appeal was provided against the assessment order, it would be futile as the appellate authority would be bound by the circular issued by the CBEC and, further, upon an appeal being filed, the petitioner would be required to deposit the entire amount demanded under exhibit P8 as a condition precedent for filing the appeal. Hence, it is contended that the petitioner has no other efficacious alternate remedy, but to approach this Court under Article 226 of the Constitution of India.

9. Apart from the liability to pay service tax under the Finance Act, the petitioner

has also been subjected to proceedings under the KGST Act. The sales tax authorities have held against the petitioner that the sale price of the SIM card, for the purpose of sales tax, was liable to be increased by the activation charge. The sales tax authorities took the view that unless the activation charges were paid and the process of activation was completed the sale of SIM card itself would be incomplete, as SIM card would not become operative. The sales tax authorities, therefore, held that activation is a process by which the SIM card becomes operational and the value of SIM card is enhanced and the said activation charge was collected along with the price of SIM card. Hence, they took the view that the amount collected by the petitioner by way of activation charge along with the sales price was. part of the sales price, and hence, exigible to sales tax. The petitioner filed an appeal before the Deputy Commissioner of Commercial Taxes (Appeals) which was dismissed by an order made on October 25, 2000 (vide exhibit P11). Aggrieved by the order petitioner moved an appeal before the Sales Tax Appellate Tribunal. Pending the appeal, the department issued revenue recovery proceedings against the petitioner. Hence, this original petition.

10. It is contended that it would be in fairness of things that this Court determines the issue once for all and decides which portion of the charges is exigible to sales tax and which is exigible to service tax. By an amendment made in the original petition, it is contended that levy of service tax on the sale of SIM card is beyond the legislative competence of the Parliament ; the tax on the sale or purchase of goods legitimately falls under entry 54 of List II of the Seventh Schedule and hence is beyond the legislative competence of the Parliament ; that the goods on which sales tax, coming within the purview of entry 54 of List II has been paid, cannot be subjected to tax again by the Parliament ; the expression "any service" used while defining the term "taxable service" in Section 65(72) of the Finance Act, 1994 as amended by Finance Act, 2001, has to be understood and interpreted in consonance with the legislative competence of Parliament, which cannot levy a tax on the sale of SIM card as it legitimately lies within the competence of State Legislature. In other words, the contention is that, the words "any service", if not restrictedly read down, would render the levy of service tax unconstitutional and beyond the competence of Parliament. The contention, therefore, is that the expression, "taxable service", u/s 65(72) of the Finance Act must be understood as excluding the sale of SIM card, the tax on which is within the exclusive Province of the State. For these reasons, it is contended that while activation of SIM card and subsequent service alone can be taxed by Parliament, the sale of SIM card alone can be taxed by the State Legislature.

O.P. Nos. 29239 and 31963 of 2001 :

11. These petitions have been brought by another cellular telephone operator, BPL Mobile Cellular Ltd., to restrain the sales tax authorities from taking any proceedings to assess the petitioner to sales tax in respect of its turnover in

Kerala.

12. The petitioner is a company having its registered office at Coimbatore with branch offices doing business in Kerala. It is engaged in the business of providing mobile phone telephony. Petitioner's Ernakulam branch is an assessee to Kerala general sales tax and the petitioner has been filing returns in respect of its business in Kerala with the first respondent and remitting the sales tax payable. For the assessment year 1997-98, the assessing authority under the KGST Act made an order of assessment dated March 27, 2001. The sales tax authorities issued a notice u/s 19 of the KGST Act proposing to assess the petitioner for the turnover of SIM cards on the footing that where a customer is provided with a SIM card by the petitioner, it amounts to sale and hence taxable under the KGST Act. The petitioner by its reply contended that providing of SIM card to the customer is essentially a service and that there is no transfer of property in goods satisfying the ingredients of a sale, and, hence, no sales tax can be levied on the transaction. The authorities, however, held against the petitioner and made a revised assessment order on July 16, 2001. The petitioner was also served with a notice dated September 4, 2001 proposing to levy penalty u/s 45A of the KGST Act. The petitioner opposed the penalty proceedings, but the penalty proceedings resulted in order dated September 18, 2001 (exhibit P5) being passed against the petitioner, levying a penalty of Rs, 3,46,366 and a demand notice being served in connection therewith. By another notice dated September 6, 2001, the petitioner was also called upon to file its return in respect of sale of SIM cards and MOTS cards for the assessment, year 1997-98 onwards. Apart from contending that providing of SIM cards or MOTS cards does not result in a transaction exigible to sales tax under the KGST Act, because it is a pure and simple service exigible to service tax under the Finance Act, the petitioner has also impugned the reopening of the assessment and the penalty proceedings on several other grounds.

O.P. No. 31963 of 2001 :

13. This petition is a sequel to the case put forward in O.P. No. 29239 of 2001 as it pertains to subsequent assessment years 1998-99 to 2000-01. The grounds urged are the same.

