THE HIGH COURT OF TRIPURA

A G A R T A L A

W. P.(C) No. 563 of 2010

Petitioner :

Bharti Telemedia Ltd.
A Company incorporated under the Companies Act, 1956, and having its registered office at: Aravali Crescent, 1, Nelson Mandela Road, Vasant Kunj, Phase-II, New Delhi 110 070 – Represented herein by Sri Sib Kumar Sarma.

By Advocates :

Mr. K.N. Coudhury, Sr. Adv.
Mr. B.K. Kashyap, Adv.
Mr. Somik Deb, Adv.
Mr. P. Majumder, Adv.

Respondents :

1. The State of Tripura,
Represented through the Secretary, Ministry of Finance (Excise & Taxation Department). Government of Tripura, Agartala.

2. Superintendent of Taxes,
Charge-VIII, Agartala,

By Advocate :

Mr. D. C. Nath, Adv.

W. P.(C) No. 280 of 2011

Petitioner :

Bharti Telemedia Ltd.
A Company incorporated under the Companies Act, 1956, having its registered office at: Aravali Crescent, 1, Nelson Mandela Road, Vasant Kunj, Phase-II, New Delhi 110 070 – and having its Branch Office at S. K. Bose Lane, Dhaleswar, P.O-Dhaleswar, PS-East Agartala, Sub-Division-Agartala, District-West Tripura.

By Advocates :

Mr. K.N. Coudhury, Sr. Adv.
Mr. B.K. Kashyap, Adv.
Mr. Somik Deb, Adv.
Mr. P. Majumder, Adv.

Respondents :

1. The State of Tripura,
Represented by the Secretary to the Government of Tripura, Department of Revenue, having his office at New Secretariat Complex, Gurkhabasti, P.O-

Kunjaban, P.S-East Agartala, Sub-Division-Agartala, District-West Tripura.

2. The Commissioner of Taxes,
Government of Tripura, having his office at Kar Bhawan, PO-Agartala, P.S-East Agartala, Sub-Division-Agartala, District-West Tripura.

3. The Superintendent of Taxes,
Charge-VIII, Government of Tripura, having his office at Kar Bhawan, P.O-Agartala, P.S-East Agartala, Sub-Division-Agartala, District-West Tripura.

By Advocates :
Mr. D. C. Nath, Adv.

W. P.(C) No. 453 of 2011

Petitioner :

TATA SKY Ltd.
An existing Company, incorporated under the Companies Act, 1956, having its Registered Office at 3rd floor, Bombay Dyeing A.O Building, Pandurang Budhkar Marg, Worli,Mumbai 400025.
And
Local office at the residence of Mr. Ram Dulal Saha, Dhaleshwar Road No. 1, P.O-Dhaleshwar, P.S-East Agartala, Sub-Division-Agartala, District-West Tripura.

Represented by its Authorised Representative, Sri Sandeep Manubarwala, son of Sri Bharat Manubarwala, having his office address at Tata Sky Limited, C-1 Wadia International Centre, Worli, Mumbai-400 025.

By Advocates :
Mr. Somik Deb, Adv.

Respondents :

1. The State of Tripura,
Represented by the Secretary to the Government of Tripura, Department of Revenue, having his office at New Secretariat Complex, Gurkhabasti, PO-Kunjaban, P.S-East Agartala, Sub-Division-Agartala, District-West Tripura.

2. The Commissioner of Taxes,
Government of Tripura, having his office at Kar Bhawan, PO-Agartala, P.S-East Agartala, Sub-Division-Agartala, District-West Tripura.

3. The Superintendent of Taxes,
Charge-VIII, Government of Tripura, having his office at Kar Bhawan, P.O-Agartala, P.S-East Agartala, Sub-Division-Agartala, District-West Tripura.

By Advocate :

Dr. A.K. Saraf, Sr. Adv.
Mr. A. Goyal, Adv.
Mr. D. C. Nath, Adv.

B E F O R E
THE HON'BLE CHIEF JUSTICE MR. DEEPAK GUPTA
THE HON'BLE MR. JUSTICE U.B. SAHA

Date of hearing **: 8th January, 2015.**

Date of Judgment **: 19th February, 2015.**

Whether fit for reporting **:**

Yes	No

JUDGMENT & ORDER

(Deepak Gupta, C.J.)

All the three writ petitions are being disposed of by a common judgment since the main question of law involved is identical in all the three cases.

