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HIGH COURT OF MADHYA PRADESH : BENCH AT INDORE

D.B.: HON'BLE MR. S. C. SHARMA AND
HON'BLE MR. RAJEEV KUMAR DUBEY, JJ

WRIT PETITION No. 7631 / 2014

M/S. IDEA CELLULAR LTD., INDORE

Vs.

THE ASSTT. COMMISSIONER OF COMMERCIAL TAX,
LTU, INDORE AND FIVE OTHERS

WRIT PETITION No. 3767 / 2015

M/S. IDEA CELLULAR LTD., INDORE

Vs.

THE ASSTT. COMMISSIONER OF COMMERCIAL TAX,
LTU, INDORE AND FIVE OTHERS

WRIT PETITION No. 363 / 2016

M/S. BHARTI AIRTEL LTD., INDORE

Vs.

THE DY. COMMISSIONER OF COMMERCIAL TAX DIV-3,
INDORE AND FIVE OTHERS

AND

WRIT PETITION No. 2320 / 2016

M/S. IDEA CELLULAR LTD., INDORE

Vs.

THE ASSTT. COMMISSIONER OF COMMERCIAL TAX,
LTU, INDORE AND FIVE OTHERS

* * * * *

ORDER

(03/01/2017)

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PER : S. C. SHARMA, J :-

Regard being had to the similitude in the controversy involved in the present cases, the writ petitions were analogously heard and by a common order, they are being disposed of by this Court. Facts of Writ Petition No. 7631/2014 are narrated hereunder.

The petitioner before this Court, a Company registered under the Companies Act, has filed this present Writ Petition being aggrieved by the final assessment order dated 31/7/2014 read with demand notice dated 31/7/2014 under Form 28 (Rule 40) of the M.P. VAT Act, 2002. It has been stated in the Writ Petition that the petitioner Company has been granted a Unified Access Services Licences (hereinafter referred to as, 'the UASL') by the Central Government for providing telecom services, inter-alia, for the Telecom Circle which is contiguous with the State of Madhya Pradesh and State of Chattisgarh. The petitioner Company provides various kinds of services ie., Cellular, Fixed Line and Broadband services which includes roaming

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facilities, STD and ISD and other various value added services to its subscribers. The petitioner is rendering a service.

It has been further stated that the Central Government by Finance Act of 1994 has imposed service tax on the said services of the petitioner and they are assessed to said tax w.e.f. 14/05/2004.

The petitioner Company is aggrieved by the action of the respondent – State in levying tax on the services provided by the petitioner Company. The contention of the petitioner is that the respondents have no authority under the Constitution of India to levy service tax on the services rendered by the petitioner and the same cannot be recovered under the provisions of the M.P. VAT Act, 2002. It has been further stated by the petitioner Company that levy of service tax on the service rendered by providing SIM Replacement Charges and the Lease Line Revenue and simultaneously levy of VAT by the State of Madhya Pradesh is contrary to the separation of legislative powers envisaged under Article

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246 of the Constitution of India. The petitioner Company has placed reliance upon various judgments delivered by the Hon'ble Supreme Court of India as well as by this Court and their contention is that the case law in respect of overlapping of powers between the State and the Union is well established and there is no scope of overlapping. The petitioner is aggrieved by the action of the State Government in levying VAT on consideration received for providing logistic charges and warranty claims received by the petitioner Company.

The contention of the petitioner is that Central Government by Finance Act of 1994 has imposed “Service tax” on the said service of the petitioners and the petitioners are being assessed to the said tax and the petitioner is paying the requisite tax w.e.f. May 14, 2004.

It is further contended on behalf of the petitioner – service provider that the use/utility of the SIM card remains the same in both the prepaid and the postpaid connections. In the case of a pre-paid SIM card, service charge is

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collected mainly for activating the connection, service tax is paid on this consideration as “telecommunication service”; a SIM card is incidental to the rendering of telecommunication service; SIM cards are not sold by the service provider to the subscribers, and are not chargeable to VAT. Similarly, when a new SIM card is issued in case the old one is lost, the process of activation is the same and again the charges remain the charges for reactivation and cannot be treated as a sale price.