14. Since the decision would affect both the taxing authorities under the Central Act as well as those under the State Act, we issued notice to both and heard them.

15. The contentions urged by the counsel for the petitioners can be summarised as under :

(a) Mr. P.K. Ravindranatha Menon for the petitioner in O.P. No. 4973 of 2001 contends that sales tax may be levied on the transaction of sale of SIM cards ; the activation is not sale but, indeed, a service being rendered, and consequently, exigible only to service tax. The relevant definition pertaining to "taxing service" though couched in wide terms, has to be read down to make it

consistent with the legislative competence of Parliament to impose the tax, and the expression "any service" cannot include within its purview a sale, for, otherwise, the tax would be relatable to entry 54 of List II of Seventh Schedule, and therefore, beyond the legislative competence of Parliament.

(b) Mr. Arshad Hidayathulla, learned counsel for the petitioner in O.P. Nos. 29239 and 31963 of 2001, however, canvasses the other extreme view. He contends that no part of the transaction is a sale. Providing SIM card is essentially a service and activation is also a service, without doubt. Thus, no part of the transaction is a "sale" or exigible to sales tax under the KGST Act. For the sales tax authorities, learned Special Government Pleader (Taxes), contends that not only is the sale price of the SIM card exigible to sales tax, but even the activation charge, as rightly found by the sales tax authorities, must be included in the sale price and is exigible to sales tax as it is nothing but value addition to the commodity, as without activation the SIM card would be useless and the subscriber would get no service at all.

(c) The learned Additional Solicitor-General contends that, irrespective of whether sales tax is payable on the value of SIM card or the activation charges, the sale of SIM card and its activation are both included in the ambit of the expression "any service" as contemplated in the definition of "taxable service". Therefore, service tax has to be paid on the price of SIM card plus the activation charge collected by the service provider.

(d) Learned counsel for both the petitioners vehemently urged that if the same transaction is held exigible to both service tax and sales tax, it would amount to double taxation, which is constitutionally impermissible.

16. Before we consider the rival contentions, it is necessary to notice the relevant statutory provisions. Service tax is leviable u/s 67 of the Finance Act, 1994, as amended by the Finance Act of 1996, the Finance Act of 1997 and Finance Act of 1998. "Taxable service" is defined in Sub-section (72) of Section 65 of the Finance Act. As far as mobile service providers are concerned, they are treated as "telegraph authority" as defined in Section 65(74) which says :

" "telegraph authority" has the meaning assigned to it in Clause (6) of Section 3 of the Indian Telegraph Act, 1885 (13 of 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."

The expression "telegraph" is defined in Section 65(73) as under :

""telegraph" has the meaning assigned to it in Clause (1) of Section 3 of the Indian Telegraph Act, 1885 (13 of 1885)."

Under Section 67 of the Finance Act, the value of any "taxable service" is the gross amount charged by the service provider for such service rendered by him.

17. The important question canvassed before us is whether the service rendered

by mobile cell phone service providers is "taxable service" within the meaning of the definition given in the Finance Act. As far as the definition in the Finance Act is concerned, all services provided to a subscriber, by the telegraph authority in relation to a telephone connection would fall within the meaning of "taxable service" defined in Section 65(72)(b) of the Finance Act. What is true of telephone connection is equally true of cellular telephone. When a customer approaches a cellular telephone service provider, he charges certain amount for providing the handset, if the customer desires to buy one. If the customer already has a handset, in order to get access to the service provided by the cellular telephone service provider, the customer has to buy a Subscriber Identification Module (SIM) card on payment of certain charges. The SIM card is a card containing computer chips with pre-recorded instructions which would enable the customer access to the service, of the cellular telephone company by means of electro-magnetic waves. Even after purchasing a SIM card and putting it in the handset, the customer does not get access to the service of the cellular telephone service provider till the SIM card is activated. The process of activation consists of putting information in the computer maintained by the cellular phone service provider, giving it the particulars of amount charged, the I.D. of the subscriber, etc. Once this process of activation is complete, the subscriber gets access to the service provided by the cellular telephone company. For the purpose of activation, the subscriber is required to pay a fee called activation charges, which are over and above the amount charged for supplying the SIM card. In the case of pre-paid cards, the cost of the card as well as the activation charge is included in the price on the prepaid SIM card, purchased by the customer off the shelf. In the case of non-prepaid SIM cards, the customer is billed periodically for user and has to pay the charges. The activation charges are collected separately.

18. The first question that arises for consideration is : when the subscriber is supplied a SIM card, is there is a "sale", or a "service", or both ? and, which part of the activity is exigible to which tax ? The second question is : whether activation charge is exigible to service tax or sales tax ?

