

BEFORE DELHI VALUE ADDED TAX, APPELLATE TRIBUNAL DELHI
Sh. Narinder Kumar, Member (Judicial)

Appeal Nos. : 613-620/ATVAT/2012
Appeal Nos. : 620(I) to
620(VIII)/ATVAT/2012
Date of Decision: 28/12/2022

M/s. Vodafone Mobile Services Ltd.,
C-45, Okhla Industrial Area,
Okhla, Phase-II,
New Delhi – 110020.

.....Appellant

v.

Commissioner of Trade & Taxes, Delhi

.....Respondent

Counsel representing the Appellant : Sh. Atul Gupta.
Counsel representing the Revenue : Sh. P. Tara.

JUDGMENT

1. The above captioned appeals have been filed challenging impugned orders dated 23/04/2012 passed by Learned OHA-Special Commissioner-III.

Appeal Nos. 613-620/2012 (Tax Period - 2006-2007)

Under challenge are default assessments of tax and interest dated 27/07/2010 and 29/07/2010 framed by learned Assessing Authority for all the four quarters of 2006-07.



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Separate assessments dated 02/08/2010 imposing penalty, for each quarter of the aforesaid period were also framed. *Same are also under challenge.*

2. Objections were filed against default assessments of tax, interest and penalty.
3. Vide impugned order, learned OHA disposed of the objections filed by the dealer-assessee-objector u/s 74 of DVAT Act.

It may be mentioned that in the order objections pertaining to as regards one issue i.e. of rejection of revised return by the Assessing Authority, Learned OHA was of the view that objector deserved a fresh opportunity to present documents before the Assessing Authority. Accordingly, Assessing Authority was directed to consider the matter and allow benefit in accordance with law, as regards rejection of revised return.

4. Assessing Authority had raised demands for the four quarters of the aforesaid tax period, by observing in the manner as:

Quarter-I

Dealer is engaged in the development of telecommunication network, providing land line phone service, mobile telephone service under GSM based technology which was introduced in Janurary-2001. In the process dealer supplies to the user handset, SIM cards known as Subscriber's Identification Modules, accessories etc dealer charges for the activation of the connection besides rental charges, charges for talk time, internet usage, security etc also sells prepaid cards, cash cards, recharge coupons though outlets.



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In providing the above service there is transfer of ownership of goods of SIM card, prepaid V.C.C, Recharge/cash coupons and telephone instruments. Instruments are purchased by the user dealer is supplying SIM card to user and charging activation charge which not only includes the activation charge but the price of the SIM card also the contention of the dealer is that it is a service and not a sale, cannot be accepted since SIM is a transfer of property in goods and is a sale SIM service that is inserted in any GSM based Mobile phones. It is a device to activate the mobile phone. If once a phone is activated though SIM, SIM card can also be transferred to any other GSM bases mobile phones.

It can also be used other than by the purchaser of SIM card as soon as the SIM card is taken out, the mobile phone start working in the various pronouncements by the Hon'ble Court, the SIM card has been held to be goods supplying of SIM card along with activation chargers, automatically includes the sales price of SIM card. The SIM card is sold by the license holder (Dealer) after purchase, to the subscriber though a chain of wholesalers, stockist, dealer, retails. If SIM card purchased by any of the above are lost, there is no provision for refunds, and the purchasing dealer loss the value of card for replacement or duplicate SIM card, one has to pay separately by charging activation charges and providing a SIM card along with it becomes a composite contract of sale and service the component of sale is the price of SIM card.

In view of the above judgment SIM card sold by the dealer have been taxed @ 4% the dealer has filed a written reply stating the quantity and purchase turnover of the SIM cards during the year 2006-07. The purchases turnover have been enhanced by 10% as profit margin to determine the sale price and taxed accordingly. The details of the quantity and price of the SIM card sold during the year 2006-07 is given as under:-



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Number of connection activated during 2006-07 and sale price of SIM Cards:-

April-2006 to June-2006

Sl. No.	Months	Quantity Activated	Average Purchase price per unit	Total Purchase price	Sale price(Purchase price + 10%)
1.	April-2006	135000	18.88	26,06,763	28,67,439
2.	May-2006	80000	18.88	1,93,79,86	21,31,785
3.	June-2006	145000	18.88	26,49,750	29,14,725
	Total	360000		71,94,499	79,13,949

The dealer is hereby directed to pay tax of an amount of Rs. 28601197/- (Two crore eighty six lacs one thousand one hundred ninety seven only) and furnish details of such payment in Form DVAT-27A along with proof of payment to the undersigned on or before 27-08-2010 for the following tax period:

Tax Period	Amount(Rs.)		
	Tax	Interest	Total
First Quarter 2006-07	1,78,75,748	1,07,25,449	2,86,01,197

Quarter-II

Dealer is engaged in the development of telecommunication network, providing land line phone service, mobile telephone service under GSM based technology which was introduced in January-2001. In the process dealer supplies to the user handset, SIM cards known as Subscriber's Identification Modules, accessories etc dealer charges for the activation of



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the connection besides rental charges, charges for talk time, internet usage, security etc also sells prepaid cards, cash cards, recharge coupons through outlets.

In providing the above service there is transfer of ownership of goods of SIM card, prepaid V.C.C, Recharge/cash coupons and telephone instruments. Instruments are purchased by the user dealer is supplying SIM card to user and charging activation charge which not only includes the activation charge but the price of the SIM card also the contention of the dealer is that it is a service and not a sale, cannot be accepted since SIM is a transfer of property in goods and is a sale SIM service that is inserted in any GSM based Mobile phones. It is a device to activate the mobile phone. If once a phone is activated through SIM, SIM card can also be transferred to any other GSM based mobile phones.

It can also be used other than by the purchaser of SIM card as soon as the SIM card is taken out, the mobile phone start working in the various pronouncements by the Hon'ble Court, the SIM card has been held to be goods supplying of SIM card along with activation charges, automatically includes the sales price of SIM card. The SIM card is sold by the license holder (Dealer) after purchase, to the subscriber through a chain of wholesalers, stockist, dealer, retails. If SIM card purchased by any of the above are lost, there is no provision for refunds, and the purchasing dealer loss the value of card for replacement or duplicate SIM card, one has to pay separately by charging activation charges and providing a SIM card along with it becomes a composite contract of sale and service the component of sale is the price of SIM card.

