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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.2532 OF 2013

Bharti Airtel Limited ...Petitioner
vs.
Mira Bhayandar Municipal
Corporation and others ...Respondents

Mr. Surel S. Shah a/w Mr. Amitt Khairnar with Mr.
Amit Dande and Mr. Taufia Kapadia i/b D.H.Law
Associates for the Petitioner
Mr.N.R.Bubna for the respondent Nos.1 and 2
Mr.A.A.Alaspurkar, AGP for respondent No.4.

CORAM : A.S.OKA AND SMT.VIBHA KANKANWADI, JJ.
DATE ON WHICH JUDGMENT IS RESERVED: JULY 1, 2017
DATE ON WHICH JUDGMENT IS PRONOUNCED: SEPTEMBER 26, 2017

(As Smt. Vibha Kankanwadi, J is sitting at Aurangabad Bench, signed judgment is pronounced by A.S.Oka, J as per Rule 1(i) of Chapter XI of the Bombay High Court Appellate side Rules, 1960)

JUDGMENT: (PER A.S.OKA, J.)

1 The question involved in this writ petition under Article 226 of the Constitution of India is as under :

"Whether Local Body Tax (LBT) under clause (aaa) of Sub-Section (2) of Section 127 of the Maharashtra Municipal Corporations Act, 1949 is recoverable on SIM cards, recharge coupons and e-recharge on its entry into municipal limits of a Municipal Corporation?"

2 With a view to appreciate the submissions made across the bar, a brief reference to few factual aspects of the case will be necessary. The first respondent is a Municipal Corporation constituted under the Maharashtra Municipal Corporations Act, 1949 (for short "the said Act"). The petitioner is engaged in the business of providing telecommunication services including the mobile telephone services.

3 By a License Agreement dated 28th September 2001 entered into between the Hon'ble President of India through the Department of Telecommunications, Ministry of Communication, Government of India on one part and the petitioner company on the other part, a licence was granted to the petitioner under section 4 of the Indian Telegraph Act, 1885 to set up and operate cellular mobile phone services in Mumbai and Maharashtra Telegraph Circle on the terms and conditions set out therein. In accordance with the said agreement, the petitioner is providing telecommunication services including mobile telephony, text messaging, voice messaging, access to internet etc to the members of public in Global System for Mobile communication (GSM) format which involves GSM wireless modem which works with GSM wireless network. The customers of the petitioner avail of the services by using mobile handsets. It is stated that the SIM (Subscriber Identification Module) card is provided by the petitioner which is a plastic/paper card encrypted with the unique number which is known as International Mobile

Subscriber Identification (IMSI). It is stated in the petition that the SIM card enables the subscriber access to telecommunication service provided by the petitioner. The contention in the petition is that the SIM card does not have any utility or intrinsic value by itself. It is stated in the petition that the petitioner provides either pre-paid or post paid services. In case of pre-paid services, the pre-paid subscriber can renew the services through the recharge coupon/card or e-recharge.

4 By incorporating clause (aaa) in Sub-Section 2 of Section 127 of the said Act by the Bombay Provincial Municipal Corporation and Bombay Village Panchayat Amendment Act, 2009, a provision was made for levy of LBT in lieu of cess or octroi. The State Government by a notification dated 25th March 2010 notified the Bombay Provincial Municipal Corporations (Local Body Tax) Rules, 2010 (for short "LBT Rules"). The LBT Rules provide a mechanism for levy and collection of LBT and rates of LBT. In exercise of the power under clause (aaa) of Sub-Section 2 of Section 127 of the said Act, the State Government directed various Municipal Corporations in the State including the first Respondent-Corporation to levy LBT on the entry of the goods into the limits of the city for consumption, use or sale in lieu of octroi or cess with effect from 1st April 2010. On 18th February 2011, another notification was issued by the State Government in exercise of the powers under section 99-B read with

section 152-B and 152-C of the said Act by which the rates of LBT to be levied by the first Respondent Corporation on entry of various categories of goods into the limits of the city for the financial year 2011 were notified. One of the items included in Schedule A to the said notification is of SIM cards (tariff item No.8542 10 10).