It is submitted by the learned counsel for the petitioner that a Subscriber Identification Module (SIM) card contains a computer chip with prerecorded instructions. It is a device which helps the service provider to identify the subscriber. It also enables the subscriber to access the service provider's network by means of electro-magnetic waves. The SIM card is merely a key to enter the service provider's facility and use their services. The process of activation involves information being fed into the computer maintained by the service provider, such as particulars of the amount charged,

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the identity of the subscriber, etc. Thus the SIM card is not sold to the subscriber but merely forms part of the service rendered by the service provider and it cannot be charged separately to sales tax. It is only if the parties intend that the SIM card should be a separate object of sale, sales tax can be levied thereon. If the sale of a SIM card is incidental to the service being provided, and merely facilitates identification of the subscribers, their credit and other details, it would not be assessable to sales tax. On the same analogy the SIM replacement charges are also not liable to be taxed since these again are in the form of service charges and do not represent sale price.

The learned counsel for the petitioner submits that SIM cards are included under the definition of telecommunication service which are liable for service tax u/s 65(109a) of Finance Act 1994 read with Finance Act 2007. A SIM card as such is only a card containing a code which enables the person to use his mobile number. It is basically an identity number which is then used for

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receiving the signals on the mobile network.

Learned counsel for the petitioner has relied upon the judgment delivered by the Hon'ble Supreme Court in the case of IDEA Mobile Communication Ltd. v. C.C.E. & C., Cochin reported in **(2011) 19 STJ 2301 (SC)** wherein the question which arose for consideration, in “IDEA Mobile, was whether the value of SIM cards, sold by the service provider to their mobile subscribers, should be included as “taxable service” under Section 65(105) of the Finance Act, 1994, (which provides for levy of service tax on telecommunication service), or whether it is taxable as “sale of goods” under the Sales Tax Act. The Hon'ble Supreme Court held that the charges paid by subscribers, for procuring a SIM card, were generally processing charges for activating the cellular phone which would, necessarily, be included in the value of the SIM card; the amount received by the cellular telephone company from its subscribers, towards the SIM Card, forms part of the taxable value for the levy of service tax; SIM cards are never sold as goods

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independent of the services provided; they are considered part and parcel of the services provided; the dominant intention of the transaction is to provide services, and not to sell the material i.e.; SIM Cards which, on its own but without the service, would hardly have any value; the value of the SIM card forms part of the activation charges as no activation is possible without a valid functioning of the SIM card; the value of the “taxable service” is calculated on the gross total amount received by the operator from the subscribers; and no element of sale is involved in the transaction. In view of the law laid down by the Supreme Court, in Idea Mobile Communication, that the value of the SIM card forms part of the activation charges, service tax can alone be levied for such services, and not sales tax, the assessing authority has exceeded their jurisdiction in levying tax on pre-paid and post-paid SIM cards. Learned counsel for the petitioner submits that levy of VAT on the consideration received for SIM replacement is ultra-vires to the provisions of the Constitution of India and thus, the

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impugned order and the impugned demand notice are liable to be set aside.

Learned counsel for petitioner further contended that the petitioner who is covered by the provisions of the Finance Act, 1994 as amended from time to time, is required to pay Service Tax on the service activity to the Central Government under Section 696 of the said Act. The petitioner has paid Service Tax on the entire amount received towards the SIM replacement. Therefore, any attempt on the part of the State Government to levy sales tax on the same activity which is already covered by the entry in List I of the Seventh Schedule to the Constitution, would be ultra vires Article 246 of the Constitution of India and consequently the State Government cannot levy sales tax.

It has been further contended that Hon'ble the Apex Court in the case of Bharat Sanchar Nigam Ltd., and another Vs. Union of India reported in **2006 (145) STC 91** has examined the position as regards taxation of the same transaction under two different headings. The Apex Court in

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para 83 of its decision has noted the definition of “subscriber” as defined under the Finance Act enacted by the Parliament which includes a person to whom any service of a leased circuit has been provided. The Apex Court further in paragraph 84 thereof observed that a telephone service is nothing but a service; that there is no sale element apart from any hand set or other accessory supplied.

It has been further contended that in the light of the categorical conclusion arrived at by the Apex Court and in view of the fact that the Petitioner is law bound to pay service tax under the Finance Act, 1994 passed by the Parliament, the very same transaction cannot be subjected to sales tax by the State Government.

