(2007) 07 P&H CK 0165

In the Punjab And Haryana At Chandigarh

Escotel Mobile Communications Ltd. APPELLANT

Vs

The State of Haryana and Others RESPONDENT

Date of Decision : 05-07-2007

Acts Referred:

Constitution of India, 1950 — Article 226, 366

Citation : (2007) 4 PLR 381 : (2008) 12 VST 443

Hon'ble Judges : M.M. Kumar, J;Ajay Kumar Mittal, J

Bench : Division Bench

Final Decision : Allowed

Judgement

M.M. Kumar, J.—This petition filed under Article 226 of the Constitution prays for quashing Sales Tax Assessment order Annexures P-1 to P-4 in respect of assessment years 1996-97, 1997-98, 1998-99 and 1999-2000 and all subsequent proceedings and orders Annexures P-5 to P-12 and P-14, where the activation charges have been included for the purposes of computing Sales Tax. The petitioner Company has further prayed that this Court may declare that Cellular Mobile Telephone Services provided by the petitioner Company is not goods within the meaning of Section 2(f) of the Haryana General Sales Tax Act, 1973 (for brevity, ''the Act1) nor providing or running the service could be considered as sale within the meaning of Section 2(i) of the Act and accordingly the Cellular Mobile Telephone Services is not assessable to Sales Tax under the Act. A further alternative prayer has also been made for declaring Section 2(f) and 2(i) of the Act as ultra vires of the Constitution.

2. M/s Escotel Mobile Communications Limited-petitioner Company is engaged in providing Cellular Mobile Telephone Services to the general public in Haryana Telecom Circle after having been granted license by the Department of Telecommunications, Government of India. It is also engaged in selling Cellular Telephone instruments, SIM Cards and other accessories. Accordingly, it is registered as a dealer in Haryana under the provisions of the Act. For the purposes of Sales Tax, it is being assessed by the Excise and Taxation Officer-

cum-Assessing Officer, Sonepat. The petitioner-Company in addition is also registered as service provider with the Central Excise Department for Service Tax. On the basis of the assessment that the service provided by the petitioner-Company is goods within the meaning of Section 2(f) of the Act or it is sale within the meaning of Section 2(i), the respondents have framed assessment orders, which have been made subject matter of challenge in the instant petition.

3. When the matter came up for consideration on 4.11.2004, a Division Bench of this Court had adjourned it to await the decision of Hon''ble The Supreme Court by passing the following order:

Whereas "Ms. Nirmaljit Kaur, learned Additional Advocate General, Punjab, states that Constitutional vires of the Act have been upheld by a Division Bench of the Kerala High Court in Escotal Mobile Communications Ltd. v. Union of India and Ors. (2002) 126 Sales Tax Cases 479, and another judgment of Andhra Pradesh High Court in State Bank of India and Others Vs. State of Andhra Pradesh, , counsel representing the petitioner states that the matter, reference whereof has been given in our order dated 9.12.2003, is still pending before the Hon''ble Supreme Court with stay and considering that fact, number of High Courts have adjourned the cases, involving the same challenge, sine die to await the decision of the Supreme Court. It is jointly stated by learned Counsel representing the parties that the matter was fixed before Hon''ble Supreme Court on 1.11.2004. Counsel for the petitioner, however, states that the matter was not taken up on 1.11.2004.

In considered view of this Court, it will be more appropriate to await the decision of the Hon''ble Supreme Court, which, concededly, is seized of the same matter and wherein, concededly as well the stay was also been granted.

List this matter on 9.11.2004.

4. On 9.11.2004, the matter was adjourned sine die on the basis of the statement made by the learned Counsel for the parties that matter was still pending before Hon''ble the Supreme Court.

5. It has now been agreed between the learned Counsel for the parties and the issue has been decided by Hon''ble the Supreme Court and judgment has been pronounced in the case of Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, . According to the aforementioned judgment it has been held that electromagnetic waves or radio frequencies are not "goods" within the meaning of the word either in Article 366(12), 366(29A)(d) or in the State legislations. The aforementioned view has been expressed by Hon''ble the Supreme Court in para 71 and 92(A). It has further been held that the goods in telecommunication are limited to the handsets supplied by the service provider. The issue with regard to SIM cards has been left open for determination by the assessing authorities. The view of Hon''ble the Supreme Court has been summoned up in para 92, which reads as under:

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 366(29A)(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.

(B) There may be a transfer of right to use goods as defined in answer to the previous question by giving a telephone connection.

(C) The nature of the transaction involved in providing the 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.

(I) The issue is left unanswered.

(E) The ''aspect theory'' would not apply to enable the value of the services to be included in the sale of goods or the price of goods in the value of the service.

6. For our purposes it is not necessary to go to any other proposition except the proposition concluded in para 92(A) because there is no dispute in the present case that the SIM card comes within the ambit of expression ''goods''. The only dispute is with regard to activation charges, which have been included as part of the sale price on the basis of the judgment of Kerala High Court in the case of Escotal Mobile Communications Ltd. Vs. Union of India (UOI) and Others, . Accordingly, it has to be held that the activation charges within the meaning of proposition laid down in para 92(A) would not constitute goods and, therefore, to that extent it cannot be considered as ''sale''. Accordingly, it would not be assessable to Sales Tax.

7. In view of the above, the writ petition succeeds and the impugned assessment orders Annexures P-1 to P-4 and the orders passed by the Revisional Authority, dated 20.11.2002 (P-9), 20.11.2002 (P-10), 25.11.2002 (P41) and 25.11.2002 (P-12) and also the order dated 12.1.2004 (P-14) passed by the Haryana Tax Tribunal, Chandigarh are hereby quashed to the extent these orders have included the element of ''activation charges'' for the purpose of computing Sales Tax. The petitioner-Company shall approach the respondents for consequential relief of refund of amount which shall be decided by the respondents in accordance with law.

The writ petition stands disposed of in the above terms.