

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I**

APPEAL No. ST/88545/2014

(Arising out of Order-in-Original No. 42 to 47/ST/RN/CMR/M-II/13-14 dated 31.3.2014 passed by Commissioner of Central Excise, Mumbai-II)

Vodafone Essar Ltd.

Appellant

Vs.

Commissioner of Central Excise, Mumbai-I

Respondent

Appearance:

Shri V. Sridharan, Sr. Advocate, with Shri Vinay Jain, Advocate, for appellant

Shri M.K. Sarangi, Joint Commissioner (AR), for respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)

Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of Hearing: 22.6.2018

Date of Decision: 2.11.2018

ORDER No. **A/87809/2018**

Per: Sanjiv Srivastava

The appeal is directed against the order in original of Commissioner Central Excise Mumbai II, holding as follows in the matter remanded by the Tribunal by its order dated 03.09.2012

"26.a) *I confirm the demand of Service tax under following SCN's*

<i>Sr.</i>	<i>Show cause notice file number and date</i>	<i>Period of SCN</i>	<i>Total Amount of Service Tax in Rs Confirmed.</i>
1	V/STC/GR-VI/Tele/HMT/SCN/221/2004 dtd 16.03.2005	Apr04 to Sept04	2933776
2	V/STC/GR-VI/Tele/HMT/SIM/2005 dtd 20.03.2006	Oct04 to Mar05	4536275
3	V/STC/GR-IX/TEI/HMT/SIM/2006 dtd 11.10.2006	Apr05 to Mar06	3294459
4	V/STC/GR-IX/TEI/HMT/SCN/2004 dtd 17.10.2007	Apr06 to Mar07	10460448
5	V/STC/GR-IX/TEI/HMT/SCN/2004 dtd 15.10.2008	Apr07 to Mar08	26133804
6	V/STC/GR-IX/TEI/HMT/SCN/2004 dtd 25.09.2009	Apr08 to Mar09	14451422

To the extent of Rs 6,18,10,184/- (Rupees Six Crore eighteen lakhs ten thousand one hundred eighty four only.) inclusive of Edu. Cess and Secondary & Higher Secondary Edu. Cess and order recovery of the same from M/s Hutchinson Max Telecom Pvt. Ltd. (Now known as M/s Vodafone Essar Ltd.) under section 73(1) of the Finance Act, 1994 read with section 68 of the Finance Act, 1994 and Rule 6 of the Service Tax Rules, 1994.

b) Interest on the amount of demand determined at 'a)' at the appropriate rate should be paid by M/s Hutchinson Max Telecom Pvt. Ltd. (Now known as M/s Vodafone

Essar Ltd.), under Section 75 of the Act read with Rule 6 of the Service Tax Rules, 1994;

c) Impose penalty of Rs 6,18,10,184/- (Rupees Six Crore eighteen lakhs ten thousand one hundred eighty four only.) under Section 78 of the Act on M/s Hutchinson Max Telecom Pvt. Ltd. (Now known as M/s Vodafone Essar Ltd.);

d) Impose penalty of as per section 76 of the Act on M/s Hutchinson Max Telecom Pvt. Ltd. (Now known as M/s Vodafone Essar Ltd.), which is as follows:

i) for the period from 01.04.2004 to 09.09.2004, a penalty of Rs 200/- for every day;

ii) for the period from 10.09.2004 to 17.04.2006, a penalty of Rs 100/- for every day during which failure to pay tax continues.

However, the total penalty shall not exceed the amount of service tax that they failed to pay.

iii) for the period from 01.04.2004 to 09.09.2004,

‘a penalty of Two hundred rupees for every day during which failure to pay tax continues or at the rate of two percent of such tax, per month, whichever is higher, starting with the first day after the due date till the date of actual payment of the outstanding amount of service tax:

Provided that the total amount of the penalty payable in terms of this clause shall not exceed the service tax payable in terms of this section.”

2.1 When the matter first came before Tribunal, tribunal vide its order dated 21/02/2012, while disposing of the stay application filed by the Appellant, had directed them to deposit entire service tax adjudged against them and report compliance. Against the said order passed in stay proceedings, appellant moved to Hon'ble High Court of Mumbai, and Mumbai High Court vide its order dated 25th June 2012 in Central Excise Appeal (L) No 84 of 2012 passed order as follows:

- 1. Whether the Tribunal was justified in directing the appellants to deposit Rs. 3,10,06,302/- for entertaining the appeal against the order-in-original dated 30th November, 2011 is the question raised in this appeal.*
- 2. The basic dispute in the present case is whether the value of the SIM cards sold by the appellants has to be included in computing the taxable value while determining the Service Tax payable by the appellants.*
- 3. By order-in-original dated 30th November, 2011, the adjudicating authority included the value of SIM cards while computing the taxable value and accordingly confirmed the Service Tax amount of Rs. 6,18,10,184/- with interest and further imposed penalty upon the assessee.*
- 4. On appeal filed by the assessee with an application seeking waiver of pre-deposit, the Tribunal noticed that the assessee has already deposited Rs. 3.80 Crores, and*

directed the assessee to deposit balance amount of the demand for entertaining the appeal against the order-in-original dated 30th November, 2011 in the light of the judgment of the Apex Court in the case of Idea Communication Ltd. v. Central Excise & Customs, reported in 2011 (23) S.T.R. 433 (S.C.). Challenging the aforesaid order, the assessee has filed the present appeal.

