(2)

Sl. No. 2
23/7/2021

BEFORE DELHI VALUE ADDED TAX, APPELLATE TRIBUNAL, DELHI
Sh. Narinder Kumar, Member (J) and Sh. Rakesh Bali, Member (A)

Application No. 41/Misc./Stay/19-20
Appeal No. 113/ATVAT/2019-20

1. M/s. Bharti Airtel Ltd.,
224, Okhla Industrial Area,
Ph-3, New Delhi – 110020. ..... Appellant –Applicant

Application No. 39 /Misc./Stay/19-20
Appeal No. 114/ATVAT/2019-20

2. M/s. Bharti Airtel Ltd.,
224, Okhla Industrial Area,
Ph-3, New Delhi – 110020. ..... Appellant –Applicant

Versus

Commissioner of Trade & Taxes, Delhi. .....Respondent

Present:

Counsel for the Appellant- Applicant : Sh. Nikhil Gupta
Counsel for the Revenue : Sh. ~~R Rana~~ C.M. Sharma

ORDER

(On Applications U/s 76(4) of DVAT Act)

1. This common order is to dispose of applications u/s 76(4) of DVAT Act, 2004 (here-in-after referred to as the Act) in both the

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above mentioned appeals, as common questions are involved in these matters.

2. The applications came to be filed with the memorandum of appeals. By way of appeal, impugned orders dated 17/06/2020, passed by learned Objection Hearing Authority (OHA) rejecting the objections of the said companies have been challenged.

The prayer in the applications is that the appeals be admitted for hearing without imposing any condition by way of pre-deposit of whole or some of the amount of penalty. The default assessment pertains to the tax period – Annual 2013-14.

3. Case of the appellant-applicant company in brief reads as:

"The appellants /applicants are engaged in providing Telecommunication Services to the customers and registered as a service provider by virtue of Licence granted by Government of India under Telegraph Act, 1885. Appellants companies – dealers are registered under the Delhi Value Added Tax Act, 2004 vide Tin No. 07910178306, and also under CST Act."

As a licencee of the Government of India, as per licence u/s 4 of Indian Telegraph Act and Indian wireless Telegraphy Act, this company is to establish a telecom network and infrastructure i.e. installation of telecom tower material and fiber network across

the area. Telecommunication infrastructure is established after installation of telecom material i.e. Antenna. Transmission apparatus, cable etc. to provide seamless connectivity. Mainly the said material is imported from out of the country (after payment of custom duty) an also procured through various channels by means of interstate purchase and stock transfer inward from other circles/ stats of the Appellant. The said material is procured after payment of due taxes as per the local law of land. There is a local purchase of few items as well and the appellant is not claiming any ITC for the same.

Accordingly, the said material is capitalized in the books of accounts of the appellant and forms part of the fixed asset base of the Appellant. The appellant is claiming depreciation on the material procured an the books of accounts of the appellant are duly audited by the Statutory Auditors of the Appellant.

The appellant needs to ensure that the signal/airwaves transmitted by the towers/carried by optical Fiber Cable are properly received at the customer premises. For this purpose, Consumer Premises Equipment (CPE) is installed at customer premises so that Customer can avail our services. These equipments fulfill the function in many ways similar to that of the SIM Card.

The network equipment installed at the customer's premises ('Modem/CPE') is an integral part of the telecommunication network of the appellant through which telecommunication services are provided. These modems are an extension of the network.

No property of the transmission apparatus is transferred to the customers and same remains the property of the Appellant, hence, there is no sale within the meaning of section 2(zc) of the DVAT Act, 2004 and no monthly/yearly rent is charged on such equipment hence there is o right to use tax u/s 2(zc) (vi) of the DVAT Act.

Supply of CPE is incidental to enable the viewing. Therefore, the dominant intent of the contract between the appellant and the subscriber is the enjoyment of services.