[2] The main issue is whether the petitioners assessee are liable to pay Value Added Tax (VAT) in terms of the Tripura Value Added Tax Act, 2004 (for short, the TAVT Act) in respect of contracts entered into by them with the customers whereby they have agreed to provide Direct To Home (DTH) service to the customers in the State of Tripura. The petitioners provide DTH service in India whereby by means of satellite, signals of various television (TV) channels are sent to the home of the customer and the customer by using the Set Top Box provided by the petitioner-assessee is able to decode the signals and watch the programs on his T.V set. It would be pertinent to mention that the State is

only imposing VAT on the value of the Set Top Boxes (STB) as valued by the petitioners in their own books.

[3] The contention of the petitioners is that they are rendering service only and being service providers they are paying service tax and are not liable to pay any VAT. The contention of the petitioners is that the equipment in the nature of STB which is used by the customers is not sold to the customers but remains the property of the service provider and the service provider retains the control of the equipment. It is urged that since the equipment remains the sole property of the petitioner-service provider and capitalization of the same is made in the books of account, the STBs continue to be the property of the service providers and are installed at the premises of the customers only with a view in providing proper service to the customers. According to the petitioners they do not collect charges towards sale or rent of the equipment from the customers and, therefore, they are not liable to pay VAT. It is next contended that there is no transfer of property or transfer of right to use any such equipment and as such the contract does not amount to sale within the meaning of the TVAT Act.

[4] Various judgments have been relied upon by the parties. But the petitioners mainly rely upon para-44 of the judgment in ***Bharat Sanchar Nigam Ltd. And Another Vrs. Union of India and Others: (2006) 3 SCC 1*** and contend that only a works contract, a hire-purchase contract and a catering contract can be divided and any other contract is in divisible and, therefore, the transaction is not exigible to tax within the meaning of the TVAT Act.

[5] The contention of the State is that the transaction entered into by the petitioners virtually amount to sale of the STBs and in any event the petitioners have transferred the right to use the STBs to the customers and, therefore, such a contract is liable to be taxed within the meaning of Section 4(2) of the TVAT Act.

[6] At this stage it would be pertinent to refer Article 366(29A) of the Constitution of India which reads as follows:

> **"366(29A) tax on the sale or purchase of goods includes-**
>
> **(a) a tax on the transfer, otherwise than in pursuance of a contact, of property in any goods for cash, deferred payment or other valuable consideration;**
>
> **(b) a tax on the transfer of property in goods (whether as goods or in some other form) involed in the execution of a works contract;**
>
> **(c) a tax on the delivery of goods on hire purchase or any system of payment by installments;**
>
> **(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;**
>
> **(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;**
>
> **(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;"**

[7] The case of the State is that since a tax on the sale or purchase of goods includes in terms of sub-clause (d) of Article 366(29A) tax on the transfer of the right to use any goods for any purpose the petitioners are liable to pay value added tax on such transfer of right to use goods. The contention of the

petitioners is that they have entered into a service contract and only the Union can levy tax on services and not the State. The petitioners have also urged that they are paying service tax to the Central Government under the provisions of law and since they are paying service tax, if there is conflict between the Central Law and the State Act the Tripura Value Added Tax Act must necessarily give way to the provisions which provide for imposition of service tax in the Finance Act of 1994.

[8] Before dealing with other issues it would be pertinent to mention that the Apex Court in ***State of Madras Vrs. Gannon Dunkerley & Co (Madras) Ltd., AIR 1958 SC 560*** held that the State had no power to tax a composite contract of goods and services (works contract) to be taxed as sale of goods. The Court further held that the law also does not permit the severance of the contract for determining the value of the goods.

[9] In view of this decision of the Apex Court, it was felt necessary to amend Constitution with a view to widen the definition of sale as traditionally understood. In common law, sale was understood to mean an agreement to transfer title in the goods on payment of consideration. The Constitution was amended and sub article (29A) was introduced in the Constitution by the Constitution Forty-sixth Amendment Act, 1982. By means of this Constitutional amendment, tax on the sale or purchase of goods now covered six more categories which may otherwise not have fallen within the definition of sale. Sub-clauses (a) to (f) to Clause 29A of Article 366 of the Constitution bring within the ambit of sale, transactions where one or more of the essential ingredients of sale as traditionally understood were absent. By legal fiction such transactions, transfers and supply of goods were deemed to be sale and purchase of the goods.