5 The case made out in the petition is that the petitioner and its distributors were compelled to register themselves under the LBT Rules. They registered themselves under protest. It is alleged that neither the petitioner nor its distributors paid any LBT on SIM cards or recharge coupons or e-recharge. The case made out in the petition is that in October 2010, the Officers of the first respondent visited the premises of various distributors of the petitioner and called upon them to pay LBT on SIM cards and recharge coupons on the basis of the amount/value of talk time mentioned. By a communication dated 30th October 2010, the petitioner informed the first respondent that the SIM cards, recharge coupons and e-recharge were not the goods which could be subjected to LBT and in fact, the petitioners are paying service tax on providing telecommunication services. On 28th March 2013, the State Government issued a notification for fixing the rate of 3.5% on "SIM cards, memory cards, activation/renewal slips whether "recharged it online or otherwise". The challenge in this petition under Article 226 of the Constitution of India is to the action of the first respondent of

assessing, levying and recovering LBT on SIM cards, recharge coupons and e-recharge brought into the limits of the first respondent. There is a consequential challenge to the notification dated 28th March 2013 issued by the State Government.

6 In view of the order of the Apex Court dated 12th September 2014, necessary priority is given to hearing of this writ petition and the same is taken up for final disposal.

7 The learned counsel for the petitioner has made detailed submissions. Basically the submission is that the SIM cards, recharge coupons and e-recharge are not the goods on the basis of which LBT could be levied. He relied upon the decision of the Apex Court in the case of Bharat Sanchar Nigam Limited vs. Union of India¹. He submitted that the SIM cards, recharge coupons and e-recharge have by itself no intrinsic value at all and that the same cannot be used independently of a cell phone. He invited our attention to the decision of the Apex Court in the case of Idea Mobile Communication Limited Vs. Commissioner of Central Excise, Cochin². He submitted that the petitioner is registered and assessed for service tax and has been paying service tax. He submitted that the charges paid by the subscribers for procuring SIM cards are general processing charges for activating the cellular phone. He submitted that the cellular telephone

1 (2006) 3 SCC 1

2 (2011) 12 SCC 608

service is recognised as a service for the purpose of service tax. He submitted that recharge vouchers are not goods and in fact it is a bill for receiving the telecommunication services of the petitioner. He submitted that by no stretch of imagination, e-recharge which is an electronic download can be included in the goods on which LBT could be levied. The learned counsel for the first respondent invited our attention to the definition of LBT under clause 31-A of Section 2 of the said Act. Inviting our attention to clause (aaa) of Sub-Section 2 of Section 127 of the said Act, he submitted that once the goods are brought into limits of a city for consumption, use or sale, LBT is payable thereon. He submitted that the recharge coupons , e-recharge and SIM cards are the goods which are brought into limits of the first respondent-Corporation for use and/or for sale and therefore LBT can be levied thereon.

8 We have given careful consideration to the submissions. Clause 31-A of section 2 of the said Act which defines LBT reads thus:

"[(31A) "Local Body Tax " means a tax on the entry of goods into the limits of the City, for consumption, use or sale therein, levied in accordance with the provisions of Chapter XIB, but does not include cess as defined in clause (6A) and octroi as defined in clause (42);]"

(emphasis added)

9 Clause 25 of section 2 of the said Act which

defines the goods reads thus:

"(25) "goods" includes animals;"

10 Clause (aaa) of sub-section 2 of Section 127 of the said Act introduces the concept of LBT. Section 127 reads thus:

"127. Taxes to be imposed under this Act.

(1) For the purposes of this Act, the Corporation shall impose the following taxes, namely:-

(a) Property taxes;

(b) a tax on vehicles, boats and animals

(2) In addition to the taxes specified in sub-section (1) the Corporation may for the purposes of this Act and subject to the provisions thereof impose any of the following taxes, namely:-

(a) octroi

(aa) a cess on entry of goods into the limits of the City for consumption, use, or sale therein to be levied in lieu of Octroi with the previous sanction of the State Government:]

[Provided that, the State Government may, by notification in the Official Gazette, direct the Corporation to levy the cess on the entry of the goods into the City for consumption, use or sale therein, in lieu of octroi:]

[(aaa) LOCAL BODY TAX ON THE ENTRY OF THE GOODS INTO THE LIMITS OF THE CITY FOR CONSUMPTION, USE OR SALE THEREIN, IN LIEU OF OCTROI OR CESS, if so directed by the State Government by notification in the Official Gazette ;]

(b) *****

(c) a tax on dogs

(d) a toll on animals and vehicles [***]
entering the City:

(f) any other tax [not being a tax on professions, trades, callings and employments] which the [State] Legislature has power under the [Constitution] to impose in the [State].

(2A) Notwithstanding anything contained in sub-section (1) or sub-section (2), no tax or toll shall be levied on motor vehicles save as provided in section 20 of the Bombay Motor Vehicles Act, 1958.]

(3) The municipal taxes shall be assessed and levied in accordance with the provisions of this Act and the rules.

(4) Nothing in this section shall authorise the imposition of any tax which the [State] Legislature has no power to impose in the [State] under the [Constitution].

