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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

920522

CIVIL APPEAL NO(s). 2048 OF 2008

BHARAT SANCHAR NIGAM LTD.

Appellant (s)

VERSUS

COMMISSIONER OF SALES TAX, CUTTACK & ANR Respondent (s)

WITH

- Civil Appeal No. 2049 of 2008
- Civil Appeal No. 2050 of 2008
- Civil Appeal No. 2051 of 2008
- Civil Appeal No. 2052 of 2008
- Civil Appeal No. 2053 of 2008
- Civil Appeal No. 2054 of 2008
- Civil Appeal No. 2056 of 2008
- Civil Appeal No. 2057 of 2008
- Civil Appeal No. 2058 of 2008
- Civil Appeal No. 2059 of 2008
- Civil Appeal No. 2060 of 2008
- Civil Appeal No. 2061 of 2008
- Civil Appeal No. 2063 of 2008
- Civil Appeal No. 2064 of 2008
- Civil Appeal No. 6174 of 2009
- Civil Appeal No. 6175 of 2009
- Civil Appeal No. 6176 of 2009
- Civil Appeal No. 6177 of 2009

Certified to be true copy
Alc...
 Assistant Registrar (Judl.)
6/5.....2013
 Supreme Court of India

O R D E R

It is not a matter of dispute that the assessment towards Sales Tax in all these cases was made on the basis of the decision rendered by this Court in "State of U.P. Vs. Union of India", (2003) 2 SCC 239. Accordingly, proceedings pending before the High Court emerged out of an assessment made in terms thereof.

We are informed by the learned Solicitor General, appearing for the appellant, that the adjudication rendered by this Court in "State of U.P. Vs. U.O.I. (supra)" has been slightly modified

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by this Court in a subsequent judgment "Bharat Sanchar Nigam Limited Vs. Union of India", (2006) 3

SCC 1. On this aspect of the matter, there is no dispute. All the same, we consider it just and appropriate to extract paragraph Nos. 78, 79 and 92 of the Judgment rendered in Bharat Sanchar Nigam Limited's case (supra) as under :-

"78. But if there are no deliverable goods in existence as in this case, there is no transfer of user at all. Providing access or telephone connection does not put the subscriber in possession of the electromagnetic waves any more than a toll collector puts a road or bridge into the possession of the toll payer by lifting a toll gate. Of course the toll payer will use the road or bridge in one sense. But the distinction with a sale of goods is that the user would be of the thing or goods delivered. The delivery may not be simultaneous with the transfer of the right to use. But the goods must be in existence and deliverable when the right is sought to be transferred.

79. Therefore whether goods are incorporeal or corporeal, tangible or intangible, they must be deliverable. To the extent that the decision in State of U.P. Vs. Union of India held otherwise, it was, in our humble opinion erroneous.

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(29-A) (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.

D) 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."

In view of the aforesaid determination, it is apparent that it was not open to the Assessing Officer to assess the appellant to sales tax by including charges pertaining to electromagnetic waves or radio frequency. Yet, in terms of the decision rendered in the earlier Judgment, the said component was taken into consideration for raising the demand under reference.

There is, therefore, no doubt in our mind that the earlier assessment, out of which the instant proceedings have arisen, was partly unjustified. The Sales Tax Authority was only justified in raising a demand based on the rental collected by

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the appellant whilst rendering services, as also
charges collected for the equipment supplied to
consumers.

In the above view of the matter, rather than
limiting our examination to the impugned order
passed by the High Court, we would consider it just
and appropriate to set aside the proceedings
initiated by the Sales Tax Authorities and require
the Assessing Authority to re-determine the sales
tax in the matter, by reference to the permissible
limits expressed by this Court in Bharat Sanchar
Nigam Limited's case (supra).

In view of the above, the entire proceedings
initiated against the appellant are hereby set
aside, with liberty to the Assessing Officer to re-
compute the sales tax and raise a demand thereon in
accordance with law.

The Civil Appeals are disposed of accordingly.

No costs.

Civil Appeal Nos. 6174 of 2009, 6175 of 2009, 6176
of 2009 and 6177 of 2009

Taken on board.

We have decided a similar controversy while
disposing of Civil Appeal No.2048 of 2008 and other
connected appeals today i.e. on 25th July, 2013. It
is not disputed, that the main controversy involved
in the present appeals are similar to those, that

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are adjudicated by us in the aforesaid appeals.

In view of the above, the instant appeals are also disposed of in the same terms as Civil Appeal No. 2048 of 2008 (decided on 25.07.2013).

No costs.

.....Sd/-.....J.
[JAGDISH SINGH KHEHAR]

.....Sd/-.....J.
[PINAKI CHANDRA GHOSE]

New Delhi;
July 25, 2013.