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

Appeal Nos.: 127-128/ATVAT/19
Date of Judgment: 10/01/2023

M/s. Bharti Telemedia Ltd.,
234, Okhla Industrial Area,
Ph-3, New Delhi – 110020. .....Appellant

v.

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

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

JUDGMENT

1. The above captioned two appeals came to be presented while challenging order dated 07/09/2020 passed by learned OHA, who rejected its objections filed against default assessment framed under DVAT Act and relating to the tax period Annual 2013-14.

2. Vide assessment dated 03/11/2017, learned Assessing officer raising demand of tax & interest of Rs. 16,85,95,638/-.

Vide separate order of even date, the Assessing Officer directed the appellant-company-dealer to pay a sum of Rs.

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10.95.36,148/- by way of penalty u/s 86(10) of DVAT Act. Before imposing penalty, learned Assessing Officer had issued notice dated 12/4/2017 to the appellant – dealer, u/s 59 (2) DVAT Act, 2004 for production of record as specified in the said notice, for carrying out assessment for the year 2013-14.

3. Objections were filed by the appellant company as it felt dissatisfied with the order 3/11/2017 passed by the Assessing Officer.

The objections were rejected vide the impugned order passed by Learned OHA.

Hence, these appeals accompanied by applications u/s 76 (4) of DVAT Act came to be filed.

4. Vide order dated 22/07/2021, the appeals were entertained subject to deposit of 20% of the impugned tax, interest and penalty. The said order is stated to have been complied with.

5. As per case of the appellant, this company is 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. Appellant company – dealer is registered under the Delhi Value Added Tax Act, 2004 vide Tin No. 07690335373, and also under CST Act.

Case of the appellant is that as a licencee of the Government of India, as per licence u/s 4 of Indian Telegraph Act and Indian

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wireless Telegraphy Act, this company is providing Direct to Home service (DTH service) to its subscribers for the purpose of viewing television programs, as per contract between the said company and the concerned customers.

It is case of appellant that from the terms and conditions of Customers Relations-ship Form – it would transpire that:

i) STB and View Card supplied to customers is only for the purpose of enjoying the service offered by the Company.

ii) The customers cannot use the STB and view card for any other purpose other than the service offered by the Company.

iii) The company has full control over the content that the customer is entitled to watch, and can control that remotely from time to time.

iv) The company can remotely control/ update/ alter the software in the View Card and STB.

v) The company reserves the right to activate/ deactivate the service.

vi) The customer cannot remove/ re-locate the STB and view card without the permission of the company.

vii) The STB and view card is wirelessly connected to the system of the company and cannot operate without such connection. Therefore, even if physical possession of the STB and view card is with the customer, the effective control of the same is retained by the company.

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Further, it has been alleged by the appellant that the appellant and its customers have no intention whatsoever of sale/purchase or transfer of right in Set Top Box (STB); that the contract for DTH services is a contract for service, and supply of goods, as a medium of delivering that service, cannot be dissected and subjected to sales tax / VAT and the attempt of the Department to do so is ex-facie illegal, bad in law and liable to be quashed.

6. As is available from the impugned assessments, tax and interest came to be levied and penalty was imposed on the basis of following observations :

> "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 instant case, the company provides set-top box and other peripheral, dish antenna to the customer place and the customer is at will to use such set-top box and other goods. 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.
>
> Moreover, as informed by the counsel such equipments are having a limited warranty of six months and once the warranty is over, the customer has to pay for making the deficiency good and therefore, all this narration come to conclude that it is very much coming under the definition of right to use the goods.
>
> Besides that when asked, the company provided the different plans being offered by them to the customer. As per information made available by the company which they have downloaded and printed from the site of the Airtel, Digital TV the different plan have been offered by the company to the customer ranging from Rs. 99/- to Rs. 5,500/-.
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> Further as per site of the company, the company is offering

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plans at different amount viz. plan of Rs. 2,090/- and monthly charges for transmission of electromagnetic waves @ Rs. 777/- p.m. likewise plan for Rs. 1,980/- monthly charges Rs. 702/- p.m., plan for Rs. 1,690/- monthly charges Rs. 445/- plan for Rs. 2,090/- monthly charges Rs. 777/- p.m. plan for Rs. 1,740/- monthly charges Rs. 503/- p.m. Since the company is offering different plans at different rates, it goes to prove that the company is charging for the different kind of set top boxes i.e. normal set-top box, HD set-top box, set-top box with recording etc. and not only for installation because the installation either of H.D. plan or of non-H.D. plan would remain the same and it will not vary with the plan cost.
Therefore, the company in the name of installation, in fact, is selling the products to the customers.

During the course of proceedings, the counsel, however, informed that they are the service provider on the direct to Home (DTH) platform and set-top box are not sold to the customers as the same remain the property of the company which capitalized in the books of accounts.
However, when the return of the company was scrutinized it has been gathered that the column Nos. R6.1 and R11.9/R11.14 where the dealer has to disclose its figures for capital goods, the dealer has shown Nil amount against these columns meaning thereby neither the capital goods were purchased nor sold during the year 2013-14."