If the charges for providing the services and the supply of CPE is composite a question arises as to the taxability of transfer of CPE for use by the subscriber, such transfer without there being a transfer of title of CPE is not 'a sale'. In case of a composite contract, same has to be disintegrated to tax the value of CPE, but where such disintegration is not possible then the transaction of providing of services cannot be broken or divided into services

and supply so as to levy tax on the transfer of CPE."

4. Vide order dated 31/3/2018, learned Assessing officer directed the appellant company-dealer-applicant to pay a sum of Rs. 22,19,891/- by way of penalty u/s 86(10) of DVAT Act. Before imposing penalty, learned Assessing Officer had issued notice to the appellant – dealer – applicant.

5. Objections were filed by the appellant company, having felt dissatisfied with the order 31/3/2018 passed by learned Assessing Officer.

6. As regards the order dt.31/3/2018, it is significant to note that while dealing with the contentions raised on behalf of the appellant, learned Assessing Officer firstly referred to provisions of sub-clause (d) of Article 366 (29)(A)of Constitution of India, and also to the information made available by the company during hearing.

7. In the order dated 31/3/2018, the Assessing Officer, while imposing penalty, observed in the manner as :

> "Since the complete records could not be provided therefore, the dealer was asked to provide the number of connections installed during the tax period and the cost of CPE device.
>
> The dealer submitted the details which revealed that , 47791 new installation were made during the tax period 2013-14. From the record, it was revealed that, a modem costs around Rs.929/- per unit. The dealer

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representative in the reply dated 26/03/18 submitted that, no charge was levied on account of installation of CPNE as the said equipment was provided on a returnable basis and was capitalized in the books of Accounts."

"The instant matter is also based on the similar analogy. In another matter of Bharat Sanchar Nigam Limited (BSNL) Vs. Union of India and Others {(2006) 145 STC 91} the Hon'ble Court held that "What are 'goods' in a sales transaction, therefore, remain primarily a matter of contract and intention." In this regard the provisions of Section 2 (zc)(vi) DVAT Act,2004, state that sale includes , "transfer of the right to use any goods for any purpose (whether or not for a specified period) for case, deferred payment or other valuable consideration."

One of the important ingredients for examination to determine as to whether the right to use has been transferred or not is by ascertaining as to who is having the control over the goods. In the instance case, the company provides modem to the customer and the customer is at will to use it. It is all desire of the customer to use the material provided to him as per his wish and time and the control of such equipment have also been provided to the customer and the company is not having any control once it is given to the customer. In view of the above, it is safely concluded that the customer is having the complete and exclusive possession and control of the modems.

In view of the above observation the total cost of modems installed during 2013-14 was calculated and which amounts to Rs.44397839/- which is assessed for tax under right to use as covered under the provision of Section (zc)(vi) of DVAT Act, 2004. The dealer is therefore assessed for

Rs.2219891/- as tax and interest thereon. Since the dealer has filed deceptive and misleading return, therefore, penalty u/s 86(10) of the rule is also imposed upon the dealer.

I am reviewing assessment order bearing Reference No. 250013023521, dated 31/03/2018 suo-moto, in exercise of the powers conferred by virtue of section 74B(5) of Delhi Value Added Tax Act, 2004.

Now, therefore, the dealer is hereby directed to pay an amount of Rs.22,19,891/- and furnished details of such payment in Form DVAT -27A along with proof of payment to the undersigned on or before 30/05/2018."

8. As noticed above, vide order of same dated i.e. 31/3/2018, learned Assessing Officer directed the appellant company to pay a sum of Rs. 35,33,580/-, towards additional tax and interest.

Findings recorded by Learned OHA

Learned OHA, while dealing with the objections of the appellant company, observed in the manner as:

"Now, in the present matter, there is no dispute that modem/ routers are goods and are identifiable. Further, when modems are installed in the premises of the customer. The customer gets effective control over the modem which is in exclusion of others. He has the legal right to use the modem/ router as per his wish and having exclusive right over it i.e. the same modem/router cannot be used by any other person/ customer. It may be the case that the objector provides repair service to the customer but the same is again subject to the wish and permission by the customer. The

said services (free of cost) are generally for limited period after which customer has to bear the repair charges himself. Thus, it cannot be said that objector dealer has only provided services, but there is also a transfer of "right to use" of goods as covered under the enlarged definition of sale under section 2(1)(zc)(vi) of the DVAT Act.

