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

S.A. No.120 & 121 of 2008-09

(From the order of the ld. ACST, Koraput Range, Cuttack,
in First Appeal Case No. AA (KOI) 204-205/06-07,
confirming the assessment order of the Assessing Authority)

Present: Smt. Suchismita Misra, Chairman,
Sri Subrata Mohanty, 2nd Judicial Member
&
Sri R.K. Rout, Accounts Member-II

M/s. Bharat Sanchar Nigam Ltd.,
Telephone Bhawan, Koraput,
At/P.O./Dist.- Koraput (Odisha). ... Appellant

- V e r s u s -

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

For the Appellant : Mr. S. Sundaram, Advocate
For the Respondent : Mr. S.K. Pradhan, A.S.C.

Date of Hearing: 20.02.2019 ******** Date of Order: 20.02.2019

O R D E R

Both these appeals above, between same parties with common issues raised for decision, are taken up together and decided by this common order for sake of convenience.

Facts of the S.A. No120/2008-09

2. Bharat Sanchar Nigam Ltd., Koraput, the appellant being unsuccessful before both the fora below has preferred appeal against the order of the First Appellate Authority/Asst. Commissioner of Sales Tax, Koraput Range, Koraput in confirming thereby the orders of the assessing authority in assessment u/s.12(5) of the Orissa Sales Tax Act, 1947 (hereinafter referred to as, OST Act) for the tax period 2003-04 ended on

31.10.2003. The assessing authority found the taxable turnover disclosed by the dealer as nil declaring the rental charges collected from the customers against the telephone connection at Rs.2,30,40,601.00 as the GTO. The dealer's plea like rental charges being not covered within the definition of "sale" u/s.2(g) of the OST Act is not exigible to local sales tax was rejected and the assessing authority treated the entire amount of GTO as TTO and levied tax and surcharge on it, thereby the total tax due-demand raised at Rs.20,27,573.00.

3. **Facts of the S.A. No121/2008-09**

In a similar manner dealing with self same facts involving identical issues for the tax period 01.01.2011 to 31.03.2011, the GTO and TTO was determined at Rs.1,83,85,850.00, tax and surcharge calculated and demanded from the dealer for Rs.16,17,955.00. Hence the facts on details are avoided from repetition.

5. The dealer challenged the assessment for the periods before the First appellate authority. Learned ACST, Koraput Range, Koraput as first appellate authority declined to interfere with the findings of assessing authority, as a result the demands remained undisturbed.

4. As against the concurrent findings of both the for a below the dealer has preferred appeals above and challenged the legal sustainability of the impugned orders on the grounds as follows-:

The electromagnetic waves/call charges are not goods, 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. The handsets were first point tax paid goods, so the levy of tax by the revenue amounts to double taxation which is not permissible.

Revenue has contested the appeals without cross objection but in the hearing it has stood that the views taken by the fora below.

5. **Findings-**

At the outset, it is pertinent to mention here that, the issues involved in these two appeals are not new since this Tribunal had the occasion to deal with the matters involving identical issues time to time

which are ended with the findings in favour of taxing authority that, the rental charges collected from the customers are exigible to Orissa Sales Tax Act, 1947. In both the cases in hand, the assessing authority as well as the first appellate authority have taken the same view in favour of the Revenue. The assessment order reveals, the authority was guided by the decision of the Apex Court in **Bharat Sanchar Nigam Ltd. & Another v. Union of India & Others 2006 (2) S.T.R. 161 (SsC)**. The first appellate authority also relied on the same decision of the Apex Court and held the rental charges amenable to sales tax. The authoritative pronouncements of the Apex Court in Bharat Sanchar Nigam Ltd. (supra) still holds the field and inconsequence thereof there is no escape from the conclusion that, this Tribunal is to follow the ratio laid down by the Apex Court. On the other hand, it is pertinent to mention here that, the dealer has almost conceded to the principle laid down in the reported case but raised some further questions like (i)the electromagnetic wave being not a goods is not exigible to sales tax,(i) the service charges and the charges towards telephone call should be kept out of the tax net in the light of the decision of the Hon'ble Court (iii) since the handsets were purchased by the dealer from registered dealer inside the State, the goods are being first point tax paid goods, it will not carry any further tax liability under this same law.

6. 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. (supra). In the reported case the Apex Court had framed the following issued 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, after in-depth analysis the constitutional mandate, earlier decisions and the facts and law involved in the issues above, the Apex Court has answered the issues as follows:-

> "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.
>
> 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."

The Hon'ble Apex Court has also accepted the view taken by the same court in Tata Consultancy Services v. State of Andhra Pradesh,..... whereby, the Apex Court in consideration of the questions of sales tax on computer software has held as follows:-

> "A "goods" may be a tangible property or an intangible one. It would become goods provided it has the attributes thereof having regard to (a) its utility; (b) capable of being bought and sold; and (c) capable of being transmitted, transferred, delivered, stored and possessed. If a software whether customized or non-customized satisfies these attributes, the same would be goods."

The above settled principle of the Apex Court approved in later period series of cases, BSNL v. Commissioner of Sales Tax, Cuttack in series of Civil Appeal(s) No.2048-2048 of 2008 and 6174-6177 of 2009, dated 25.07.2013, wherein the Apex Court has held as follows:-

> "xxx xxx xxx
> The Sales Tax Authority was only justified in raising a demand based on the rental collected by the appellant whilst rendering services, as also charges collected for the equipment supplied to consumers."

7. Reverting to the case in hand it can safely be said that the reported decision is squarely applicable to it. So avoiding further discussion, here it is held that, the rental charges collected from customers by the dealer-BSNL towards the hand set/equipments is exigible to sales tax.

The dealer has taken a new plea before this tribunal that the rental charges as per the determined GTO or TTO in the cases in hands includes the call charges, service charges /the electromagnetic wave which is kept out of tax liability by the Apex court. But this belated plea is not supported by any evidence. No document or telephone bill is produced reflecting the call charges included in rental charges. The term rent itself denotes it relates to the good upon which right to use goods, for cash, deferred payment etc. a per section 2(g)(iv) of the OST Act. Even though, it is argued that, any bill of the relevant period showing collection of rental charges/includes the call charges could have produced. Conversely, the argument of the Addl. Standing Counsel found more conceivable such as, the department was issuing the bills containing rental charges on distinct head from the call charges. The discussion above leads to a conclusion that, the rental charges does not include the call charges and the plea of the dealer is a afterthought and got up one having no credible evidence.

8. Besides, the reasons and findings hereinabove, when we look into the disputed questions involved in this appeal decided by this Tribunal time to time for different tax period, in that case it is found that this Tribunal has consistently taken a view in favour of the taxing authority and it is remained undisputed that till date the view of this Tribunal has not

been set aside and varied by any higher forum. In BSNL v. UOI (supra), it is 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."

Thus, from above it is held that the order of the first appellate authority suffers no illegality or irregularity. Hence, calls for no infirmity.

9. In the result, it is ordered. Both the appeals are dismissed on contest.

Dictated & corrected by me,

Sd/-
(Subrata Mohanty)

Sd/-
(Subrata Mohanty)

2nd Judicial Member

2nd Judicial Member

I agree,

Sd/-
(Suchismita Misra)
Chairman

I agree,

Sd/-
(R.K. Rout)
Accounts Member-II