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Case :- SALES/TRADE TAX REVISION No. - 479 of 2017

Applicant :- M/S Samsung (India) Electronics Pvt. Ltd.
Opposite Party :- Commissioner Of Commercial Taxes U.P. Lucknow
Counsel for Applicant :- Nishant Mishra
Counsel for Opposite Party :- C.S.C

WITH

STR Nos. 457 of 2015; 458 of 2015; 459 of 2015; 460 of 2015; 461 of 2015; 462 of 2015; 463 of 2015; 464 of 2015; 114 of 2016; 115 of 2016; 116 of 2016; 117 of 2016; 334 of 2016; 335 of 2016; 336 of 2016; 337 of 2016 and 478 of 2017

Hon'ble Yashwant Varma,J.

Heard Shri Tarun Gulati, learned counsel assisted by Shri Shashi Mathew and Nishant Misha for the revisionist and Shri A.C. Tripathi, learned standing counsel for the respondent.

The seminal issue which arises in this batch of revisions is whether a mobile charger when sold as part of a composite package comprising the said article as well as a mobile phone is liable to be taxed separately treating it to be an unclassified item under the provisions of the U.P. VAT Act 2008[1]. The issue itself has arisen consequent to the Department taking the position that the charger is liable to be taxed separately in light of the decision rendered by the Supreme Court in **State of Punjab Vs. Nokia India Pvt Ltd**[2]. The principal questions of law as framed and upon which the rival submissions centered read thus:

"A. Whether the Tribunal ought to have held that the entire composite set

1 2008 Act
2 2014 (16) SCC 410

having a mobile phone and mobile charger having a single MRP was liable to assessed to a single classification under Entry No. 28 of Schedule-II, Part B of the Act?

B. Whether the Tribunal erred in applying the judgment dated 17.12.2014 by the Hon'ble Supreme Court in the case of State of Punjab V. Nokia Private Limited to the Applicant's facts and circumstances and in view of the fact that Entry No.28 of Schedule-II, Part-B of the Act reads differently from the entry considered by the Hon'ble Supreme Court?"

The position in the different revisions would be evidenced from the following:

Sr.No	STRP No.	Period	Amount
1	457/15	April-2014	17,36,705/-
2	458/15	May-2014	22,83,121/-
3	459/15	June-2014	26,84,895/-
4	460/15	July-2014	26,91,838/-
5	461/15	August-2014	34,78,058/-
6	46215	September-2014	33,67,562/-
7	463/15	October-2014	36,27,700/-
8	464/15	November-2014	20,27,655/-
9	114/16	December-2014	13,24,229/-
10	115/16	January-2015	24,24,565/-
11	116/16	February-2015	25,27,901/-
12	117/16	March-2015	26,40,209/-
13	334/16	April-2015	27,41,178/-
14	335/16	May-2015	26,93,382/-
15	336/16	June-2015	38,34,242/-
16	337/16	July-2015	47,45,272/-
17	479/17	2012-13	2,52,01,348/-
18	478/17	August-2015	56,56,532/-

For the purposes of disposal of this batch, STR No. 479 of 2017 which relates to Assessment Year 2012-13 was treated as the lead matter.

This revision has called in question an order of the Tribunal dated 12 January 2017 which has affirmed the view taken by the assessing authority that the charger although sold as part of a composite package was not liable to be taxed at the rate of 5% as contemplated under Entry-28 appearing in Part-B of Schedule-II but as an accessory and therefore liable to be treated as an unclassified item and chargeable to tax @ 14%. The relevant entry of the Schedule reads thus:-

> **"Cell phones and its parts but excluding cell phone with MRP exceeding Rs. 10,000/-."**

Both the assessing authority as well as the Tribunal have rested their decisions on the judgment of the Supreme Court in **Nokia** to hold that a charger is liable to be treated and viewed as an accessory and not an integral part of the mobile phone. It is in the above backdrop that these revisions have travelled to this Court.

Shri Tarun Gulati, learned counsel appearing for the revisionist has urged the following submissions.

Shri Gulati would contend that **Nokia** is not an authority for the proposition that a charger when sold as a part of a composite package is liable to be treated and taxed as an accessory. This submission is advanced by Shri Gulati since according to him the decision in **Nokia** came to be rendered in light of the submission advanced before the Court that the charger and mobile phones are composite goods. Shri Gulati submits that it has never been the contention of the revisionist that a charger and the mobile phone are composite goods. In his submission the decision in **Nokia** cannot be applied without considering and appreciating the question which was raised before the Supreme Court and the contentions which were advanced before it in this connection.

According to Shri Gulati a careful reading of the decision in Nokia India would establish that the primary contention which was urged for consideration of the Supreme Court was that the charger and the mobile phone were composite goods and thus liable to be taxed bearing in mind the principles enshrined in the General Rules for Interpretation of the First Schedule of Import Tariff appended to the Customs Tariff Act 1975. The submission of Shri Gulati was that the reference to Rule 3 (b) of the General Rules of Interpretation is clear evidence of the nature of contentions which were urged before the Supreme Court namely of the charger and the mobile phone being composite goods. Shri Gulati submitted that it was in the context of the submissions advanced that the Court proceeded to hold that the charger is not an integral part of the mobile phone so as to bring it within the ambit of the expression 'composite goods'. He submits it was in light of the nature of the contentions urged that the Court proceeded to hold that the charger is an accessory to a mobile phone and not a part thereof. In view of the above, Shri Gulati has submitted that the decision in **Nokia** cannot be blindly applied to the facts of a case where the assessee does not claim them to be composite goods.