19. As far as the sale of SIM card is concerned, there cannot be any doubt that it amounts to "sale" within the meaning of Section 2(xxi) of the KGST Act as there is transfer of property in the goods, i.e., SIM card, by the service provider to the subscriber, for cash or for deferred payment or other valuable consideration. Mr. Hidayathulla, learned counsel appearing for the petitioner in O.P. Nos. 29239 and 31963 of 2001, however, contends that the transaction does not amount to a sale as contemplated in Section 2(xxi) of the KGST Act. According to him, in order to fall within the meaning of the word "sale" as defined in Section 2(xxi), there has to be a transfer of the property in the goods for cash or other valuable consideration. The SIM card has no value, per se. It merely represents a means of access provided by cellular telephone service provider. It is, so to say, a key to enter the service provider's facility and use his services. Hence, even this part of the transaction, according to the learned counsel, does not fulfil the definition of

expression "sale" and does not become exigible to sales tax under the KGST Act. He urges that the transaction of supplying the subscriber the SIM card for valuable consideration is nothing but a "service" which is exigible only to service tax. As to the activation charges, Mr. Hidayathulla contends that there is no doubt whatsoever that they were charges received for activation and would also be exigible to service tax.

20. The learned Special Government Pleader (Taxes) contends that the definition of the expression "sale" has undergone tremendous transformation by the insertion of Explanation (3B) by Act No. 17 of 1984 with effect from July 1, 1984. The judgment of the Supreme Court in Gannon Dunkerly v. State of Rajasthan [1993] 88 STC 204 This reference appears to be to Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, , held that in a works contract, the transfer of property being negligible as the intention is to get a service from the contracting party, no sales tax would be payable. There were amendments made both to the Constitution and in the Sales Tax Acts in the different States. Clause (29A) was added in Article 466 of the Constitution to define the expression "tax on the sale or purchase of goods" so as to include, inter alia, by Sub-clause (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. Learned counsel contends that as a result of this new definition and the inclusion of Explanation (3B) to Section 2(xxi) of the KGST Act, a transfer of a right to use any goods for any purpose, whether or not for specified purpose, for cash or deferred payment or other valuable consideration, is now deemed to be a "sale" under the KGST Act. After all, what is the nature of the transaction involved? Even if the contention of the petitioners that the SIM card, by itself, has no value is accepted, the SIM card definitely represents the right to use the service of the cellular telephone service provider for a specified period upon payment of valuable consideration. It is urged that, the transfer of such an intangible right is also a sale within the meaning of Section 2(xxi) read with explanation (3B) of the KGST Act and exigible to sales tax.

21. Mr. Hidayathulla strongly relied on the concept of "goods" as defined in the KGST Act and contends that, even assuming there is a transfer of property in the transaction of supplying the SIM card to the subscriber, neither is the SIM card "goods", nor is the right to use the service of the "service providers" "goods" within the meaning of Section 2(xii) of the KGST Act. Unless it falls within the meaning of Section 2(xii), it would not be a "sale" within the meaning of Section 2(xxi), however wide the ambit of explanation (3B) to Section 2(xxi).

22. Section 2(xii) of the KGST Act defines the expression "goods" as under :

" "goods" means all kinds of movable property (other than newspapers, actionable claims, electricity, stocks and shares and securities) and includes livestock, all materials, commodities and articles (including those to be used in the construction, fitting out, improvement or repair of immovable property or

used in the fitting out, improvement or repair of movable property) and every kind of property (whether as goods or in some other form) involved in the execution of a works contract, 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."

We are unable to accept the contention of Mr. Hidayathulla that the definition of goods in Section 2(xii) of the KGST Act would not apply to intangible property. As a matter of fact, "goods" is defined in Section 2(xii) to mean all kinds of movable property. Movable property would necessarily include the right to use movable property.

23. Mr. Hidayathulla relied on the judgment of the Allahabad High Court in *Union of India v. State of U.P.* [1999] 114 STC 288, to contend to the contrary. In that case, the State of U.P. had called upon the Union of India in the Telecommunication Department to register as a dealer under the State Sales Tax Act and pay sales tax. The contention urged in support was that u/s 3-F of the local Act, tax had to be paid on the net turnover on transfer of any right to use any goods for any purpose for cash, deferred payment or other valuable consideration or transfer of property of any goods. The division Bench of the Allahabad High Court emphasised that Section 3-F of the Act itself had a heading : "Tax on the right to use any goods or goods involved in the execution of works contract". It also took the view that the subscriber's right to use the telephone is not consequential to the execution of a works contract, nor incidental to it. The division Bench was also of the view that by reason of Article 285 of the Constitution, such a sales tax cannot be levied on the Union. In our view, this judgment is not an authority for the proposition canvassed by the counsel for the petitioner. Mr. Hidayathulla contended that inasmuch as Section 3-F(1)(a) of the U.P. Trade Tax Act is identical with explanation (3B) to Section 2(xxi) of the KGST Act, the judgment of the Allahabad High Court would be relevant. In the first place, with respect, we are unable to accept the reasoning in the judgment. The words used in Clause (a) were sufficiently wide. Even if they were restricted by reference to the heading of the section, we see nothing therein which would restrict the amplitude of Section 3-F(1) of the U.P. Trade Tax Act, and make it applicable only to a works contract. In fact, the heading rightly describes the two facets of the section, one applicable to Clause (a) and the other applicable to Clause (b) which alone deals with works contract. Hence, we are unable to agree that the authority cited before us is an authority for the proposition canvassed.