In view of the above judgment SIM card sold by the dealer have been taxed @ 4% the dealer has filed a written reply stating the quantity and purchase turnover of the SIM cards during the year 2006-07. The purchases turnover have been enhanced by 10% as profit margin to determine the sale price and taxed accordingly. The details of the quantity and price



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of the SIM card sold during the year 2006-07 is given as under:-

Number of connection activated during 2006-07 and sale price of SIM Cards:-

July-2006 to September-2006

Sl. No.	Months	Quantity Activated	Average Purchase price per unit	Total Purchase price	Sale price(Purchase price + 10%)
1.	July-2006	183000	18.88	37,44,200	41,18,620
2.	Aug-2006	248500	18.88	54,08,144	59,48,958
3.	Sept-2006	176450	18.88	32,07,617	35,28,379
	Total	607950		1,23,59,961	1,35,95,957

The dealer is hereby directed to pay tax of an amount of Rs. 2,12,16,983/- (Two crore twelve lacs sixteen thousand nine hundred eighty three only) and furnish details of such payment in Form DVAT-27A along with proof of payment to the undersigned on or before 29-08-2010 for the following tax period:

Tax Period	Amount(Rs.)		
	Tax	Interest	Total
Second Quarter 2006-07	1,35,74,406	76,42,577	2,12,16,983

Quarter-III

Dealer is engaged in the development of telecommunication network, providing land line phone service, mobile telephone service under GSM based technology which was introduced



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in January-2001. In the process dealer supplies to the user handset, SIM cards known as Subscriber's Identification Modules, accessories etc dealer charges for the activation of the connection besides rental charges, charges for talk time, internet usage, security etc also sells prepaid cards, cash cards, recharge coupons through outlets.

In providing the above service there is transfer of ownership of goods of SIM card, prepaid V.C.C, Recharge/cash coupons and telephone instruments. Instruments are purchased by the user dealer is supplying SIM card to user and charging activation charge which not only includes the activation charge but the price of the SIM card also the contention of the dealer is that it is a service and not a sale, cannot be accepted since SIM is a transfer of property in goods and is a sale SIM service that is inserted in any GSM based Mobile phones. It is a device to activate the mobile phone. If once a phone is activated through SIM, SIM card can also be transferred to any other GSM based mobile phones.

It can also be used other than by the purchaser of SIM card as soon as the SIM card is taken out, the mobile phone start working in the various pronouncements by the Hon'ble Court, the SIM card has been held to be goods supplying of SIM card along with activation charges, automatically includes the sales price of SIM card. The SIM card is sold by the license holder (Dealer) after purchase, to the subscriber through a chain of wholesalers, stockist, dealer, retails. If SIM card purchased by any of the above are lost, there is no provision for refunds, and the purchasing dealer loss the value of card for replacement or duplicate SIM card, one has to pay separately by charging activation charges and providing a SIM card along with it becomes a composite contract of sale and service the component of sale is the price of SIM card.

In view of the above judgment SIM card sold by the dealer have been taxed @ 4% the dealer has filed a written reply stating the quantity and purchase turnover of the SIM cards



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during the year 2006-07. The purchases turnover have been enhanced by 10% as profit margin to determine the sale price and taxed accordingly. The details of the quantity and price of the SIM card sold during the year 2006-07 is given as under:-

Number of connection activated during 2006-07 and sale price of SIM Cards:-

October-2006 to December-2006

Sl. No.	Months	Quantity Activated	Average Purchase price per unit	Total Purchase price	Sale price(Purchase price + 10%)
1.	Oct-2006	236711	18.88	43,11,463	47,42,609
2.	Nov-2006	265000	18.88	55,34,750	60,88,225
3.	Dec-2006	406000	18.88	69,77,740	76,75,514
	Total	907711		1,68,23,953	1,85,06,348

The dealer is hereby directed to pay tax of an amount of Rs. 2,35,71,291 /- (Two crore thirty five lacs seventy one thousand two hundred ninety one only) and furnish details of such payment in Form DVAT-27A along with proof of payment to the undersigned on or before 29-08-2010 for the following tax period:

Tax Period	Amount(Rs.)		
	Tax	Interest	Total
Third Quarter 2006-07	1,54,46,178	81,25,113	2,35,71,291



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Quarter-IV

Dealer is engaged in the development of telecommunication network, providing land line phone service, mobile telephone service under GSM based technology which was introduced in January-2001. In the process dealer supplies to the user handset, SIM cards known as Subscriber's Identification Modules, accessories etc dealer charges for the activation of the connection besides rental charges, charges for talk time, internet usage, security etc also sells prepaid cards, cash cards, recharge coupons through outlets.

In providing the above service there is transfer of ownership of goods of SIM card, prepaid V.C.C, Recharge/cash coupons and telephone instruments. Instruments are purchased by the user dealer is supplying SIM card to user and charging activation charge which not only includes the activation charge but the price of the SIM card also the contention of the dealer is that it is a service and not a sale, cannot be accepted since SIM is a transfer of property in goods and is a sale SIM service that is inserted in any GSM based Mobile phones. It is a device to activate the mobile phone. If once a phone is activated through SIM, SIM card can also be transferred to any other GSM based mobile phones.

It can also be used other than by the purchaser of SIM card as soon as the SIM card is taken out, the mobile phone start working in the various pronouncements by the Hon'ble Court, the SIM card has been held to be goods supplying of SIM card along with activation chargers, automatically includes the sales price of SIM card. The SIM card is sold by the license holder (Dealer) after purchase, to the subscriber through a chain of wholesalers, stockist, dealer, retails. If SIM card purchased by any of the above are lost, there is no provision for refunds, and the purchasing dealer loss the value of card for replacement or duplicate SIM card, one has to pay separately by charging activation charges and providing a SIM card along with it becomes a composite

contract of sale and service the component of sale is the price of SIM card.

In view of the above judgment SIM card sold by the dealer have been taxed @ 4% the dealer has filed a written reply stating the quantity and purchase turnover of the SIM cards during the year 2006-07. The purchases turnover have been enhanced by 10% as profit margin to determine the sale price and taxed accordingly. The details of the quantity and price of the SIM card sold during the year 2006-07 is given as under:-

Number of connection activated during 2006-07 and sale price of SIM Cards:-

January-2007 to March-2007

Sl. No.	Months	Quantity Activated	Average Purchase price per unit	Total Purchase price	Sale price(Purchase price + 10%)
1.	Jan-2007	530000	18.88	97,88,000	1,07,66,800
2.	Feb-2007	312000	18.88	64,90,700	71,39,770
3.	Mar-2007	467000	18.88	74,72,910	82,20,201
	Total	1309000		2,37,51,610	2,61,26,771

The dealer is hereby directed to pay tax of an amount of Rs. 2,86,54,024 /- (Two crore eighty six lacs fifty four thousand twenty four only) and furnish details of such payment in Form DVAT-27A along with proof of payment to the undersigned on or before 29-08-2010 for the following tax period:

Tax Period	Amount(Rs.)		
	Tax	Interest	Total
Fourth Quarter 2006-07	1,92,43,273	94,10,751	2,86,54,024

5. Vide separate assessments, framed u/s 33 of DVAT Act, Learned Assessing Authority imposed penalty u/s 86 of DVAT Act while observing in the manner as:

“Quarter-I

The dealer vide default assessment notice under reference No.040261511011 dated 27-07-2010 has been assessed for a deficiency of tax of Rs. 1,78,75,748/-. The deficiency of tax thus arised is assessed to penalty under section 86(12) of DVAT Act, 2004.

