
(2009) 09 AHC CK 0238

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition Nos. 118 (Tax) of 2008 and 539 (Tax) of 2006

Kuldeep Chaurasia & etc.

APPELLANT

Vs

State of U.P. & Ors.

RESPONDENT

Date of Decision : 07-09-2009

Acts Referred:

Uttar Pradesh Trade Tax Act, 1948 — Section 3F

Citation : (2009) 09 AHC CK 0238

Hon'ble Judges : R.K.Agrawal, J and S.K.GUPTA, J

Judgement

Shashi Kant Gupta, J.—In these two writ petitions, similar questions of law are involved, with the consent of the parties, they are taken U. P. together and are being disposed of by a common judgment and order.

2. Civil Misc. Writ Petition No. 118 (Tax) of 2008 has been filed, inter alia, for the following reliefs;

"(a) issue a writ, order or direction in the nature of certiorari quashing the impugned assessment orders dated 31.10.07 (Annexure No. 2) and its consequential orders (Annexure No. 3), issued by the respondents.

(b) issue a writ, order or direction in the nature of mandamus staying realization of Trade Tax from the petitioner under Section 3F of U.P. Trade Tax Act, 1948.

(c) issue a writ, order or direction in the nature of Mandamus declaring providing and regulating various signals on television channels not to be covered under the definition of Section 3f of U.P. Trade Tax Act, 1948."

3. The connected writ petition No. 539 (Tax) of 2006 has been filed, inter alia, for the following reliefs;

"(i) issue a writ order or direction in the nature of CERTIORARI quashing the Recovery Certificate dated 1.9.2005 issued by Trade Tax Officer, Sector2, Allahabad (Annexure1) to the writ writ petition.

(ii) issue a writ order or direction in the nature of MANDMUS declaring the levied of the Trade Tax on the Cable T.V. Is ultravires to the Constitution of India.

(iii) Issue a writ order or direction in the nature of MANDMUS directing to the respondents not make any further Assessment creating the demand regarding the Cable Connection provided to the T.V. Viewers by the petitioner."

4. The facts of these writ petitions are more or less the same which ultimately goes to the root of similar controversy. The writ petition No. 118 of 2008 is being treated as a leading case.

5. The facts as enumerated in the writ petitions No. 118 of 2008 are as follows; The petitioner is a cable operator providing cable service through a cable television network and is having licence under the U. P. Entertainment & Betting Tax Act, 1979. The petitioner has also taken license under the Central Cable Network Act. The petitioner provides transmission of programme by cable and broadcast television signals to its subscribers. The petitioner is paying tax under Entertainment Tax Act, 1979.

6. Respondent No. 3 is trying to levy tax on the petitioner under Section 3F of U. P. Trade Tax Act, 1948 (in short "U. P. Act") for providing cable service to its subscribers. Consequently, the notices were issued to the petitioner by the respondent No. 3 and by order dated 31.10.07, respondent No. 3 passed an assessment order for the assessment years 200203, 200304 & 200405 and levied tax in terms of Section 3F of the U. P. Act. Now, the demand notice has been issued against the petitioner. Hence, the present writ petition.

7. Since the facts of the connected writ petition No. 539 of 2006 is similar, therefore, the facts of the said writ petition are not being repeated here again.

8. Heard Sri N. C. Gupta, learned counsel for the petitioner and Sri U. K. Pandey, learned Standing Counsel appearing for the respondents and perused the record.

9. Learned counsel for the petitioner has submitted that the impugned assessment orders and the demand notices/recovery issued against the petitioner are illegal, arbitrary and without jurisdiction.

10. On the other hand, learned Standing Counsel appearing for the respondents has justified the order passed by the respondents and has submitted that the provisions of section 3F of the U. P. Act are fully applicable in the matter and the petitioner is liable to pay tax.

11. The only point for determination before this Court is whether the petitioners who are running cable television network providing cable connections to its subscribers are liable to pay tax as provided under Section 3F of the U. P. Act. Before adjudicating upon the said controversy, it is appropriate to reproduce the relevant provisions under Section 3F Subclause (1) and 2 (d) of the U. P. Act which read as follows;

"3F. Tax on the right to use any goods or goods involved in the execution of

works contract.