Shri Gulati then placed reliance upon a decision rendered by a Division Bench of this Court in **M/s. Samsung India Electronics Pvt Ltd Vs. State of U.P. and others**[3] to submit that the distinguishable features of the **Nokia** decision of the Supreme Court were duly noticed by the Division Bench and that the issue itself came to be answered in favor of the present revisionist. In his submission the decision of the Division Bench in Samsung clearly settles the controversy beyond any doubt and that the

3 Writ Tax No. 435 of 2016 decided on 1 August 2016

Tribunal has clearly erred in failing to apply the said decision in the facts of the present case.

Shri Gulati then submitted that there was no intent to affect a separate sale of the charger and that on an application of the dominant intention test it would clearly be evident that the charger could not have been taxed separately. It was his submission that the sale of the charger along with the mobile phone in a composite package would fall within the specie of a composite contract and therefore tax could have been levied only in terms of Entry-28.

Shri Gulati referring to the decision of the Supreme Court in **Bharat Sanchar Nagam Limited Vs. Union of India**[4] ["BSNL"] submitted that only a particular category of composite contracts covered specifically by Article 366 (29-A) of the Constitution were liable to be bifurcated and taxed separately.

Taking the case of the revisionist further Shri Gulati then submitted that Entry-28 was itself indicative of the linkage between the article in question and the maximum retail price. In his submission since the composite package carried and bore a single MRP, it was not permissible for the respondents to levy tax separately on the charger and the mobile phone.

Referring to the provisions of the Legal Meteorology Act, 2009[5] as well as the Legal Metrology (Packaged Commodities) Rules, 2011[6] Shri Gulati submits that only one MRP of the product could be mentioned and carried on the package. According to him mentioning of the MRP would indicate that the same was for the entire package. In view thereof, he

4 2006 (3) SCC 1
5 2009 Act
6 2011 Rules

submitted that there was no possibility of splitting the value of the different products contained in that package and subjecting them to assessment separately. This in his submission was even otherwise impermissible since no provision of the 2008 Act empowered the respondents to bifurcate the contents of a composite package in this fashion nor were there any machinery provisions which contemplated such an exercise being undertaken.

Sri Gulati further submitted that the issue of taxing of composite packages was considered and decided by the Union Government itself and clarifying the position a circular came to be issued on 30 November 2015 mandating the treatment of an accessory when bundled together to be treated as part of the main article. According to Sri Gulati this was noticed by the Himachal Pradesh Tax Tribunal in **Nokia India Sales Pvt Vs. Excise and Taxation Commissioner, Himachal Pradesh and another**[7] when the following observations came to be made:

> "10.Reliance has been placed on a Ministry of Finance, Department of Revenue (State Taxes Division) circular dt 30.11.15, whereby attention of all State Commercial Tax Commissioners, has been drawn to the Hon'ble Apex Court decision (Nokia case) holding that a charger is not a part of a mobile but an accessory That the judgment has been interpreted by some states to imply that mobile chargers sold as a single unit with the mobile phone is to be taxed separately. That para 2 and 3, of the circular further mentions as follows: "In such cases, the Government of India, based on the Customs (Accessory Conditions Rule, 1963) notified by notification No.18-Cus dt. 23.01.1963, specifically provides that accessories compulsorily supplied free with an Article attract the same rate of duty,

7 2017-VIL-16-TRB

which is applicable on the imported Articles. "para 3" As this matter impacts the entire range of consumer electronic products, the States may also consider taking the view that accessories be treated as a part of the main item when they are sold bundled together as a single unit".

He also placed reliance upon the **Accessories (Condition) Rules, 1963**[8] which read thus: -

> "In exercise of the powers conferred by Section 156 of the customs Act, 1962 (52 of 1962], the Central Government hereby makes the following rules, namely: -
>
> 1. These rules may be called the Accessories (Condition) Rules, 1963:
> 2. Accessories of and spare parts and maintenance or repairing implements for, any article, when imported alongwith that article shall be chargeable at the same rate of duty as that article, if the proper officer is satisfied that in the ordinary course of trade:-
>
> (i) such accessories, parts and implements are compulsorily supplied along with that article; and
>
> (ii) no separate charge is made for such supply, their price being included in the price of the article."

According to Sri Gulati, these provisions, rules and clarifications were never brought to the attention of the Supreme Court when it decided **Nokia.**

Sri Gulati then invited the attention of the Court to the decision rendered by the Himachal Pradesh Tax Tribunal to underline his submission that the **Nokia** decision has been understood entirely out of context. This position, in his submission was accepted by the Tribunal as would be evident from the following extracts of its judgment: -

> "13.Therefore, it is clear that mobile phone and battery charger are sold as a single retail pack and the essential character of the package is that of a mobile phone/telephone set. On application of Rule 3 (a) of General Rule of Interpretation of Import Tariff, it is clear that the entry of

8 1963 Rules

telephone set is more specific than the residuary entry and the goods would thus be classified as telephone sets under Rule 3 (a). Even assuming that the classification cannot be done under Rule 3 (a), even under Rule 3 (b), the composite box put up in sets for retail sale are to be classified as if they consisted of the material or component which gives them their essential character i.e the telephone set. The Hon'ble Supreme Court in Kemrock Industries V. CCE Vadodara, 2007 (210) ELT 497 (SC), held that the composite box is to be classified as "telephone set" and the appellant has correctly paid the tax under the Act and no further demands can be made from them. Thus, by this reasoning the composite goods or goods put up in sets for retail sale of the mobile phone and battery charger can only fall in the classification of the cell phone.

