

# Simply Payment of Sales Tax Will Not Absolve From Service Tax Liability Unless That Aspect Is Not Covered by Centre's Power



There are so many circumstances under which both Sales tax under respective VAT law as well as Service tax under the Finance Act'1994 are levied. After the judgement delivered by Honourable Supreme Court of India in *BSNL Vs. Union of India* (2006) 3 SCC 1, a lot of confusion was prevailing on the interpretation of the judgement. Honourable Supreme Court's decision dated 4<sup>th</sup> August, 2011 in the case of *Idea Mobile Communications Ltd Vs. Commissioner of C. C. E & C.*<sup>1</sup> has become a benchmark decision in so far as the interpretation of BSNL judgement is concerned.

## Introduction

After the judgement delivered by Honourable Supreme Court of India in *BSNL Vs. Union of India* (2006) 3 SCC 1 (hereinafter referred to as BSNL judgement), the ratio of the judgement was being interpreted in different manner. Some people have harped upon the aspect theory discussed in the judgement and interpreted that same transaction can be taxed by both Centre and State if it is covered by different aspects as per the powers given to them. Some have harped upon payment theory where tax has already been levied, viz, sales tax and other authority did not have power to tax it, viz, service tax.

It is in the back drop of these interpretations that a lot of confusion was prevailing on

the interpretation of the BSNL judgement. Honourable Supreme Court's decision in the case of *Idea Mobile Communications Ltd Vs. Commissioner of C. C. E & C. Cochin* [Civil Appeal no. 6319 of 2011 arising out of SLP (c) No. 24690 of 2009 delivered on 4<sup>th</sup> August' 2011] (hereinafter referred to as Idea Mobile judgement), has become a benchmark decision in so far as the interpretation of BSNL judgement is concerned. This article is an attempt to unveil the interpretation made by Honourable Supreme Court in the case of Idea Mobile judgement.

## Issues which were and are still being debated

There are so many circumstances under which both sales tax under



**CA. Pradeep Mehta**

(The author is a member of ICAI. He can be reached at mpradeep@icai.org)

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respective VAT law as well as service tax under the Finance Act'1994 are levied. One of the examples is taxability on the Annual Maintenance Contracts (AMCs). Annual maintenance contract is being treated as works contract on account of material being used therein and hence being subjected to VAT under respective State VAT legislations. At the same time the same is chargeable to service tax and has been covered under the taxable services under clause (64) of Section 65 of the Finance Act' 1994 as amended from time to time. One may argue as to when service tax has been paid on AMCs, why sales tax should be paid on the same transaction. But, it is because of two different aspects, i.e., sale involved in AMC as well as provisioning of service in the same AMC, which have allowed both Centre and State to subject the same to tax under their respective powers. However, taxation of AMC has been one of the more clarified transactions where both trade/legal as well as departmental authorities has more or less consensus except on a few points. But there were some transaction where there were debate and were subjected to judicial scrutiny. One of those much debated transaction as was discussed in BSNL judgement was transaction charges recovered

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on sale of SIM cards as well as activation charges. This transaction was subjected to both sales tax as well as service tax not only on a part but on the whole transaction. The sales tax authorities not only subjected the sale of SIM cards to sales tax but also activation charges to sales tax. Similarly, the service tax authorities not only subjected the activation charges to service tax but also on sale of SIM cards. The matter went upto the Honourable Supreme Court. There it was not finally decided but provided certain guidelines to be followed by the assessing authorities.

#### **BSNL Judgement**

The Honourable Supreme Court had the occasion to deal with this issue and discussed at para 87 as follows:-

*87. It is not possible for this Court to opine finally on the issue. What a SIM card represents is ultimately a question of fact, as has been correctly submitted by the States. In determining the issue, however the assessing authorities will have to keep in mind the following principles: if the SIM card is not sold by the assessee to the subscribers but is merely part of the services rendered by the service providers, then a SIM card cannot be charged separately to sales tax. It would depend ultimately upon the intention of the parties. If the parties intended that the SIM card would be a separate object of sale, it would be open to the Sales Tax Authorities to levy sales tax thereon. There is insufficient material on the basis of which we can reach a decision.*

*However we emphasise that if the sale of a SIM card is merely incidental to the service being*