5. It is argued on behalf of the appellants that the judgment of the Apex Court in the case of Idea Mobile Communication Ltd. (supra) has no relevance in view of the exemption Notification No. 12 of 2003, dated 20th June, 2003 which is not considered by the Apex Court. It is the contention of the appellants that in the light of the said Notification No. 12 of 2003, the assessee is exempted from payment of tax on the value of goods and material sold by the assessee to the recipient of service. On perusal of the order passed by the Adjudicating Authority as also the order passed by the Tribunal, it is seen that both the authorities have not considered the applicability of the Notification No. 12 of 2003 to the facts of the present case. It is not in dispute that assessee had claimed benefit of the above notification before the authorities below and in fact they said claim of the assessee is recorded in the impugned orders but no finding is recorded. Since the Apex Court in the case of Idea Mobile Communication Ltd. (supra) has not considered the applicability of Notification No. 12 of 2003, in our view, it is just and proper that the impugned order be quashed and set aside and the matter be remanded to the Tribunal for fresh consideration in accordance with law.

6. Accordingly, the impugned order dated 21st February, 2012 is quashed and set aside and the matter

is restored to the file of the Tribunal for fresh consideration in accordance with law. Appeal is disposed of accordingly.”

2.2 While hearing the stay application again as per the remand order of the Hon’ble Bombay High Court, Tribunal disposed of the appeal, remanding the matter back to Adjudicating authority as per the following order.

“5. We have to decide the application for waiver of pre-deposit of dues as per the observation made by the Hon’ble Bombay High Court vide order dt. 25.6.2012. In the present case the applicants claim the benefit of Notification No. 12/2003-ST before the adjudicating authority as evident from the para 2.1.13 and 2.1.14 of the adjudication order. The benefit of Notification was denied by the adjudicating authority only on the ground that applicants are seeking adjustment of the VAT against the demand of service tax. In para 4.6 of the adjudicating authority held that the request of adjustment of Sales Tax against the Service Tax liability is not acceptable as there is no provisions under the Finance Act for such adjustment.

6. *The provisions of Notification No. 12/2003 ST reads as under:-*

“In exercise of the powers conferred by Section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts so much of the value of all the taxable services, as is equal to the value of goods and materials sold by the service provider to the recipient of service, from the service tax leviable thereon

under Section (66) of the said Act, subject to condition that there is documentary proof specifically indicating the value of the said goods and materials”.

7. The benefit of the notification is to be considered as per the conditions laid down on the notification. The adjudicating authority has not considered the claim of applicant in respect of benefit of notification in terms of the contentions of the notification. In view of this prima facie we find merit in the contention of the applicant and amount already deposited by the applicant is sufficient for hearing of the appeal. The pre-deposit of the remaining amount of dues are waived and recovery of the same is stayed during the pendency of the appeal.

8. As noted above, the benefit of notification No, 12/2003-ST claimed by the appellant had not been considered in right perspective by the adjudicating authority hence the matter requires reconsideration by the adjudicating authority afresh. The impugned order is set aside and matter is remanded to the adjudicating authority for denovo adjudication and to consider the claim of the applicant in respect of the Notification No. 12/2003-ST. Both sides are at liberty to produce the evidence in support of their claim. The appellants are directed to appear before the adjudicating authority on 6.11.2012 and thereafter adjudicating authority will fix the date of hearing in accordance with law and decide after affording an opportunity of hearing to the appeal. Appeal is disposed of by way of remand.”

2.3 Matter has been adjudicated by the order as referred in para 1 supra, by the Commissioner again holding that benefit of the Notification 12/2003-ST shall

not be admissible to the appellants. Against this order of Commissioner Appellant are in appeal.

3.1 Appellants have challenged the order of the Commissioner in their appeal memo on various grounds as mentioned below:

a. Definition of “goods” under the Sale of Goods Act, 1930 covers all movable properties subject to certain exclusions and SIM cards, being movable property, are also goods. The Subscriber Identification Module (SIM) card is a plastic card encrypted with a unique number called IMSI i.e., International Mobile Subscriber Identification. For the submission that SIM cards are goods, they draw support from the decision of Apex Court in case Bharat Sanchar Nigam Ltd vs Union of India and Other [145 STC 91]. By the said decision Hon’ble Court has clearly laid down that if SIM Cards are sold then their value can’t be included in the value of the service and no service tax can be charged.

b. They also rely on the decision of the Apex Court in case Imagic Creative Pvt Ltd. Vs Commissioner of Commercial Taxes [2008 (9) STR 337 (SC)] (para 28)

c. They also rely on the Hon’ble Finance Minister’s speech in 1994 relating to Service Tax, and recommendations made by the Rajah Chelliah Committee

d. There has always been distinction between the goods which are subject to customs duty/ excise duty/ VAT and services which are subject to service tax, since inception of levy of service tax. In the instant case SIM cards sold by the appellants have been subjected to local sales tax.

e. They purchase and sell the SIM cards after charging and payment of VAT due.

f. They strongly rely on the decision of tribunal in following cases in their support:

i. Idea Mobile Communication Ltd vs CCE [2006 (4) STR 132 (T-Bang);

ii. BPL Mobile Communications Ltd [2007 (7) STR 240 (T-Mum)];

iii. RPG Cellular Services Ltd [2008 (10) STR 298 (T-Chennai)];

g. The value of the SIM card sold is excludable by virtue of Notification No 12/2003-ST. The Commissioner has denied benefit of the said notification even on remand by the High Court and Tribunal.

h. The finding of Commissioner that value of SIM cards sold to the Customers is clearly shown separately. The finding of the Commissioner in this regards is erroneous.

