

**BEFORE THE FULL BENCH: ODISHA SALES TAX TRIBUNAL,  
CUTTACK.**

**Present: Smt. Suchismita Misra, Chairman,  
Sri Subrata Mohanty, 1<sup>st</sup> Judicial Member  
&  
Sri P.C. Pathy, Accounts Member-I**

**S.A. No.1895 of 2003-04**

**S.A. No.1896 of 2003-04**

**S.A. No.1897 of 2003-04**

**S.A. No.1898 of 2003-04**

**S.A. No.1899 of 2003-04**

(From the order of the Id. ACST, Sundargarh Range, Rourkela,  
in First Appeal Case No. AA 38 to 42 (RLII) 2003-04,  
disposed of on 30.08.2003)

M/s. Telecom District Manager,  
The General Manager, Telecom District,  
M/s. Bharat Sanchar Nigam Ltd.,  
Rourkela. ... Appellant

**- V e r s u s -**

State of Odisha, represented by the  
Commissioner of Sales Tax, Odisha,  
Cuttack. ... Respondent

For the Dealer : Mr. P.K. Harichandan, Advocate  
For the Respondent : Mr. M.L. Agrawal, S.C.

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Date of Hearing: 27.06.2019 \*\*\*\*\* Date of Order: 01.07.2019  
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**ORDER**

The assessee-dealer M/s. BSNL through General  
Manager, Telecom District, Rourkela being unsuccessful before both  
the fora below called the confirming order of first appellate authority  
in question in all these appeals above with a prayer to set aside the

levy of tax to establish the claim that, the collection under the head of rental from the subscribers is not exigible to local tax and the demand raised by the taxing authority treating the rental against the use of telephone instrument as a sale covered u/s.2(g)(i) or (iv) of the Orissa Sales Tax Act, 1947 (hereinafter referred to as, OST Act).

2. All the appeals above between same parties involve same questions for decision are taken up together for sake of convenience and to avoid conflicting opinion, if any.

3. The undisputed facts relevant for the disposal of these appeals are, the assessee, M/s. BSNL is a service provider. It has supplied telephone instruments and other accessories to its subscribers and used to collect telephone bill on monthly basis consisting call charges and rental charges from the subscribers. Claim of the assessee is, being a service provider all the collections from the subscribers against bill raised are not exigible to local tax as it does not amount to any kind of sale covered u/s.2 of the OST Act. Per contra, the claim of the taxing authority is, the telephone instruments supplied to the consumers is a compulsory one and against the use of that instruments by consumer, the assessee-BSNL authority collects rental. So, the use of instrument is covered u/s.2(g)(i) & (iv) and the rental collected is treated as a sale/transfer of right to use of the instrument, hence exigible to local tax.

4. The taxing authority has assessed the dealer u/s.12(3) of the OST Act for different assessment periods under assessment and raised demand. Accordingly, for sake of brevity it is the details of the demand raised for different periods are mentioned herein below. The assessee being aggrieved with such assessment and demand raised by the assessing authority, preferred appeal before first appellate authority but the effort ended in vein as the first appellate authority confirmed the view of assessing authority and thereby the demand of tax as raised remained undisturbed.

5. On the backdrop above, the dealer preferred all these second appeals before this Tribunal. The contention of the dealer are as follows.

- (a) The handset provided to the subscriber should not be treated as sale or transfer of right to use of any goods as per sec.2(g)(i) or (iv) of the OST Act.
- (b) The judgment of the Division Bench of the Apex Court is not in consonance to the ratio laid down by the Apex Court in larger bench in the case of BSNL Vrs. UOI.
- (c) Rental charges carries service tax in it. Since service tax and local tax are mutually exclusive to each other, no tax in local law is permissible because the dealer has paid service tax on both, call charge and rental charge.
- (d) Rental charges is a fixed charge and it is not against the transfer of right to use because in many cases the consumers do not opt for equipment but still found liable to fix charges or rental charges.
- (e) In cases when calls covered under the free limit slab under a scheme then also the rental charges collected.
- (f) BSNL gives services like repairing, shifting etc. and that also covers under rental charges on such because there can be no segregation of actual rental of the equipment for the purpose of levy of tax or levy of tax on entire amount of rental charge is incorrect.