[10] After amendment of the Constitution the Apex Court in ***Gannon Dunkerley and Co. Vs. State of Rajasthan: 1993(1) SCC 364*** dealing with works contracts held that only the value of the goods involved in the execution of works contract could be taxed and this would have to be determined by taking into account the value of the entire works contract after deducting therefrom the charges towards labour, services etc. The Apex Court in the ***Second Gannon Dunkerley*** Case concluded that only the value of the goods involved in the execution of a works contract were amenable to the provisions of the Sales Tax/VAT Act of the State.

[11] In the cases before us the contracts are for hiring of goods and services. The stand of the State is that the customer has the exclusive use and right to use the STBs and has full control and possession of the same and therefore there is transfer of the right to use the STBs and as such tax is leviable under Section 4(2) of the TVAT Act. Section 4(2) of the TVAT Act reads as follows:

> **(2) Tax on transfer of the right to use any goods- Notwithstanding anything contained elsewhere in this Act, any transfer of the right to use any goods for any purpose (whether or not for a specified period) shall be taxable at the rate as specified in the Schedule.**

The main issue is whether there is a transfer of the right to use any goods or not?

[12] A Constitution Bench of the Apex Court in ***20th Century Finance Corpn. Ltd. and another Vrs. State of Maharashtra : (2000) 6 SCC 12*** dealt with the issue with regard to the power of the State legislature to levy tax under Clause 29A(d) of Article 366 of the Constitution on the transfer of the

right to use any goods. This is the leading judgment on the point. The following questions were framed by the Apex Court:

> **"The questions therefore, that arise for consideration in these cases are, whether a State can levy sales tax on transfer of right to use goods merely on the basis that the goods put to use are located within its State irrespective of the facts that—**
>
> **(a) the contract of transfer of right to use has been executed outside the State:**
>
> **(b) sale has taken place in the course of an inter-State trade; and**
>
> **(c) sales are in the course of export or import into the territory of India.****"**

Answering this question the Apex Court held as follows:

> **"27. Article 366(29A)(d) further shows that levy of tax is not on use of goods but on the transfer of the right to use goods. The right to use goods accrues only on account of the transfer of right. In other words, right to use arises only on the transfer of such a right and unless there is transfer of right, the right to use does not arise. Therefore, it is the transfer which is sine qua non for the right to use any goods. If the goods are available, the transfer of the right to use takes place when the contract in respect thereof is executed. As soon as the contract is executed, the right is vested in the lessee. Thus, the situs of taxable event of such a tax would be the transfer which legally transfers the right to use goods.****"**

[13] In ***State of A.P and Another Vrs. Rashtriya Ispat Nigam Ltd.: (2002) 3 SCC 314*** the Apex Court dealt with meaning of the phrase "transfer of right to use goods". In that case the Rashtriya Ispat Nigam was the owner of the Visakhapatnam Steel Project. It engaged various contractors to do the work and supplied sophisticated machines to the contractors for being used in execution of the contracted works. The Rashtriya Ispat Nigam Ltd. received hire charges for the same. The tax was levied on this transaction on the ground that there was a transfer of the right to use goods. The Andhra Pradesh High Court in its judgment held that there was no transfer of the right to use this

machinery in favour of the contractor. While coming to this conclusion the High Court of Andhra Pradesh analysed the various clauses of the agreement and held that the contractors were not free to make use of the machinery for works other than the project work of the respondent or move out the machinery during the period of contract. The Court went on to hold that the condition that the contractor would be responsible for the custody of the machinery while it was on the site did not militate against the possession and control of the Ispat Nigam over the property. The Apex Court upheld the judgment of the High Court of Andhra Pradesh.

[14] In ***Bharat Sanchar Nigam Ltd. and another Vs. Union of India and others, (2006) 3 SCC 1*** the Apex Court was dealing with the issue as to whether the transaction by which mobile phone connections are enjoyed is a sale or a service or both. The Apex Court held that if it was a sale only the State would be competent to levy sale tax on such a transaction under Entry 54 of List-II of the Seventh Schedule to the Constitution. If it was a service then the Central Government alone could levy service tax under Entry-97 of List-I or Entry-92-C of List-I after 2003. The Apex Court further held if the nature of the transaction has characteristics of both sale and service then the moot question would be whether legislative authorities could levy separate taxes together or only one of them. The Apex Court dealt with the following question:

> **"The principal question to be decided in these matters is the nature of the transaction by which mobile phone connections are enjoyed. Is it a sale or is it a service or is it both? If it is a sale then the States are legislatively competent to levy sales tax on the transaction under Entry 54 List II of the Seventh Schedule to the Constitution. If it is a service then the Central Government alone can levy service tax under Entry 97 of List I (or Entry 92C of List I after 2003). And if the nature of the transaction partakes of the character of both sale and service, then the moot question would be**

> **whether both legislative authorities could levy their separate taxes together or only one of them."**

[15] In the BSNL case the petitioners before the Supreme Court argued that they were only providing service and there was no transfer of right to use goods. On the other hand it was contended by the State that there was transfer of the right to use goods and hence the transactions should be treated to be sales and were amenable to sales tax. Dealing with sub clause (29A) of the Article 366 of the Constitution the Apex Court held as follows:

> **"41. Sub-clause (a) covers a situation where the consensual element is lacking. This normally takes place in an involuntary sale. Sub-clause (b) covers cases relating to works contracts. This was the particular fact situation which the Court was faced with in Gannon Dunkerley and which the Court had held was not a sale. The effect in law of a transfer of property in goods involved in the execution of the works contract was by this amendment deemed to be a sale. To that extent the decision in Gannon Dunkerley was directly overcome. Sub-clause (c) deals with hire purchase where the title to the goods is not transferred. Yet by fiction of law, it is treated as a sale. Similarly the title to the goods under Sub-clause (d) remains with the transferor who only transfers the right to use the goods to the purchaser. In other words, contrary to A.V. Meiyappan decision a lease of a negative print of a picture would be a sale. Sub-clause (e) covers cases which in law may not have amounted to sale because the member of an incorporated association would have in a sense begun as both the supplier and the recipient of the supply of goods. Now such transactions are deemed sales. Sub-clause (f) pertains to contracts which had been held not to amount to sale in State of Punjab vs. M/s. Associated Hotels of India Ltd. (supra). That decision has by this clause been effectively legislatively invalidated.**
>
> **42. All the sub-clauses of Article 366 (29A) serve to bring transactions where one or more of the essential ingredients of a sale as defined in the Sale of Goods Act 1930 are absent, within the ambit of purchase and sales for the purposes of levy of sales tax. To this extent only is the principle enunciated in Gannon Dunkerly limited. The amendment especially allows specific composite contracts viz. works contracts (Sub-clause (b)), hire purchase contracts (Sub-clause (c)), catering contracts (Sub-clause (e)) by legal fiction to be divisible contracts where the sale element could be isolated and be subjected to sales tax.**
>
> **43. Gannon Dunkerley survived the 46th Constitutional Amendment in two respects. First with regard to the definition of 'sale' for the purposes of the Constitution in general and for the purposes of Entry 54 of List II in particular except to the extent that the clauses in**

Art.366(29A) operate. By introducing separate categories of 'deemed sales', the meaning of the word 'goods' was not altered. Thus the definitions of the composite elements of a sale such as intention of the parties, goods, delivery etc. would continue to be defined according to known legal connotations. This does not mean that the content of the concepts remain static. The courts must move with the times. But the 46th Amendment does not give a licence, for example, to assume that a transaction is a sale and then to look around for what could be the goods. The word "goods" has not been altered by the 46th Amendment. That ingredient of a sale continues to have the same definition. The second respect in which Gannon Dunkerley has survived is with reference to the dominant nature test to be applied to a composite transaction not covered by Article 366(29A). Transactions which are mutant sales are limited to the clauses of Article 366(29A). All other transactions would have to qualify as sales within the meaning of Sales of Goods Act, 1930 for the purpose of levy of sales tax.

44. Of all the different kinds of composite transactions the drafters of the Forty-sixth Amendment chose three specific situations, a works contract, a hire purchase contract and a catering contract to bring them within the fiction of a deemed sale. Of these three, the first and third involve a kind of service and sale at the same time. Apart from these two cases where splitting of the service and supply has been Constitutionally permitted in clauses (b) and (f) of clause (29-A) of Article 366, there is no other service which has been permitted to be so split. For example, the sub-clauses of Article 366(29-A) do not cover hospital services. Therefore, if during the treatment of a patient in a hospital, he or she is given a pill, can the sales tax authorities tax the transaction as a sale? Doctors, lawyers and other professionals render service in the course of which can it be said that there is a sale of goods when a doctor writes out and hands over a prescription or a lawyer drafts a document and delivers it to his/her client? Strictly speaking, with the payment of fees, consideration does pass from the patient or client to the doctor or lawyer for the documents in both cases.