24. Mr. Hidayathulla then referred to the judgment of the Supreme Court in *M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs*, , particularly the observations in paragraph 27. In this case, the Supreme Court was concerned with the issue as to whether the drawing, designs, etc., relating to machinery or technology imported from foreign collaborators by the appellant would be goods. The issue was answered against the appellant-company by

holding that they would be "goods" within the meaning of Section 12 read with Section 2(22) of the Customs Act. The word "goods" has been defined in Section 2(22) of the Customs Act and includes under Sub-clause (e) "any other kind of movable property". Explaining this, the Supreme Court observed, "even though the definition of the "goods" purports to be an exclusive one, in effect it is so worded that all tangible movable articles will be the goods for the purposes of the Act by residuary Clause (22)(e)". Highlighting this observation, Mr. Hidayathulla contended that in order to be "goods", the property had to be tangible property or article as emphasised by the Supreme Court. We are unable to agree. The Supreme Court was concerned with whether drawing, designs, etc., were "goods" within the meaning of Customs Act. It was concerned with the importation into India of certain "goods" and the liability to pay customs duty. In that connection, the Supreme Court held that, even though the drawings and designs could be considered intangible, knowledge in the form of books, computer disks or cassettes which contain the information, technology or ideas would be necessarily regarded as "goods" under the aforesaid section of the Customs Act. Hence, they were movable goods and covered by Section 2(22)(e) of the Customs Act. In our view, this judgment does not help the learned counsel in showing that the expression "goods" as used in Section 2(xii) of the KGST Act does not include the right to use temporarily or otherwise the service provided by cellular telephone service provider.

25. In this connection, the judgment of the Supreme Court in *Vikas Sales Corporation v. Commissioner of Commercial Taxes* [1996] 102 STC 106 is illuminative. Here, the Supreme Court was concerned with the transfer of REP licences/Exim scrips for valuable consideration, and whether it would constitute a "sale of goods" within the meaning and for the purpose of sales tax in Kerala, Tamil Nadu and Karnataka. After noticing the definition of "goods" in KGST Act, the Supreme Court went on to consider what would be the meaning of the expression "movable property" used in the definition of "goods" in Section 2(xii) of the KGST Act and other Acts. The Supreme Court approvingly referred to *Jowitt's Dictionary of English Law* (Sweet & Maxwell Limited, 1977), Volume I, and observed (at page 117) :

"In its largest sense property signifies things and rights considered as having a money value, especially with reference to transfer or succession, and to their capacity of being injured. Property includes not only ownership, estates, and interests in corporeal things, but also rights such as trade marks, copyrights, patents, and rights in personam capable of transfer or transmission, such as debts."

The Supreme Court reiterated its own view in the decision in *H. Anraj Vs. Government of Tamil Nadu*, wherein the Supreme Court, had taken the view that sale of lottery tickets would amount to "sale of goods" as it would amount to transfer of entitlement of right to participate in a draw, which was a beneficial interest in movable property of incorporeal or intangible character. In this view of

the matter, the Supreme Court held that transfer of REP licence/Exim scrips for valuable consideration amounted to "sale" exigible to sales tax leviable under different State Sales Tax Acts.

26. It was contended by both the learned counsel, Mr. Hidayathulla and Mr. Ravindranatha Menon, that SIM card is not transferable and no one but the transferee may use the facility thereof. In our view, free transferability is not necessarily indicative of a right to movable property not being a sale of goods. Even under the Sale of Goods Act, 1930, there is no such requirement for the sale to be effective.