Learned counsel for the petitioner has placed reliance upon the judgment delivered by the Hon'ble Supreme Court in the case of Bharat Sanchar Nigam Ltd., and another Vs. Union of India reported in **(2006) 3 SCC 1** and in the case of Imagic Creative Pvt. Ltd. v. Commissioner of Commercial Taxes reported in **2009 (2) SCC 614** wherein it has been

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categorically held that service tax and VAT is not payable on the same amount as both taxes are mutually exclusive. Learned counsel has submitted that the impugned order seeking to confirm demand of VAT on a transaction which is taxed as a service and on which service tax has been paid under the Finance Act, 1994 is improper and liable to be set aside.

The respondents have filed a detailed and exhaustive return and their contention is that the petitioner was not assessed for sale of SIM cards provided to the customer treating it to be a service as it will be activated. It has been argued that initially at the time of giving original SIM card no sale tax has been imposed but in the event when the customer comes before the service provider for issuance of new SIM or for replacement of damaged SIM the petitioner Company is charging valuable consideration for such replacement and, therefore, Sales Tax / VAT has rightly been charged.

Learned counsel for the respondent – State has drawn

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attention of this Court towards the provision of Section 2 (u) and 2 (v) and from its perusal it is clear that charges taken by the petitioner Company virtually falls within the purview of section 2 (u) and 2 (v) as initially the SIM is the property of the petitioner Company and no consideration is charged but later at the time of SIM replacement, may be because of damage, the petitioner Company is charging certain amount for that replacement which is valuable consideration as defined in section 2 (v). In support of their contention, learned counsel for the respondent State has placed heavy reliance upon the judgment delivered by the apex Court in the case of Reliance Mobile v. CCT reported in **(2007) 11 ST J 795 (MP)**.

A rejoinder has also been filed in the matter and the petitioner has stated that the judgment delivered in the case of Reliance Mobile Vs. CCT reported in **(2007) 11 STJ 795 (MP)** has been considered in the judgment delivered by the Hon'ble Supreme Court in the case of Idea Mobile Communication Ltd., Vs. Commissioner of Central Excise

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& Customs reported in **(2011) 19 STJ 201 (SC)** and, therefore, the judgment relied upon by the respondents is of no help to the respondents.

It has been stated that the concept of valuable consideration and sale price u/s 2 (u) or 2 (v) would apply only if the amount charged is qua “goods” and not when the amount charged is qua “services”. It has been stated in the rejoinder that the Sim cards are just like a license card which enables the petitioner to identify a subscriber and connect the electromagnetic frequency to that particular number. Activation is the process of enabling such an identity creation. For this process both at the time of sale and even at the time of replacement, KYC norms are required to be fulfilled – i.e. customers identity and address is required as well as signature on the form. A very nominal charge is levied both at the time of issuance of original SIM as well as its replacement. The process itself shows that this activity is nothing but a service.

It has been contended that in a case of a driving

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licence/high court bar license, the card itself does not have any value. It only enables the holder to drive/practice. If the driving licence is lost, for a new one some charges are levied which again are part of service. Same is the case of a SIM card. Replacement charges are only service charges on which service tax has been duly paid. These SIM cards are not the goods and hence there cannot be any element of sale therein and therefore, the consideration received thereof both at the time of issuance and replacement are of the nature of service charges and not sale.

Heard learned counsel for the parties at length and perused the record. The matter is being disposed of with the consent of the parties.

In the present case, the respondents are charging on VAT from the petitioner Company for providing SIM replacement to customers and Lease Line Charges received from the customers. A SIM Card which is a short form of 'Subscriber Identification Module' contains a Computer Chip with pre-recorded instructions. It is a device which helps the

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service provider to identify the subscriber. It also enables the subscriber to access the service provider's network by means of electro-magnetic waves. SIM is merely a key to enter service provider's facility and use their services. The process of activation involves information being fed into the computer maintained by the services provider, such as price of the amount charged, the identity of the subscriber etc., Thus, the SIM card is not sold to the subscriber but merely forms part of the services rendered by the service provider. It cannot be charged separately to sales tax. It is only if the parties intend that the SIM card should be a separate object of sale, then only sales tax can be levied thereon. If the sale of a SIM Card is incidental to the services being provided and merely facilitates identification of the subscribers, their credit and other details, it would not be accessible to sales tax. On the same analogy the SIM replacement charges are also not liable to tax since these again are in the form of service charges and do not represent sale price. SIM cards are included under the definition of 'Telecommunication