6. All the appeals are heard with cross objections raised by the dealer. In the cross objections, the Revenue has supported the views of fora below as the rental collected against the handsets supplied to the subscriber is exigible to Orissa Sales Tax Act.

7. Questions famed for decision are as follows.

The first appellate authority has committed wrong in confirming the view of assessing authority that,

- (a) the telephone instruments supplied to the subscriber is a goods treated under Sales of Goods Act;
- (b) there was transfer of any right to use the goods/instruments covered under section 2(g)(iv) of the OST Act;
- (c) the charges collected under the head of rental charges along with the telephone bill from the subscriber should carry tax under Orissa Sales Tax

**And**

- (d) whether since the dealer has paid service tax on the bill amount which includes rental charges, in that case imposition of local tax is not permissible.

8. The plea of the dealer can be summarized as follows. The handsets supplied to the subscriber is a part of the scheme and it is always at the option of the subscriber the handsets were supplied. It is a part of service provided by the BSNL authority, the telephone bill collected from the subscribers are only against the service provided to the subscriber. Though for it is for some period, the bills raised contained call charges and rental charges separately but, it does not amount to any transfer of right to use or sale attracting tax liability under OST Act. The alternative plea of the assessee is, it pays service tax to the Service Tax Authority for entire amount/charges collected from a subscriber. So, when the rental amount is covered under the service tax paid to the appropriate authority, then the same amount cannot be taxed again under the OST Act, it amounts to double taxation. The specific claim is service tax and sales tax is mutually exclusive to each other. So, once an amount/charges covered under service tax net, then there is no question of tax liability under the Sales Tax Act.

9. Payment of service tax against the rental collected from the subscribers does not ipso facto exonerate the dealer from paying tax under the local act if it is otherwise found exigible as per law. This

argument by learned Counsel for the dealer that, the service tax and local tax are mutually exclusive to each other is not disputed but because of the fact that, a dealer has paid tax under one head under wrong impression of law, he will be exonerated from paying tax under the other head under which he is covered as per law. Question of cross adjustment between the service tax authorities and sales tax authorities cannot arise even for the reason that, the service tax authorities is not made a party to this appeal. In absence of service tax authority, the liability or non-liability under service tax cannot be decided. So, the plea of the dealer is of no avail and it can safely be said that, these appeals must confine to the decision on the liability of the dealer under Orissa Sales Tax Act unless. it will be a jurisdictional error by this Tribunal.

10. To appreciate the questions raised above, it will be worth mentioning the relevant portion of the judgment by the Apex Court in **Bharat Sanchar Nigam Ltd. & Another v. Union of India & Others 2006 (2) S.T.R. 161 (SC)**. In the reported case the Apex Court had framed the following issues for decision-

“These broadly speaking are the respective contentions and in our opinion, the issues which arise for consideration in these matters are:-

- A) what are “goods” in telecommunication for the purposes of Article 366(29A)(d)?
- B) is there any transfer of any right to use any goods by providing access or telephone connection by the telephone service provider to a subscriber ?
- C) is the nature of the transaction involved in providing telephone connection a composite contract of service and sale? If so, is it possible for the States to tax the sale element?
- D) If the providing of a telephone connection involves sale is such sale an interstate one?
- E) Would the “aspect theory” be applicable to the transaction enabling the States to levy sales tax on the same transaction in respect of which the Union Government levies service tax.”

In the conclusion, the Apex Court has answered the issues as follows:-



- (iii) **Bharat Sanchar Nigam Ltd. & Another v. Union of India & Others 2006 (2) S.T.R. 161 (SC);**
- (iv) **State of Andhra Pradesh v. Bharat Sanchar Nigam Ltd. (2012) 49 VST 98 (AP);**
- (v) **A P State Electricity Board (Now A P Transco) Vrs. State of Andhra Pradesh (2011) 43 VST 359 (AP HC DB);**
- (vi) ***Larsen and Toubro Limited Vs. State of Karnataka, reported in [2013] 65 VST 1 (SC)***

12. Here, it is pertinent to mention here that, same issue between the same parties where only the place of business differs are time and again decided by this Tribunal and it is the consistent view of this Tribunal is, the rental collected against the handset is exigible to local tax.