27. Mr. Hidayathulla then contended that even assuming that within the meaning of explanation (3B) to Section 2(xxi) of the KGST Act, that there is a transfer of right by the transfer of SIM card, the right is not the right to use movable property, but the right to use immovable property. He relied on the judgment of the High Court of Punjab and Haryana, in *Union of India v. State of Haryana* [2001] 123 STC 539. This was also a case of sales tax attempted to be levied on the department of Telecommunications by the State of Haryana. The definition of "sale" in the local Act pertaining to sales tax was "any transfer of property in goods for cash or deferred payment or other valuable consideration". There is an inclusive part in the definition which is almost the same as Explanation (3B) to Section 2(xxi) of the KGST Act. The division Bench followed the view of the Allahabad High Court in *Union of India v. State of U.P.* [1999] 114 STC 288 and the judgment of the Andhra Pradesh High Court in *Union of India v. Secretary, Revenue Department* [1999] 113 STC 203, and held that what the Telecommunications Department was charging was the rent for connecting instruments placed in the premises of the subscriber with the telephone exchange by way of telegraphic lines. So the department was charging for telegraphic lines including the instrument, which was not a mere charge of the rent or fee as per measured rate system or message rate system, and, therefore, it could not be equated with sale of goods or deemed sale of goods by way of transfer of the right to use goods within the meaning of Section 2(1)(iv) of the local Sales Tax Act. As far as we can see, apart from the articulated reason, there was a stronger reason on which the judgment could be founded. If the rent charged by the telecommunication department was a rent not only for hiring the telephone instrument, but also the facilities in the telephone exchange, obviously, it would be a rent for use of immovable property, which could not itself be "movable property". Hence, the situation was not one of transfer of right to use "movable property" ; therefore, not a "sale of goods", even under the Haryana General Sales Tax Act.

28. Our attention was drawn to a judgment of the Supreme Court in *Tata Consultancy Services v. State of Andhra Pradesh* [2001] 122 STC 198, wherein the Supreme Court considered the issue as to whether printed or unprinted computer software could be held as goods and referred it to a larger Bench.

29. The learned Special Government Pleader (Taxes) contended that not only is

the transfer of the property in SIM card a "sale" within the meaning of the expression as used under the KGST Act, but what is styled as "activation charges" is nothing but a deferred consideration or deferred payment for the same sale. He contended that what the subscriber gets is a facility made available by the mobile cellular telephone service provider and this is done in two-steps. First, by transfer of SIM card on payment of certain charges ; second, by the process of activation on payment of activation charges. He contended that by the value addition theory, what is done by the activation charges is to increase the utility or value of the SIM card itself. Hence also, the activation charges must be exigible to sales tax and includible in determining the sale price. In other words, the total consideration paid for getting the facility of cellular telephone service starting from registration charges, the purchase price of SIM card, and finally, including the activation charges. All this is a continuous process of "sale", inasmuch as it would be a transfer of the right to use the facility of the mobile cellular telephone service provider in three steps, the consideration being paid in three instalments.

30. The learned Special Government Pleader (Taxes) relied on explanation (3D) to Section 2(xxi) of the KGST Act which reads as under :

"Unless otherwise expressly provided in this Act, any transfer, delivery or supply of any goods referred to, in this clause shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and purchase of those goods by the person to whom such transfer, delivery or supply is made."

We are inclined to accept the contention of the learned Special Government Pleader (Taxes) that the entire consideration moving from the subscriber to the service provider would be exigible to sales tax as there is a "sale" within the meaning of the expression as used in the KGST Act.

31. Mr. Ravindranatha Menon, learned counsel for the petitioner in O.P. No. 4973 of 2001, however, contends partly to the contrary. He urges that the transaction is in two steps. First, there is a sale and purchase of SIM card, on which sales tax can be legitimately imposed. Then, there is activation charges on which service tax can be legitimately imposed. He, however, contends that, the sale of SIM card is not exigible to service tax ; nor is the service provided by activation exigible to sales tax.

32. In our view, there is conceptual confusion here by not keeping the taxable event in mind. The taxable event for sales tax is the "sale" as understood in Section 2(xxi) together with all explanations under the KGST Act. The taxable event for levy of service tax is the "taxable service" as understood within the meaning of Section 65(72)(b) of the Finance Act. Mr. Ravindranatha Menon contends that it would be impossible that the same transaction can be treated both as "sale" and as "service". If that were to be done, then the legislation would be bad for the vice of double taxation, in the submission of the learned counsel.

33. The difficulty as apprehended by Mr. Menon is purely chimerical. Every transaction may have different aspects. It is open to a Legislature or more than one Legislatures to impose a tax on that particular "aspect" of the transaction which is within its legislative competence. Doing so is perfectly permissible. In Federation of Hotel and Restaurant Association of India, etc., Vs. Union of India (UOI) and Others, elaborating the theory of "aspects legislation", the Supreme Court observed : (vide paragraphs 30--32, 37, 38 ; page Nos. 120, 121 and 123 in STC)

"30. In Lefroy's Canada's Federal System, the learned author, referring to the "aspects of legislation" under Sections 91 and 92 of the Canadian Constitution, i.e., the British North America Act, 1867, observes that one of the most interesting and important principles which have been evolved by judicial decisions in connection with the distribution of legislative power is that 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. Learned author says :

".....that by "aspect" must be understood the aspect or point of view of the legislator in legislating the object, purpose, and scope of the legislation that the word is used subjectively of the legislator, rather than objectively of the matter legislated upon".