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Services' which are liable for service tax under Sec. 65(109a) of the Finance Act, 2002. A SIM card as such is only a card containing a Code which enables a person to use his mobile number. It is basically an identity which is then used for receiving the signals in mobile network. In case, for the first time, a SIM card is given, no VAT is imposed and the Assessing Officer has erroneously held that for the first time there is no sale, hence no VAT can be imposed, however, when the SIM is replaced on account of loss / damage then there is a sale, meaning thereby, for first issuance of a SIM card no VAT is being levied and for replacement VAT is being levied. The matter relating to levy of VAT Taxes has been considered by the Hon'ble Supreme Court in various judgments.

In the case of Bharat Sanchar Nigam Ltd., and another Vs. Union of India and others reported in **(2006) 3 SCC 1**, the apex Court in paragraph 87, 88, 89 and 90 has held as under :

87. 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

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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 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 Association of India Vs. Union of India* (1989) 3 SCC 634- "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. They 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".

88. No one denies the legislative competence of States to levy sales tax on sales provided that the necessary concomitants of a sale are present in the transaction and the sale is distinctly discernible in the transaction. This does not however allow State to entrench upon the Union list and tax services by including the cost of such service in the value of the goods. Even in those composite contracts which are by legal fiction deemed to be divisible under Art. 366(29A), the value of the goods involved in the execution of the whole transaction cannot be assessed to Sales Tax. As was said in *Larsen & Toubro Vs. Union of India*(supra):-

"The cost of establishment of the contractor which is relatable to supply of labour and services cannot be included in the value of the goods involved in the execution of a contract and the cost of establishment which is relatable to supply of materials involved in the execution of the works contract only can be included in the value of the goods".

89. For the same reason the Centre cannot include the value of the SIM cards, if they are found ultimately to be

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goods, in the cost of the service. As was held by us in Gujarat Ambuja Cements Ltd. Vs. Union of India (2005) 4 SCC 214,228.

"This mutual exclusivity which has been reflected in Article 246(1) means that taxing entries must be construed so as to maintain exclusivity. Although generally speaking, a liberal interpretation must be given to taxing entries, this would not bring within its purview a tax on subject- matter which a fair reading of the entry does not cover. If in substance, the statute is not referable to a field given to the State, the Court will not by any principle of interpretation allow a statute not covered by it to intrude upon this field."

90. We will therefore have to allow the appeals filed by BPL in Civil Appeal Nos. 3329-30 of 2002 and Escotel in Civil Appeal No.2408 of 2002 and remand the matter to the Sales Tax Authorities concerned for determination of the issue relating to SIM Cards in the light of the observations contained in this judgment.

The Division Bench of this Court in the case of M.P. Reliance Telecom Ltd., Indore Vs. Commissioner of Commercial Tax, reported in **(2007) 11 STJ 795**, in paragraph 2 to 7 has held as under :

2. Learned Counsel for the appellant does not dispute that during the period pertaining to the Assessment Year 1998-1999 and 1999-2000, the appellant had floated a Scheme for rendering Telecom service to the subscribers in which hand sets were made available to the subscribers on non returnable basis along with the Sim Cards. The Department, levied tax on the value of the hand set and also the value of the Sim Cards which substituted the original Sim Cards on account of damage etc. for which extra charge was made. It was this levy of commercial tax which was assailed by the appellant.

3. Learned Counsel submits that insofar as the supply of hand set to the subscribers was concerned, it was not the main business of the appellant who was liable to pay only service tax under the provisions of Finance Act, 1994 with the result the appellant was not required to get itself

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registered as a 'Dealer' under the Commercial Tax Act, 1994 but on account of some mis-conception, application was made to the Department and a registration as 'Dealer' was obtained. Learned Counsel has referred to the decision in State of Tamil Nadu and Anr. v. Board of Trustees of the Port of Madras STC Vol. 114 1999 Page 520 and the decision in Bharat Sanchar Nigam Ltd. and Anr. v. Union of India and Ors. STC Vol. 145 2006 Page 91. It is on the strength of the above authorities that the learned Counsel contends that once the hand set forms a negligible part of the service and is not a sale, the commercial tax could not have been claimed by the respondents on the said Cellular hand sets.