- g. The y had submitted the CA certificate which certified that the value of SIM card as “Cost of SIM Card + Normal Profit”. However no finding has been rendered on this.
- h. Commissioners reliance on the Hon’ble Supreme Court decision in case of IDEA Cellular is erroneous.
- i. When SIM card is loaded into the mobile phone, no service is being provided. SIM is only for identification.
- j. If the appellants are held liable to pay service tax on SIM, then VAT/ CST already paid by them against the sale of such SIM should be allowed to be adjusted. [Bharat heavy Electricals Limited vs Union Of India 1996 (4) SCC 230].
- k. The computation of Service Tax is incorrect and not taking into account the provisions of Section 67(2) and Supreme Court decision in case of CCE vs Maruti Udyog Limited [2002 (49) RLT 1 (SC)]
- l. Since appellants acted bonafidely no penalty and interest should be imposed. {Hindustan Steel Ltd vs The State of Orissa {1969 (2) SCC 627}.
- m. In case of Bhati Airtel {ST 529-534/2011 dated 21.09.2011, in similar facts Tribunal has held no penalty is to be imposed.

n. Simultaneous penalties cannot be invoked under Section 76 and Section 78 and for this they rely on the decision of Tribunal in case Silver OAK Gardens Resort [2008 (9) STR 481 (T-Del)].

4.1 We have heard Shri V Sridharan counsel for Appellants and Shri M K Sarangi Joint Commissioner, Authorized Representative for the Revenue.

4.2 Arguing for the Appellants learned counsel produced a series of case laws to advance his contention that value of SIM card should not have been included while determining the value of taxable service provided by him.

4.3 Learned counsel submitted that indeed in this case there is transfer of possession of SIM cards from Appellant to its customer. The transaction involved in the present case is one of bailment. As per Salmond on Jurisprudence, 12th Edition 2018, at page no 277, it has been stated *"In common law a bailee is one who is given possession of goods on the understanding that he is to deliver them in specie to the bailer or at the bailer's directions. Such a person acquires possession of the goods in law as well as in fact."* In the present case, the appellant is bailer has bailed the SIM cards to its customer i.e. the bail with a condition that the SIM cards shall be returned to appellant after its use. Thus

the customer of appellant has possession of the SIM cards both in law as well as in facts. Hence in view of Section 2(h) of the Central Excise Act, 1944, the said transfer of possession of SIM cards from the Appellant to its customer amounts to sale and is eligible for relief conferred by Notification No 12/2003-ST.

4.4 Learned counsel also produced sample invoices enclosed on pages 129 to 150 of paper book showing the value of SIM cards. They also produced the Copy of Chartered Accountant Certificate dated 21.03.2014 in their support along with sample invoices of the purchase of SIM cards. On the basis of the above learned counsel submitted that there was actual sale of SIM cards by them and the value of SIM has been shown separately on the sale invoice. Bifurcation in the invoice is the best evidence indicating the value of goods. Hence he submitted that in their case the requirements of Notification No 12/2003-ST are satisfied and Commissioner should have allowed the benefit of same to him.

4.5 Learned Counsel further submitted that in any case the value of SIM should have been taken as cum tax price and the Service Tax computed accordingly. He also claimed that the benefit of Sales tax paid by the appellant should be adjusted against the demand of

service tax if any {M/s Idea Mobile Communication Ltd vs UOI 2016 (42) STR 823 (P &H)]

4.6 He further submitted that in fact there was no reason for invoking penal provisions under section 78 for imposing penalty on them as they have acted in a bonafide manner.

4.7 Further simultaneous penalties under Section 76 and 78 cannot be justified in view of the various decisions of the Tribunal including that in case of Silver OAK Gardens Resort

4.8 He submitted the following decisions for the consideration of bench:

- i. Idea Mobile Communication Ltd Vs CCE & C [2011-TIOL-71-SC-ST]
- ii. CCE Vs Idea Mobile Communication Ltd [2009-TIOL-318-HC-Kerala-ST]
- iii. Bharti Airtel Ltd vs CCE [2015-TIOL-2616-CESTAT-MUM]
- iv. Bharti Televentures Ltd (Bharti Airtel Ltd) vs CST [2012-TIOL-1658-CESTAT-MAD]
- v. Bharti Airtel Ltd vs CST [2014-TIOL-1713-CESTAT-AHM]
- vi. Bharti Hexacom Ltd vs CCE [2012-TIOL-742-CESTAT-Del]

- vii. Bharti Hexacom India Ltd vs CCE CESTAT Final Order No ST/A/531/2012-CU{DB} dated 4.7.2012.
- viii. Hutchison Max Telecom Ltd vs CCE [2005-TIOL-1642-_CESTAT-DEL]
- ix. CST vs Hutchison Max Telecom Ltd [2008 (9) STR 455 (BOM)]Idea Cellular Ltd vs UOI [2016 (42) STR 823 (P & H)
- x. Bharat Heavy Electricals Ltd vs UOI 1996 AIR 1854
- xi. D Navinchandra & Co Bombay and Anr vs UOI 1987 (29) ELT 492 (SC)]
- xii. CCE vs Idea Mobile Communication [2016-TIOL-2958-CESTAT-CHD
- xiii. Loop Mobile India Ltd vs CST [2016-TIOL-959-CESTAT-Mum}
- xiv. CCE vs Advantage Media Consultant [2008 (10) STR 449 (T-Kol)]
- xv. Idea Cellular Ltd vs CCE [2018-TIOL-194-CESTAT-MUM]
- xvi. Hutchison Max Telecom Pvt Ltd vs CCE [2008 912) 373 9T-Del)]
- xvii. EECE Industries Limited Vs CCE [2004 (164) ELT 236 (SC)]
- xviii. P&B Pharmaceuticals (P) Ltd Vs CCE [2003 (153) ELT 14 (SC)]