Now, therefore the dealer is hereby directed to pay penalty of an amount of rupees 3,73,60,313/- (Three crore seventy three lacs sixty thousand three hundred thirteen only) and furnish details of such payment in Form DVAT-27A along with proof of payment to the undersigned on or before 02-09-2010.

Quarter-II

The dealer vide default assessment notice under reference No.040269221011 dated 29-07-2010 has been assessed for a deficiency of tax of Rs. 1,35,74,406/-. The deficiency of tax thus arised is assessed to penalty under section 86(12) of DVAT Act, 2004.

Now, therefore the dealer is hereby directed to pay penalty of an amount of rupees 2,66,05,835/- (Two crore sixty six lacs five thousand eight hundred thirty five only) and furnish details of such payment in Form DVAT-27A along with proof of payment to the undersigned on or before 02-09-2010.



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Quarter-III

The dealer vide default assessment notice under reference No.040269231011 dated 29-07-2010 has been assessed for a deficiency of tax of Rs. 1,54,46,178/-. The deficiency of tax thus arised is assessed to penalty under section 86(12) of DVAT Act, 2004.

Now, therefore the dealer is hereby directed to pay penalty of an amount of rupees 2,82,66,505 /- (Two crore eighty two lacs sixty six thousand five hundred five only) and furnish details of such payment in Form DVAT-27A along with proof of payment to the undersigned on or before 02-09-2010.

Quarter-IV

The dealer vide default assessment notice under reference No.040269241011 dated 29-07-2010 has been assessed for a deficiency of tax of Rs. 1,92,43,273/-. The deficiency of tax thus arised is assessed to penalty under section 86(12) of DVAT Act, 2004.

Now, therefore the dealer is hereby directed to pay penalty of an amount of rupees 3,27,13,564/- (Three crore twenty seven lacs thirteen thousand five hundred sixty four only) and furnish details of such payment in Form DVAT-27A along with proof of payment to the undersigned on or before 02-09-2010."

6. While disposing of objections, Learned OHA observed in the manner as:

"Taxability of SIM Card:

For Subscriber Identification Module (SIM), the money that is charged from the subscriber by the service provider i.e. MTNL is on account of activation fees. SIM cards are merely identification modules. They help in the subscriber identification based on which the complete system of



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telephony operates. This is the entry point into a service provider's network. The complete network would fail if the subscriber was not identified by the network. The principle has been laid down by the Hon'ble Supreme Court in CWP No. 183/2003, BSNL V/s Union of India dated 02.03.06 wherein the court has held that:

"If the SIM card is not sold by the assessee to the subscribers but is merely part of the service rendered by the service providers then 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 seaport object of sale it would be open to the Sales Tax Authorities to levy sales tax thereon."

I would go by the principles laid down by the Hon'ble Supreme Court in the above said judgment. The assessing authority is directed to ascertain the intention between the parties and then arrive at the conclusion.

Transfer of Right to Use/Transfer of Right to Use/rent charges (Towersharing):

The objector company is sharing the telephone tower with RTIL for transmission of the telephone signals and received rent for rendering transmission tower facility. Such consideration comes under the definition of sale as enshrined in Section 2(zc)(vi) of DVAT Act, 2004 as 'Sale with its grammatical variations and cognate expression means any transfer of property on goods by one person to another for cash or for deferred payment or for other valuable consideration (not including a grant or subvention payment made by any government agency or department whether of the central government or of any State Govt. to another) and includes-

"(vi) Transfer of the right to use any goods for any purpose (whether or not for specific period) for cash, deferred payment of other valuable consideration."

Therefore, tax levied on this account is upheld. The objection on this issue is disallowed.

So far as value added service are considered, the same falls under the category of goods as such products are part and parcel of telecom products and its ancillary having the element of both goods and services, therefore objection raised in this regard is also disallowed.

Taxability of Broadband services:

In the matter of Bharti Airtel Ltd. v/s State of Karnataka & othr decided by the Karnataka High Court (2011-ST2-GJX-0395-KAR), the Hon'ble Court has held that the light energy which is used as a carrier in telecommunication service for rendering service is covered by the Parliamentary legislation i.e. the Finance Act, 1994 read with Section 65(109a). It does not fall within entry 54 of List II of the Seventh Schedule. The light energy (artificially created light energy-ACLE) is one for of electromagnetic waves. It is not "goods" as defined in article 366(12) of the Constitution of India.

Accordingly, the objection on this aspect is allowed. The tax levied on this account by the VATO is set aside.

However, the assessing authority may re-assess the case if the issues covered by the present objections are decided by any superior court including Hon'ble Supreme Court in the manner different from the present."



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Appeal Nos. 620(I) to 620(VIII)

Tax Period (2007-2008)

7. The assessments for this tax period were framed by Learned Assessing Authority under Sections 32 and 33 of DVAT Act.
8. The demands came to be raised under the following heads:
 - i. SIM card sales
 - ii. Value added products
 - iii. Deemed sale because of transfer of right to use goods i.e. transmission of telephone signals by giving on rent its towers to other telecom companies by the dealer-appellant.

Penalties came to be levied u/s 86(10) of DVAT Act.

The demands raised towards tax, interest and penalty, as tabulated and reflected in the head note of the impugned order, are as under:

Amount in Dispute		
Period DVAT	Tax + Interest (Rs.)	Penalty (Rs.)
I Qtr.	81,00,362/-	1,12,29,543/-
II Qtr.	1,06,57,288/-	1,43,80,039/-
III Qtr.	1,25,24,885/-	1,64,36,767/-
IV Qtr.	1,30,01,661/-	1,65,81,570/-

Objections were filed u/s 74 of DVAT Act challenging four notices of default assessments of tax and interest and four separate assessments of penalty, pertaining to each quarter of the assessment year 2007-2008, were decided by Ld OIA on 23/04/2012.

9. Feeling aggrieved by the impugned orders, dealer filed present eight appeals.
10. Arguments heard in respect of all the 16 appeals. Files perused.