In Union Colliery Co. of British Columbia v. Bryden [1899] AC 580, Lord Haldane said :

"It is remarkable the way this Board has reconciled the provisions of Section 91 and Section 92, by recognizing that the subjects which fall within Section 91 in one aspect, may, under another aspect, fall u/s 92,"

31. Indeed, the law "with respect to" a subject might incidentally "affect" another subject in some way ; but that is not the same thing as the law being on the latter subject. 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 an overlapping does not detract from the distinctiveness of the aspects. Lord Simonds in Governor-General in Council v. Province of Madras [1945] 1 STC 135 (PC) at page 141 ; (1945) FCR 179 (PC) at page 193 ; AIR 1945 98 (Privy Council) in the context of concepts of duties of excise and tax on sale of goods said :

".....The two taxes, the one levied upon a manufacturer in respect of his goods, the other upon a vendor in respect of his sales, may, as is there pointed out, in one sense overlap. But in law there is no overlapping. The taxes are separate and distinct imposts. If in fact they overlap, that may be because the taxing authority, imposing a duty of excise, finds it convenient to impose that duty at the moment when the excisable article leaves the factory or workshop for the first time upon the occasion of its sale....."

32. Referring to the "aspect" doctrine, Laskin's "Canadian Constitutional Law" states :

"The "aspect" doctrine bears some resemblance to those just noted but, unlike them, deals not with what the "matter" is but with what it "comes within"....." (page 115)

".....It applies where some of the constitutive elements about whose combination the statute is concerned (that is, they are its "matter"), are a kind most often met with in connection with one class of subjects and others are of a kind mostly dealt with in connection with another. As in the case of a pocket gadget compactly assembling knife blade, screwdriver, fishscaler, nailfile, etc., a description of it must mention everything but in characterizing it the particular use proposed to be made of it determines what it is (page 116)."

".....I pause to comment on certain correlations of operative incompatibility and the "aspect" doctrine. Both grapple with the issues arising from the composite nature of a statute, one as regards the preclusory impact of federal law on provincial measures bearing on constituents of federally regulated conduct, the other to identify what parts of the whole making up a "matter" bring it within a class of subjects....." (page 117)

37. It is trite law that the true nature and character of the legislation must be determined with reference to the question of the power of the Legislature. The consequences and effects of the legislation are not the same thing as the legislative subject-matter. It is the true nature and character of the legislation and not its ultimate economic result that matters.

38. Indeed, as an instance of different aspects of the same matter, being the topic of legislation under different legislative powers, reference may be made to the annual letting value of a property in the occupation of a person for his own residence being, in one aspect, the measure for levy of property tax under State law and in another aspect constitute the notional or presumed income for the purpose of Income Tax."

34. Double taxation is not bad unless the Constitution forbids it expressly. In the absence of any impediment specifically created by the Constitution or the legislative enactment itself, the desirability or need otherwise to avoid such levies has been held to pertain to areas of political wisdom of policy making and adjusting of public finances of the State, and not for the law courts, though courts would, unless there is clear and specific mandate of law in favour of such multiple levies more than once, in construing general statutory provisions, lean in favour of an interpretation to avoid taxation. [See Municipal Council, Kota, Rajasthan Vs. The Delhi Cloth and General Mills Co. Ltd., Etc. Etc., .

35. Further, nothing can be said to be a double taxation, unless the two or more taxes must have been--(i) levied on the same property or subject-matter, (ii) by the same Government or authority, (iii) during the same taxing period, and (iv)

for the same purpose. Thus, strictly speaking, there is no double taxation where (a) the taxes are imposed by different States, (b) one of the impositions is not a tax, (c) one tax is against property and the other is not a property tax, or (d) the double taxation is indirect rather than direct. [See in this connection the observation of the Supreme Court in *Sri Krishna Das Vs. Town Area Committee, Chirgaon*, .

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

37. Mr. Menon relied on the judgment of the Allahabad High Court in *Union of India v. State of U.P.* [1999] 114 STC 288 . We have already held that this judgment does not lend support to the argument of the petitioners. Reference was also made to the judgment in *M/s. PSI Data Systems Ltd. Vs. Collector of Central Excise*, . Mr. Menon highlighted the observations of the Supreme Court in paragraph 13 that a computer and its software are distinct and separate, both as a matter of commercial parlance as also upon the material on record. A computer may not be capable of effective functioning, unless loaded with software such as discs, floppies and C.D. ROMs, but that is not to say that these are a part of the computer or to hold that, if they are sold along with the computer, their value must form part of the assessable value of the computer for the purposes of excise duty. In our view, this judgment does not afford any assistance to the petitioners. The question is not whether the SIM card is part of anything else that is sold for the purpose of any duty. The question is whether the sale of SIM card is simultaneously capable of being viewed as rendering of service, and whether the two aspects of the same transaction could be simultaneously exigible to two different taxes levied by two different Legislatures. Learned counsel relied on the judgment in *M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs*, , and contended that whenever an intangible benefit passes to the customer, it can never amount to anything other than service. Conversely, it is submitted that, in order to amount to sale within the meaning of the expression "sale" under the KGST Act, what is transferred must be a tangible benefit in a movable property. We have no hesitation in rejecting the contention, in view of

the decision in *Vikas Sales Corporation and another, etc. etc. Vs. Commissioner of Commercial Taxes and another, etc. etc.*, . Even the learned counsel was not able to contend that sale of a copy right or a patent right, though sale of intangible property would not attract sales tax.