45. The reason why these services do not involve a sale for the purposes of Entry 54 of List II is, as we see it, for reasons ultimately attributable to the principles enunciated in Gannon Dunkerley's case, namely, if there is an instrument of contract which may be composite in form in any case other than the exceptions in Article 366(29-A), unless the transaction in truth represents two distinct and separate contracts and is discernible as such, then the State would not have the power to separate the agreement to sell from the agreement to render service, and impose tax on the sale. The test therefore for composite contracts other than those mentioned in Article 366 (29A) continues to be:- Did the parties have in mind or intend separate rights arising out of the sale of goods? If there was no such intention there is no sale even if the contract could be disintegrated. The test for deciding whether a contract falls into one category or the other is to as what is 'the

> **substance of the contract'. We will, for the want of a better phrase, call this the dominant nature test."**

[16] Thereafter the Court dealt with the question as to whether the dominant nature test would continue to apply even in respect of contracts falling within the ambit of Clause 29A of the Constitution. The Apex Court held as follows:

> **"49. We agree. After the 46th Amendment, the sale element of those contracts which are covered by the six sub-clauses of clause (29A) of Article 366 are separable and may be subjected to sales tax by the States under Entry 54 of List II and there is no question of the dominant nature test applying. Therefore when in 2005, C.K. Jidheesh vs. Union of India (2005) 13 SCC 37 held that the aforesaid observations in Associated Cement (2001) 4 SCC 593 were merely obiter and that Rainbow Colour Lab (2000) 2 SCC 385 was still good law, it was not correct. It is necessary to note that Associated Cement did not say that in all cases of composite transactions the 46th Amendment would apply.**
>
> **50. What are the "goods" in a sales transaction, therefore, remains primarily a matter of contract and intention. The seller and such purchaser would have to be ad idem as to the subject matter of sale or purchase. The Court would have to arrive at the conclusion as to what the parties had intended when they entered into a particular transaction of sale, as being the subject matter of sale or purchase. In arriving at a conclusion the Court would have to approach the matter from the point of view of a reasonable person of average intelligence."**

As far as the present cases are concerned there can be no manner of doubt that the set top boxes would be goods and there is no dispute on this count and there is no dispute on this count.

[17] After referring to ***20th Century Finance Corpn. Ltd.*** case the Apex Court went on to hold that the delivery of the goods was also an essential part of the right to transfer of the goods. The relevant observations are as follows:

> **"75. In our opinion, the essence of the right under Article 366 (29A) (d) is that it relates to user of goods. It may be that the actual delivery of the goods is not necessary for effecting the transfer of the right to use the goods but the goods must be available at the time**

> **of transfer must be deliverable and delivered at some stage. It is assumed, at the time of execution of any agreement to transfer the right to use, that the goods are available and deliverable. If the goods, or what is claimed to be goods by the respondents, are not deliverable at all by the service providers to the subscribers, the question of the right to use those goods, would not arise."**

[18] After discussing the entire law on the subject the Apex Court in BSNL Case held as follows:

> **"92. For the reasons aforesaid, we answer the questions formulated by us earlier in the following manner:**
>
> **(A) Goods do not include electromagnetic waves or radio frequencies for the purpose of Article 366(29-A)(d). The goods in telecommunication are limited to the handsets supplied by the service provider. As far as the SIM cards are concerned, the issue is left for determination by the Assessing Authorities.**
>
> **(B) There may be a transfer of right to use goods as defined in answer to the previous question by giving a telephone connection.**
>
> **(C) The nature of the transaction involved in providing the 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.**
>
> **(D) The issue is left unanswered.**
>
> **(E) The 'aspect theory' would not apply to enable the value of the services to be included in the sale of goods or the price of goods in the value of the service."**

Thus the Apex Court clearly held that though electromagnetic waves or radio frequencies are not goods, there may be transfer of right to use goods by giving a telephone connection. With regard to the SIM card, the question was left open.