18.The answers to the questions as posed in para 5 (supra) are as follows, the Hon'ble Apex Court has in the Micromax judgement stated that the Nokia case is distinguishable; the Nokia judgment is not ratio decendi for provisions under the H.P. VAT Act, wherein entries No.57 of Schedule-A clearly state that 5% concessional rate of tax will apply to "mobile phones" and "parts thereof". Similarly Rule 3 (a) and (b) of the General Rules for interpretation of Harmonised System appended to the Customs Tariff Act, 1975, stipulates that the essential character of the goods in question in a composite transaction comprising of different components has to be determined with reference to main component of higher value. In fact Justice A.K. Goyal, in his decision in VAT Appeal 54 of 2010, (Punjab High Court) has reiterated the distinction between 'part of goods' and accessories' and distinguished the judgements relied upon by the revenue, in case Kores India Ltd, (1977) 039 STC 0008 ð 1976-VIL-08-SC, in which case the Hon'ble Supreme Court, held that there was nothing to show that the ribbon and carbon papers were sold without extra charges along with the typewriter. The revenue wanted to assess the carbon papers, ribbon and other items at the same rate at which typewriter was taxed which plea was rejected by the Hon'ble Apex Court. Similarly in the I.A.S. products Vs. Commissioner Tax, Uttarakhand (2010) 29 VST 507, the LPG regulator was taxed at higher rate and plea of the assessee for applying concessional rate applicable to gas cylinder was rejected by holding that even though LPG regulator may be part and parcel of the connection, but the same was separable from the cylinder.

There was nothing to show that the regulator sold was part of composite package without any extra charges along with cylinder.

19. It is clear that the entries in the H.P. VAT Act, are distinct from the Punjab VAT entries. Tax on VAT items cannot be charged differentially, i.e. @ 5% when a charger comes as a prepackaged product as part of a telephone or at the residuary rate of 13.75% when a stand alone purchase is made of a charger. Such an interpretation of a same product being charged differentially will not be conducive to a healthy tax environment. Therefore, the revenue to contend that the appellant paid tax @ 13.75% on sale of stand alone chargers, cannot be accepted. Therefore, reliance is to be placed on rule 3 (a) of the HSN interpretation rules appended to the Excise Tariff Act, 1975, which stipulates that, when two or more headings each refer to part only of the items in a set put up for retail sale, then classification would be as per the material or component which gives them their essential character. Similarly Rule 3 (b), lays down that composite goods made of different components and goods put up in sets for retail sale are then to be classified by that component which gives them their essential character. This tribunal without delving into the issue of a charger being a part thereof or a separate accessory, in view of the Apex Court findings. However, in view of the rules of interpretation for HSN, it is clear that the Maximum Retail Price (MRP) is already affixed on these retail packages at the time of import or sale. If separate tax is to be levied on chargers then the revenue should also tax the pre packed batteries separately. I cannot accede to such proposition. It is not appropriate to tax differently the individual components, which have entered into a determination of the price of the goods, and more specifically composite goods. The said charger is of zero value, without a particular brand or model of a cell phone. Therefore, in view of the specific entries in entry 57 of the H.P. VAT Act, the clarification regarding interpretation of the General rules of interpretation of HSN appended to Customs Tariff Act, 1975, given by Ministry of Finance, dated 30.11.2015 (post the Nokia judgement), various judicial pronouncements on the common parlance text, and essential characteristic test of composite goods. I am inclined to hold that a charger ought to be levied a tax equivalent to the rate of tax as levied on the cell phone."

Shri Avinash Chandra Tripathi, the learned standing counsel has while refuting the above submissions contended that the decision of the Supreme

Court in **Nokia** is a direct and emphatic answer to the questions raised. According to Shri Tripathi, **Nokia** is a binding precedent for the proposition that a charger is an accessory and thus liable to be taxed separately. Shri Tripathi has in support of his submission placed reliance upon the decisions of the Supreme Court in **M/s. Annapurna Carbon Industries Co. Vs. State of Andhra Pradesh**[9] as well as **Mehra Brothers Vs. Joint Commercial Officer, Madras**[10] to submit that the charger is clearly an accessory since it does constitute an adjunct, addition and accompaniment for convenient or comfortable use of the main article. In his submission, the Department therefore has rightly subjected the charger to tax @ 15% treating it to be an unclassified item. Sri Tripathi also laid stress on the language employed in Entry 28 to submit that the expression *"Cell phones and its parts…."* cannot be said to include a charger since it is not a part of the cell phone.