- xix. M/s Raval Trading Co vs CST [2016 TIOL 112 HC-AHM-ST
- xx. CCE vs First Flight Courier Ltd [2011 (22) STR 622 (P &H)]
- xxi. Agarwal Colour Advance Photo System vs CCE 2010 (19) STR 181 (T)
- xxii. Agarwal Colour Advance Photo System vs CCE 2011 (23) STR 608 (T)
- xxiii. Safety Retreading Company (P) Ltd Vs CCE [2012 (26) STR 225 (T)]
- xxiv. Laxmi Tyres Vs CCE [2014 (36) STR 364 (T)]
- xxv. CCE vs Tyresoles India Pvt Ltd [2016 (42) STR 861 (T)]
- xxvi. Safety Retreading Company Pvt Ltd vs CCE [2017-TIOL-28-SC-ST
- xxvii. G D Builders vs UOI [2013 (32) STR 783 (T-LB)]
- xxviii. Hindustan Aeronautical Ltd vs CCE [2014 (33) STR 86 (T)]
- xxix. Mehta Plast Corporation vs CCE [2014 (33) STR 401 (T)]
- xxx. Bharati Tele Ventures Ltd vs CCE [2014 (33) STR 86 (T)]
- xxxi. State of Gujarat vs Bharat Pest Control [2018 SCC Online SC 217]
- xxxii. State of Gujarat vs Bharat Pest Control [2016-TIOL-2316-HC-AHM-VAT]

- xxxiii. Tata Consultancy Services vs State of Andhra Pradesh [2004 (178) ELT 22 (SC)]
- xxxiv. Associated Cement Companies Ltd vs CCE [2001 (128) ELT 21 (SC)]
- xxxv. Idea Mobile Communication Ltd vs CCE Trivandrum [2006 (4) STR (T-Bang)]

4.9 Learned AR arguing for the revenue submitted that, the issue with regards to inclusion of value of SIM cards in the value of taxable services provided by the mobile companies has been settled by the Apex Court in case of Idea Mobile Communications Ltd vs CCE 2011-TIOL-71-SC-ST. Hence following the ratio of the said decisions the value of SIM has been rightly held to be included in the value of taxable services provided.

4.10 He further submitted that issue has been remanded by the tribunal for the purpose of consideration of applicability of the 12/2003-ST. Hon'ble Commissioner has after consideration of all the facts have found that benefit of the said notification cannot be extended as the appellants do not fulfill the requirements of the said notification. He also referred to the certificate of Chartered Accountant wherein it has been specifically stated *"The company has debited to Profit & Loss Account cost of SIM consumed for respective F Y and company's normal Gross profit ratio based on*

revenue from operations and other income which is liable to service tax is as per table detailed below:"

4.11 To avail the benefit of Notification No 12/2003-ST, there should be sale of goods, if item under consideration does not satisfy the ingredients "goods" or there is no sale then such benefit cannot be extended.

He relied on the decisions as follows in his support:

- i. Bharati Televenture [2014-33-STR-86-T-MUM)
- ii. BSNL [2011-TIOL-731-HC-AP-ST]
- iii. Super quality Service vs CCE 2018-TIOL-CESTAT-MAD
- iv. S S Electricals Vs CCE 2017-52-STR 322-Tri-Mum
- v. Daswani Classes Ltd vs CCE 2017-TIOL-1080-CESTAT-Del
- vi. Bata India vs CCE 2017-TIOL-4295-CEST-DEL
- vii. Idea Cellular 2017-TIOL-98-HC-MP-VAT
- viii. Mahanth Ente vs State 2018-TIOL-657-HC-MAD-CT date 16.03.2018

4.12 He also referred to the invoices produced by the appellants, and pointed out that the invoice specifically states

"-The property in SIM card would remain vested with VIL and there is no transfer of property or right to use SIM cards to any person including subscribers.

-For item "Refill Slips, Scratch Cards and TopUp" 12.36% Service Tax 9inclusive of Education Cess of 3%) is being charged

-Service tax is on total Maximum Value."

The above remarks in view of the learned AR specifically clinch to issue as appellants themselves are declaring that there is no transfer in property or the right to usage. Hence in his view there is no sale of SIM hence the benefit of exemption under notification No 12/2003-ST has been rightly denied to the Appellants.

4.13 He also pointed out that as per the invoices enclosed (pg 129-173 of paper) while price for GSM card/ pre-paid smart card/ smart card have been shown at the price of Rs 7.88/ pc (p-154) to Rs 12.57 /pc (p-166) but for splitting value for VAT same has been shown at Rs 237/ pc. Gross profit as per CA Certificate has been shown at 27.37% to 38.15% Hence the finding of adjudicating authority towards artificial splitting of value cannot be disputed.