(emphasis added)

11 Section 152-P of the said Act confers a power on the Municipal Corporation of levying LBT. Section 152-P reads thus:

"152-P Levy of Local Body Tax

152P. Subject to the provisions of this Chapter and the rules, the Corporation, to which the provisions of clause (aaa) of sub-section (2) of section 127 apply, may, **for the purposes of this Act, levy and collect Local Body Tax on the entry of goods specified by the State Government by**

notification in the Official Gazette, into the limits of the City, for consumption, use or sale therein, at the rates specified in such notification.

(emphasis added)

12 Section 149 of the said Act confers rule making power for incorporating the procedure to be followed for levy of taxes such as LBT.

13 Thus, a Municipal Corporation under the said Act is empowered to levy LBT on the entry of goods into the limits of city for (a) consumption, (b) use or (c) sale. Thus, when goods are brought into city for consumption or use, LBT can be levied. The definition of the goods is very wide as clause 25 of Section 2 provides for inclusive definition. In the case of Sodexo SVC India Private Limited vs. State of Maharashtra and others³, the Apex Court dealt with the issue whether the Sodexo vouchers are goods for the purpose of levy of LBT. In paragraph 9 of the said decision the Apex Court observed thus:

"9 As is clear from the reading of Section 2 (31-A), **LBT is the tax on the entry of goods into the limits of the city, when these goods are for consumption, use or sale.** The tax is to be levied in accordance with the provisions of Chapter XI-B. It, however, specifically excludes octroi, as defined in Section 2(42). It also becomes clear that

3 (2015) 16 SCC 479

octroi is a cess on the entry of goods into the limits of a city for consumption, use or sale therein, but it does not include a cess as defined in clause (6-A) or LBT. **Both these levies are on the goods that enter into the limits of a city for consumption, use or sale therein."**

(emphasis added)

In paragraph 13, the Apex Court held thus:

"13 What follows from the conjoint reading of the aforesaid provisions is that LBT or octroi is a tax "on the entry of goods into the limits of city", which goods are meant for "consumption, use or sale therein". In this backdrop, we have to find out the true nature of the Sodexo Meal Vouchers and to ascertain whether they are "goods".

(emphasis added)

14 Ultimately, the Apex Court on facts proceeded to hold that the Sodexo coupons are provided by the employer to the employees to avail of facility of food and non alcoholic beverages. It was held that a perquisite given to the employees by adopting the methodology of vouchers and therefore, cannot be treated as goods.

15 Now coming to the decision of the Apex Court in the case of Bharat Sanchar Nigam LTD (BSNL), the issue before the Apex Court was about the nature of the transaction by which the mobile phone

connections are enjoyed. The question was whether it is a sale or it is a service or it is both. The Apex Court considered the concept of goods for the purpose of sales tax. In paragraph 55 to 57, the Apex Court observed thus:

"55 In fact the question whether "goods" for the purpose of sales tax may be intangible or incorporeal need not detain us. In Associated Cement Companies Ltd. v. Commr. of Customs the value of drawings was added to their cost since they contained and formed part of the technical know-how which was part of a technical collaboration between the importer of the drawings and their exporter. It was recognised that knowledge in the abstract may not (sic) come within the definition of "goods" in Section 2 (22) of the Customs Act.

56 This view was adopted in Tata Consultancy Services V. State of A.P. for the purpose of levy of sales tax on computer software. It was held : (SCC p.342, para 81)

"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 customised or non-customised satisfies these**

attributes, the same would be goods."

57 This in our opinion, is the correct approach to the question as to what are "goods" for the purpose of sales tax. We respectfully adopt the same."

(emphasis added)

16 The Apex Court also dealt with the right acquired by the subscriber who subscribes mobile telephony service. In paragraph 63 and 64 of the said decision, the Apex Court observed thus:

"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.

64 The second reason is more basic. A subscriber to a telephone service could not reasonably be taken to have intended to purchase or obtain any right to use electromagnetic waves or radio frequencies

when a telephone connection is given. Nor does the subscriber intend to use any portion of the wiring, the cable, the satellite, the telephone exchange, etc. At the most the concept of the sale in a subscriber's mind would be limited to the handset that may have been purchased for the purposes of getting a telephone connection. As far as the subscriber is concerned, no right to the use of any other goods, incorporeal or corporeal, is given to him or her with the telephone connection."