At the outset the Court notices the submission of Sri Gulati that the issues raised stand concluded in light of the decision of the Division Bench in **Samsung**. In order to appreciate this submission it would be apposite to extract the following observations from the decision of the Division Bench: -

> "10. In the facts of this case, it cannot be said that there was any fresh material nor any tangible material which would permit the authorities to reassess or issue said notice. Decision of Nokia will not apply to facts of this case. The factual scenario in the case on hand are as under:
>
> (a) The judgment has been rendered in context of Punjab VAT Act. The entry in the Schedule under the Act reads differently and, as such, provisions are different.

9 AIR 1976 SC 1418
10 (1991) 1 SCC 514

(b) The case has been decided on facts of another assessee i.e. Nokia India Pvt. Ltd. And cannot be applied to facts of petitioner which are distinct. Nokia had admitted in its reply to notices and as also before Tribunal in State of Punjab that battery charger is an accessory. It is submitted that it is not case of petitioner that battery charger is an accessory and, as such, Nokia judgment does not apply.

(c) The Court in para 17 has noticed Rule 3 (b) of the General Rules of Interpretation of Ist Schedule of Customs Tariff. Rule 3 (b) applies to three distinct categories of goods being mixtures, composite goods consisting of different materials and goods put up in sets for retail sale.

(d) For all three categories, text for classification is that goods are classified as if they consisted of material or component which gives "essential character". The only finding given by the Court is that merely because goods are sold in a composite pack, it does not become "composite goods", perhaps because it was argued that cellphone and battery charger are composite goods. Petitioner in present case has never argued that two are composite goods. Instead it's case is that these goods are put up in sets for retail sale and fall under category (c) noticed above. There is no finding of the Court that if goods fall in category (c), they cannot be classified according to essential character test. By use of words, "as if" Rule 3 (b) applies a fiction by which it is assumed that component which gives essential character is only component which is relevant and common classification of all goods put up in the set has to be classification of component which gives the set its essential character. Undoubtedly, in a set or a composite box containing the cellphone and the battery charger, the essential character of set is that of cellphone and entire set is to be classified as a cellphone.

(e). No argument was raised in Nokia and there is no finding on the issue in that case that there is a legal impossibility of making a separate classification and having a separate value for each component in a composite box containing the cellphone and the battery charger. Under the Legal Metrology Act, the MRP of product has to be mentioned on the package. Only one MRP of the product can be mentioned on the package and that MRP will be that of entire package. There is no possibility of splitting the value of different products and subjecting them to classification and assessment separately.

(f) There is no mechanism in the Act or Rules to split consideration in the case of a composite contract. Where there is no machinery created under statutory provisions for computation of the tax, it has to be presumed that statute did not contemplate a tax on the subject matter (CC v. Larsen & Toubro, (2016) 1 SCC 170 and CIT v. BC Srinivasa Shetty, (1981) 2 SCC 460). In the present case, neither there is a separate price for the mobile charger nor can it be determined under the Act/Rules and, therefore, it has been merely estimated at Rs.180/- per piece in a most arbitrary manner. As the Act/Rules do not provide for a mechanism to disintegrate a composite contract, no tax can be charged separately on a mobile charger. These arguments were never raised or considered in Nokia's case."

This Court however notes that this decision was rendered and the observations extracted herein above made in the context of an exercise of reassessment sought to be initiated by the respondents therein based upon the decision rendered in **Nokia.** It would therefore be appropriate to independently evaluate the rival submissions, which have been advanced before this Court.

Since the principal submissions advanced by parties have revolved around the question as to whether **Nokia** concludes the controversy or not, the first and foremost exercise which this Court must undertake is to ascertain the ratio decidendi of the said judgment. But before embarking on this exercise, it would be apposite to first notice the relevant parts of the judgment of the Court in **Nokia**. They are, for the sake of convenience, extracted herein below: -

"**9.** The learned counsel appearing on behalf of the respondent demonstrated the composite package of cellphone, cellphone and battery charger and some other accessories like headphone. The contention of the respondent had been that battery charger not being independently sold, was sold with the cellphone in same packing and hence tax chargeable was @ 4% and proper tax had been paid and, therefore, there was no good ground to charge tax @ 12.5% on sale of those battery chargers which are free with the cellphone in the composite package.

10. On the other hand, according to the counsel for the appellant State a battery charger is not a part of the cellphone but merely an accessory thereof even as per the respondents themselves, who had separately paid tax @ 12.5% on the battery chargers sold separately. According to him, the battery chargers are not covered under Entry 60(6)(*g*) of Schedule B of the Act and was thus liable to be taxed @ 12.5% on its value under Schedule F of the Act which covers all residuary items not falling in any of the classifications of the other Schedules of the Act.

11. We have heard the rival contentions made on behalf of the parties and perused the record. Schedule B of the Act contains list of goods taxable @ 4%. Cellphone is mentioned in the said Schedule and it finds further place at Serial No. 6(*g*) under Entry 60 and is thereby liable to be charged @ 4%.

12. According to the counsel for the respondent, charger is an integral part of the cellphone and the cellphone cannot be operated without the charger and when any person comes for cellphone, he purchases the cellphone and then automatically takes away the charger for which no separate money is charged. However, it is admitted that whenever the Company sells chargers separately then 12.5% tax is charged which is applicable to goods in residuary Schedule F of the Act.