Discussion (as regards all the 16 appeals)

11. Case of the appellant-dealer, in brief, is that on 05/10/2001, Department of Telecommunication issued a license to the dealer-appellant u/s 4 of Indian Telegraph Act, 1885. Vide this license, the dealer was allowed to provide Telecommunication services. Accordingly, the appellant got engaged in the business of providing Telecommunication services. In the said process, appellant made available to the subscribers SIM card so as to enable the subscriber to connect to the telegraph network.

Further, it is case of the dealer-appellant that an agreement was arrived at between appellant and other service providers to share with each other tower facility and Passive Infrastructure.

As claimed, appellant has been providing certain Value Added Service to its customers which are termed as caller tunes services, blackberry services, mobile internet services, network support services and such like other services.



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As submitted on behalf of the appellant, the information transmitted by way of Value Added Service is Audio or visual, but only by means of Electro-magnetic waves. By way of these services, appellant transfers data to the customers or enables the customers to have access to the data in the network of the appellant.

12. As per case of the appellant, Value Added Services are not intended to be sold to the customer separately from the telecommunication service. The contention on behalf of the appellant is that Value Added Services are part of the telecommunication service provided by the appellant. It has also been submitted ~~that~~ on behalf of the appellant ~~is~~ that Value Added Services are not goods and rather, these are services.

Accordingly, it has been urged on behalf of the appellant that Value Added Services are not exigible to VAT. In support of this submission reliance has been placed on the following decisions:-

1. **Tata Consultancy Service v. State of Andhra Pradesh**, (2005) 1 SCC 308;
2. **Associated Cement Companies Ltd. v. Commissioner of Customs**, (2001) 4 SCC 593;
3. **Bharat Sanchar Nigam Ltd. & Anr. v. Union of India & Ors.**, (2006) 3 SCC 1;
4. **State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.**, AIR 1958 SC 560;
5. **BSNL v. State of Andhra Pradesh**, (2012) 25 STR 321;



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6. Indus Towers Ltd. v. Deputy Commissioner of Commercial Taxes, 2012 (56) VST 369 (Kar).

In BSNL's case (supra), Hon'ble High Court of Andhra Pradesh observed in the manner as:-

"Value added services, like ring tones and music downloads, are audio messages, and the manner of their transmission from the service provided to the subscriber, or from one subscriber to another, is by electro-magnetic waves. Wall paper, like SMS/text messages, are visual images. The process of transmission of voice messages is identical to the transmission of data in non-voice messages. Sounds or images are converted into electro-magnetic waves, transmitted through the network of cell towers and servers of the service provider, and are received by the person to whom it is intended in his handset.

The mobile handset is both a transmitter and a receiver. Information transmitted/ received by a mobile phone, be it audio or visual, is only by means of electro-magnetic waves. VAS involves only a transfer of data (textual, audio, visual, etc.) and/or accessibility (ability to access) of such data or content in the network of the service provider.

"Value added services" fall within the ambit of "telecommunication services" as defined in section 2(k) of the TRAI Act and section 65(109a) of the Finance Act, 1994. Ringtones, music downloads, wall paper, music clips, etc., fall within the definition of "development and supply of content" under section 65(36c) and constitute "taxable service" under section 65(105) (zzzb) of the Finance Act, 1994".

"Value added services, even if they are held to be software, do not constitute "goods" as they are not recorded in a physical medium before they are marketed or sold, but are merely transmitted through electromagnetic waves. The process of



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sending a signal is that it is superimposed on a carrier current or wave by means of a process called modulation.

Signal modulation can either be analog or digital. (Bharat Sanchar Nigam Ltd. [2006] 3 VST 95 (SC); [2006] 145 STC 91 (SC); [2006] 282 ITR 273 (SC); [2006] 3 SCC 1; David Gilles and Roger Marshal: Telecommunication Law: Butterworths). The transfer of software to the subscriber or to his mobile instrument takes place only telegraphically by the use and by means of a telegraph line/electro-magnetic waves. The transfer does not take place by means of downloading the software from a physical medium, (i.e., floppy disk etc.,) provided by the service provider, into the subscriber's instrument. All value added services involve transmission and receipt of messages, i.e., textual, audio and visual data.

The service providers carry messages. They are only carriers, and do not have property over the message they carry. This method of carriage of the message is carriage of goods, and not a transfer of the right to use goods, if any. (Bharat Sanchar Nigam Ltd. [2006] 3 VST 95 (SC); [2006] 145 STC 91 (SC); [2006] 282 ITR 273 (SC); [2006] 3 SC 1). Transmission messages, by the service provider to the subscriber, is by means of electro-magnetic waves. A subscriber to a telephone service cannot, reasonably, be taken to have intended to purchase or obtain any right to use electro-magnetic waves or radio frequencies when a telephone connection is given. Nor does the subscriber intend to use any portion of the wiring, the cable, the satellite, the telephone exchange, etc. (Bharat Sanchar Nigam Ltd. [2006] 3 VST 95 (SC); [2006] 145 STC 91 (SC); [2006] 282 ITR 273 (SC); [2006] 3 SCC 1).

“Value added services” are not recorded in a physical medium before they are marketed. They are merely messages carried by means of electromagnetic waves. Both “software” which is not recorded on a physical medium before it is marketed, and “electro-magnetic waves” through which audio and visual messages/ signals are transmitted, are not “goods” liable to tax under the Act. Levy of tax on value added



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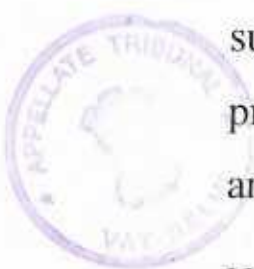
services, either under section 4(1) or 4(8) of the Act, by the revisional/appellate/assessing authorities concerned is without jurisdiction and is legal.”

On behalf of the Revenue, it is not being disputed that decisions in Indus towers Ltd's case (supra) by Hon'ble High Court of Karnataka and **State of Andhra Pradesh v. BSNL**, 2012 (25) STR 321 by Hon'ble High Court of Andhra Pradesh on this point are against the Revenue.

In Indus towers Ltd's case (supra), it was observed by Hon'ble High Court that the entire infrastructure/instruments/appliances and exchange are in the physical control and possession of the assessee/service provider at all times and there is neither any physical transfer of such goods nor any transfer of right to use such equipment or apparatus.

In **State of Andhra Pradesh v. BSNL**, 2012 (25) STR 321, Hon'ble High Court observed that “Value Added Services”, even if they are held to be software, do not constitute goods as they are not recorded in a physical medium before they are marketed or sold, but are merely transmitted through electromagnetic waves. The process of sending a signal is that it is superimposed on a carrier current or wave by means of a process called modulation. Signal modulation can either be analog or digital.