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the transactions and allowed  
them to subject the same to  
service tax even if sales tax  
has been paid.**

*provided and only facilitates the identification of the subscribers, their credit and other details, it would not be assessable to sales tax. In our opinion the High Court ought not to have finally determined the issue. In any event, the High Court erred in including the cost of the service in the value of the SIM card by relying on the "aspects" doctrine. That doctrine merely deals with legislative competence. As has been succinctly stated in Federation of Hotel & Restaurant Assn. of India v. Union of India: (SCC pp. 652-53, paras 30-31)*

*" ... subjects which in one aspect and for one purpose fall within the power of a particular legislature may in another aspect and for another purpose fall within another legislative power".*

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*There might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is overlapping does not detract from the distinctiveness of the aspects."*

(Italics supplied)

Hence, the Honourable Supreme Court was of the view that it is

not possible to finally opine on the issue but enunciated the principles to decide on the issue and stated that if the SIM card is not sold by the assessee to the subscribers but is merely part of the services rendered by the service providers, then a SIM card cannot be charged separately to sales tax. Hence, the matter was remanded back to Assessing authorities to decide the issue after taking into consideration the principles laid down.

#### **Decision of Assessing/Appellate authorities upon remand**

After remanding back the matter by the Honourable Supreme Court, given the facts that sales tax was already paid on the whole transaction, the assessee took up the matter before the Honourable CESTAT to drop the levy of service tax in view of sales tax already paid on the whole transaction and as per the guidelines provided by the Honourable Supreme Court in the BSNL judgement. The Honourable CESTAT-Bangalore decided in the case of Idea Mobile Communications Ltd Vs. Commissioner of Central excise, Trivendrum, 2006-TIOL-857-CESTAT-Bang that, "On a careful consideration, we notice that the assessee is not contesting the levy of sales tax. They have already paid the sales tax. It follows that service tax is not leviable on the item on which sales tax has been collected. In terms of the Apex Court judgment and the paragraph quoted (*supra*) the appellant's contention is required to be accepted and no service tax is payable in view of the sales tax already paid on the whole transaction." (Italics supplied)

This judgement of Honourable CESTAT in the case of Idea Mobile Communications (*Supra*) became a landmark judgement in so far as the interpretations of BSNL judgement (*Supra*) was concerned so as to interpret that if sales tax has already

been paid on a transaction, service tax will not be leviable.

In a way, it was a relief to the assesses also who could rest assured that if sales tax has been paid on a transaction, there will not be double taxation, as no service tax could have been levied in view of the CESTAT judgement.

#### **Idea Mobile judgement**

The decision of the CESTAT-Bang in the case of Idea Mobile Communications (*supra*), was challenged by the department and the appeal was allowed in favour of the department by the Honourable High Court of Kerala vide its order dated 4.9.2008. This order was challenged by the assessee in the Supreme Court.

The Honourable Supreme Court in its order has held that "-----  
*But we cannot accept a position in law that even if tax is wrongly*



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*remit that would absolve the parties from paying the service tax if the same is otherwise found payable and a liability accrues on the assessee. The charges paid by the subscribers for procuring a SIM Card are generally processing charges for activating the cellular phone and consequently the same would necessarily be included in the value of the SIM Card."*

(Italics supplied)

The judgement delivered by the Honourable Supreme Court in Idea Mobile judgement has put to rest various kinds of interpretations being given to the BSNL judgement and paved the way to the departmental authorities to find out the real nature of the transactions and allowed them to subject the same to service tax even if sales tax has been paid. Though, the sufferer is, no doubt, assesses who will be caught in between the interpretations made by Central and State tax authorities leaving the matter to be interpreted by the judiciary.

#### **Concluding Remark**

It appears from all these judicial developments that crux of the matter lies in identifying the real nature of the transaction. Simply payment with one authority, either sales tax or service tax, will not help in not paying to other authority as per this judgement.

Though, in this world of business complexities, particularly in the era of IT, E-Commerce, there are certain transactions which are yet to be put to judicial test, yet brainstorming amongst the in-house subject experts as well as legal fraternity will bring some idea about the nature of transactions. If required and possible, matter should be referred to Advance Ruling Authorities to bring the clarity instead of getting into litigation and blocking the huge funds with either of the authorities. ■