16. The learned counsel for the respondent referred to general rules for interpretation of the First Schedule of the Import Tariff under the Customs Tariff Act, 1975. The classification of the goods in the Schedule for the purpose of Rule 3(*b*) in the General Rules for Interpretation of Import Tariff reads as follows:

> "**3. (*b*)** Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(*a*), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable."

19. <u>In view of the aforesaid facts, we find that the assessing authority, appellate authority and the Tribunal rightly held that the mobile/cellphone charger is an accessory to the cellphone and is not a part of the cellphone. We further hold that the battery charger cannot be held to be a composite part of the cellphone but is an independent product which can be sold separately, without selling the cellphone. The High Court failed to appreciate the aforesaid fact and wrongly held that the battery charger is a part of the cellphone.**"**</u> (emphasis supplied)

A careful consideration of the decision rendered by the Supreme Court in

Nokia establishes that the contention urged before the Court was that the charger as well as the mobile phone when placed in a singular package were liable to be viewed as composite goods. In that context, the Supreme Court held that merely by packaging the mobile phone and its charger together would not make them composite goods. This finding was returned in light of the provisions of Rule 3 (b) of the General Rules for Interpretation.

It is pertinent to bear in mind that a decision rendered by a Court primarily has three basic postulates. The first, of course, is the facts in the backdrop of which the decision is rendered. The second comprises of the submissions and the issues of law or fact which are urged for the consideration of the Court. The third pillar of the judgment is the principle of law which the Court ultimately formulates and declares. The quest to discern and identify the ratio of a precedent requires the judgment to be read in its entirety, not to be misled by every singular observation as also to bear in mind always the factual backdrop in which it comes to be rendered as well as the questions which are raised for the consideration of the Court. The ratio of a decision can neither be culled out nor recognized without due consideration being conferred on the aforementioned factors. While these principles are well settled, it would be relevant to notice the following observations as made by the Supreme Court in **Natural Resources Allocation**[11]:-

> **"69.** Article 141 of the Constitution lays down that the "law declared" by the Supreme Court is binding upon all the courts within the territory of India. The "law declared" has to be construed as a principle of law that emanates from a judgment, or an interpretation of a law or judgment by the Supreme Court, upon which, the case is decided. (See *Fida Hussain* v. *Moradabad Development Authority* [(2011) 12 SCC 615 : (2012) 2 SCC (Civ) 762] .) <u>Hence, it flows from the above that the</u>

11 (2012) 10 SCC 1

“law declared” is the principle culled out on the reading of a judgment as a whole in light of the questions raised, upon which the case is decided. [Also see *Ambica Quarry Works* v. *State of Gujarat* [(1987) 1 SCC 213] and *CIT* v. *Sun Engg. Works (P) Ltd.* [(1992) 4 SCC 363]] In other words, the “law declared” in a judgment, which is binding upon courts, is the ratio decidendi of the judgment. It is the essence of a decision and the principle upon which the case is decided which has to be ascertained in relation to the subject-matter of the decision.

70. Each case entails a different set of facts and a decision is a precedent on its own facts; not everything said by a Judge while giving a judgment can be ascribed precedential value. The essence of a decision that binds the parties to the case is the principle upon which the case is decided and for this reason, it is important to analyse a decision and cull out from it the ratio decidendi. In the matter of applying precedents, the erudite Justice Benjamin Cardozo in *The Nature of the Judicial Process*, had said that “if the Judge is to pronounce it wisely, some principles of selection there must be to guide him among all the potential judgments that compete for recognition” and “almost invariably his first step is to examine and compare them;” “it is a process of search, comparison and little more” and ought not to be akin to matching “the colors of the case at hand against the colors of many sample cases” because in that case “the man who had the best card index of the cases would also be the wisest Judge”. Warning against comparing precedents with matching colours of one case with another, he summarised the process, in case the colours do not match, in the following wise words:

“It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the Judge begins. He must then fashion law for the litigants before him. In fashioning it for them, he will be fashioning it for others. The classic statement is Bacon's: ‘For many times, the things deduced to judgment may be meum and tuum, when the reason and consequence thereof may trench to point of estate. The sentence of today will make the right and wrong of tomorrow.’”

71. With reference to the precedential value of decisions, in *State of Orissa* v. *Mohd. Illiyas* [(2006) 1 SCC 275 : 2006 SCC (L&S) 122] this Court observed: (SCC p. 282, para 12)

“*12.* … According to the well-settled theory of precedents, every decision contains three basic postulates: (*i*) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (*ii*) statements of the principles of law applicable to the legal problems disclosed by the facts; and (*iii*) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment."