Hon'ble High Court held that “Value Added Services” are not recorded in a physical medium before they are marketed. They



are merely messages carried by means of Electro-magnetic waves. Both "Software" which is not recorded on a physical medium before it is marketed, and "Electro-magnetic waves" through which audio and visual messages/ signals are transmitted, are not "goods" liable to tax under the Act. Levy of tax on value added services, either under Section 4 (1) or 4(8) of the Act, by the revisional/appellate/assessing authorities concerned is without jurisdiction and is illegal.

13. In view of the above decisions, there is merit in the claim of the dealer-appellant that the Value Added Services provided by the dealer-appellant are not exigible to tax.

Accordingly, the impugned order passed by learned OHA and the assessments framed learned Assessing Authority as regards said value added services are set aside.

Whether on account of tower facility provided by the dealer-appellant, is it a case of transfer of right to use of goods?

14. As per case of the appellant, it has no liability to pay VAT under this head, the reason being that this is not a case of transfer of right to use goods/equipment.

Case of the appellant is that in order to provide telecommunication service, appellant erects towers. Since there are number of other companies in the field of providing



Cellular Mobile Telephony Services and it is not feasible to erect towers at each place, these companies have "Infrastructure Sharing Agreement" among themselves for which bills are raised for such sharing of resources. In this way, the company has been providing transmission tower facility to other companies for transmission of telephone signals. The Company is said to have provided month-wise data about the revenue earned from transmission towers.

Further, it is the case of the appellant that in such like cases, right, title and interest of such sites remain with the Passive Infrastructure Service provider, whereas the right, title and interest in the BTS, access radio and other equipment, brought in by the beneficiaries, remain with the beneficiary party. In support of its case, Counsel for appellant has relied on decisions in **Indus Towers Limited vs. UOI**, 2014 (35) S.T.R. 459 (Del.), and once again to the BSNL's case (supra).

In Indus Towers Limited's case (supra), our own Hon'ble High Court observed that the petitioner therein had not transferred the possession of the passive infrastructure to the sharing telecom operators in the manner understood in law, and the limited access provided to them could only be regarded as a permissive use or a limited licence to use the same.

Hon'ble High Court further observed that the possession of the passive infrastructure always remained with the petitioner

therein and the sharing telecom operators did not have any right to use the passive infrastructure.

15. On the other hand, on behalf of the Revenue, it has not been disputed that decision in Indus Towers Limited's case (supra) has gone against the Revenue. No material has been pointed out to prove that this is a case where possession of the infrastructure was also transferred by the dealer-appellant. Even no decision contrary to the above said decisions has been referred to or cited on behalf of the Revenue.

In the given facts and circumstances and applying thereto the above decisions, finding merit in the contention raised on behalf of the dealer-appellant on this issue, the impugned order passed by learned OHA and the impugned assessment framed by learned Assessing Authority are hereby set aside.

Taxability of transactions pertaining to SIM cards

16. As noticed above, learned OHA has remanded the matter to learned Assessing Authority to determine the intention of the parties, for the purpose of levy of VAT on SIM cards.

Appellant has challenged the impugned order even as regards remand of the matter on the said point.



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17. On behalf of the appellant, it has been submitted that there was no occasion for the OHA to remand the matter. The contention is that the impugned order as regards remand deserves to be set aside, when the same has been passed by learned OHA only with a view to afford an opportunity to the Assessing Authority for re-examination of the case.

In this regard, reliance has been placed on decision in **Kamal Corporation v. CTT, UP, Lucknow**, (2009) 20 VST 157 and **Nehru Steel Rolling Mills, Muzaffarnagar v. Commissioner of Sales Tax**, (1993) UOTC 407.

As contended on behalf of the appellant, when SIM card is sold to the customer, it has no intrinsic value and is sold as a part of larger telecommunication service, such amount of turnover is not exigible to VAT.

18. On behalf of the appellant, ^{at the same time} it has been submitted that this is a case of no sale of SIM cards, the reason being that there is no transfer of property- an essential ingredient for transaction of sale, and also because SIM cards are supplied to distributors, who are service providers / agents only for the purpose of further distribution of SIM cards to the subscribers. Reliance has also been placed on decision in **BSNL v. Union of India**, (2006) 145 STC 91 (SC).



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It has been submitted on behalf of the appellant that as per decision by Hon'ble Apex Court in the case of **Idea Mobile Communication Ltd. v. CCE Cochin**, 2011 (23) STR-433(SC), sale of SIM Cards is not exigible to VAT. Reliance has also been placed on decision in **CCE Cochin Ltd. v. Idea Mobile Communication Ltd.**, 2010(19) STR-18 (Kerala).

In support of the contention that the transaction whereby SIM cards are provided, amounts to providing of service, reliance has been placed on the decision in **Commissioner of Service Tax v. Idea Mobile Communications Ltd.**, (2009) 22 VST 454 (Ker.), decided by Hon'ble Kerala High Court and decision by Hon'ble Apex Court in the same matter, reported as (2011) 43 VST 1.

19. In Idea Mobile Communication Ltd.'s case (supra), following issue arose before Hon'ble Apex Court:

“Whether the value of SIM cards sold by the appellant herein to their mobile subscribers is to be included in 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.”

Therein, during the relevant assessment years, i.e., 1997-1999, the appellant was selling the SIM cards to its franchisees and was paying the sales tax to the State and activating the SIM card in the hands of its subscribers on a valuable consideration and paying service tax only on the activation charges.

The Department of Sales Tax, State of Kerala, included the activation charges as part of the sale consideration of SIM cards on the ground that activation is nothing but a value addition of the "goods" and thus comes under the definition of "goods" under the Kerala General Sales Tax Act, 1963 and accordingly levied sales tax on activation charges. The Department of Central Excise, Ernakulum (Service Tax Department) observed that a mere SIM card without activation is of no use and held that the appellant was liable to pay service tax on the value of SIM card also. In both the cases interest and penalty were levied.

20. In para 19 of Idea Mobile Communication Ltd's case (supra), Hon'ble Apex Court observed in the manner as:-

"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



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understood the aforesaid position that no element of sale is involved in the present transaction”.

In CCE Cochin v. Idea Mobile Communication Ltd., 2010 (19) STR 18, Hon'ble High Court of Kerala observed as under:-

“(.....) 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.”

Decision in Idea Mobile Communication Ltd's case (supra) is stated to have been followed by Hon'ble High Court of Andhra Pradesh in the case of **State of Andhra Pradesh v. BSNL**, 2011-VIL-49-AP.