4.14 He relies upon the decision of Bombay High Court in case of Mosanto Mahyco Biotech India Ltd vs UOPI [2016-44-STR-161-BOM] to state that mere mention of any commodity in VAT Act does not suomotto leads to tax, rather what must be looked at is the real nature of transaction and actual intention of parties if it is

permissive use, then it is service and liable to service tax. In present case, supplying SIM card to subscriber is only its permissive use and enjoying mobile service, which can be discontinued by the mobile operator at his will.

4.15 Appellant stopped paying the service tax without intimating the nor they sought any clarification from the department at any time. As appellants failed to pay the service tax in time they are liable to penalty. He relied upon the decision of tribunal in case of BSNL vs CCE 2011-TIOL-552-CEST-MUM and Renaissance Leasing & Finance Pvt Ltd vs CCE 2017-STr-4-Tri-Del for supporting the penalty imposed.

5.1 We have considered the submissions made by the Appellant and Revenue.

5.2 The issues for consideration for us in the present appeal are:-

- i. Whether the value of SIM supplied by the Appellant for activation and providing the mobile telephony services to its customer includible in taxable value of services provided by him.
- ii. If the value of such SIM's is includible in the taxable value of the services provided by them whether the benefit of exemption under

notification No 12/2003-ST can be extended to them.

- iii. Whether the benefit of cum tax price needs to be extended to the appellant for determining the service tax leviable
- iv. Whether interest is demandable and recoverable from the appellants
- v. Whether in facts and circumstances of this case penalty under Section 76 and Section 78 of the Finance Act, 1994 are justified.
- vi. Whether the adjustment of VAT paid on sale of SIM to its consumers is allowed.

6.0 Issue at 'i' is no longer resintegra and has been settled by the Apex Court in favour of revenue holding that value of SIM cards is part and parcel of the services rendered by the appellant. The relevant para of the Apex Court decisions are reproduced below:

"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 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. v.

Union of India and Others, reported in (2002) Vol. 126 STC 475 (Kerala) = 2006 (2) S.T.R. 567 (Ker.) = 2004 (177) E.L.T. 99 (Ker.), 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.

.....

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 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.”*

13. *It would be appropriate to mention that later on the said Escotel Mobile Communications Ltd. merged with the appellant company i.e. M/s. Idea Mobile Communication Ltd. The aforesaid decision of the Kerala High Court was under challenge in this Court in the case of BSNL v. Union of India reported in (2006) 3 SCC 1. The Supreme Court has framed the principal question to be decided in those appeals as to the nature of transaction by which mobile phone connections are enjoyed. The question framed was, is it a sale or is it a service or is it both. In paragraphs 86 and 87 of the Judgment the Supreme Court has held thus : -*

86. *In that case Escotel was admittedly engaged in selling cellular telephone instruments, SIM cards and other accessories and was also paying Central sales tax and sales tax under the Kerala General Sales Tax Act, 1963 as applicable. The question was one of the valuation of these goods. The State Sales Tax Authorities had sought to include the activation charges in the cost of the SIM card. It was contended by Escotel that the*

activation was part of the service on which service tax was being paid and could not be included within the purview of the sale. The Kerala High Court also dealt with the case of BPL, a service provider. According to BPL, it did not sell cellular telephones. As far as SIM cards were concerned, it was submitted that they had no sale value. A SIM card merely represented a means of the access and identified the subscribers. This was part of the service of a telephone connection. The Court rejected this submission finding that the SIM card was “goods” within the definition of the word in the State Sales Tax Act.

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 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’.

** * **

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.”

14. In paragraph 88 this Court observed that no one denies the legislative competence of the 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 but that would not in any manner allow the State to entrench upon the Union List and tax services by including the cost of such service in the value of the goods. It was also held that for the same reason the Centre cannot include the value of the SIM cards, if they are found ultimately to be goods, in the cost of the service. Consequently, the Supreme Court after allowing the appeals filed by Bharat Sanchar Nigam Ltd. and Escotel remanded 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 that judgment.

15. As against the order passed by the adjudicating authority, the appellant assessee took up the matter in appeal before the Commissioner of Central Excise &

Customs, Cochin. The appellate authority upheld the findings of the adjudicating authority. The assessee took up the matter before the CESTAT, Bangalore. The CESTAT vide its order dated 25-5-2006 held that the levy of service tax as demanded is not sustainable for the reason that the assessee had already paid the sales tax and therefore it follows that service tax is not leviable on the item on which sales tax has been collected.

16. Being aggrieved by the aforesaid order dated 25-5-2006, an appeal was filed before the Kerala High Court by the department, which was disposed of by the impugned order dated 4-9-2009 [2010 (19) S.T.R. 18 (Ker.)].

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 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.”

7.1 In respect of the issue at ‘ii’, learned counsel has argued that benefit of the notification No 12/2003-ST should be available to them. In his view all the conditions of sale are fulfilled and the value of the SIM separately shown as required for admissibility of the said exemption. He relied upon the Salmond on Jurisprudence, 12th Edition 2018, at page no 277, it has been stated *“In common law a bailee is one who is given possession of goods on the understanding that he is to deliver them in specie to the bailer or at the bailers directions. Such a person acquires possession of the goods in law as well as in fact.”* In his view there is actual transfer of possession of the SIMs and hence should be treated as sale as per section 2(h) of the Central Excise Act, 1944. For ease of reference section 2(h) of Central Excise Act, 1944 is reproduced below:

“2(h) ‘sale’ and ‘purchase’, With their grammatical variations and cognate expressions means any transfer of the possession of goods by one person to another in ordinary course of trade or business for cash or deferred payment or other valuable consideration.”