4. The Board, in considering the said contention, has referred to the decision of the Supreme Court in Anand Commercial Agencies v. Commercial Tax Officer STC Vol. 107 1997 Page 586.

5. Apropos the first contention of the learned Counsel that supplying of the hand set to the subscribers was only an ancillary activity and not the main activity, suffice would be to say that service rendered by the appellant Company would be meaningless unless the receivers are available with the subscribers. The fact that the Company did not insist the subscribers to purchase a receiver from outside and use its Sim Card and proposed to supply the receiver along with the Sim Card clearly indicates the intention of the Company to pass on to the customer the Cellular phone as part of the deal which constituted sale. It cannot be denied that the Cellular phone had a market value and they were supplied to the customer, apparently not free of charge but the charge with constituted part of the package. In Anand Commercial Agencies (supra) the Apex Court considered a situation where bottles were supplied free of charge on understanding that they would be returned to the 'Dealer' with a stipulation that the amount of advance deposited would stand forfeited if the bottles were not returned within the prescribed period. This amount was treated as forming sale price and charged appropriately to tax. The decisions relied upon by the learned Counsel for the appellant however, deal with the matter in different field. In Bharat Sanchar Nigam Limited Their Lordships were considering whether the Sim Card sold to the subscribers were dealing with a situation where the Sim Card not sold to the subscribers but forming part of the services rendered were held as not chargeable to sales tax. In that decision also it was clarified that if the parties contended that the Sim Card would be a separate subject of

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sale, it would be open to the Sales-Tax Authorities to levy sales tax thereon.

6. From the orders passed by the Sales-Tax Authorities we find that the Authorities have been discerning enough between the Sim Card supplied free of charge and the Sim Card substituted on payment of charges. It is only the Sim Card which is substituted on account of damage etc. and for which extra charge is made that the Authorities are charging commercial tax. However, the situation with regard to the supply of hand set is entirely different from the one present before Their Lordships and, therefore, we do not find that the contention of the appellant is substantiated by the ratio of the said decision. Reference has also been made to 114 STC Page 520. The said case was dealing with the incidental transaction of unserviceable goods. The case of the appellant obviously is that it is not an unserviceable item which has been supplied to the subscriber but very much a hand set which is an essential component for receiving the service. Under these circumstances, the decision in Board of Trustees (supra) also does not further the case of the appellant.

7. In view of the above discussion, we do not find that these appeals give rise to any question of law, much less substantial, for decision in the appeal under Section 53(2) of the VAT Act.

The Division Bench of Kerala High Court in the case of Commissioner of Central Excise & Customs Vs. Idea Mobile Communication Ltd., reported in **(2009) 15 STJ 337 (Kerala)**, in paragraph 3 has held as under :

3. In the BSNL case (supra) decided by the Supreme Court, the controversy was whether sales-tax is payable on the value of SIM cards to the State Government or whether the value has to be included in taxable service for reckoning liability towards service-tax payable to Central Government. Now since the State Government after remand by Supreme Court has given up the claim for sales-tax, the question to be considered is whether the value of SIM cards forms part of taxable service. Admittedly respondent answers the

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description of telegraph authority defined under s. 65(111) of Finance Act, 1994 and they are registered for the payment of service-tax and they are in fact remitting tax on activation charges. The exclusion claimed by them is only on the value of SIM cards, that too only on the ground that they are free to supply SIM cards as sale of goods and remitted sales-tax thereon. In order to consider whether the value of SIM card constitutes taxable service, we have to examine the functioning of this item in the service provided by the respondent. Admittedly SIM card is a computer chip having its own SIM number on which telephone number can be activated. SIM card is a device through which customer gets connection from the mobile tower. In other words, unless it is activated, service provider cannot give service connection to the customer. Signals are transmitted and conveyed through towers and through SIM card communication signals reach the customer's mobile instrument. In other words, it is an integral part required to provide mobile service to the customer. Customer cannot get service without SIM card and it is an essential part of the service. SIM card has no intrinsic value or purpose other than use in mobile phone for receiving mobile telephone service from the service provider. Therefore, in our view, the stand taken by the BSNL and BPL mobile services that it is not goods sold or intended to be sold to the customer but supplied as part of service is absolutely tenable and acceptable. Consequently, we hold that the value of SIM card supplied by the respondent forms part of taxable service on which service-tax is payable by the respondent.