[19] The other relevant judgment on the point is ***Imagic Creative(P) Ltd. Vrs. Commissioner of Commercial Taxes and Others; (2008) 2 SCC 614.*** In this case, the appellant before the Apex Court was an advertisement agency. It entered into a contract with ISRO for conceptualizing, designing and producing computer artwork. It also supplied the advertising material to its

customers. It raised bills under two heads; (1) the bills raised for conceptualizing and designing were treated to be in the nature of service and service tax was paid on the same. (2) With regard to the goods it supplied to its customers, the company treated the said transaction as sale and paid sales tax on the same. When the matter came up before High Court it rejected the plea of the assessee holding that the contract was a comprehensive contract for supply of printed material developed by the company. The High Court held that the indivisible contract was divided by the company under different heads. The Apex Court after discussing all the relevant law on the point including the judgments which we have referred to hereinabove set aside the judgment of the High Court and held as follows:

> **"27. What, however, did not fall for consideration in any of the aforementioned decisions is the concept of works contract involving both service as also supply of goods constituting a sale. Both, in Tata Consultancy (2005) 1 SCC 308 as also in Associated Cement Company (2001)4 SCC 593, what was in issue was the value of the goods and only for the said purpose, this Court went by the definition thereof both under the Customs Act as also the Sales Tax Act to hold that the same must have the attributes of its utility, capability of being bought and sold and capability of being transmitted, transferred, delivered, stored and possessed. As a software was found to be having the said attributes, they were held to be goods.**
>
> **28. We have, however, a different problem at hand. The appellant admittedly is a service provider. When it provides for service, it is assessable to a tax known as service tax. Such tax is leviable by reason of a parliamentary statute. In the matter of interpretation of a taxing statute, as also other statutes where the applicability of Article 246 of the Constitution of India, read with the Seventh Schedule thereof is in question, the Court may have to take recourse to various theories including "aspect theory" as was noticed by this Court in Federation of Hotel & Restaurant Association of India, etc. v. Union of India& Ors. [(1989) 3 SCC 634].**
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> **29. If the submission of Mr. Hegde is accepted in its entirety, whereas on the one hand, the Central Government would be deprived of obtaining any tax whatsoever under the Finance Act, 1994, it is possible to arrive at a conclusion that no tax at all would be payable as the tax has been held to be an indivisible one. A distinction must be borne in mind between an indivisible contract and a composite contract. If in a**

> **contract, an element to provide service is contained, the purport and object for which the Constitution had to be amended and clause (29A) had to be inserted in Article 366, must be kept in mind.**
>
> **30. We have noticed hereinbefore that a legal fiction is created by reason of the said provision. Such a legal fiction, as is well known, should be applied only to the extent for which it was enacted. It, although must be given its full effect but the same would not mean that it should be applied beyond a point which was not contemplated by the legislature or which would lead to an anomaly or absurdity.**
>
> **31. The Court, while interpreting a statute, must bear in mind that the legislature was supposed to know law and the legislation enacted is a reasonable one. The Court must also bear in mind that where the application of a Parliamentary and a Legislative Act comes up for consideration; endeavours shall be made to see that provisions of both the acts are made applicable.**
>
> **32. Payments of service tax as also VAT are mutually exclusive. Therefore, they should be held to be applicable having regard to the respective parameters of service tax and the sales tax as envisaged in a composite contract as contradistinguished from an indivisible contract. It may consist of different elements providing for attracting different nature of levy. It is, therefore, difficult to hold that in a case of this nature, sales tax would be payable on the value of the entire contract, irrespective of the element of service provided. The approach of the assessing authority, to us, thus, appears to be correct."**

[20] The Apex Court in ***BSNL's*** case clearly held that in a contract falling under Clause 29A of Article 366 of the Constitution the dominant nature test would not apply but the contract could be split up to determine the value of that part of the contract which amounted to services and that portion of the contract which amounted to a deemed sale. This aspect has been also explained in ***Imagic Creative(P) Ltd.*** case. The Apex Court has clearly taken a view that the service part of the contract cannot be taxed by the State. This view is in line with the view taken by the Apex Court in the ***Second Gannon Dunkerley*** Case.

[21] A Division Bench of this Court in W.P(c) No. 75 of 2013 ***(M/s. Oil Field Instrumentation (India) Ltd. Vrs. The State of Tripura and***

others) and other connected matters decided on 10th September, 2014 after discussing the entire law on the subject held that no person can be directed to pay both sales tax and service tax on the same transaction. It was also held that if there are both elements of service and transfer of right to use goods present in a contract and the contract is not divisible then if service tax has been paid to the Central Government, the State cannot be levy sales tax.