The above definition needs to be understood in the context in which the same has been made. The said

definition refers to sale and purchase of the goods for the purpose of levy of Central Excise Duty, in which there is transfer of possession of goods. Under the Central Excise Act, 1944, there are number of situations where there is transfer in possession of the goods but such transfer does not amount to sale. One such situation is wherein the possession in goods is transferred by the principle to the job worker for further working and return back do such transfer of possession amounts to sale where the condition for transfer of possession is return after job working. When the condition of transfer of possession is that there is no transfer in property either immediately or on deferred payment, there is no sale in terms of Central Excise Act, 1944.

7.2 The term possession cannot be interpreted in isolation. Possession implies both intent to posses and control. Possession without both the ingredients present cannot be effective possession. It cannot be the case that consumer, of telephony services provided by the appellant had the intent to possess the said SIM. The intent of the consumer is to avail the telephony service. Further even the appellant does not have any intent to transfer the property in the said SIM's to the consumer as is evident from the sale invoices. Since there was no intent to transfer the property in the said SIM's by the

appellant to consumer either on the date of transference of possession or thereafter, mere transfer of possession cannot be held to be said to be sale within the meaning of Section 2(h) as claimed by the Appellants. The reference made by the counsel to the Salmon's, and argument that on such transfer of possession, the possessor holds the goods on the bailment, is improper, because in case of bailment the transfer of possession is with ultimate intention of transfer of property in goods or for return of the goods after expiry of the period of bailment. To a specific query made by the bench with regards the return of the SIM cards by the consumers on termination of the services being provided by the appellants, learned counsel agreed in no case there was such return. Thus transfer of possession in such case wherein there is no ultimate transfer of property to receiver or return of the goods, such transaction cannot be one of transfer of possession on bailment. Even otherwise a contract of bailment with a restriction on right to use cannot be considered as transfer of possession. It is also a settled law that every contract of bailment is not a contract for sale of the goods. Thus we are not in position to agree with the submissions made by the Appellant in this respect.

7.3 The expression sale should have to be examined with reference to the sale invoices prepared by the appellants themselves. Sample invoices in this respect are reproduced below:

Ans - 8

129-140

Invoice

To : MERCHANT & SONS
103A, Plot No.54, Newtown villa,
54 Chappel Road, Bandra W,
mumbai - 400050

CS No. : WAA/2006/CS04/7989
Date : 05/09/2006

Bank Name : *
Chq / DD No. :

Sr.	Item Name (Item Group) Description	Basic	Service Tax	Qty.	Amt.
1	RPSM1006(H3) (Prepaid) PREPAID 16K SIM H3 899120001273359006 1)To 899120001273359505	70.76000	2.83000	500	36795.00

- The property in SIM card would remain vested with VIL and there is no transfer of property or right to use SIM cards to any person including subscribers.

- For item "Refil Slips, Scratch Cards and eTopUp" 12.36% service tax (inclusive of Education Cess of 3%) is being charged

- Service Tax is on Total Maximum value.

E. & O.E. Grand Total 111: 36,795.00

STC :- AAACH5332BST001

Prepared By: Shabana Upade
Remarks:

131

Invoice

To : M/s ROOPAM TRADERS
 Vikant Villa, Bunglow No.1,
 Ghatia Village Rd, Near Maltri Park
 Chembur, MUMBAI - 400071

CS No. : WAA/2007/CS04/19997
Date : 01/09/2007

Bank Name :
Chq / DD No. :
Mobile Nos. :

Sr.	Item Name (Item Group) Description	Basic	Service Tax	Qty.	Amt.
1	RPSM1006(H7) (Prepaid) PREPAID 16K SIM H7 899120001673047581 1)To 899120001673048080	70.76000	2.83000	500	36795.00

- The property in SIM card would remain vested with VIL and there is no transfer of property or right to use SIM cards to any person including subscribers.

- For item "Refil Slips, Scratch Cards and eTopUp" 12.36% service tax (inclusive of Education Cess of 3%) is being charged

- Service Tax is on Total Maximum value.

E. & O.E.

Grand Total 111: 36,795.00

STC :- AAACH5332BST001

Prepared By: Rutuja Mahadik

Remarks:

7.4 From the above invoices it is quite evident that appellants have themselves on the invoice declared that there is no transfer of property or rights to use SIM cards. At all the time the property in SIM vests with the

appellants. Thus when from start to end if there is no transfer in the property, then handing over of the SIM to the customer cannot be for any other purpose other than as part of supply of services. There seem to be no transfer of possession as appellants do not permit any right in the said SIM's to the consumers at any time. The transfer of possession as referred in section 2(h) of the Central Excise Act, 1944 do not bar the right of usage of the said goods by the receiver. Receiver has right of usage of the said goods. The definition as per section 2(h) of the Central Excise Act, 1944 provides for transfer of possession for cash or deferred payment and such transfer of possession is unconditional. When appellants by way of sale invoice bar the right of usage, then there cannot be any transfer of goods as consumer holds the goods for the purpose of the appellants i.e. for the services to be provided by the appellants. Thus in fact the consumer is only receiving the services from the appellant, and the SIM is only a medium for providing the said services. Since SIM is only a medium for providing the services, it has been held to have no intrinsic value. Similar view has been expressed by the Kerala High Court in case of Idea Mobile Communication