17 In paragraph 109, the Apex Court held thus:

"109 Briefly, the subscriber originates/generates his voice message through the handset. The transmitter in the handset converts the voice into radio waves within the frequency band allotted to the petitioners. The radio waves are transmitted to the switching apparatus in the local exchange and thereafter after verifying the authenticity of the subscriber, the message is transmitted to the telephone exchange of the called party and then to the nearest Base Transceiver Station (BTS). BTS transmits the signal to the receiver apparatus of the called subscriber, which converts the signals into voice, which the subscriber can hear."

(emphasis added)

18 In case of Idea Mobile Communication Limited,

the issue before the Apex Court was whether the value of SIM cards sold by the appellants before the Apex Court to their mobile subscribers is to be included in taxable service under section 65 (105) (zzzx) of the Finance Act, 1994 which provides for levy of service tax on communication service. Another issue before the Apex Court was whether the sale of SIM cards is taxable as sale of goods under the Sales Tax Act. In paragraph 11, Apex Court considered the nature of the SIM cards. Paragraph 11 reads thus:

"11 A SIM card or Subscriber Identity Module is a portable memory chip used in cellular telephones. It is a tiny encoded circuit board which is fitted into the cell phones at the time of signing on as a subscriber. The SIM card holds the details of the subscriber, security data and memory to store personal numbers and it stores information which helps the network service provider to recognise the caller."

(emphasis added)

19 The SIM cards are normally made of plastic or paper. The SIM cards are capable of being bought and sold. The SIM cards have utility value. The SIM cards are capable of being transferred, stored and possessed. The concept of Sales Tax and LBT are not the same. LBT can be levied on the goods brought within the limits of a Municipal Corporation even if the same are not sold, but the same are brought

either for consumption or use. Going by what is held by the Apex Court in paragraph 11 of its decision in the case of Idea Mobile, SIM cards are capable of being used by putting the same in a mobile phone handset. A SIM card is a portable memory chip used in cellular telephones. It is a tiny encoded circuit board which is fitted into the cell phones at the time of signing on as a subscriber. Even assuming that by itself the SIM cards have no intrinsic sale value, considering the nature of its use, it has a value in terms of money apart from its value as a portable memory chip. Even recharge vouchers which are made of paper or plastic are capable of being bought and sold. The same are capable of being used. The same are capable of being transferred, stored and possessed. The recharge vouchers or cards made up of paper or plastic may have a little value by itself, but the same are capable of being used and that its use has a value as the holder thereof can get a talk time or internet data which has a value in terms of money. SIM cards and recharge vouchers are tangible goods which are capable of being brought into the limits of a city. The same are capable of being used after the same are brought into the limits of a city. Hence, the same will be goods within the meaning of clause 25 of Section 2 of the said Act. In the decision of the Apex Court in the case of Idea Mobile, the High Court had come to the conclusion that the SIM card has no intrinsic sale value and therefore, the sales tax is not payable. But, the Apex Court has not considered the question whether

the SIM cards are capable of being used which is a relevant consideration for charging LBT.

20 The schedule under the rules framed under the said Act provide for levy of LBT on following items:

GROUP II

"133 All types of mobile phones, Pager, I Pad, I pod, tablet and all sorts of means of communication and their components, spare parts and accessories. **SIM card, memory card, activation/renewal slips/vouchers whether recharged it online or otherwise."**

(emphasis added)

21 As far as e-recharge is concerned, by no stretch of imagination, it can be said that e-recharge is capable of being brought into limits of a city. In clause 133 quoted above, e-recharge is not specifically included. Assuming that it is included, it is nothing but an electronic download by use of internet. Hence, e-recharge cannot be subject to levy of LBT. E-recharge is capable of being used. But it cannot be said that by downloading e-recharge through internet, e-recharge is brought into limits of a Municipal Corporation. Hence, LBT cannot be recovered on e-recharge.

22 Now, coming back to SIM cards and recharge coupons/cards, as held earlier, the same will be covered by the definition of goods under sub-section 25 of section 2 of the said Act. Charging section for LBT under the said Act is section 152P. LBT is

leviable on the entry of goods into the limits of city for consumption, use or sale. Hence, the first respondent was well within its powers to levy LBT on SIM cards and recharge voucher in physical form.

23 Hence, the petition must succeed in part and we pass the following order:

- (I) We hold that e-recharge is not covered by the Item No.133 of the Government Notification dated 28th March 2013 and that in any event, LBT cannot be levied on e-recharge;
- (II) We reject the contention of the petitioner that the LBT is not payable on the SIM cards and recharge vouchers/coupons brought into the limits of the first respondent-Municipal Corporation;
- (III) Writ petition to the above extent must succeed in part. Rule is made partly absolute accordingly;
- (IV) The interim order operating till today will continue to operate for a period of six weeks from today.

(VIBHA KANKANWADI, J.)

(A.S.OKA, J.)