The apex Court in the case of Idea Mobile Communication Ltd., Vs. Commissioner of Central Excise & Customs, Cochin reported in **(2011) 19 STJ 201 (SC)**, in paragraphs 12, 17, 18 and 19 has held as under :

12. 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 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

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information which helps the network service provider to recognize the caller. As stated hereinbefore the Kerala High Court had occasion to deal with the aforesaid issue and in that context in its Judgment pronounced on 15th February, 2002 in Escotel Mobile Communications Ltd. vs. Union of India and Others, reported in (2002) Vol. 126 STC 475 (Kerala), it was stated in paragraph 36 that a transaction of selling of SIM Card to the subscriber is also a part of the "service" rendered by the service provider to the subscriber. The Kerala High Court in the facts and circumstances of the case observed at paras 36 and 47 as under: -

"36. With this perspective in mind, if we analyse the transaction that takes place, it appears to us that there is no difficulty in correctly understanding its facts. The transaction of selling the SIM. card to the subscriber is also a part of the "service" rendered by the service provider to the subscriber, Hence, while the State Legislature is competent to impose tax on "sale" by a legislation relatable to entry 54 of List II of Seventh Schedule, the tax on the aspect of "services" rendered not being relatable to any entry in the State List, would be within the legislative competence of Parliament under Article 248 read with entry 97 of List I of the Seventh Schedule to the Constitution. We are, therefore, unable to accept the contention of Mr. Ravindranatha Menon that there is any possibility of constitutional invalidity arising due to legislative incompetence by taking the view that "sale" of SIM card is simultaneously exigible to sales tax as well as service tax. Once the "aspect theory" is kept in focus, it would be clear that the same transaction could be exigible to different taxes in its different aspects. Thus, we see no reason to read down the legislation as suggested by Mr. Menon.

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47. Conclusions:

(a) The transaction of sale of SIM Card is without doubt exigible to sales tax under the KGST Act. The activation charges paid are in the nature of deferred payment of consideration for the original sale, or in the nature of value addition, and, therefore, also amount to parts of the sale and become exigible to sales tax under the KGST Act.

(b) Both the selling of the SIM Card and the process of activation are "services" provided by the mobile cellular telephone companies to the subscriber, and squarely fall

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within the definition of "taxable service" as defined in section 65(72)(b) of the Finance Act. They are also exigible to service tax on the value of "taxable service" as defined in Section 67 of the Finance Act."

17. The High Court has given cogent reasons for coming to the conclusion that service tax is payable inasmuch as SIM Card has no intrinsic sale value and it is supplied to the customers for providing mobile service to them. It should also be noted at this stage that after the remand of the matter by the Supreme Court to the Sales Tax authorities the assessing authority under the Sales Tax Act dropped the proceedings after conceding the position that SIM Card has no intrinsic sale value and it is supplied to the customers for providing telephone service to the customers. This aforesaid stand of the Sales Tax authority is practically the end of the matter and signifies the conclusion.

18. The sales tax authorities have themselves conceded the position before the High Court that no assessment of sales tax would be made on the sale value of the SIM Card supplied by the appellant to their customers irrespective of the fact whether they have filed returns and remitted tax or not. It also cannot be disputed that even if sales tax is wrongly remitted and paid that would not absolve them from the responsibility of payment of service tax, if otherwise there is a liability to pay the same. If the article is not susceptible to tax under the Sales Tax Act, the amount of tax paid by the assessee could be refunded as the case may be or, the assessee has to follow the law as may be applicable. But we cannot accept a position in law that even if tax is wrongly remitted 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.

19. There cannot be any dispute to the aforesaid position as the appellant itself subsequently has been paying service tax for the entire collection as processing charges for activating cellular phone and paying the service tax on the activation. The appellant also accepts the position that activation is a taxable service. The position in law is therefore clear that the amount received by the cellular telephone company from its subscribers towards SIM Card will form part of the taxable value for levy of service tax, for the SIM Cards are never sold as goods independent from services provided. They are

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considered part and parcel of the services provided and the dominant position of the transaction is to provide services and not to sell the material i.e. SIM Cards which on its own but without the service would hardly have any value at all. Thus, it is established from the records and facts of this case that the value of SIM cards forms part of the activation charges as no activation is possible without a valid functioning of SIM card and the value of the taxable service is calculated on the gross total amount received by the operator from the subscribers. The Sales Tax authority understood the aforesaid position that no element of sale is involved in the present transaction.