73. It is also important to read a judgment as a whole keeping in mind that it is not an abstract academic discourse with universal applicability, but heavily grounded in the facts and circumstances of the case. Every part of a judgment is intricately linked to others constituting a larger whole and thus, must be read keeping the logical thread intact. In this regard, in *Islamic Academy of Education* v. *State of Karnataka* [(2003) 6 SCC 697] , this Court made the following observations: (SCC p. 719, para 2)

"*2.* … The ratio decidendi of a judgment has to be found out only on reading the entire judgment. In fact, the ratio of the judgment is what is set out in the judgment itself. The answer to the question would necessarily have to be read in the context of what is set out in the judgment and not in isolation. In case of any doubt as regards any observations, reasons and principles, the other part of the judgment has to be looked into. By reading a line here and there from the judgment, one cannot find out the entire ratio decidendi of the judgment." (emphasis supplied)

This settled position has been reiterated more recently by the Supreme Court in **Roger Shashoua Vs. Mukesh Sharma & others**[12]

52. At this juncture, we think it necessary to dwell upon the issue whether *Shashoua* principle is the *ratio decidendi* of *BALCO* and *Enercon (India) Ltd.* (supra) and we intend to do so for the sake of completeness. It is well settled in law that the *ratio decidendi* of each case has to be correctly understood. In *Regional Manager* v. *Pawan Kumar Dubey [(1976) 3 SCC 334]*, a three-Judge Bench ruled:

"7. … It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts."

54. In this context, a passage from *Commissioner of Income Tax* v. *Sun Engineering Works (P) Ltd. [(1992) 4 SCC 363]* would be absolutely apt:

"39. … It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under

12 2017 SCC online SC 697

consideration and treat it to be complete 'law' declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings. …"

56. From the aforesaid authorities, it is quite vivid that a ratio of a judgment has the precedential value and it is obligatory on the part of the Court to cogitate on the judgment regard being had to the facts exposited therein and the context in which the questions had arisen and the law has been declared. It is also necessary to read the judgment in entirety and if any principle has been laid down, it has to be considered keeping in view the questions that arose for consideration in the case. One is not expected to pick up a word or a sentence from a judgment de hors from the context and understand the *ratio decidendi* which has the precedential value. That apart, the Court before whom an authority is cited is required to consider what has been decided therein but not what can be deduced by following a syllogistic process." (emphasis supplied)

As has been succinctly explained in the decisions noticed above, the ratio is the principle deducible from the application of the law to the facts of a particular case and it is this which constitutes the true ratio decidendi of the judgment. Each and every conclusion or finding recorded in a judgment is not the law declared. The law declared is the principle which emerges on the reading of the judgment as a whole in light of the questions raised. It is on these basic principles that the Court proceeds to ascertain the ratio decidendi of **Nokia**.

A careful reading of the entire decision establishes beyond doubt that the Court found that a charger and mobile phone are not composite goods. This evidently because a charger cannot possibly be recognized as an integral part or constituent of a mobile phone. A mobile phone is not an amalgam of various products and a charger. Since the submission advanced before the Court was that these were composite goods, the Supreme Court proceeded to recognize a charger to be an accessory to a mobile phone.

The contention which is urged before this Court namely that the sale of the mobile phone along with its charger in a single retail package constitutes a composite contract and requires the application of the dominant intention test was neither urged nor considered by the Supreme Court. The Supreme Court consequently in **Nokia** did not record any finding nor did it declare the law to be that the sale of a mobile phone and its charger in a single retail package would not constitute a composite contract. This Court must also necessarily take note of the fact that the circular of the Government of India dated 13 November 2015 as well as the provisions of the 1963 Rules which are noticed in the decision of the Himachal Pradesh Tax Tribunal also do not appear to have been brought to the attention of the Court. The entry of the Punjab VAT Act in the backdrop of which the decision itself came to be rendered is also distinct from the one which stands embodied in the 2008 Act. The distinguishable features of the judgment of the Supreme Court in **Nokia** was also noticed by the Division Bench in **Samsung.** The Court must also additionally note that the submissions urged by Shri Gulati namely that a single retail package which bears one MRP cannot be severed and the articles contained therein assessed separately was also one which was neither urged nor canvassed in Nokia and therefore consequently not considered.

On an over all consideration of the aforesaid aspects, this Court finds itself unable to hold that **Nokia** is a precedent at all on the question of a composite contract being subjected to tax.

The Court then proceeds to consider the submission of Sri Gulati with regard to the applicability of the dominant intention test. In order to appreciate the core of the doctrine of "dominant intention" it would be apposite to revisit the historical background which resulted in the amendments to the Constitution and Article 366 (29A).

Initially it was **Gannon Dunkerley**[13], which held the field and had declared that for the purposes of a tax on the sale or purchase of goods, the expression "sale" would have to be understood in the manner in which it stood defined under the Sales of Goods Act, 1930. As a result of this declaration of the law, the transfer of goods in the course of execution of a works contract, the provision of service in eating establishments, the transfer of a right to use, all fell outside the ambit of taxation. This for the Court in **Gannon Dunkerley** recognized that in order to constitute a sale it was necessary that there exist an agreement to transfer title supported by consideration and an actual transfer of property in goods. It was consequently not permissible to deconstruct a particular contract and all specie of hybrid contracts were liable to be viewed as one entire and indivisible transaction. In view of the law so declared it was not permissible for taxing authorities to subject composite contracts involving elements of sale to tax.

In terms of the recommendations made by the Law Commission in 1974, it was ultimately decided by Parliament to amend Article 366 (29A). The Constitution (Forty-sixth) Amendment Act, 1982 introduced a definition of the expression "tax on the sale or purchase of goods" and this marked a paradigm shift in the manner in which hybrid or composite

13 State of Madras Vs. Gannon Dunkerley AIR 1958 SC 560

contracts would henceforth be liable to be viewed and taxed. By virtue of the amendments effected certain contracts which involved an involuntary sale element became subject to taxation.