21. Herein, counsel for Revenue has submitted that in the given situation significant aspect yet to be determined is as to whether SIM Cards were provided by the dealer-appellant merely as part of services or if the parties intended that the SIM Card would be a separate object of sale. He has further submitted that in the given situation when there is insufficient evidence on record, ^{2d CHA -} First Appellate Authority has rightly passed order of remand on this point. In support of this contention, he has placed reliance on the ^{judgments and} ~~following~~ observations in BSNL's case (supra).
22. It is pertinent to note here that in BSNL's case (supra), Hon'ble Apex Court 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.

On the point in issue, the significant principles laid down by Hon'ble Apex Court in BSNL's case (supra) read as under:

"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."

On behalf of the Revenue, it has rightly been pointed out that in above said BSNL's case, Hon'ble Apex Court observed that it was not possible to opine finally on the issue for want of insufficient material.

Hon'ble Apex 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.

Herein, the same issue has arisen because of the contest by the Revenue and due to insufficiency of material made available by appellant.



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In Idea Mobile Communication Ltd.'s case (supra), Hon'ble Apex Court observed that the sales tax authorities had 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 had filed returns and remitted tax or not.. that 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.

At the cost of repetition, herein, the order of remand has been passed due to insufficiency of material made available to the learned OHA.

23. As regards the material made available by the assessee, on behalf of the appellant, it has been submitted that as regards assessment for the tax period 2007-2008 during hearing on objections, dealer had submitted sample copies of invoices issued for provision of SIM cards dated 5 October 2007, 4 January 2008 and 2 April 2007, whereas in the objections pertaining to the tax period 2006-2007 sample copies of *some* invoices issued by the dealer – appellant to distributors of SIM cards were made available.

24. Counsel for appellant has relied upon decision by this Appellate Tribunal in another matter- Appeal No. 993-

995/ATVAT/2011 and Appeal No. 1223-1226/ATVAT/2011 decided on 29/06/2022 to submit that therein the order passed by First Appellate Authority upholding impugned assessment relating to transaction of SIM Cards was set aside, while holding that the SIM Cards provided by the dealer for purposes of activation of the mobile phones being not a transaction of sale of goods, were not exigible to sales tax.

Indisputably, the above decision was given by this Appellate Tribunal while holding that the SIM Cards provided by the dealer for purposes of activation of the mobile phones being not a transaction of sale of goods, was not exigible to sales tax.

But, in that matter, no question arose or was raised on behalf of the Revenue that for want of insufficient material or invoices it could not be determined if the SIM Cards were provided by the dealer-appellant merely as part of services or if the parties intended that the SIM Card would be a separate object of sale.

In the decision in Appeal No. 1509/ATVAT/2011, that was relied on behalf of the Appellant in above said Appeal Nos. 993-995/ATVAT/2011, it was specifically observed that therein, the transaction in question was a supply of SIM Cards by the distributors to the subscriber at the time the connection was issued to them. The subscriber had not purchased the SIM Cards and that was not a case of sale as per provisions of Delhi Sales Tax Act.

In **M/s Idea Mobile Communication Ltd. v. CCE, Cochin** 2011 (23) STR 433, (supra), Hon'ble Apex Court specifically observed that it was established from the record and facts of the case that the value of SIM Card formed part of the activation charges as low activation was possible without a valid functioning of SIM Card. Hon'ble Apex Court further observed that the Sales Tax Authority understood the position that no element of sale was involved in that transaction.

Here, specific objection has been raised on behalf of the Revenue that for want of insufficient material i.e. invoices it cannot be determined if the SIM Card was provided by the dealer-appellant merely as part of services or if the parties intended that the SIM Card would be a separate object of sale, and that the matter needs to be remanded to the Assessing Authority while upholding the impugned order passed by learned OHA.

Only the record would show the nature of the transaction between the dealer-assessee and the retailer-represented to be its agent, and the amount(s) charged, to arrive at right conclusion as to exigibility to tax, of the transaction between the dealer-assessee and the retailer-its agent.

Even in case of supply of SIM Card to the subscriber directly by the dealer-assessee, without the intervention/availing of services of its agent, only the record would show the amount(s)



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charged by the dealer-assessee from the subscriber, and the nature of the transaction.

Surprisingly, Counsel for the appellant has stated that dealer is not a running a shop for the purpose of direct supply of SIM card to the subscriber. On the other hand, counsel for the Revenue has submitted that some of the sample invoices go against the submission made on behalf of the appellant. He has further submitted that it is not case of the dealer as per record that none of the transactions took place directly between the dealer-assessee and the subscriber.

25. Counsel for the appellant has stated that each transaction cannot be checked and that generally only sample invoices are checked to arrive at an opinion as regards exigibility of an item or transaction to tax.

There is no merit in this contention. It is well-settled that for the purpose of exigibility of items or transactions to tax, each transaction is to be considered by the Assessing Authority/Department. It would be a different matter if the Assessing Authority, after going through each transaction, may proceed to make common observation as regards outcome of similar type of transactions/items.

26. In the course of arguments, counsel for the appellant, surprisingly, stated that a dealer cannot be called upon to

produce invoices which pertain to an old period like the present case which pertains to the tax period – years 2006-07 and 2007-08. Not only this, he went on to state that at times even Court records are not traceable.

These submissions on behalf of the appellant do not come to the aid of the appellant.

As regards the first submission, no law prevents the Assessing Authority or the Revenue from going through all the relevant documents. Rather, law provides that each transaction is to be carefully considered to see exigibility to tax.

As regards the other strange submission comparing a Court file to an invoice, suffice it to say that a court file cannot be compared to an invoice.

When a dealer challenges assessments or impugned orders like the present one, it is required to preserve requisite record for its submission to the concerned authorities for the purposes of *just* determination as to exigibility of an item/transaction to tax.

27. Herein, in respect of tax period 2006-07 and 2007-08 only few invoices were made available to learned OHA by way of sample invoices. In the course of arguments in these appeals, Counsel for the applicant has made reference only to five sample invoices made available to learned OHA. Same are taken up one by one.



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VODAFONE ESSAR MOBILE SERVICES LIMITED
B-109, 1ST FLOOR, ANSAL PLAZA 110001

Vodafone

RECEIPT CUM INVOICE

S.No. : COMMERCIAL-MRINAL SHARMA-2245610

DATE:

6/10/2006

Form No. : 1280059

Received with thanks from Ramesh Sherawat

A sum of Rs. 999.00 Rupees (in words) Nine Hundred and Ninty Nine Only

Towards particulars given below:

Payment Type Amount (Rs.)
CASH 999.00

S. No.	Particulars	Connection	Rate	Amount(Rs.)
1.	PLAN ENROLLMENT FEE	1	890.06	890.06
Total				890.6
Service Tax @12%				106.81
EDUCATIONAL CESS @2%				2.14
Total Invoice Value (Rounded)				999.0

Subscriber Name Ramesh Sherawat S/o B S Sherawat, 42 Chirag Delhi.