Further, dispute the fact that objector dealer was liable to pay tax on the transfer of right to use of modems/ routers which he failed to do and thereby furnished a return which is false, misleading and deceptive on material particular, therefore, imposition of penalty u/s 86(10) has also been imposed in accordance with law.

In view of the above discussion, I am of the considered view that impugned notice of default assessment of tax and interest and notice of assessment of penalty dated 31/03/2018 issued u/s 32 & 33 of DVAT Act by the VATO (Audit) for the tax period 2013-14 (Annual) have been rightly issued in accordance with law and accordingly both the objections filed by the objector dealer are hereby dismissed/ rejected in above terms."

On the point of pre-deposit

9. Sub-section (4) of section 76 of DVAT, Act 2004 provides that no appeal against an assessment shall be entertained by the Appellate Tribunal, unless the appeal is accompanied by satisfactory proof of the payment of the amount in dispute, and any other amount assessed as due from the person.

However, as per First proviso to sub-section (4) of section 76, the Appellate Tribunal may, if it thinks fit, for reasons to be recorded in writing, entertain an appeal against such order without payment of some or all of the amount in dispute, on the appellant furnishing in the prescribed manner security for such amount, as it may direct.

10. On the point of admission of appeal with or without pre-deposit, in **Ravi Gupta Vs. Commissioner Sales Tax,** 2009(237) E.L.T.3(S.C.), it was held as under:-

> "It is true that on merely establishing a prima facie case, interim order of protection should not be passed. But if on a cursory glance it appears that the demand raised has no legs to stand, it would be undesirable to require the assessee to pay full or substantive part of the demand. Petitions for stay should not be disposed of in a routine matter unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand. There can be no rule of universal application in such matters and the order has to be passed keeping in view the factual scenario involved. Merely because this court has indicated the principles that does not give a license to the forum/ authority to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest. Where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizen's faith in the impartiality of public administration, interim relief can be given."

11. Furthermore, in the case of **UOI V Adani Export** [2007(218)ELT 164], Hon'ble Apex Court has held that following are

the three aspects to be focused while dealing with the application for dispensing of pre-deposit:

(a) prima facie case,

(b) balance of convenience, and

(c) irreparable loss.

The discretion of stay has to be exercised judiciously by the Appellate Authority.

12. As noticed above, here, the Assessing Officer has taken into consideration the decision in BSNL's case and while applying to the facts of this case, observed in the manner as:

> "One of the important ingredients for examination to determine as to whether the right to use has been transferred or not is by ascertaining as to who is having the control over the goods. In the instance case, the company provides modem to the customer and the customer is at will to use it. It is all desire of the customer to use the material provided to him as per his wish and time and the control of such equipment have also been provided to the customer and the company is not having any control once it is given to the customer. In view of the above, it is safely concluded that the customer is having the complete and exclusive possession and control of the modems.

Learned OHA has rejected the objections while observing that when modems are installed in the premises of the customer, the customer gets effective control over the modem which is in exclusion

of others. Learned OHA has further observed that when the consumer has exclusive right over the modem/router, same cannot be used by any other person/ customer. As regards provision for repair service, Learned OHA has observed that said service is provided free of cost generally for a limited period and that ultimately the customer has to bear the repair charges himself. Accordingly, Learned OHA has observed that it cannot be said that objector dealer provides services, but there is also a transfer of "right to use" of goods as covered under the enlarged definition of sale under section 2(1)(zc)(vi) of the DVAT Act.

Contention on the Applications

13. The only contention on behalf of the applicant is that modem is provided by the company to the customer without charging any cost, and when the transaction is without any consideration, utilization of modem by the customer, as a medium, while availing of telecommunication services would not amount to transfer of right of use so as to attract provisions of section 2(1)(zc)(vi) of DVAT Act.