The shift in the legal position is elaborately noticed in **BSNL** itself and was explained as follows: -

> **35.** To answer the questions formulated by us, it is necessary to delve briefly into the legal history of Article 366(29-A). Prior to the Forty-sixth Amendment, composite contracts such as works contracts, hire-purchase contracts and catering contracts were not assessable as contracts for sale of goods. The *locus classicus* holding the field was *State of Madras* v. *Gannon Dunkerley & Co. (AIR 1958 SC 560).* There this Court held that the words "sale of goods" in Entry 48 of List II, Schedule VII to the Government of India Act, 1935 did not cover the sale sought to be taxed by the State Government under the Madras General Sales Tax Act, 1939. The classical concept of sale was held to apply to the entry in the legislative list in that there had to be three essential components to constitute a transaction of sale, namely, (*i*) an agreement to transfer title, (*ii*) supported by consideration, and (*iii*) an actual transfer of title in the goods. In the absence of any one of these elements it was held that there was no sale. Therefore, a contract under which a contractor agreed to set up a building would not be a contract for sale. It was one contract, entire and indivisible and there was no separate agreement for sale of goods justifying the levy of sales tax by the provincial legislatures. "Under the law, therefore, there cannot be an agreement relating to one kind of property and a sale as regards another." (AIR p. 573, para 33) Parties could have provided for two independent agreements, one relating to the labour and work involved in the execution of the work and erection of the building and the second relating to the sale of the material used in the building in which case the latter would be an agreement to sell and the supply of materials thereunder, a sale. Where there was no such separation, the contract was a composite one. It was not classifiable as a sale. The Court accepted the submission of the assessee that the expression "sale of goods" was, at the time when the Government of India Act, 1935 was enacted, a term of well-recognised legal import in the general law relating to sale of goods and must be interpreted in Entry 48 of List II of Schedule VII of the 1935 Act as having the same meaning as in the Sale of Goods Act, 1930. According to this decision if the words "sale of goods" have to be interpreted in their legal sense, that sense can only be what it has in the law relating to sale of goods. To use the language of the Court: (AIR p. 577, para 46)

"*46*. To sum up, the expression 'sale of goods' in Entry 48 is a nomen juris, its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement. In a building contract which is, as in the present case, one, entire and indivisible—and that is its norm, there is no sale of goods, and it is not within the competence of the Provincial Legislature under Entry 48 to impose a tax on the supply of the materials used in such a contract treating it as a sale."

36. Following the ratio in *Gannon Dunkerley* that "sale" in Entry 48 must be construed as having the same meaning which it has in the Sale of Goods Act, 1930, this Court as well as the High Courts held that several composite transactions in which there was an element of sale were not liable to sales tax."

As a consequence of the amendments introduced, certain contracts from which the elements of sale as understood under the provisions of the 1930 Act were absent were brought within the bounds of sales and purchases for the purposes of levy of a sales tax. Composite contracts of the character encompassed in Article 366 (29A) consequently came to be recognized as embodying elements of a "deemed sale" of goods. However the caveat which is very often overlooked is that only a specified category or genre of composite contracts were covered by Article 366 (29A). These composite contracts stand covered under sub clause (a) [involuntary sales], sub clause (b) [works contracts], sub clause (c) [hire purchase contracts] and sub clause (e) [catering contracts]. The amendment in essence enabled and empowered taxing authorities to view the abovementioned category of contracts as ones that were divisible and where by legal fiction a sales element could be isolated and subjected to tax. It is to this extent only that the principles elucidated in **Gannon Dunkerley** ceased to have application.

However composite contracts which do not stand digested and dealt with by Article 366 (29A) specifically still stand on the same pedestal. What needs to be understood and recognized is that the power to deconstruct composite contracts stands restricted only to such categories of contracts, which are specifically covered by the various sub clauses of Article 366 (29A) and none other. Article 366 (29A) in that sense is not a general essay or provision which empowers authorities to tax all kinds of composite contracts. This is evident from the following observations as they appear in **BSNL**: -

> **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 [(1967) 20 STC 115(Mad)]* 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* v. *Associated Hotels of India Ltd. [(1972) 1 SCC 472].* That decision has by this clause been effectively legislatively invalidated.
>
> **42.** All the sub-clauses of Article 366 (29-A) 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 Dunkerley Ltd.* (*sic* modified). 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 Forty-sixth 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 Article 366 (29-A) 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 Forty-sixth 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 Forty-sixth 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(29-A). Transactions which are mutant sales are limited to the clauses of Article 366(29-A). All other transactions would have to qualify as sales within the meaning of the Sales of Goods Act, 1930 for the purpose of levy of sales tax.

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 pinciples enunciated in *Gannon Dunkerley 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(29-A) 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.

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.

Proceeding then to the doctrine of *"dominant intention"* or the *"dominant nature"* test [as the Supreme Court chose to describe it in **BSNL**], what it basically bids the Court to do is to identify and recognize the *"substance of the contract"* and the true intent of parties. The enquiry liable to be undertaken must pose and answer the question whether in a composite contract there exists a separate and distinct intent to sell. While **BSNL** dealing with the dominant nature test was concerned with the splitting of the element of sale and service, in the facts of the present case, the application and invocation of that principle requires the Court to consider whether there was a separate and distinct intent to effect a sale of the charger or whether its supply was a mere concomitant to the principal intent of sale of a mobile phone.