Mobile Number 9873164942

Serial Details

Stock	Start	End	Quantity
Description	Sr. No.	Sr. No.	
32K POSTPAY HLRI CTICK NORMAL	89911100000056662506	89911100000056662506	1

For VODAFONE ESSAR MOBILE SERVICES LIMITED

Sign _____
Name _____

Customer Signature

Service Tax Regn. No. AAACS4457QST001

TIN 7260181137

Nature of Service Telephone Services

Conditions 1 Please retain this Receipt-cum-invoice in original with you for future requirements.
2 Cheques are subject to Realization.



VODAFONE ESSAR MOBILE SERVICES LIMITED
B-109, 1ST FLOOR, ANSAL PLAZA 110001

RECEIPT CUM INVOICE

S.No. : COMMERCIAL-MRINAL SHARMA-2245610

DATE: 6/10/2006

3MRP Inclusive of Service Tax of 12% and Educational Cess of 3%

Regd Office : C-48 Okhla Industrial Area, Phase-II New Delhi 110020 INDIA

From the contents of the above Receipt cum invoice, it appears to be a case of transaction directly between the dealer-assessee and the subscriber. It pertains to charging of Rs. 890.06 /- towards plan enrolment fee. This sample invoice does not depict that the same pertains to supply of a SIM card.

28/11/06



1



VODAFONE ESSAR MOBILE SERVICES LIMITED
B-109, 1ST FLOOR, ANSAL PLAZA 110001

Vodafone

RECEIPT CUM INVOICE

S.No. : COMMERCIAL-MRINAL SHARMA-2245455

DATE: 6/10/2006

Form No. : 9014993

Received with thanks from Surinder Singh

A sum of Rs. 99.00 Rupees (inwords) Ninty Nine Only

Towards particulars given below:

Payment Type Amount (Rs.) Bank Name Instrument Number Instrument Date
CREDIT/CARD 99.00 6/10/2006

S. No.	Particulars	Connection	Rate	Amount(Rs.)
I.	SERVICING FEE-PREPAID	1	88.20	88.20
Total				88.20
Service Tax @12%				10.58
EDUCATIONAL CESS @2%				0.21
Total Invoice Value (Rounded)				99.0

Subscriber Name SURINDER SINGH C-328 Defence Colony %.

Mobile Number 9899119845

Serial Details

Stock Description Start End Sr. No. Sr. No. Quantity
PREPAID NORMAL HLR 2 89911100020030259302 89911100020030259302 1

For VODAFONE ESSAR MOBILE SERVICES LIMITED

Sign
Name

Customer Signature
Service Tax Regn. No. AAACS4457QST001
TIN 7260181137

Conditions

1 Please retain this Receipt-cum-invoice in original with you for future requirements.
2 Cheques are subject to Realization.

VODAFONE ESSAR MOBILE SERVICES LIMITED
B-109, 1ST FLOOR, ANSAL PLAZA 110001

Vodafone

RECEIPT CUM INVOICE

S.No. : COMMERCIAL-MRINAL SHARMA-2245455

DATE: 6/10/2006

3MRP Inclusive of Service Tax of 12% and Educational Cess of 3%

Regd Office : C-48 Okhla Industrial Area. Phase-II New Delhi 110020 INDIA



From the contents of the above Receipt cum invoice, it appears to be a case of transaction directly between the dealer-assessee and the subscriber. It pertains to charging of Rs. 88.20 /- towards servicing fee-prepaid. This sample invoice does not depict that the same pertains to supply of a SIM card.

VODAFONE ESSAR MOBILE SERVICES LIMITED
E-356, Nirman Vihar New Delhi 110092

Vodafone
RECEIPT CUM INVOICE

S.No.: COMMERCIAL-COMMERCIAL-2661059

DATE: 02/04/2007

Form No :
Received with thanks from AMIT SIRASWAL
a sum of Rs. 99.00 Rupees (in words) Ninty Nine Only

towards particulars given below:

Payment Type Amount (Rs.)

CASH 99.00

S.No.	Particulars	Connection	Rate	Amount(Rs.)
1.	RECONNECTION FEE PREPAID	1	88.20	88.20

Total	88.20
SERVICE TAX@ 12%	10.58
EDUCATIONAL CESS @ 2%	0.21
Total Invoice Value(Rounded)	99.00
Subscriber Name	AMIT SIRASWAL 431/5 DALHAI MOHALLA BHOLA NATH NAGAR SHAHDARA

Mobile Number : 9999048118

Serial Details

Stock	Start	End	Quantity
Description	Sr. No.	Sr.No.	
16K PREPAY HLR3 REPL	89911100070001791072	89911100070001791072	1

For VODAFONE ESSAR MOBILE SERVICES LIMITED

Sign _____
Name _____

Customer Signature _____
Service Tax Regn No. AAACS4457QST001
TIN 7260181137

Nature of Service Telephone Services

- Conditions
1. Please retain this Receipt-cum-Invoice in original with you for future requirements.
 2. Cheques are subject to Realization.
 3. MRP Inclusive of Service Tax of 12% and Educational Cess of 3%.

Regd Office: C-48, Okhla Industrial Area, Phase-II New Delhi 110020, INDIA



VODAFONE ESSAR MOBILE SERVICES LIMITED
Shop No. G 1 & G2 Plot No-2, Sector-12 Dwarka 110075

Vodafone

RECEIPT CUM INVOICE
S.No.: HS 00000 D05-BHUVANMEHTA1-3149224
Date :

05/10/2007

Nature of Service

Telephone Services

- Conditions: 1. Please retain this Receipt-cum-Invoice in original with you for future requirements.
2. Cheques are subject to Realization.
3. MRP Inclusive of Service Tax of 10% and Educational Cess of 3%.

Regd Office: C-48, Okhla Industrial Area, Phase -II New Delhi 110020, INDIA

From the contents of the above Receipt cum invoice, it appears to be a case of transaction directly between the dealer-assessee and the subscriber. It pertains to charging of Rs. 88.20 /- towards servicing fee-prepaid. This sample invoice does not depict that the same pertains to supply of a SIM card.