7. Learned Assessing Officer calculated the **stock variation** by observing in the manner as:

"As per the statement, the dealer in his return for 2nd qtr. 2014-15 filed on 21/10/2014 the dealer has shown total amount of stock held by him on 31/3/2014 to the tune of Rs. 1,95,58,705/-. On the other hand if we go by the total purchases and total sales made by the dealer during the year 2012-13, the dealer was having total purchases of Rs. 1,15,92,09,517/- and made the sales to the tune of Rs. 52,45,99,347/- and therefore, at the end of the financial year 2012-13 and on 31/3/2013, the dealer was having the stock

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of Rs. 63,46,10,170/-. This must have been the opening stock of the dealer as on 1/4/2013. During the year 2013-14, she had the purchases of Rs. 82,19,54,328/- with the gross turn over (GTO) /sales of Rs. 56,07,16,608/- and must be having closing stock of Rs. 26,12,37,720/- on 31/3/2014. Therefore, as per this mathematical calculation on 31/3/2014, the dealer must be having the closing stock of Rs. 89,58,47,890/- (This includes stock of Rs. 63,46,10,170/- the dealer carry forwarded which must be the opening balance as on 1/4/2013).

However, in his return for 2nd qtr. 2014-15, in Annexure ID, filed by him on 21/10/2014, the dealer has shown stock in hand as on 31/3/2014 to the tune of Rs. 1,95,58,705/-. Therefore, there is stock variation of Rs. 87,62,89,185/- (Rs. 89,58,47,890/- minus Rs. 1,95,58,705/- which is required to be taxed @ 12.5% along with interest."

8. Learned OHA, while dealing with contention raised on behalf of the appellant-objector observed that in the present case, there is no manner of doubt that the STB falls within the ambit of "goods". In this regard, ld. OHA referred to decision of Hon'ble Apex Court in BSNL's case, wherein it was 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.

Next, it was contended before Learned OHA, that the company derived revenue mainly from the subscription fee realized from its customers and not from the sales of the STB, which is just an

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incidental transaction.

Learned OHA found it difficult to accept said contention of the objector, while observing that as in today's business scenario nothing can be/ is given free of cost. Wherever, new connections are installed or subscribed by a customer, onetime amount is charged from the customer which necessarily and generally includes the price of the setup boxes and even price is charged for the wire (as per the length measurement) along with subscription charges for one/two months. Thus, Learned OHA was of the view that it could not be said that STBs were given without charging anything from the customers. Learned OHA noticed that the costs of the said setup boxes were capitalized by the objector in its books of account.

9. Today, in the course of arguments, when these appeals have been taken up it has been pointed out by learned counsel for the appellant that learned OHA did not record any findings as regards levy of tax and interest so far as stock variation is concerned, and that the matter needs to be remanded to learned OHA.

Learned counsel for the Revenue is in agreement with the above submission put forth by learned counsel for the appellant on the point of remand, due to the above reason.

10. Counsel for the appellant has also pointed out that during pendency of this appeal the appellant sought permission from

this Court to produce certain documents and same were allowed to be produced. He has further submitted that since these documents were not available before learned OHA or before the Assessing Authority, the same need to be considered by the OHA, and as such matter needs to be remanded to learned OHA. Keeping in view the production of certain documents by the dealer-appellant before this Appellate Tribunal, which were earlier not produced before learned OHA or learned Assessing Authority, Learned counsel for the Revenue is again in agreement with the submission of learned counsel for the appellant on the point of remand.

11. Having regard to all the facts and circumstances, when specific objection is stated to have been raised by the dealer before learned OHA challenging levy of tax and interest due to stock variation, it was for learned OHA to decide the same before upholding the assessment regarding tax and interest framed by the Assessing Authority.

However, while passing the impugned order, admittedly, learned OHA did not deal with objection raised by the dealer against levy of tax and interest due to stock variation. Therefore, the matter certainly needs to be remanded to the learned OHA.

12. Admittedly, following documents were allowed to be produced before this Appellate Tribunal for the first time:

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Annexure	Particulars
1	Screenshots of a customer's profile (Dayan Shankar -3013444117/ STB No. 03393682031) who has availed DTH services of the Appellant and later disconnected
2	Screenshots from the account statement of the above-mentioned customer
3	Challan for transferring the STBs from Warehouse to Service Partner (including STB No. 03393682031)
4	Invoice dated 12.10.2013 for Activation charges raised on the customer
5	Recovery of STB No. 03393682031 from the above-mentioned customer's site after disconnection.
6	Documents for reverse logistics for STBs (including STB No. 03393682031)
10	Pre-paid Distribution Agreement with Prakash Trading Company

13. Since the above said documents were not made available to the learned Assessing Authority or to learned OHA, and have been produced before this Appellate Tribunal for the first time, keeping in view their relevancy in determining liability to pay tax and interest, the matter needs to be remanded to learned OHA.

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As a result, both these appeals are disposed of and while setting aside the impugned order passed by learned OHA, the matter is remanded to learned OHA for disposal of the objections afresh, after providing reasonable opportunity of being heard to the dealer-appellant-objector.

14. Dealer-appellant to appear before learned OHA on 30/01/2023.

15. File be consigned to the record room. Copy of the judgment be supplied to both the parties as per rules. One set of judgment to be placed in the connected file of Appeal No. 128/19. One copy be sent to the concerned authority. Another copy be displayed on the concerned website.

Announced in open Court.
Date : 10/01/2023

Narinder Kumar
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(Narinder Kumar)
Member (J)

Appeal No. 127-128/ATVAT/19/33-40

Dated: 11/01/2023

Copy to:-

(1) VATO (Ward- 92)
(2) Second case file
(3) Govt. Counsel
(4) Secretary (Sales Tax Bar Association)
(5). PS to Member (J) for uploading the judgment on the portal of DVAT/GST, Delhi - through EDP branch.
(6) Dealer
(7) Guard File
(8) AC(L&J)

REGISTRAR

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