“2. The question involved is whether the value of SIM cards sold by the respondent 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 telecommunication service or it is taxable as sale of goods under the Sales Tax Act. Different mobile operators took divergent stand in the matter before the departmental authorities. While BPL Mobile Services, a leading mobile operator, took the stand that SIM card has no intrinsic sale value and is supplied to the customers for providing mobile service and they paid service tax including value of SIM card, respondent herein paid sales tax on the sale price of SIM cards and started remitting service tax only on activation charges. BSNL also took the stand similar to BPL Cellular services and their sales tax assessment on the value of SIM cards upheld by this Court was taken up to Supreme Court which led to judgment in BSNL's case, 2006 (2) S.T.R. 161 (S.C.) = A.I.R. 2006 S.C. 1383. The Supreme Court elaborately discussed the issues raised and in paragraph 86, the contention of the respondent that they have paid sales tax on sale price of SIM card is recorded by the Supreme Court. However, the Supreme Court in the final judgment left open the issue to be considered by the assessing authorities under the Sales Tax Act. It was further discussed in paragraph 92 of the judgment that the nature of transaction involved in providing 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. Since the sales tax authorities under the KGST Act did not show any anxiety to decide the matter after remand by of the Supreme Court, we issued specific direction for compliance with the judgment. Special Government Pleader produced orders of the Asst. Commissioner of Commercial Taxes, Special

Circle, Thiruvananthapuram, wherein he has conceded the position canvassed by BSNL and BPL Mobile services that SIM card has no intrinsic sale value and it is supplied to customers to provide telephone service to them. So much so, the assessing authority under the Sales Tax Act dropped the proceedings to levy sales tax on SIM cards. So far as the respondent is concerned, it is not known whether returns are filed conceding turnover and liability under the Act, or whether assessments are pending. In any case, the assessing officer in the case of respondent cannot take a stand different from the stand taken by another assessing officer in the case of BSNL and BPL mobile services. Consequently, no assessment for sales tax could be made on the sale value of SIM cards supplied by the respondent to their customers, no matter whether they have filed returns and remitted tax or not. There is no need for us to consider the legality or otherwise of the proceedings pertaining to respondent pending before the Sales Tax authorities. If tax is wrongly remitted, it is for them to claim refund and if tax remitted is collected tax, it has to be forfeited under Section 46(A)(1) of the KGST Act, and customers can claim refund. Leaving open this issue, we proceed to decide the correctness of the Tribunal's order which is under challenge.

3. In the BSNL case 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 description of telegraph authority defined under Section 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 it's 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. Since the dispute was bona fide and it is settled based on the observations of the Supreme Court, we feel levy of penalty under Section 73 of the Finance Act, 1994 was

not tenable. While upholding the demand of service tax on value of SIM cards and the interest thereon, we hold that no penalty could be levied on the respondent under Section 73 of the Act.”

7.5 Thus we are not in position to agree with the contention of the Appellant that any sale of SIM cards independently have taken place in the process of providing the taxable service. The supply of SIM cards is integral with provision of the taxable service and without the said SIM cards the provisioning of this taxable service is impossible. Accordingly we are not in position to extend the benefit of Notification No 12/2003-ST to the Appellants.

8.1 Appellants have claimed that the quantum of tax should have been computed by treating the value of SIM claim by them as cum tax price. Hon'ble Supreme Court has in the case Dugar Tetenal Ltd [2008 (224) ELT 180 (SC)] has held in favour of allowing such benefit. The relevant excerpts from the decision are reproduced below:

The Tribunal accepted this plea of the assessee relying upon the decision of the Tribunal in the case of Shri Chakra Tyres Ltd (supra). The view taken in Shri Chakra Tyres Ltd. (supra) was affirmed by this Court in Commissioner of Central Excise, Delhi v. Maruti Udyog Limited, 2002 (3) SCC 547. Learned counsel for the Revenue has relied upon the judgment of this Court in

Asstt. Collector of Central Excise v. Bata India Limited, 1996 (4) SCC 563. This judgment was duly considered in *Maruti Udyog Limited (supra)*. After considering the case in *Bata India Limited (supra)* this Court observed in para 5 as under :-

“5. A reading of the aforesaid Section clearly indicates that the wholesale price which is charged is deemed to be the value for the purpose of levy of excise duty, but the element of excise duty, sales tax, or other taxes which is included in the wholesale price is to be excluded in arriving at the excisable value. This Section has been so construed by this Court in *Asstt. Collector of Central Excise and Ors v. Bata India Ltd.*, 1996 (4) SCC 563, and it is thus clear that when cum-duty price is charged, then in arriving at the excisable value of the goods the element of duty which is payable has to be excluded. The Tribunal has, therefore, rightly proceeded on the basis that the amount realised by the respondent from the sale of scrap has to be regarded as a normal wholesale price and in determining the value on which excise duty is payable the element of excise duty which must be regarded as having been incorporated in the sale price, must be excluded. There is nothing to show that once the demand was raised by the Department, the respondent sought to recover the same from the purchaser of scrap. The facts indicate that after the sale transaction was completed, the purchaser was under no obligation to pay any extra amount to the seller, namely, the respondent. In such a transaction, it is the seller who takes on the obligation of paying all taxes on the goods sold and in such a case the said taxes on the goods sold are to be deducted under Section 4(4)(d)(ii) and this is precisely what has been directed by the Tribunal. There is also nothing to show that the sale price was not cum-duty.”