In support of this contention, learned counsel has referred to decision in Lakshmi Audio Visual Inc. an another v. Assistant commissioner of Commercial Taxes and another, 2001 SCC Online Kar 789, by Hon'ble High Court of Karnataka; para 97 of decision in BSNL v. Union of India, (2006) SCC 1; Commissioner of Service Tax

v. Adani Gas Ltd., 2020(40)GSTL 145(SC); Idea Mobile Communications Ltd. v. CCE, Cochin, (2011) 12 SCC 608; State of Andhra Pradesh v. Rashtriya Ispat Nigam Ltd., (2002) 3 SCC 314; and Sun Direct Tv Pvt. Ltd. v. State of U.P., 2013 52 NTN DX 373.

While making assessment, the purchase price of modem i.e. Rs. 929/- per piece has also been taken into consideration. In this case, the applicant company has to satisfy as to why a modem, purchased by it at such a price, is agreed to be supplied free of charge, to the customer. At the same time, the applicant company has to satisfy as to what are constituents of the total amount charged by the applicant company from the customer, for the services. While making assessment, only the purchase price of the modem has been taken into consideration on the basis of material made available by the applicant company. In this situation, while making assessment the Revenue Department did not find it difficult to split at least the price of the modem, for the purposes of assessment.

14. In para 12 of decision in BSNL Vs. Union of India (2206) 3 SCCI, Hon'ble ~~Judge~~ Court observed in the manner as –

> "The licence clearly manifest that it is one for providing telecommunication service and not for supply of goods or transfer of right to use any goods. It expressly prohibits transfer or assignment. The integrity of the licence cannot be broken into pieces nor can the telecommunication service rendered by them be so mutilated. Not only

does this position flow from the terms of contract, this also flows from Section 4 of the Telegraph Act which provides for grant of licence on such conditions and consideration of such payments as it thinks fit".

"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".

15. Hon'ble Supreme Court while dealing with controversy of the "Sales Tax" and "Service Tax", in the matter of **Idea Mobile Communication Ltd. v CCE & Customs,** (2011) 12 SCC 608 observed in the manner as –

"Observed that no one denies the legislative competence of the States to levy sales tax on sales provided that the necessary concomitants of a sale are present in the transaction and the sale is distinctly discernible in the

transaction but that would not in any manner allow the State to entrench upon the Union List and tax services by including the cost of such service in the value of the goods. It was also held that for the same reason the Centre cannot include the value of the SIM cards, if they are found ultimately to be goods, in the cost of the service."

16. It is well settled that to constitute a transaction a transfer of right to use goods, the transaction must have following attributes:(a) there must be goods available for delivery;(b) there must be a consensus ad idem as to the identity of the goods;(c) the transferee should have a legal right to use the goods; (d) for the period during which the transferee has such legal right, it has to be the exclusion of the transferor; (e) during the period for which it is to be transferred, the owner cannot again transfer the same right to others. The judicially evolved principles to identify a transaction involving the transfer of right to use goods to be a sale clearly exclude the indispensability of delivery of physical possession thereof as an essential pre-condition."

17. In State of **A.P. v. BSNL**, (2012) 49 VST 98 (AP), Hon'ble Court observed that Telephone instruments, mobile handsets, modems and Caller ID instruments are "goods" both under Article 366(12) of the Constitution of India and Section 2(16) of the Act.

It was observed that in case these goods are sold or supplied to the subscribers by the service providers such "sale" or the "transfer of the right to use these goods" would be liable to tax either under Section

4(1) or Section 4(8) of the Act, under consideration in that case. Further, it was observed that if, these goods are procured by the subscribers from suppliers, other than the service providers or their distributors/franchisees, the monthly charges, which the subscriber is called upon to pay by the service provider, would fall within "telecommunication service" and cannot be made liable to tax under the Act.

18. It may be mentioned here that in **BSNL's case (supra),**Hon'ble Apex Court also opined in the manner as –

> "A telephone service is nothing but a service. There is no sales element apart from the obvious one relating to the hand set, if any. That and any other accessory supplied by the service provider, in our opinion, remain to be taxed under the State Sales Tax Laws."