In the light of the aforesaid judgments delivered on the subject matter, the position of law is very clear that the amount received by the cellular telephone company from its subscribers towards SIM card will form part of the taxable value for levy of service tax, as the SIM cards are never sold as goods independent from service provided. As already held by the Hon'ble Supreme Court, they are considered to be part and parcel of the services provided and dominant position of the transaction is to provide services and not to sell the material ie., the SIM cards which on its own, but without the services, would hardly have any value at all. Even in the case of replacement of SIM Card, the value of replacement in respect of SIM cards forms part of the activation charges, as no activation is possible without a

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valid functioning of SIM card and the value of taxable service is calculated on the gross amount received from the operator from the subscriber and, therefore, once it has been held by the Hon'ble Supreme Court that no sales tax can be charged for providing a SIM, the question of charging it on replacement of a SIM, does not arise. The impugned order passed by the assessing authority dt. 31/7/2014 and the Notice dt. 31/7/2014 deserves to be quashed.

The other issue in respect of of VAT on lease line charges is only in the present Writ Petition (WP No. 7631/2014) and is covered by the judgment delivered by the Division Bench of this Court in the case of Bharti Infratel Ltd., Vs. State of Madhya Pradesh and others (W.P.No. 5340/2013, decided on 20/8/2015), wherein the Division Bench of this Court while deciding the issue of infrastructure charges received in respect of mobile towers has held that such charges are of the nature of service charges and are not liable for VAT since the mobile towers all along remain in control and possession of the Company

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and hence there is no sale. In the case of lease line charges also this very principle applies since a subscriber of a lease line does not become the owner of the line either by control or by possession and hence such charges are only for services rendered and there is no element of sale therein.

The Division Bench of this Court in the case of Bharti Infratel Ltd., Vs. State of Madhya Pradesh and others (W.P.No. 5340/2013, decided on 20/8/2015), in paragraph 35, 36, 37, 38, 39 and 40 has held as under :

35. We are in respectful agreement with the view taken by the Karnataka High Court in the judgment cited (supra). The right to use the goods – in this case, the right to use the passive infrastructure – can be said to have been transferred by the petitioner to the sharing telecom operators only if the possession of the said infrastructure had been transferred to them. They would have the right to use the passive infrastructure if they were in lawful possession of it. There has to be, in that case, an act demonstrating the intention to part with the possession of the passive infrastructure. There is none in the present case. The passive infrastructure is an indispensable requirement for the proper functioning of the active infrastructure which is owned and operated by the sharing telecom operators. The passive infrastructure is shared by several telecom operators and that is why they are referred to as sharing telecom operators in the MSA. The MSA merely permits access to the sharing telecom operators to the passive infrastructure to the extent it is necessary for the proper functioning of the active infrastructure. The MSA also defines “site access availability” as meaning the availability of access to the sharing operator to the passive infrastructure at the site. Clause 2 of the MSA which has been quoted above provides for “site access” and Clause 1.7 limits the site access availability to the sharing operator on use – only basis so far

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as it is necessary for installation, operation and maintenance etc. of the active infrastructure; the clause further states that the sharing operator does not have, nor shall it ever have, any right, title or interest over the site or the passive infrastructure. The Clause also takes care to declare that the sharing operator shall not be deemed to be the tenant of petitioner and no tenancy rights shall be deemed to exist over the site/passive infrastructure. Clause 2.1.8, presumably by way of abundant caution, states that it is expressly agreed by the sharing operator that nothing contained in the MSA or otherwise shall create any title, right, tenancy, or any similar right in favour of the sharing operator.