8.2 Appellants have in their submissions relied upon various decisions and authorities in support of allowing the said contention. [Advantage Media Consultant [2008 (10) STR 449 (T-Kol) affirmed by Apex Court at [2009 (14) STR J49 (SC)] and Bharti Airtel Ltd [2009-TIOL-2616-CESTAT-MUM]. Following the said decisions we are of the view that benefit of cum tax value should have been allowed in this case. Since Commissioner has not rendered any finding in this respect, the matter needs to be remanded for consideration of this plea and determining the tax liability and penalties.

9.0 In their submissions have claimed against the demand of interest from them. However we are not in agreement with said contention because demand of interest is a natural consequence on account of delay in payment of the tax. Since appellants have short paid the tax, interest is demandable from them under Section 75 of the Finance Act, 1994. From plain reading of the above provision it is quite evident that interest is compensatory in nature and is required to be paid by the tax payer in case of any default in payment of tax for the period of default. Issue with regards to statutory levy of interest is no longer res integra. Bombay High Court has in case of Commissioner Of Central Excise vs

Padmashri V.V. Patil Sahakari [2007 (215) ELT 23 Bom]
has held as follows:

“10. So far as interest Under Section 11AB is concerned, on reference to text of Section 11AB, it is evident that there is no discretion regarding the rate of interest. Language of Section 11AB(1) is clear. The interest has to be at the rate not below 10% and not exceeding 36% p.a. The actual rate of interest applicable from time to time by fluctuations between 10% to 36% is as determined by the Central Government by notification in the official gazette from time to time. There would be discretion, if at all the same is incorporated in such notification in the gazette by which rates of interest chargeable Under Section 11AB are declared.

The second aspect would be whether there is any discretion not to charge the interest Under Section 11AB at all and we are afraid, language of Section 11AB is unambiguous. The person, who is liable to pay duty short levied / short paid / non levied / unpaid etc., is liable to pay interest at the rate as may be determined by the Central Government from time to time. This is evident from the opening part of Sub-section (1) of Section 11, which runs thus:

Where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, the person, who is liable to pay duty as determined under Sub-section (2) or has paid the duty under Sub-section (2B) of Section 11A, shall in addition to the duty be liable to pay interest at such rate....

The terminal part in the quotation above, which is couched with the words "shall" and "be liable" clearly indicates that there is no option. As discussed earlier, this is a civil liability of the assessee, who has retained

the amount of public exchequer with himself and which ought to have gone in the pockets of the Central Government much earlier. Upon reading Section 11AB together with Sections 11A and 11AA, we are of firm view that interest on the duty evaded is payable and the same is compulsory and even though the evasion of duty is not mala fide or intentional.”

10.1 Penalty under Section 76 is for the delay in payment of service tax, Hon'ble Kerala High Court in the case of *Commissioner of Central Excise vs. Krishna Poduval* – 2006 (1) STR 185 (Ker.) has held as reproduced below:-

11. The penalty imposable under S. 76 is for failure to pay service tax by the person liable to pay the same in accordance with the provisions of S. 68 and the Rules made thereunder, whereas S. 78 relates to penalty for suppression of the value of taxable service. Of course these two offences may arise in the course of the same transaction, or from the same act of the person concerned. But we are of opinion that the incidents of imposition of penalty are distinct and separate and even if the offences are committed in the course of same transaction or arises out of the same act, the penalty is imposable for ingredients of both the offences. There can be a situation where even without suppressing value of taxable service, the person liable to pay service tax fails to pay. Therefore, penalty can certainly be imposed on erring persons under both the above Sections, especially since the ingredients of the two offences are distinct and separate. Perhaps invoking powers under S. 80 of the Finance Act, the appropriate authority could have decided not to impose penalty on the assessee if the

assessee proved that there was reasonable cause for the said failure in respect of one or both of the offences. However, no circumstances are either pleaded or proved for invocation of the said Section also. In any event we are not satisfied that an assessee who is guilty of suppression deserves such sympathy. As such, we are of opinion that the learned Single Judge was not correct in directing the 1st appellant to modify the demand withdrawing penalty under S. 76. Therefore, the judgment of the learned Single Judge, to the extent it directs the first appellant to modify Ext. P1 by withdrawing penalty levied under S. 76, is liable to be set aside and we do so. The cumulative result of the above findings would be that the Writ Petitions are liable to be dismissed and we do so. However, we do not make any order as to costs.

10.2 Thus penalties imposed under Section 76 of the Finance Act, 1994 are justified and we do not find any reason to alter them. Since the penalties imposed under Section 76 are upheld, we do not find justification in separate penalties imposed under Section 78. Moreover, when all the demands for taxes have been made within normal period. Accordingly penalties under Section 78 are set aside. Same view has been expressed by Hon'ble High Court in *Idea Mobile Communication Ltd.* (supra).

11.0 Now coming to the last question with regards to adjustment of the VAT paid towards the demand for Service Tax, we are not in position to permit or allow for

such adjustment or uphold such contention. VAT is levied under the State Act and Service Tax under the Central Act. Since both the authorities, under which Service Tax and VAT are levied are not the same, the tribunal being creature of the Central Act, would not be in position to determine such transfer and adjustment of VAT paid under State Act, towards the tax liability under a Central Act.

12.1 In view of above we remand the matter to adjudicating authority for determination of quantum of Service Tax payable after allowing the benefit of cum tax value to the appellant.

12.2 We waive of the penalties imposed under Section 78 of the Finance Act, 1994.

12.3 On all other issue we hold against the appellant.

12.4 The appeal is disposed in above terms.

(Pronounced in court on 2.11.2018)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)