19. In the case of **Xerox Modicorp Limited vs. State of Karnataka** (2005) 142 STC 209 (SC), Hon'ble Apex Court observed that under the agreements, apart from the service element, for which no tax is sought to be levied, there is the element of supplying parts and components like toners/developers etc. merely because price is not being separately charged for this, does not detract from the position that the supply is for a price. Hon'ble Court further observed that such supply has all the elements of sale as understood in law. There is transfer of title in movables for a price. The mere fact that it is not

known in the beginning whether or not a part will have to be replaced is irrelevant.

20. Further it was observed that it could not be denied that, even in the absence of any such Agreements, if a part was required to be replaced and was replaced there would be a sale of that part. The same position remains even under the Agreements. As and when a part is required to be and is replaced a sale takes place at that instance. To leave no room for doubt it must be mentioned that the tax is on sale. So if there is no replacement of a part then there is no sale of a part. So far as toners and developers are concerned it is known from the beginning that they will require regular replenishment. Under SSMA the customer buys them. Under FSMA they are replenished by the Appellants.

21. Hon'ble Supreme Court further opined that the toners and developers could not be considered as consumables. Once the toner and developer are put into the machine they belong to the customer. At this stage they are tangible movables in which property can pass. They are goods in which property can pass is also clear from the fact that in the SSMA the customer has to buy the toner and developer. If as now claimed they are consumables in which property cannot be transferred how the petitioners are charging for toners and developers. The sale i.e. transfer of property takes place before the goods are consumed. The transfer takes place in respect of tangible goods. Just like petrol is

consumed after sale or ink is consumed after sale in this case also the toners and developers get consumed after sale. The property passes the moment they are put in the machine. At that stage they are not consumed but are tangible goods in which property can pass. Therefore, it was held that there is sale of parts, both in FSMA and SSMA and also sale of toners and developers even in the case of FSMA.

22. As further observed, even when worn out or damaged parts are replaced by new parts and even if worn out or damaged parts become the property of the contractor, it amounts to transfer of property in goods. Merely, taking back the damaged parts of the machine is not sufficient to hold that there is no transfer of property in goods.

23. Hon'ble Court went on to observe that the ratio of law laid down in Rainbow Colour Lab v State of M.P.'s is not applicable in the matter of annual maintenance contract and wherever spare parts or other parts are supplied, it will amount to transfer of property in the goods from the supplier to the customer.

24. In view of the above discussion, in the given facts and circumstances, and the case law cited by learned counsel for the parties, and the case law relied on by us, when triable issues are involved in this appeal, and that the modem purchased for Rs.929/-per unit is said to have been provided by the company to the customer free

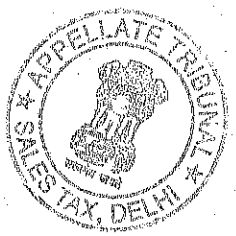
of charge, for the reasons known to the applicant company, we are of the view that this is a case where applicant company should be called upon to deposit 10% of the impugned tax and interest, and 10% of the impugned penalty, under section 76(4) of DVAT Act, for the purposes of admission of these appeals. We order accordingly. Applicant company to deposit the amount by way of pre-deposit within 25 days from today.

25. However, it is made clear that the observations made above are merely for the purposes of disposal of these applications on the point of pre-deposit for the purposes of admission of appeals, and shall have no effect on the decision of the appeals on merits.

Announced in open court.

Dated : 22/7/2021

(Rakesh Bali)
Member(A)



22/7/2021

(Narinder Kumar)
Member (J)

Appeal No.113-114/ATVAT/19-20/591-599

Dated: 23/7/21

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(9) Secretary (Sales Tax Bar Association)
(10). PS to Member (J) for uploading the judgment on the portal of DVAT/GST, Delhi - through EDP branch.

APPELLATE TRIBUNAL VAT SALES TAX, DELHI

PS/ PA to Member (A)