(1) Notwithstanding anything contained in Section 3A or Section 3AAA or Section 3D but subject to the provisions of Sections 14 and 15 of the Central Sales Tax Act, 1956, every dealer shall, for each assessment year, pay a tax on the net turnover of

(a) transfer of the right to use any goods for any purpose (whether or not for a specific period) for cash, deferred payment or other valuable consideration; or

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

At such rate not exceeding twenty percent as the State Government may, by notification, declare and different rates may be declared for different goods or different classes of dealers.

"2 (d) "Goods" means every kind or class of movable property and includes all materials, commodities and articles involved in the execution of a works contract, and growing crops, grass, trees and things attached to, or fastened to anything permanently attached to the earth which, under the contract of sale, are agreed to be severed but does not include actionable claims, stocks, shares, securities or postal stationery sold by the Postal Department;

12. Thus from the aforesaid provision, it follows that the petitioner can be fastened with the liability to pay tax under Section 3F of the U. P. Act, only when there is transfer of right to use any "goods" for any purpose of cash etc. or transfer of property in goods involved in execution of work contract.

13. Now we have to examine whether there is transfer of right to use any goods or transfer of property in goods involved in the execution of work contract in the present matter as provided under Section 3 F of the U. P. Act.

14. The petitioner is a cable television operator and what is being transferred to the consumers by the petitioner is digital signals through the cable network. Digital signals cannot be included within the definition of "goods" as defined under Section 2 (d) of the U. P. Act, which means every kind or class of movable property, includes all material commodities and articles involved in the execution of works contract etc. Neither the digital signals which is being transferred by the petitioner to the subscribers are "goods" as defined under the U. P. Act nor there is transfer of right to use any "goods" for any purpose.

15. It is also notable that the Central Government is also levying service tax on the petitioners under the Service Tax Act.

16. In this regard, it is useful to refer to provisions of Cable Television Network (Execution) Act, 1985 wherein "cable operator", "cable service" and "cable television network" have been defined which are reproduced as under;

"2. Definitions. In this Act, unless the context otherwise requires,

(a) "cable operator" means any person who provides cable service through a cable television network or otherwise controls or is responsible for the management and operation of a cable television network;

(b) "cable service" means the transmission by cables of programmes including retransmission by cables of any broadcast television signals ;

(c) "cable television network" means any system consisting of a set of closed transmission paths and associated signal generation, control and distribution equipment, designed to provide cable service for reception by multiple subscribers ;"

17. In this context, it is very relevant to refer to the decision of the apex court in the case of Bharat Sanchar Nigam Ltd. & Another Vs. Union of India & others 2006 NTN (Vol.29) Page 307, wherein it has been interalia observed as follows;

"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)

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.

91. As far as the question whether providing of a telephone connection involves interstate 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 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.

5. To constitute a transaction for the transfer of the right to use the goods the

transaction must have the following attributes:

- a. There must be goods available for delivery;
 - b. There must be a consensus ad idem as to the identity of the goods;
 - c. The transferee should have a legal right to use the goods consequently all legal consequences of such use including any permissions or licenses required therefore should be available to the transferee;
 - d. For the period during which the transferee has such legal right, it has to be the exclusion to the transferor this is the necessary concomitant of the plain language of the statute viz. A "transfer of the right to use" and not merely a licence to use the goods;
 - e. Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others.
6. In my opinion, none of these attributes are present in the relationship between a telecom service provider and a consumer of such services. On the contrary, the transaction is a transaction of rendition of service.

(Emphasis supplied)

17. Here in the present matter, the petitioner provides the transmission of programme by cable and broadcast television signals to its subscribers for which he receives subscription from the viewers. The petitioner is already paying tax under Entertainment Tax Act, 1979. Since only digital signals are being transmitted to the subscribers by the petitioner through cable network, as such digital signal cannot be included within definition of goods. It has already been held in the case of Bharat Sanchar Nigam Ltd. Vs. Union of India (supra) that electromagnetic waves or radio frequencies are not "goods", therefore, it does not come under the purview of section 3F of the Act. The proposition laid down in the said decision is fully applicable to the facts and circumstances of the present case. The learned Standing Counsel appearing for the respondents was unable to dispute the aforesaid legal position.

18. In view of the above discussions, the petitioners cannot be held liable to pay tax under the U. P. Trade Tax Act, 1948 and the assessment orders passed against the petitioners, and the consequent recovery issued against the petitioners in these writ petitions cannot be sustained.

19. In the result, these writ petitions are allowed and the impugned orders passed against the petitioners are quashed, and the respondents are restrained from recovering any tax in pursuance of the impugned assessment orders passed under the U. P. Trade Tax Act.