38. Mr. Menon then contended that activation charges were separately billed and there was no consideration for activation charges. For this reason, he contends that activation charges could not form part of the transaction of or consideration for sale of SIM card. Merely because, for the purpose of convenience, the consideration for sale is made payable at different stages, it does not make a change in the true character of the transaction. The contention of the Revenue is that this is merely a device or convenience, appears to be justified. The mere fact that activation is the second step in the process, for which activation charges are collected, it cannot take it out of the definition of "sale", if otherwise it falls within the definition.

39. Mr. Menon referred to the decision in *Khandelwal Metal and Engineering Works and Another Vs. Union of India (UOI) and Others*, , particularly the observation in para 42. The Supreme Court pointed out that the proper approach to determine the legislative competence of Parliament is whether the subject-matter of a legislation falls in List II, the State List, which is the only field which the Parliament cannot enter. If it does not fall in List II, Parliament would have the legislative competence to pass the law by virtue of Article 248 read with the residuary entry 97 of List I. He also referred to the judgment of the Supreme Court in *Union of India v. Harbhajan Singh Dhillon*, (1972) 83 ITR 582 (SC) , wherein the Supreme Court observed that, there are three Lists and a residuary power, and therefore, in this context, if a Central Act is challenged, as being beyond the legislative competence of Parliament, it is enough to enquire if it is a law within respect to matters or taxes enumerated in List II. If it is not, no further question arises;

40. We are afraid that these two judgments do not carry forward the petitioners' case at all. In fact, in order to press forward the proposition raised by Mr. Menon, it would have to be demonstrated that the tax levied by way of service tax is, in pith and substance, referable or relatable to an entry in the State List in Seventh Schedule to the Constitution. The only entry pointed out is entry 54 of List II. We have already held that service tax is different from sales tax ; that the same transaction may simultaneously involve "service" and "sales" as its two aspects and that it is open to different Legislatures to tax different aspects of the same subject within their individual legislative competence. Merely because a tax is measured by relating it to the value of taxable sale, it does not cease to be a service tax, for the taxable event is the rendering of service and not the sale. For this reason, we are unable to accept the contention of Mr. Menon that transaction of sale of SIM card does not amount to taxable service within the meaning of Section 65(72)(b) of the Finance Act or that it is not exigible to service tax merely because on the sale aspect it becomes exigible to sales tax.

41. Mr. Menon cited in support the judgment of the Andhra Pradesh High Court in *Union of India v. Secretary, Revenue Department* [1999] 113 STC 203. We may mention here that this was the judgment followed by the Punjab High Court. In this case, the State of Andhra Pradesh attempted to levy sales tax on the Telecommunication Department u/s 5-E(a) of the local Sales Tax Act, which is in parimateria with explanation (3B) to Section 2(xxi) of the KGST Act. The Andhra Pradesh High Court relied on a previous decision rendered by it in *State Bank of India v. State of Andhra Pradesh* [1988] 70 STC 215, in which the question for consideration was whether the hire charges for hiring lockers would be exigible to sales tax. One of the reasons given for holding that it was not, was the fact that it was not charges paid for transferring the right to use any movable property, for locker is not a movable property. Yet another reason was given by the division Bench, but we have our own doubt about that reason. Following this reasoning, the Andhra Pradesh High Court in *Union of India v. Secretary, Revenue Department* [1999] 113 STC 203 held that telephone facility is not merely installation of a telephone instrument at the consumer's residence ; it is in fact maintenance of a system at an exchange which is connected to the instrument placed at the consumer's place ; that the instrument, per se, was a useless thing unless it is connected to a system and it becomes only a service once it is connected to a system by the Telecommunications Department and as such there is no transfer of any tangible thing to the consumer ; only a facility is provided, which by no stretch of imagination can be considered as "goods".

42. With greatest respect, we are unable to accept the above reasoning in the face of the definition of Section 5-E(a) of the A.P. Act and our own definition under the KGST Act in Section 2(xxi) with explanation (3B). In our view, the judgment could be rested on the surer foundation on the first proposition, viz., that the right to use lockers or the facility on the telephone exchange would not be a right to use movable property.