Admittedly, the mobile phone and charger are sold as part of a composite package. The primary intent of the contract appears to be the sale of the mobile phone and the supply of the charger at best collateral or connected to the sale of the mobile phone. The predominant and paramount intent of the transaction must be recognized to be the sale of the mobile phone. In the case of transactions of the commodity in question, the Court must also bear in mind that a charger can possibly be purchased separately also. However in case it is placed in a single retail package along with the mobile phone, the primary intent is the purchase of the mobile phone. The supply of the charger is clearly only incidental. In any view of the matter, there does not appear to be any separate or distinct intent to sell the charger.

Regard must also be had to the fact that the Court is considering the case of a composite package, which bears a singular MRP. The charger is admittedly neither classified nor priced separately on the package. It is also not invoiced separately. The MRP is of the composite package. The respondents therefore cannot be permitted to split the value of the commodities contained therein and tax them separately. This especially when one bears in mind that entry 28 itself correlates the article to the MRP.

The third aspect which also commends consideration is that the MRP mentioned on the package is for the commodities or articles contained therein as a whole. It is not for a particular commodity or individual article contained in the composite retail package. The Court notes that Shri Tripathi, the learned standing counsel, was unable to draw its attention to any provision or machinery under the 2008 Act which may have conferred or clothed the assessing authority with the jurisdiction to undertake such an exercise. It is pertinent to note that the only category of composite contracts which stand encapsulated under the 2008 Act are works contract and hire purchase agreements. The other part of Article 366 (29-A) which stands engrafted is with respect to the transfer of a right to use. The composite contracts which arise from the sale of a composite package are not dealt with under the 2008 Act. The Act also does not put in place or engraft any provision which may empower the assessing authority to severe or bifurcate the assessable value of articles comprising a purchase and sale of composite packages. This more so in the absence of a specific, independent and identifiable element to sell. In the absence of any procedure or provision in the 2008 Act conferring such authority, the Court concludes that in the case of a sale of composite packages bearing a singular MRP, the authorities under the 2008 Act cannot possibly assess the components of such a composite package separately. Such an exercise, if undertaken, would also fall foul of the principles enunciated by the Supreme Court in **Commissioner of Commercial Tax Vs. Larsen & Toubro**[14] and **CIT v. BC Srinivasa Shetty**[15].

The Court additionally must also bear in mind that in the case of a composite contract, the true enquiry which must be undertaken is to cull out what the parties intended to buy and sell. As has been noted hereinabove, in the facts of the present case there does not appear to have existed any intention of the assessee to affect a separate or distinct sale of the charger. The Court notes that no separate price was fixed or declared for the charger. In fact the commodity was also not separately identified on the package. The charger was supplied along with the primary article which formed the bedrock of the transaction namely, the mobile phone. There was thus no intention of the parties to enter into a transaction involving the sale of the charger. It merely happened to be part of the composite package. As noticed hereinabove, the supply of the charger was only collateral. The aspect of true intent fell for consideration of the Supreme Court in **Idea Mobile Communication Ltd Vs. Commissioner of Central Excise and Customs, Cochin.**[16] when the Court observed as follows:-

> "20. 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. There cannot be any dispute to the aforesaid position as the appellant itself subsequently has been paying service tax for the entire collection as processing charges for activating cellular phone and paying the service tax on the activation. The appellant also accepts the position

14 (2016) 1 SCC 170
15 (1981) 2 SCC 460
16 . (2011) 12 SCC 608

> that activation is a taxable service. The position in law is therefore clear that the amount received by the cellular telephone company from its subscribers towards SIM Card will form part of the taxable value for levy of service tax, for the SIM Cards are never sold as goods independent from services provided. They are considered part and parcel of the services provided and the dominant position of the transaction is to provide services and not to sell the material i.e. SIM Cards which on its own but without the service would hardly have any value at all."

That then leaves the Court only to consider the submission of Shri Tripathi that Entry-28 on its plain reading would not lend sanction to the contention urged on behalf of the assessee since its stands restricted to a cell phone and its parts. The Court find itself unable to hold against the assessee on the basis of this contention since the same is evidently urged without having due regard to the fact that Entry 28 clearly and in unambiguous terms correlates and connects the words cell phone to the MRP. As has been held hereinabove in the case of a composite package only one MRP stands disclosed and borne on the package. It is with reference to this singular MRP only that a tax can be imposed. The State respondents do not dispute that the single retail package does not carry or bear a separate MRP for the charger included therein. It is also not their case that the charger is invoiced separately even though it may form part of the composite package. A holistic reading of Entry 28 clearly establishes an inseparable link between the cell phone and its MRP. It is this which forms the basis and measure for taxability. In view thereof, the Court holds that the disjunctive reading to the Entry which is sought to be urged on behalf of the State respondents does not commend acceptance and would not enable the charger contained in a composite package to be held to be exigible to tax separately.

Accordingly and for the reasons aforenoted, these revisions shall stand

allowed. The orders of the Tribunal impugned herein shall stand set aside. The questions framed are answered in favour of the assessee and against the Revenue.

Date: - 18.01.2018 **(Yashwant Varma, J.)**
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