20/12

VODAFONE ESSAR MOBILE SERVICES LIMITED
B-25, OKHLA PHASE-I NEW DELHI

Vodafone

RECEIPT CUM INVOICE

Name	TRADE-PP-SHINE TELECOM	Invoice No.	3677607	Invoice Information
Address	N-5, BAJRANG HOUSE, BASEMENT, SOUTH EXTENSION I	Invoice Date.	04-JAN-2008	
Cust. Tin No.		Order No.	32778	
Shipping Add.		Comp. Tin No.	07260181137	
Customer Details		Serv. Tax No.	AAACS4457QST001	
		Nature of Serv.	Telephone Services	

Item Description

S.No.	Particulars	Connection	Rate	Amount (Rs.)
1.	SERVICING FEE PREPAID- MRP 99	400	4.11	1644.00

TOTAL	1644.00
SERVICE TAX @ 12%	4229.28
EDU.CESS @2%	84.59
S & H EDU. CESS @ 1%	42.29
Sub Total	6000.16
Total Invoice Value (Rounded)	6000.00

Amount in words : Six Thousand Only

Payment Details

Payment Type	Amount (Rs.)	Bank	Instrument Number	Instrument Date
CHEQUE	6000.00	PNB	840077	1/4/2008

For VODAFONE ESSR MOBILE SERVICES LIMITED

Sign. _____

Customer Signature _____

Name _____

Date _____

Terms and Conditions:

1. Please retain this Receipt-cum-Invoice in original with you for future requirements.
2. Cheques are subject to Realization.
3. MRP Inclusive of Service Tax of 10% and Educational Cess of 3%.

Annexure

Stock Description	Start Serial No.	End Serial No.	Quantity
PREPAID NORMAL HLR 1	89911100000041265621	89911100000041269615	400

Regd Office: C-48, Okhla Industrial Area, Phase-II New Delhi 110020, INDIA
Regional Address: C-48, Okhla Industrial Area, Phase-II, New Delhi-110020, INDIA

Shipping Address:

From the contents of the above Receipt cum invoice, it appears to be a case of transaction directly between the dealer-assessee and the retailer. It pertains to charging of Rs. 6000.14, including servicing fee prepaid to the tune of Rs. 1644/- This sample invoice does not depict that the same pertains to supply of a SIM card.

VODAFONE ESSAR MOBILE SERVICES LIMITED
41A GOPAL NAGAR AZADPUR New Delhi 110033

RECEIPT CUM INVOICE

S.No. : COMMERCIAL- COMMERCIAL -2297662

DATE: 1/11/2006

Form No. : 1337218

Received with thanks from TRADE-PO-CHAITANYA
A sum of Rs. 150.00 Rupees (inwords) One Hundred Fifty Only
Towards particulars given below:

Payment Type	Amount (Rs.)	Bank Name	Instrument Number	Instrument Date
CHEQUE	150.00	uco	426046	1/11/2006

S. No.	Particulars	Connection	Rate	Amount(Rs.)
1.	SECURITY DEPOSIT POSTPAID	1	250.00	250.00
2.	LESS: ADVANCE ADJUSTED	1	-100.00	-100.00
3.		1	.00	.00
Total				
Total Invoice Value (Rounded)				

Subscriber Name Tarun 41 A GOPAL NAGAR AZADPUR

Mobile Number 9899765940

Serial Details

Stock Description	Start Sr. No.	End Sr. No.	Quantity
32K POSTPAY HLR2 CTICK NORMAL	89911100030002244174	89911100030002244174	1

For VODAFONE ESSAR MOBILE SERVICES LIMITED

Sign Name

Customer Signature
Service Tax Regn. No. AAACS4457QST001
TIN 7260181137

Conditions

- Nature of Service Telephone Services
- 1 Please retain this Receipt-cum-invoice in original with you for future requirements.
 - 2 Cheques are subject to Realization.
 - 3 MRP Inclusive of Service Tax of 12 % and Educational Cess of 3%.

VODAFONE ESSAR MOBILE SERVICES LIMITED
41A GOPAL NAGAR AZADPUR NEW DELHI 110033

Vodafone

RECEIPT CUM INVOICE

S.No. : COMMERCIAL- COMMERCIAL -2297662

DATE:

1/11/2006

Regd Office : C-48 Okhla Industrial Area, Phase-II New Delhi 110020 INDIA

From the contents of the above Receipt cum invoice, it appears to be a case of transaction directly between the dealer-assessee and the retailer. It pertains to charging of Rs. 250/- i.e. (Rs. 150/- towards security deposit post paid and adjusting Rs. 100/- already deposited). This sample invoice does not depict that the same pertains to supply of a SIM card.

28. As already noticed above, in **BSNL v. Union of India**, (2006) 3 SCC 1, Hon'ble Apex Court clearly observed that the Assessing Authorities have to keep in mind that where the SIM card is not sold by the assessee to subscriber and same is merely part of the service rendered by the service providers then SIM card is not

to be charged separately to sales tax. Hon'ble Apex court further observed that the Assessing Authorities have also to keep in mind that if the parties intended that the SIM card would be a separate object of sale, it would be open to Sales Tax Authorities to levy sales tax thereon.

With the above observations, and as held in para 88 of the judgment, Hon'ble Supreme Court remanded the matter to the Sales Tax Authorities for determination of the issue, the reason being that there was insufficient material available on record to reach a decision on any of the above said two aspects i.e. whether SIM card was merely part of the service rendered by the service providers or whether the parties intended that the SIM card would be a separate object of sale.

29. In view of the above discussion, the orders of remand passed by the learned OHA having regard to decision by Hon'ble Apex Court in BSNL's case (supra) and applying the same to the given situation, deserves to be

upheld. The case of the appellant that the impugned order is a non-speaking order or an order without reasons, is without any basis. Accordingly, the impugned orders as regard remand with direction to the Assessing Authority on the point of taxability of SIM card are upheld.

30. No other argument was advanced by learned Counsel for the parties.

Result

31. As a result, all the appeals are allowed as regards challenge to assessments of Tax, Interest and Penalty framed concerning Value Added Services and Sharing of Towers-Infrastructure.

So far as transactions pertaining to SIM cards are concerned, the appeals are dismissed as regards challenge to impugned orders of remand.

The assessment of Penalties concerning the issue of SIM cards can safely be said to have been set aside, keeping in view the impugned orders whereby Assessing Authority has been directed to ascertain the intention of the parties and then to arrive at the conclusion.

Consequently, learned Assessing Authority to provide reasonable opportunity of being heard to the dealer – assessee as regards the issue of SIM cards for decision afresh, concerning the tax period 2006-07 and 2007-08, keeping in view the guidelines laid down by Hon'ble Apex Court in BSNL's case (supra).

32. Dealer – assessee to appear before learned Assessing Authority on 09/01/2023.
33. File be consigned to the record room. Copy of the judgment be also placed in the record of Appeal Nos. 620(I) to 620(VIII)/ATVAT/2012. Copy of the judgment be supplied to both the parties as per rules. One copy be sent to the concerned authority. Another



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copy be displayed on the concerned website.

Announced in open Court.

Date: 28/12/2022.

Narinder Kumar
28/12/2022

(Narinder Kumar)
Member (Judicial)