[22] Learned counsel for the petitioners has placed reliance on the Division Bench Judgment of the Gauhati High Court in ***S.S. Photographic Lab (P.) Ltd. Vrs. State of Assam and Others : (2011) 6 GLR 87*** wherein the Gauhati High Court held that the conversion of exposed photographic film rolls into negatives and then into positive photographs is nothing but a rendering of service specific to a customer and is a matter of skill and expertise of the developer and it is not a works contract. The issue before the Court was Whether the exposed photographic film rolls and negatives are "goods" or not. The Gauhati High Court held that they are not "goods" and, therefore, came to the conclusion that the contract for processing exposed photographic films is not a works contract. In our view this judgment has no applicability to the facts of the present case.

[23] In ***Lakshmi Audio Visual Inc., and Another Vrs. Assistant Commissioner of Commercial Taxes and Another : (2001) Sales Tax Cases 426, Vol.124*** the Karnataka High Court was dealing with a case where the petitioners were carrying on the business of hiring audio visual and multimedia equipments. They had purchased public address systems, video cameras, LCD projectors, lighting and other related equipments. They had also engaged lot of technicians for this business. The case of the revenue was that when this equipment is hired out by the petitioners to their customers, this

would amount to a deemed sale under Section 5(C) of the Karnataka Sales Tax Act, 1957. The Court held as follows:

> **"10. I will now examine the nature of a business of hiring of audio, visual and multimedia equipment, in the light of the aforesaid principles. The position will be as follows :**
>
> **(i) If the petitioner hires the audio/visual multimedia equipment to the customer without rendering any other service, i.e., it merely delivers the equipment to the customer on hire and leaves it to the customer to transport the equipment, installs and operate them in any manner he wants and at the end of the period of hiring, return them to the petitioner, then the possession and the effective control is transferred to the customer. The transaction will therefore be a deemed sale, exigible to tax under Section 5C.**
>
> **(ii) On the other hand, if the customer engages the petitioner for providing audio visual services for any programme or event and the petitioner does not deliver any equipment to the customer, but takes the equipment to the site of the programme, installs them, operates them and then dismantles them and brings them back after the period of hiring, in such an event the possession and effective control never leaves the petitioner and the customer never gets the right to the use of equipment. In such an event there is no deemed sale attracting tax under Section 5C.**
>
> **The undisputed facts in this case disclose that the transaction of the petitioners falls under the second category and therefore, the transactions are not transfer of use of goods amounting to deemed sales exigible to tax under Section 5-C of the Act."**

In the first part it was clearly held that if the assessee hires the equipment without rendering any other service it would amount to a sale exigible under Section 5(C) of the Karnataka Sales Tax Act, 1957. On behalf of the petitioners it is contended that it is the second part of the Para-10 of the judgment which will apply in as much as the petitioners continues to rendering services. The only issue is whether that portion of the contract whereby the STBs are handed over by the petitioners to the customers is a sale within the meaning of the TVAT Act.

[24] Admittedly, the contracts in question do not fix any value on the STBs. In fact the contracts have been framed in such a manner which tend to show that the STBs remain the property of the assessee companies. The STBs shall always bear the logo and mark of the assessee companies and the same shall not be erased or effaced by the customers. On behalf of the State it is pointed out that as far as the petitioners in W.P(C) No.453 of 2011 (Tata Sky Ltd. Vrs. The State of Tripura and others) is concerned till a few years back Tata Sky Ltd. was selling the STBs to its customers and in the year ending March 31, 2011 an amount of Rs.1,68,78,13,832/- was shown as revenue from the sale of STBs. In the year ending March 31, 2012 the revenue from sale of STBs was shown as nil but the activation and installation revenue were shown to be Rs.1,62,15,01,992/-. It is, therefore, contended that the petitioners are actually selling the STBs but the contract is drafted in such a manner to show it to be activation and installation charges. Dr. Saraf submits that the petitioners cannot be permitted to take such a plea.

[25] While hearing the petitions this Court had clearly informed the petitioners that this Court would take judicial notice of the web sites of the companies to determine the dispute. In the web site of Tata Sky Ltd. in the case of an ordinary STB, the charges for Tata Sky connection and standard activation are Rs.1,600/-. Charges for activation of Tata Sky HD box is Rs.2,000/- with one month waiver of HD access fees. The charges for installation and activation of Tata Sky Plus HD activation box are Rs.8950/- and the charges for Tata Sky 4k box is Rs.6400/-. As far as the electromagnetic waves are concerned there are monthly charges for transmission of the same. That is service and there can be no dispute with regard to that. Indeed, the

State is not levying any tax on that person but is only levying tax on the cost of the DTH boxes as reflected in the books of accounts of the company.

