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

Appeal Nos.: 113 & 114/ATVAT/19
Date of Judgment: 10/01/2023

M/s. Bharti Airtel Ltd.,
224, 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. C. M. Sharma.

JUDGMENT

1. These appeals pertain to tax period - Annual 2013-14.
2. Learned Assessing Authority framed assessments under DVAT Act raising demand of Rs. 35,33,580/- towards tax and interest and of Rs. 22,19,891/- towards penalty. The objections filed against these assessments came to be dismissed.
3. Case of the appellant company in brief, reads as under:

> "The appellants 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

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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

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('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. As regards the assessment dt.31/3/2018, it is significant to note that while dealing with the contentions raised on behalf of the appellant, learned Assessing Authority 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.

5. While framing assessments, the Assessing Authority took into consideration decision in BSNL's case and while applying the same 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."

6. In the assessments dated 31/3/2018, the Assessing Authority further 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 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."……
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> "The instant matter is also based on the similar analogy. In another matter of Bharat Sanchar Nigam Limited (BSNL) Vs.

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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

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DVAT -27A along with proof of payment to the undersigned on or before 30/05/2018."

7. Learned Assessing Officer accordingly directed the appellant company also to pay a sum of Rs. 35,33,580/-, towards additional tax and interest.

Vide separate assessment dated 31/3/2018, learned Assessing Authority directed the appellant company-dealer-assessee to pay a sum of Rs. 22,19,891/- by way of penalty u/s 86(10) of DVAT Act. Record reveals that before imposing penalty, learned Assessing Authority had issued notice to the appellant – dealer.

8. Having felt dissatisfied with the order 31/3/2018 passed by learned Assessing Authority, appellant filed objections before learned OHA.

Findings recorded by Learned OHA

9. 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."

10. In these appeals, in the course of arguments, counsel for the appellant has 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.

Learned counsel for the Revenue is in agreement with the submission of learned counsel for the appellant on the point of

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remand, keeping in view the production of certain documents by the dealer-appellant before this Appellate Tribunal.

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

Annexure	Particulars	Page No.
2.	Screenshot of the activation and deactivation details of the above mentioned customer – Account No. 7011141341.	4
3.	Copies of the 1st & 2nd invoices raised on the above customer – Account No. 7011141341.	5-11

12. 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.

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.

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

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14. 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. 114/19. 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)