36. There are other provisions in the MSA which control the right of the sharing operator to gain access to the site and the passive infrastructure . For instance, Clause 3.1.2 states that the access shall be limited to the purpose of carrying out operation and maintenance activities and that too only to the authorised representatives or properly authorise subcontractors of the sharing operator. Clause 1.8 of the Schedule 2 of the MSA has to be read along with the above clause. The tables set out in this schedule providing for payment of service credits by petitioner to the sharing operators for failure to achieve the uptime service levels and those prescribing payment of service credits by petitioner to the sharing operators for non-submission of the reports and providing for stiff penalties for any failure on the part of petitioner show that it is the responsibility of petitioner to ensure that the passive infrastructure functions to its full efficiency and potential, which in turn means that it has to be in possession of the passive infrastructure and cannot part with the same in favour of the sharing telecom operators. With several such restrictions and curtailment of the access made available to the sharing telecom operators to the passive infrastructure and with severe penalties prescribed for failure on the part of the petitioner to ensure uninterrupted and high quality service provided by the passive infrastructure, it is difficult to imagine how the petitioner could have intended to part with the possession of part of the infrastructure. That would have been a major impediment in the discharge of its responsibilities assumed under the MSA. The limited access made available to the sharing telecom operators is inconsistent with the notion of a “right to use” the passive infrastructure in the fullest sense of the expression. At best it can only be termed as a permissive use of the passive infrastructure for very limited purposes with very limited and strictly regulated access. It is therefore

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difficult to see how the arrangement could be understood as a transfer of the right to use the passive infrastructure.

37. When the petitioner has not transferred the possession of the passive infrastructure to the sharing telecom operators in the manner understood in law, the limited access provided to them can only be regarded as a permissive use or a limited licence to use the same. The possession of the passive infrastructure always remained with the petitioner. The sharing telecom operators did not therefore, have any right to use the passive infrastructure.

38. A careful perusal of the judgment of the Karnataka (supra) shows that the following propositions were laid down:-

a) No operation of the infrastructure is transferred to the sharing telecom operator. The latter is only provided access to use the passive infrastructure, but Indus has retained the right to lease, licence etc. the passive infrastructure to any advertising agency;

b) The entire infrastructure is in the physical control and possession of Indus at all times and there is no parting of the same nor any transfer of the right to use the equipment or apparatus;

c) The permission granted to the telecom operator to have access to the passive infrastructure for limited purposes is loosely termed by the taxing authorities as “a right to use the passive infrastructure”;

d) There is no intention on the part of the Indus to transfer the right to use; it is only a licence or an authority granted to telecom operator as defined in Section 52 of the Easements Act, 1952. A licence cannot in law confer any right; it can only prevent an act from being unlawful which, but for the licence, would be unlawful. A licence can never convey by itself any interest in the property;

e) The entire MSA has to be read as a whole without laying any undue emphasis upon a particular word or clause therein. What is permitted under the MSA is a licence to the telecom operators to have access to passive infrastructure and a permission to keep equipments of the sharing telecom operator in a prefabricated shelter with provision to have ingress and egress only to the authorized representatives of the mobile operator.

39. In the matter of **Indus Towers Limited v. Union of India** decided on **18th April, 2013** [Writ Petition (C) No.4976/2011] almost a similar question was raised by the

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petitioner therein before the Delhi High Court and the Division Bench of Delhi High Court in complete agreement with the view taken by the Karnataka High Court in the case of **M/s. Indus Towers Limited v. The Deputy Commissioner of Commercial Tax & four others** (supra) has allowed the writ petition.

40. For these reasons, we are of the view that the judgment of the Karnataka High Court will be fully applicable in the present facts and circumstances of the case. The order dated 13.03.2013 (Annexure P/1) passed by the Additional Commissioner, Commercial Tax, Indore (Respondent No.3) on the basis that the petitioner transferred the right to use passive infrastructure to the sharing telecom operators is quashed.

Thus, the controversy involved in respect of the issue relating to VAT on lease line charges has already been adjudicated by this Court.

From the foregoing discussion it, therefore, inevitably follows that Sec.2(u) and 2(v) of the MP VAT Act, 2002 is ultra-vires and void, in so far as it relates to imposition of VAT on SIM replacement charges and lease line revenue, which are merely services. The impugned order passed by the assessing authority dt. 31/7/2014 and the Notice dt. 31/7/2014 are hereby quashed. The other orders also relating to imposition of VAT on SIM replacement charges and lease line revenue are also quashed.

The present Writ Petition stands allowed and disposed

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of. The order passed in W.P.No. 7631/2014 shall be applicable in all the connected Writ Petitions and the impugned notices and assessment orders passed therein are also hereby quashed.

No order as to costs.

(S. C. SHARMA)
J U D G E

(RAJEEV KUMAR DUBEY)
J U D G E

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