In Radhasoami Satsang v. CIT (supra), the Apex Court has held as follows.

“We are aware of the fact that, strictly speaking, res judicata does not apply to income-tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.”

Reliance also can also be placed in this regard in Bio Pharma Capsules v. Deputy Commissioner of Commercial Tax, Government of A.P. (2007) 6 VST 35 (AP),

13. So, at the cost of avoiding repetition, it can be concluded that, the findings of this Tribunal on earlier occasions between the self-same parties involving identical/same issues/questions are binding. In M/s. Bharat Heavy Electrical v. Sales Tax Tribunal in OJC No.11592/2001, it is accepted that, judicial propriety demands that, the Tribunal ought to have followed the same decision which was binding on the Tribunal qua the same parties and no second view is required.

It is apt to mention here that, in **Bharat Sanchar Nigam Ltd.** (supra) the Hon'ble Court has held as follows.

“res judicata does not apply in matters pertaining to tax for different assessment years because res judicata applies to debar Courts from entertaining issues on the same cause of action whereas the cause of action for each assessment year is distinct. The Courts will generally adopt an earlier pronouncement of the law or a conclusion of fact unless there is a new ground urged or a material change in the factual position. The reason why Courts have held parties to the opinion expressed in a decision in one assessment year to the same opinion in a subsequent year is not because of any principle of res judicata but because of the theory of precedent or the precedential value of the earlier pronouncement. Where facts and law in a subsequent assessment year are the same, no authority whether quasi judicial or judicial can generally be permitted to take a different view. This mandate is subject only to the usual gateways of distinguishing the earlier decision or where the earlier decision is per incuriam. However, these are fetters only on a coordinate bench which, failing the possibility of availing of either of these gateways, may yet differ with

the view expressed and refer the matter to a bench of superior strength or in some cases to a bench of superior jurisdiction.”

14. Learned Counsel for the dealer submitted that, keeping view the undisputed fact that, the disputed questions are, agitated again before the Hon’ble Apex Court in the matter of **BSNL v/s. State of AP SLP (CIVIL) CC No.7650-7654/12** and particularly when the Hon’ble Apex Court has admitted the SLP staying further proceeding in the assessment, in that view of the changed scenario this Tribunal should keep these matters as well as the related matters involving the same issues in abeyance till final disposal of the aforesaid SLP by the Hon’ble Supreme Court.

The submissions of the learned Counsel for the dealer even though, has got considerable force in it but, it is not within the jurisdiction of this Tribunal to keep the matter pending awaiting any decision of the Hon’ble Apex Court, more fully, when the decision of the Hon’ble Court is in hand, i.e. passed in the light of the decision of the Hon’ble Apex Court BSNL v. UOI mentioned (supra) and not reversed, varied or set aside till date, then, the bindingness of the authority on this Tribunal is beyond question. Hence, the plea of the dealer is not sustainable in law.

For the reasons discussed hereinabove, it is held that, there can be no departure from the earlier view by this Tribunal till the authority above holds the field.

15. After a threadbare discussion of the facts of the cases in hand, the relevant provisions under law placing reliance on the authoritative pronouncement of the Hon’ble Court and Apex Court mentioned above, the Full Bench of this Tribunal in adherence to the authority in **Bharat Sanchar Nigam Ltd.** (supra) has held that the rental charges falls under the category of transfer of right to use as per Sec.2(g)(iv) of the OST Act and there by exigible to local tax.

Therefore, there is no reason for departure from earlier view here in these appeals. Hence, in consonance to the decision earlier taken on the same question, it is ordered.

16. The appeals are dismissed on contest as of no merit.

Dictated & corrected by me,

Sd/-  
(Subrata Mohanty)  
1<sup>st</sup> Judicial Member

Sd/-  
(Subrata Mohanty)  
1<sup>st</sup> Judicial Member

I agree,

Sd/-  
(Suchismita Misra)  
Chairman

I agree,

Sd/-  
(P.C. Pathy)  
Accounts Member-I