43. Both Mr. Hidayathulla and Mr. Menon contended that the principle enunciated in these judgments would be equally applicable in the case of mobile cellular telephone service providers, because what is offered by them is the transfer of the right to use the mobile services, albeit, by wireless telephone, and that their instruments installed in their office are really immovable property. This contention cannot be accepted, as there is no material placed before us to support this. We, therefore, decline to express any opinion thereupon. As requested by the learned counsel, we keep open the question as to whether the right to use the petitioners' services for valuable consideration would be a right to use "movable property" or "goods" within the meaning of expression "sale" as defined in Section 2(xxi) read with explanation (3B) of the KGST Act to be decided by the statutory authority upon material being produced. We are deciding the issue on the footing that it is movable property and hence, it would amount to sale.

44. Mr. Menon also placed reliance on the judgment of the Punjab and Haryana

High Court in Union of India v. State of Haryana [2001] 123 STC 539 with which we have already dealt. Mr. Menon referred to the judgment of the Supreme Court in Narain Swadeshi Weaving Mills Vs. The Commissioner of Excess Profits Tax, , where the Supreme Court held that, no general principle could be laid down which would be applicable to all cases and that each case must be decided on its own circumstances according to ordinary common sense principles. In our view, if the field were open to us, it may be possible to decide it with a common sense principle. But, when the aspect theory of legislation, as approved by the Supreme Court is to be considered, it has to be considered in accordance with established principles of interpreting fiscal statutes.

45. Mr. Menon vehemently contended that the same transaction cannot be "service" and "sale" for different statutes and for taxation by different authorities. We have already held that this contention has no merit. [See in this connection the decision in Federation of Hotel and Restaurant Association of India, etc., Vs. Union of India (UOI) and Others, and The Western India Theatres Ltd. Vs. The Cantonment Board, Poona, Cantonment, .

46. Though Mr. Hidayathulla contended that authorities in Maharashtra were not treating the activation charges as liable to sales tax, the learned Special Government Pleader produced before us an order of the TRAI and a Trade Circular dated April 16, 2001. At item 7, it shows that 7 per cent sales tax has been imposed on SIM card on the ground that it amounts to sale of incorporeal and intangible goods. It is also pointed out by the learned Government Pleader that BPL had actually collected the sales tax on the activation charges for the year 1997-98, but had not submitted it, which has resulted in the penalty proceedings.

47. Conclusions :

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

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

48. We find no substance in the petitions. The original petitions are accordingly dismissed. No order as to costs.

49. We have not gone into the question of correctness of the penalty proceedings and departmental assessment. But we have decided only the question of exigibility to tax on different aspects of the transaction. We have also left open

the issue as to whether sale of SIM card represents the transfer of right to use "immovable property", as the arguments before us proceeded on the assumption that it was transfer of the right to use a movable property. The departmental authorities are free to decide this issue in accordance with the evidence, which may be produced before them.

O.P. No. 4973 of 2001 :

50. The petitioner has challenged the reassessment proceedings as time barred as well as penalty and levy of penal interest before the appellate authority contemplated under the Finance Act regarding service tax. Petitioner has also filed an appeal before the Sales Tax Appellate Tribunal challenging the levy of sales tax. An application is made before us that all these proceedings may be kept pending till the disposal of respective proceedings before the departmental authorities. In our view, it would not be proper to grant such a blanket order. The petitioner is at liberty to apply to the respective departmental authority for stay of recovery proceedings pending the hearing of each of the proceedings. There shall be a stay of the recovery proceedings for a period of fifteen days from today, to enable the petitioner to file such applications. If such applications are filed within the time stipulated by us, then the stay will continue till the respective authorities hear and dispose of the applications for stay.

O.P. Nos. 29239 and 31963 of 2001 :

51. The penalty orders passed against the petitioner were also challenged in these writ petitions. We have declined to interfere with them in these writ petitions and left them to be decided by the statutory authorities. Learned counsel for the petitioners does not dispute that those orders are capable of being challenged by revision applications under the provisions of the KGST Act. We, therefore, see no reason why this Court should be concerned with it. However, there shall be stay of recovery for a period of fifteen days from today to enable the petitioner to file revision applications and obtain appropriate orders from the concerned departmental authority. If such revision applications and stay applications are filed within fifteen days, the stay granted by us will continue till the applications for stay filed are heard and disposed of by the departmental authorities.

In all the three writ petitions, the counsel orally applied for leave to appeal to the Supreme Court under Article 134A(b) read with Article 133(1)(a) and 133(1)(b) of the Constitution of India. These cases involve substantial questions of law of general importance likely to affect a large number of people which are not decided by the Supreme Court. Hence, we grant the certificate as prayed for under Article 134A(b) read with Article 133(1)(a) of the Constitution.

Order on C.M.P. No. 8253 of 2001 in O.P. No. 4973 of 2001(P) dismissed.

Order on C.M.P. No. 47539 of 2001 in O.P. No. 29239 of 2001(E) dismissed.

Order on C.M.P. No.52163 of 2001 in O.P. No.31963 of 2001(E) dismissed.