[26] As far Bharati Telemedia Ltd. is concerned, it also has many types of set of boxes. The costs of the services differ with the type of box. As far as HD Recorder is concerned it is sold for Rs.4990/-, the HD Plus is sold at a minimum price of Rs.1830/-, the HD and the standard box for Rs.1480/-. It is thus clear that it is the nature and cost of the box which determines the activation charges.

[27] In ***Quippo Oil and Gas Infrastructure Limited Vrs. The State of Tripura and others (W.P(C) No.315 of 2010)*** where similar question was involved, this Court held as follows:

> **"[34] After carefully going through the contracts we are of the view that the contracts are mainly for hiring of services. There may be a very small element of transfer of right to use goods but according to us the pre-dominant portion of the contract relates to hiring of services and not to transfer of right to use the goods. We are aware that the dominant nature test is not to be used in composite contracts falling within the ambit of Article 366(29A) but from the reading of the contract it is more than apparent that the intention of the parties was to treat the contract as a contract for hiring of services. Moreover, it is impossible to divide the contract into two separate portions. Every element of the digging directional wells and Mobile Drilling Rig service contains a major element of provisions of services. In such an eventuality it is virtually impossible to divide the contract. It is not possible to work out the value of the right to use goods transferred under the contract.*****"**

As far as this Court is concerned it has been held that even in a case of a composite contract when the contract can be divided with exactitude and the value of the element of the sales part can be decided that portion of the contract which amounts to sale of goods can be taxed under the State law. As far as the present cases are concerned, the case of the petitioners is that

they have not sold the STBs to the customers but they only provide service to the customers.

[28] True it is that the petitioner companies have not sold the STBs to the customers. There can however be no manner of doubt that the right to use these goods i.e. the STBs has been transferred to the customers. In today's world, nothing is given free of cost. The cost of the STB is obviously included in the activation charges and/or the monthly subscription. Under the TVAT Act even where payment of the goods is made by way of deferred payment the goods can be subjected to tax. The main issue is whether the contract can be easily divided and the value of the goods can be ascertained with exactitude.

[29] One of the most important elements of determining whether the right to use goods has been transferred or not is by ascertaining who has effective control over the goods. As far as STBs are concerned they are in total control of the customer. Under his effective control the STBs are installed in the house of the customer. He can use the STB when he wants to. He can use the STB to view whichever channel he wants to view. He may or may not use the STB. The company does not even have the power of entering the premises of the customer. Most importantly as per the terms of the agreement, the companies are responsible for the functioning of the STBs only for a period of 6(six) months. The warranty is valid only for six months and thereafter there is no warranty. Therefore, if STB of a customer is spoiled after six months he will have to pay for repair or replacement of the same. We are of the considered view that this amounts to transfer of the right to use goods

[30] Sri K. N. Choudhury, learned Sr. counsel has placed strong reliance on the observations of the Apex Court in para-44 of the judgment in

BSNL's case and urges that only in the case of works contract and catering contract can the service and sale elements be split up. At first blush this argument is attractive, however, when we read para 49 of the ***BSNL's*** judgment it is clear that the Apex Court held that after the Forty Sixth Amendment the sale element of all the six contracts covered under Clause 29-A of Article 366 are separable and may be subjected to sale tax. Finally in para-92, the Apex Court again held that when a telephone connection is given there may be transfer of right to use goods and where both composite contract of service and sales is concerned the State may impose tax on the sale elements provided there is discernible sale and only the sale element can be taxed.

[31] As far as present cases are concerned the State is assessing the tax solely on the basis of the value of the STBs as given in the books of account of the petitioners. The petitioners claim depreciation etc. on these STBs and the valuation given by the petitioners is the value of the goods, the right to use which has been transferred to the customers. This is easily separable and discernible and the State has the full authority to levy value added tax on the sale part of the transaction i.e. the value of the STBs.

[32] Therefore, we find no merit in the petitions which are accordingly dismissed. The stay orders granted earlier are vacated.

No costs.

JUDGE **CHIEF JUSTICE**